IRELAND ON THE FAULT LINE BETWEEN THE THEORY AND PRACTICE OF SELF-DETERMINATION

Richard J. Harvey, Barrister, Garden Court Chambers, London

I am not an academic lawyer. I always feel a little nervous in the company of professors. But I confess that I am a lawyer, of sorts. For 40 years I have been an activist for human rights. Law has been my toolkit.

I had the great good fortune to begin studying international human rights the same year the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights were opened for signature by UN Member States. Back then, the attitude of most of my contemporaries was: "What's the point of Common Article 1 on self-determination? There will never be an international police force to prevent violations of civil and political rights; there will never be an international criminal court to punish them; and, even if there is, no country will ever let its nationals be tried before it."

As a lawyer, I have always refused to accept that. I have taught and written about the international covenants as living instruments and I have argued their principles before frequently bemused-looking judges in London, New York, Belfast and Derry. And

during the past ten years I have been privileged to participate in no less than four trials in two international criminal tribunals resulting from conflicts over self-determination. This work has taken me *via* Arusha and The Hague to Bosnia and Herzegovina, Republika Srbska and Kosovo, where issues of secession and self-determination remain permanently on the agenda.

As an English law student in the late sixties and early seventies, I was pathetically ignorant of human rights issues here. I was more aware of US soldiers in Viet Nam than British troops in Belfast and Derry; more conscious of detention without trial in South Africa than internment here. I used to hand out anti-apartheid leaflets between lectures at the Council of Legal Education while studying for the Bar exam. One day a fellow student came up and with no warning started punching me in the face. I am not a complete pacifist, neither was my failure to strike back due to alone to believing it was wrong to strike a woman. It was the shock that paralysed me – the shock that anyone could be against something as elementary as the right to self-determination of all the people of South Africa.

It made me wonder about my chosen profession. Middle class male, pale, privately-educated products of Oxbridge – like me – predominated at the bar and, even more so, on the bench. Yet there were a few young women and men then who talked about using the

law as a tool for change, as a sword to attack injustice and a shield to defend the oppressed. We all joined the Haldane Society of Socialist Lawyers. We sent fact-finding missions to Chile, the Front Line States of Southern Africa, Western Sahara, West Germany. In U.S. jails I met with political prisoners – Black Panthers, Native Americans, Puerto Rican Independentistas. The African-American law student who accompanied me had chosen as her human rights thesis *Ireland vs. United Kingdom*, the torture in internment case. I was intrigued by her choice and made the mistake of saying to her what I had heard so many of my London colleagues say: "Of course, you can't compare discrimination in South Africa with Northern Ireland." "Why not?" she shot back. Those two words had far-reaching repercussions for my own life. Hers as well, as we have lived together for the last 32 years!

I struggled for an answer. The more I struggled, the less convinced I became by my own arguments and when she asked if we had ever conducted a fact-finding mission to the Six Counties I felt more than a little bit of a hypocrite. Back in London, at the next meeting of the Haldane Executive, everyone agreed to my proposal that we undertake an inquiry into the operation of emergency legislation both in the North and in the Republic. So it's no stretch to say I took the long route to get here, *via* South Africa and the United States.

The right to self-determination is the foundation of all other human rights. Not alone for peoples under "alien subjugation, domination and exploitation," in the words of the UN General Assembly's 1971 consensus Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. But for all peoples. Self-determination frees the coloniser as well as the colonised. This right is recognised as *jus cogens*, a peremptory norm of international law, binding on all states. It is a right owed *erga omnes* by all states to all peoples, as the International Court of Justice held in its Advisory Opinion on the Wall in the Occupied Palestinian Territories (2004).

These are fine and resounding phrases: peremptory norms; *jus cogens*; *erga omnes, lex lata*. Lawyers usually dive into Latin when they want to make simple concepts seem difficult or expensive to their clients. But sometimes you need an international language, even a dead one, to emphasise that a movement of living significance has taken place. We sometimes forget that the law is not engraved on stone tablets. It is in constant motion and it is the peoples of the world who move it, sometimes with help from remarkable lawyers like Pat Finucane and Rosemary Nelson.

But in a painfully divided society, the right to self-determination may be the most divisive right to assert. For one group on the island of Ireland, the right to self-

determination was violated by partition while, to others, partition itself was the exercise of their self-determination. To one group, human rights violations including extrajudicial executions, internment, torture, denials of fair trial and due process can be traced directly to the fault line drawn 90 years ago by a South African judge to divide the six counties from the twenty-six. To others, most human rights violations had nothing to do with self-determination; they were unavoidable casualties in the battle against terrorism.

To most human rights defenders here on the fault line of this contradiction, the struggle to document and challenge abuses of civil and political rights involved a desperate search for an objective middle ground where divided communities might possibly be persuaded to come together to assert and defend those rights. In the quest for credibility, for the ability to raise human rights in public and to force case-hardened judges and dismissive governments to pay attention, it was seen as counter-productive and too dangerously "political" to speak of self-determination.

In Paris in 1985, at the International Conference of Lawyers for Ireland, I talked with two rare lawyers. Sean MacBride I had met a few times and I'd read his pamphlet "Ireland's Right to Sovereignty, Independence and Unity is Inalienable and Indefeasible." He was an international statesman, former High Commissioner for Namibia, former Irish Minister of Foreign Affairs and (sh!) former Chief of Staff of the IRA; a hands-on expert

on self-determination. But there was another lawyer there, my own age, who immediately caught my attention. Pat Finucane was there to talk about all human rights, including the right to self-determination and made no hesitation in linking the denial of the right to self-determination directly to denial of other rights. He became a firm friend for the four years left to him before his murder by British government agents.

Shortly after Pat was killed the New York law school's review of International and Comparative law asked me to write an article for them. I decided on *The Right of the People of the Whole Island of Ireland to Self-Determination, Unity, Sovereignty and Independence*. In doing so, I was inspired by Professor Kader Asmal, then senior lecturer in law at Trinity College, Dublin. During his decades of exile, Kader wrote extensively on the right of the all people of South Africa to self-determination, writings that were read not just in universities and law schools but also in the bush by combatants of mKonto we Sizwe fighting for that right. I urged him to write about self-determination in the Irish context but he said with characteristic forthrightness that if I wanted to see it written it was time I got down and wrote it myself.

In researching my article, apart from MacBride's pamphlet, I found virtually no available literature on the relation to Ireland of Common Article 1 of the International Covenants. You could read about the scandal of the Widgery Report on the Bloody Sunday massacre

and the abuses of the Diplock Court system which had done so much to undermine respect for the justice system. On the other side of the fault line, I had met a young senator in Dublin in 1980 who was then the only person who had the courage to criticise and document the abuses of Diplock's evil twin, the Special Criminal Court. Her name was Mary Robinson.

However, the only time the question of Ireland's status under international law was ever raised at the United Nations was when Ireland's Minister of Foreign Affairs tried to get it on the agenda of the Security Council in 1969. British representatives to the UN successfully stifled the debate sought by the Irish Government when Dr. Patrick Hillery told the Security Council, that:

> "The Six Counties, after all, do not constitute a geographically isolated area, but are an integral part of the island of Ireland and an important part of a country which throughout history has been universally regarded as one unit. The historic unity of Ireland is so self-evident as not to require argument. The claim of the Irish nation to control the totality of Ireland has been asserted over centuries by successive generations of Irish men and women, and it is one which no spokesman for the Irish nation could ever renounce ... it has never been conceded that a

> unilateral action on the part of the British government could sunder an entity which nature and history have made one."

When I first read this, I was impressed by the forthrightness of the language and shocked, if not surprised, that the UN in 1969 had so unquestioningly accepted British assurances that its army was merely dealing with an internal affair under Article 2(7) of the UN Charter; troops would be withdrawn as soon as law and order had been restored; the greater part of civil rights demands had already been accepted; and reform was under way.

Almost three decades later, Ireland's constitutional claim to the whole of the national territory was modified by popular referendum so now the Constitution reads that reunification: "shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island." Some have tried to portray this element of the Good Friday Agreement as leaving the Unionist veto intact. Others have castigated it as a betrayal of nationalist aspirations.

Given the history, scepticism and caution are justified. But the Good Friday Agreement marks a bright line, not a fault line, between the past and the future. It recognises that it is for all the people of the island of Ireland to determine their own future. If a majority of

people in the north indicate their preference for a united Ireland then the British government has agreed to legislate for it. The agreement provides the means for this to happen. For the first time in the history of this island, a constitutional mechanism has been established which is not merely an aspiration but a route map towards self-determination and reunification – not by one party or country imposing its will by armed force or economic coercion but by the people of Ireland.

I confess to finding that a bit breathtaking. Not because we have all seen the photographs of Martin McGuinness and Iain Paisley roaring with laughter together but because we are seeing formerly sworn enemies now swearing to work together on education, health, the environment and, yes, even policing and justice.

It is not for any British person to say what the people of Ireland should do – we've been doing that for far too long. But it is a wonderful and remarkable thing for us all to be able to see what the people of Ireland now can do; how in a time of economic crisis they can look at the institutions of administration North and South and say, for example, why do we need two environment ministries, two tourism boards, two health systems?

I have always believed that the ultimate resolution of Ireland's future lies not through the barrel of a gun and not through the mouths of politicians but rather through recognising a

shared economic and social imperative. We must never forget that the right to self-determination is inscribed not only in the Covenant on Civil and Political Rights but equally in article 1 on Economic, Social and Cultural Rights. Britain pours untold billions of pounds into sustaining the fault line between North and South and the Irish Republic has for decades thrown billions of punts and euros at the same problem.

For those in the business of persuasion, I sense that today there is as much, if not more, work to be done 90 miles south of here than there is in the North itself. I will never forget the words of the redoubtable Bernadette Devlin MacAliskey in a speech in Dublin on the 75th Anniversary of 1916, on the theme "what 1916 means to me," which she concluded by saying: "There have been many shames visited on the people of this country but the greatest shame is that freedom has been wasted on the 26 counties."

The politics of coercion are now giving way to a politics of persuasion and people in the Irish Republic can at last look across the fault line to see the six counties as a potential source of mutual cultural, social and economic enrichment rather than a chasm of chaos. It is too much to claim that these developments offer any kind of a template for Basques, Catalans, Kurds, Tamils and Palestinians. But it does show that the law is in constant motion, peoples are in motion and in Ireland at least, it is at last possible to believe there

is firm ground, not just a fault line, on which we may base a belief that, in Seamus Heaney's words: "justice can rise up and hope and history rhyme."