

NEW ULSTER MOVEMENT

1. Any examination of the legal bases of partition in Ireland must begin with a recital of the various instruments which contributed to the creation of the separate legal status of Northern Ireland. These instruments would appear to be:-

- (a) the Redistribution of Seats (Ireland) Act 1918 (7 & 8 Geo 5 c.65) defining the boundaries of parliamentary constituencies, and "other local government Acts defining local government boundaries" (Calvert, Constitutional Law in Northern Ireland (1968) p 211)
- (b) the Government of Ireland Act 1920 (10 & 11 Geo 5 c 67) which by s.1(1) established a Parliament for Northern Ireland, and by s.1(2) defined Northern Ireland for the purposes of the Act as "the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone and the Parliamentary boroughs of Belfast and Londonderry - i.e. the boundaries covered by the legislation listed in (a) above;
- (c) the "Articles of Agreement for a treaty between Great Britain and Ireland" of 6 December 1921, which by Article 11 provided that for a period of a month "from the passing of the Act of Parliament for ratification of this instrument" there should be maintained in force as regards Northern Ireland the provisions of the 1920 Act; by Article 12 it provided that if within that Month an Address was presented to the Crown by both Houses of the Parliament of Northern Ireland to that end, the powers of the Parliament and Government of the Irish Free State should not extend to Northern Ireland. The provisions of the 1920 Act were then, in general, to "continue to be of full force and effect" as regards Northern Ireland.

The "Articles of Agreement", by Article 12, also provided that in the event of such an address a Boundary Commission should be appointed to determine "in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland". These boundaries were to be definitive for the purposes of both the 1920 Act and the "Articles of Agreement". The "Articles of Agreement" were embodied in municipal legislation in the United Kingdom (Irish Free State (Agreement) Act 1922 (12 Geo. 5 c.4) and in the Irish Free State (Constitution of the Irish Free State (Saorstát Éireann) Act 1922);

- (d) the "Agreement amending and supplementing the Articles of Agreement for a Treaty between Great Britain and Ireland" of 3 December 1925. This instrument followed the breakdown of the Boundary Commission set up under the 1921 "Articles of Agreement". After reciting that the 1921 instrument had been "ratified and given the force of law" by the United Kingdom and Irish Free State legislatures described above, the Agreement provided, by Article 1, that the powers of the Boundary Commission should be revoked and that "the extent of Northern Ireland for the purposes of the Government of Ireland Act 1920 and of the Articles of Agreement (of 6 December 1921) shall be such as was fixed by sub-section (2) of section one of that Act."

The amending Agreement was embodied in municipal legislation in the United Kingdom by the Ireland (Confirmation of Agreement) Act 1925 (15 & 16 Geo 5 c 77) and in the Irish Free State by the Treaty (Confirmation of Amending Agreement) Act 1925.

the assumption - as seems beyond challenge - that the instruments described in paragraph 1 are the only possible legal bases for partition in Ireland, all must depend on the compatibility of these with constitutional law, and, perhaps more fundamental, international law. As to 1 (a) above, there is no problem: legislation passed by the Parliament of the United Kingdom and Ireland in or before 1918 was clearly within the competence of that Parliament which exercised the requisite degree of control over all the territory in question (pace the differences in opinion as to the exact legal effects of the proclamation of the Republic of Ireland on 24 April 1916). As far as the international community was concerned the United Kingdom was sovereign over the whole of Ireland up to and including 1918.

3. The validity of the Government of Ireland Act 1920 would seem to be susceptible of a similar explanation. The first Dail Eireann's celebrated Declaration of Independence of 21 January 1919 did not lead to any formal recognition of the "Republic" (the establishment of which was "ratified" by the Declaration) by the international community, and it would appear that on 23 December 1920, when Royal Assent was given to the Act, the Parliament of the United Kingdom of Great Britain and Ireland was still the only body capable, in the eyes of international law, of legislating for the whole of Ireland. I advert later to the legal effect of the apparent acceptance of the validity of the 1920 Act by the Government of the Irish Free State in 1925, see para 11.

4. On the question of the characterisation in international law of the "Articles of Agreement for a Treaty" of 6th December 1921, there seems no reason to disagree even now with Mr Philip Noel Baker's classic description of 1929 - the "Treaty" was merely "an agreement between the British Cabinet on the one side and the representatives of a de facto revolutionary Government on the other. The de facto revolutionary Government had never established its authority over the territory it claimed to rule, still less had its independence of the British Empire received formal recognition by any foreign Power". (The present Juridical Status of the British Dominions in International Law p 319). Consequently, in the opinion of Mr Nicholas Mansergh in 1934: "In international law, the word 'Treaty' was a concession to Irish sentiment rather than a statement of actual fact." (The Irish Free State p. 41).

It is clear that both these distinguished commentators based their assessments on two assumptions: first, that at the time at which each was writing (a fortiori on 1921) the only agreement invested with the legal character of a treaty in international law was an express agreement between sovereign states, and, secondly, that the entity described as the "Irish Republic" and "ratified" by the first Dail Eireann on 21 January 1919 had not been regarded as such a sovereign state capable of entering into a treaty under international law. On the first point (the ambit of the term "treaty"), it is fair to assume that in 1921 the term would have been restricted to an agreement between states generally regarded by the international community as sovereign. It is significant that even in 1969, the Vienna Convention on the Law of Treaties, whilst not denying possible extensions of the "treaty" concept, was so phrased as to restrict the term "treaty" for the purpose of the Convention to "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments" (Article 2). As to the second assumption, the absence of international recognition of the "Republic" "ratified" by the first Dail Eireann has already been noted in paragraph 3 above.

(5) The amending Agreement of 3 December 1925, however, bears a much closer resemblance to typical treaties recognised by international law. It was without doubt an inter-governmental agreement, the one Government representing a sovereign state, the United Kingdom, and the other exercising authority over a permanent population and a defined territory - in short "a stable political community, supporting a legal order, in a certain area" (Brownlie, Principles of Public International Law (1966) p 67. It is impossible, however, to describe the 1925 Agreement unequivocally as a treaty in view of the confusion which surrounded legal relations between the governments of the dominions of the British Commonwealth at least in the period when the Irish Free State was regarded as a dominion before the Statute of Westminster in 1931.

the policy of the United Kingdom government in 1925 and preceding years to deny that Commonwealth countries governed their relations inter se by international law. Pursuant to this policy the United Kingdom Government consistently opposed attempts to invest Commonwealth agreements with international character as full treaties: this policy has been fully examined by Mr J.E.S. Fawcett (The British Commonwealth in International Law (1963), pp 145-176). The British Government's attitude was typified by the opposition shown to attempts by the Irish Free State Government to register the 1921 and 1925 Agreements with the League of Nations. Just as consistently the Irish Free State Government sought to support its claim to international recognition as a separate, sovereign state by (inter alia) attempting to register its agreements. The respective policies of the two governments are not conclusive of the international character of agreements inter se, although, as we shall see, consistency of practice on the part of a state is not without legal significance in that it may stop that state from denying later the underlying assumptions on which that practice was based or appeared to be based. Registration de bene esse of United Kingdom - Irish Free State Agreements by the League of Nations means no more than that the instruments were actually received by the depository or registering authority, the receipt being expressly subject to a reservation of any opinion on the legal character of the instruments. Registration of this kind is, in fact, a typical face-saving device in international relations of no legal significance in itself.

(6) To what extent, then, do the instruments described in paragraph 1(c) and 1(d) above and analysed in paragraphs 4 & 5 create a permanent binding legal obligation? It is submitted that little advantage would be gained by protracted attempts to prove that these instruments were, or were not, treaties. In truth they were, like many "independence" arrangements, in a legal class of their own, savouring more in their content of municipal legislation but more in their labelling and packaging of international obligations. Clearly state practice during the last fifty years has shown that the 1921 and 1925 Agreements are not without legal effect. The international community generally recognises an entity described as the "United Kingdom of Great Britain and Northern Ireland"; general recognition of the right of the Eire Government to claim neutral status in the Second World War was equally apparent. From the standpoint of the international community as a whole the Government of the Republic of Ireland has been regarded as sovereign only within that part of Ireland under its actual control, and the government of the United Kingdom has equally been considered as a sovereign in Northern Ireland. While it is true to say that third states have avoided formal pronouncements on the respective rights of the two governments in relation to Ireland, or parts of Ireland, nevertheless state practice seems to have accorded recognition to the authority of each government within the area under its control. Viewed objectively, then, partition in Ireland would appear to be accepted internationally and, indeed, the attitude of the United Kingdom government on partition appears to coincide with this practical interpretation of the situation.

(7) Assuming, therefore, that the United Kingdom Government is in favour of the status quo in the matter of the partition of Ireland, I proceed to examine the contrary contentions of the Government of the Republic of Ireland. These seem to be based on the three grounds:-

- (a) that the geographic island of Ireland forms an ancient kingdom with a single culture and single population;
- (b) that even if the agreements arrived at between the British government and "Irish representatives" in 1921 and between the same government and the Irish Free State in 1925 are relevant in relation to the rights of the two governments in 1971, the agreements were themselves invalid in that they were not freely arrived at on the Irish side;
- (c) that successive governments of the Irish Free State, Eire, and the Republic of Ireland have (at least since the coming to power of the Fianna Fail government in the Irish Free State in 1932) consistently repudiated the agreements entered into by "Irish representatives" in

1921 and by the government of the Irish Free State in 1925, which effectively created partition. This repudiation is coupled with the declaration of the authority of the government of Eire over the whole of the geographic islands of Ireland in Articles 2 and 3 of the Eire Constitution of 1937. These provisions were, of course, re-affirmed as fundamental principles by Mr. Lynch, the Taoiseach of the Republic of Ireland, as recently as 1 March 1971 (Belfast Telegraph 2 March 1971).

8. As to the "ancient unified Irish Kingdom" argument, this would appear to rest on complex questions involving, among other things, the acquisition of territory by historic title - a basis of title such as that claimed by the Arab states (as successors to the Turkish Empire) in relation to the territory of Israel. Whether or not there is such a single Irish nation would seem to require determination by an appropriate international tribunal after due examination of the historic evidence. Whether or not the Government of the Republic of Ireland can alone claim to be the successor of an ancient Irish Kingdom would likewise rest on the weight of a body of historic evidence similar to that examined by the International Court of Justice in the case of the Minquiers and Ecrehos (I.C.J. reports 1953 p 47). Suffice to observe at the moment that insofar as the "English" element in Northern Ireland may - at the very least - claim to be lineal descendants of the Plantation settlers of the reign of James I, they could not, after 350 years, be regarded as usurpers or intruders on the basis of the findings of most international tribunals in similar situations where the competing claims of ethnic or religious groups to title to territory have been in issue.

9. That the Agreements of 1921 and 1925 were the result of duress would seem to have been a recurrent theme of those in the Irish Free State/Eire/Republic of Ireland who have opposed the results of those agreements over the years since they were finalised. Successive Fianna Fail administrations constantly reiterated, during the 1930's and subsequently, their repudiation of the 1921 "Articles of Agreement", in particular as having been (as they said) negotiated "under threat of immediate and terrible war". It has already been suggested in this opinion that neither the agreement of 1921 nor that of 1925 constituted a treaty in international law; consequently the rules of invalidation of treaties in circumstances of duress are not applicable. For the sake of completeness, however it may be stated that in 1925 and earlier years customary international law considered duress as rendering international agreements invalid when threats were made against representatives of a state in person to induce them to sign an agreement. Threats against a state - e.g. by a state resorting to war to enforce particular settlement or to compel the making of agreements - did not, however, in general invalidate agreements attended by such duress. In passing it may be noted that the Vienna Convention of 1969 on the Law of Treaties by Article 51 preserves the invalidity rule in relation to threats against representatives of states; the Convention's reference to threats against states in Article 52 is referable only to post-United Nations Charter situation. Clearly, had there been a sovereign state called the "Republic of Ireland" in 1921 an international agreement forced upon that state by threats to levy war upon it would not necessarily have invalidated the agreement given the state of international law at the time. The view has already been expressed above that there was no such sovereign state as "Ireland" in 1921, and, indeed, no "treaty" in the sense understood in international law at that time.

10. It would appear, however, that the duress alleged by those who oppose the 1921 "Articles of Agreement for a Treaty" as having been applied by the United Kingdom Government consisted, in their view, of pressure on the Irish representatives in person to sign an agreement against their better judgment - an agreement which (as is said) ceded basic points of principle on the Irish side. The alleged threat of "immediate and terrible war" is variously described as having taken the form of either a spelling-out by the British Government of the dire consequences of inability to reach agreement in terms of prolonged civil war in Ireland, or, at the other end of the spectrum, a deliberate threat on the part of that government to inflict mass destruction on Irish persons and property by means of British armed forces. If the 1921

Articles of Agreement for a "Treaty" had, in fact, ranked as a Treaty. The threats against representatives of a party, once proved, would have invalidated the supposed agreement. As the "Articles of Agreement" were not, in my opinion, a treaty but a hybrid instrument embodying political compromise in a secession situation, great caution is called for in applying these and other treaty rules by analogy.

Even if, for the sake of argument, the rule of invalidation of agreements as a consequence of duress on a party's representatives were to be accepted as applicable in the instant case, what evidence is there of such duress? Whilst it would presumably be necessary to seek out and examine exhaustively contemporary records in this connection, it may be noted that the presumptively more partisan (from a Southern Irish point of view) authorities who have recorded the 1921 negotiations (e.g. Macardle: The Irish Republic (1937), parts IX and X; Pakenham: Peace by Ordeal (1935), parts three and four) seem to consider the ultimate acceptance of the "Articles of Agreement" on the Irish side as much the result of the Irish delegates being politically out-manoeuvred by the British Prime Minister and Cabinet as the result of circumstances which have since been classed as threats. To these authors, the "threats" seem to have taken the form of emphasising the dire consequences of failure to reach any agreement. The evidence seems, in short, inconclusive in relation to the 1921 "Treaty". There is, on any view, no evidence whatsoever of duress upon Irish delegates in the context of the 1925 amending Agreement.

11. The final, and perhaps most significant, contention of the Government of the Republic of Ireland is that outlined in paragraph 7 (above) - complete rejection of partition in Ireland despite the various instruments listed above. This rejection is, in truth, the modern re-statement of the views of the anti-Treaty faction in Ireland in 1921 and succeeding years.

In advising whether or not the present Government of the Republic of Ireland has any legal grounds for disclaiming the 1921 and 1925 Agreements, (and the legislation of the Westminster Parliament, such as the Government of Ireland Act, on which they were based) regard must be had to the doctrine of estoppel; the question then is whether the endorsement by the democratically-elected Irish Free State Government in 1925 of the regime created in essence by the 1921 "Articles of Agreement for a Treaty" constitutes a legally-binding territorial regime in relation to Ireland.. Whilst the present Government of the Republic of Ireland might contend that those of their political persuasion, had, even in opposition, consistently resisted and denounced partition, the Government of the Irish Free State of the time was clearly entitled, as a freely-elected Government to deal with other states in 1925 and to make legally-binding arrangements. Similarly the British Government of the time was entitled to treat with the Irish Free State Government in 1925 as it was then composed, and to make agreements with that Government. It is not a great step to proceed thence to the view that the British Government was entitled to rely on the permanence of territorial demarcations embodied in intergovernmental agreements thus freely made. On this basis it can also be maintained that the Government of the Republic of Ireland is estopped from denying the validity of formal boundary demarcations once made and relied upon.

Estoppel in international law has been described (e.g. by Bowett in 33 British Yearbook of International Law (1957), p176) as a clear, unambiguous statement of fact, made voluntarily and unconditionally by those authorised to make it - a statement on which another party has relied in good faith to its detriment. In my opinion the combined effect of the 1921 "Articles of Agreement" and the 1925 Agreement is such as to raise an estoppel of this kind in favour of the United Kingdom government. I am fortified in this opinion by the apparent readiness of the International Court of Justice to accept estoppels created by territorial demarcations in such cases as the Arbitral Award by the King of Spain (I.C.J. reports 1960 p 192) and the Temple of Preah Vihear (I.C.J. report 1962 p. 6). If, like international tribunals engaged in boundary arbitrations one seeks a critical date in relation to the establishment

the two separate governmental authorities within the geographic land of Ireland, 3 December 1925 might well be regarded as such a date as it was then that the basic territorial limits of authority of each government became formalised. Later agreements between the United Kingdom Government and that of the Irish Free State and its successors did not modify this 1925 arrangement in any material particular. The unilateral claims of more extensive spheres of authority by the Government of Eire and its successors as a result of Articles 2 and 3 of the 1937 Eire Constitution are without significance in International Law in that the assertion of territorial jurisdiction has not been followed up any actual display of sovereignty or exercise of authority by the Governments of Eire/Republic of Ireland within Northern Ireland.

12. It can be seen from the preceding paragraphs that partition in Ireland rests on a confused mass of unique legal instruments, displaying characteristics of both constitutional and international law. The 1921 "Treaty" may not have been in fact a treaty, but it is not devoid of legal effect in that its principles were enshrined, quite freely, in the 1925 amending Agreement, an undoubted inter-governmental agreement in which both parties have subsequently relied.

The painful separation of the United Kingdom and the Irish Free State in 1921-22 was naturally a period of considerable political tension in which delicate compromises were required. In the circumstances it is scarcely surprising that the "independence" instruments should have lacked the legal sophistication of those documents which in later years were to embody the grant of independence by the United Kingdom to its former colonial territories. No clear and rational explanation of partition in Ireland is to be found in the rules of international law; like any secession the particular situation made a precedent in itself, a precedent not susceptible of a purely legal as opposed to a political rationalisation.

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THE TEMPLE,
12, MAY 1971