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***Law as Deliberative Discourse:
The Politics of International Legal Argument – Social Theory with Historical
Illustrations***

Abstract: *This article proposes an account of international law as a subset of international political argument, in turn understood as a practice of deliberative discourse. I draw on a Habermasian communicative framework to integrate legal and political argument, facilitating a more nuanced, and more plausible, understanding of how international law and politics interact. Through a detailed examination of two historical cases from the first decade of the Northern Ireland conflict, involving the United Nations and the European Convention on Human Rights respectively, I illustrate three key dimensions of this framework: the relation between legal and political argument; the relation between domestic and international argument; and the distinction between strategic and communicative uses of legal argument.*

1. Introduction

On 2 October 1972, Adrian Thorpe, an official in the UK Foreign and Commonwealth Office, circulated a memorandum urging that the United Kingdom consider, as a matter of urgency, withdrawing from the European Convention on Human Rights (the ECHR), a treaty which it had negotiated two decades earlier¹.

At the forefront of Thorpe's mind was the situation in Northern Ireland. The conflict that would become known simply as 'the Troubles' was entering its fourth year, and 1972 was to be its bloodiest; 479 people were killed that year, including 148 members of the security forces². It was, in these terms, the biggest domestic threat to any Western European state in the post-war era. As the conflict escalated, the government in Westminster had been forced into increasingly drastic responses: the deployment of British troops to maintain order in August 1969; the introduction of internment without trial in August 1971; and the suspension of devolved government in March 1972³. However, the memo's focus was not the overall security situation. Rather, it was a complaint made by the Irish government under the ECHR in respect of security policy in Northern Ireland, alleging discrimination, brutality and torture of detainees. As Thorpe wrote, it seemed likely that an interfering neighbour and a legalistic convention would together see the UK denounced for officially sanctioning torture. It

¹ Memorandum 'Strasbourg: The Next Stage' Thorpe to White (2 October 1972) Foreign and Commonwealth Office (FCO87/143/335); on the history of the ECHR, A. W. B. SIMPSON, *Human rights and the end of empire : Britain and the genesis of the European Convention* (Oxford: Oxford University Press, 2001)

² MALCOLM SUTTON, *An index of deaths from the conflict in Ireland, 1969-1993* (Ireland: Beyond the Pale Publications, 1994).

³ See generally PETER NEUMANN, *Britain's long war : British strategy in the Northern Ireland conflict, 1969-98* (New York: Palgrave MacMillan, 2003)

was, he suggested, time to re-examine the Convention's value. It was all very well signing up to human rights standards – although these obviously did nothing to improve human rights in the country – but to be forced to defend one's actions before an international tribunal and to conduct foreign policy through the medium of law was surely more than any pious human rights document was worth⁴? The UK acceded to treaties because it intended to comply with them; what purpose was served by protracted argument over whether and how far it actually did so?

Such concerns are echoed in contemporary debates about the UK's relation to the ECHR. However my interest in this episode is not as a forerunner of today's debates. Rather, in this paper I examine the Irish ECHR complaint, together with a slightly earlier initiative at the United Nations, as case studies of the political role of international legal argument. These are cases of politicised law, and legalised politics. As such, my hope is that they can take us beyond the dualism characterising much contemporary scholarship on the politics of international law, illustrating the ways that international law and international politics are mutually implicated, and mutually constructed, as aspects of a single deliberative discourse.

The next section introduces some key features of the literature on the politics of international law, criticising the existing compliance literature and various strands of constructivist discourse theory which express, in different ways, an unhelpful opposition of law and politics. Instead, I propose an integrated model of legal and political argument, building on Habermasian communicative action theory. Various scholars have hypothesised that international politics can be in part understood as communicative action, but have struggled to demonstrate such action in specific cases. I extend their approach, locating legal argument within its wider deliberative context, and suggesting how legal and non-legal logics interact, and how agents' dual roles, participating in both international and domestic discourses, limit, without pre-empting, such international communicative action. By understanding international law and politics as thus mutually implicated we can better appreciate the ways political agents make use of, whilst being simultaneously shaped by, legal institutions and arguments.

Subsequent sections interrogate two historical cases from the Northern Ireland conflict to show these logics in action, not only as limits on agents, but as sources of action, suggesting that at various points we can identify agents revising their factual and normative understandings through communicative interaction, and thereafter acting on these revised understandings. Section 3 examines the Irish government's unsuccessful attempts in 1969 to initiate a debate on Northern Ireland at the United Nations, first in the Security Council and subsequently in the General Assembly. While no substantive debate took place in either forum, the implications of action, both legal and practical, were fully canvassed by both states in the course of intensive

⁴ Similar sentiments were expressed when the UK was the subject of an interstate complaint in respect of Cyprus in 1956/57: SIMPSON, *supra note 1* at 983.

lobbying. The complex normative questions raised, involving claims of a territorial dispute, a post-colonial situation, a domestic conflict and a human rights issue, make this an excellent case for examining legal argument within ostensibly political processes. Section 4 examines Ireland's inter-state complaint under the ECHR. This was only the fourth inter-state case under the ECHR. Like the UN initiative, it was a response to politically sensitive developments in Northern Ireland. However, the institutional context is different. It is more explicitly legalised, and third states are less relevant. While UN case illustrates law in the domain of politics, the ECHR case is more clearly one of politics in the domain of law. The two case studies, while closely linked, thus offer opportunities to examine the politics of international legal argument in quite different settings.

2. From Law as Rules to Law as Deliberative Discourse

The literature on the politics of international law is vast, and summarising it is beyond the scope of this paper.⁵ Different schools of international relations theory suggest different accounts of the political significance of law, ranging from realist scepticism through institutionalists' cautious acceptance to constructivists' thorough embrace.⁶ However, much of this existing literature is characterised by an unhelpful dualism. Law and politics are understood as distinct, prompting questions about how each affects the other.⁷

This is most obvious in the compliance literature, which examines whether, to what extent, and under what conditions, states comply with international law.⁸ The compliance question, so stated, assumes a causal relation between law and agent. Whether this is understood as expressing a logic of consequences or appropriateness, it implies that law exists apart from, and prior to, agent and action.

This, however, ignores an important feature of international legal practice, namely the way legal norms are invoked. Many – perhaps most – norms may directly and

⁵ Useful overviews are Beth A Simmons & Richard H. Steinberg, *International Law and International Relations*, (Cambridge: Cambridge University Press, 2006); Oona Anne Hathaway & Harold Hongju Koh, *Foundations of International Law and Politics* (New York: Foundations Press, 2005)

⁶ For a critical review: BENEDICT KINGSBURY, "The Concept of Compliance as a Function of Competing Conceptions of International Law", (1998) 19 *Mich J Int'l Law* 345

⁷ For (some of) the problems this dualism raises: KRATOCHWIL, "How do Norms Matter?" in Michael Byers ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 35 at 41-42; ANNE-MARIE SLAUGHTER BURLEY, "International Law and International Relations Theory: A Dual Agenda", (1993) 87 *AJIL* 205 at 209-215

⁸ e.g. THOMAS M. FRANCK, *The power of legitimacy among nations* (Oxford: Oxford University Press, 1990); ROBERT O. KEOHANE, "International Relations and International Law: Two Optics", (1997) 38 *Harv. Int'l. L. J.* 487; J. W. LEGRO, "Which norms matter? Revisiting the "failure" of internationalism", (1997) 51 *International Organization* 31; A. T. GUZMAN, "A compliance-based theory of international law", (2002) 90 *California Law Review* 1823

uncontroversially determine agents choices.⁹ But when international law becomes visible, it is because it is invoked, by specific agents, whether to justify their own behaviour, or to challenge, criticise or persuade others.¹⁰ The intersubjectivity of legal norms thus goes beyond their social constitution to include an important social quality in their operation.¹¹ We need a model that can account for this.

This objection is not new. However, the alternative models of normative invocation and contestation that critics of compliance propose in fact reproduce this duality, albeit in different forms.

The contested compliance literature, for example, recognises the role of argument in clarifying legal norms, and thereby determining what constitutes compliance or breach.¹² Law cannot be understood as prior to interaction.¹³ However, its logic of action continues implicitly to distinguish norm (law) and agent (politics). Agents stand apart from the norms they are debating. Politics and law interact, but they do so within the domain of law. However in the cases I examine, agents and actions, as well as norms, are objects of discursive contestation. The question ‘what does this rule require?’ is relevant only as it impacts the practical question, ‘what should I/we/you do?’; and the latter question rarely reduces to the former. Contested compliance dereifies the norm; but what is required is to dereify the agent.

Another prominent approach is Johnstone’s account of law as discourse.¹⁴ Johnstone characterises international law as a justificatory discourse, substantially open, but constrained by a distinctive logic that limits the moves that can be made, and the arguments that can count as legitimate.¹⁵ Agents use law to ‘explain, defend, justify and persuade’.¹⁶ However, as understood by Johnstone, legal discourse does not

⁹ It is to these cases that Henkin refers when he suggests that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”: Louis Henkin, *How Nations Behave: law and foreign policy* (New York: Praeger, 1968) at 47

¹⁰ For this point: CHAYES & CHAYES, *The new sovereignty: compliance with international regulatory agreements* (Cambridge, Mass: Harvard University Press, 1998); JG COLLIER & AV LOWE, *The settlement of disputes in international law : institutions and procedures* (Oxford: Oxford University Press, 1999) at 3-5. Cf. MARTHA FINNEMORE, *National interests in international society* (New York: Cornell University Press, 1996) at 136-143

¹¹ For this limitation of constructivist models: JG MARCH & JP OLSEN, “The Institutional Dynamics of International Political Orders”, (1998) 52:4 *International Organization* 943 at 952.

¹² E.g. Antje Wiener, “Contested Compliance: Interventions on the Normative Structure of World Politics”, (2004) 10 *EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS* 189; Antje Wiener, “Contested Meanings of Norms: A Research Framework” (2007) 5 *COMP EUR POLIT* 1. Cf. ABRAM CHAYES & AH CHAYES, “On Compliance”, (1993) 47:2 *International Organization* 175; *The new sovereignty*, *supra* note 10. For a less optimistic interpretation on contested meanings: ANTHONY CARTY, “Critical International Law: Recent Trends in the Theory of International Law”, (1991) 2:1 *European Journal of International Law* 66

¹³ Kratochwil makes an analogous point, arguing that the interpretation of norms and language is an inter-subjective rather than individualist practice: KRATOCHWIL, *supra* note 7 at 52.

¹⁴ IAN JOHNSTONE, “Security Council Deliberations: The Power of the Better Argument”, (2003) 14:3 *Eur J Int Law* 437; *The Power of Deliberation* (Oxford: Oxford University Press, 2011).

¹⁵ JOHNSTONE, “Security Council Deliberations”, *supra* note 14, at 450

¹⁶ JOHNSTONE, “Security Council Deliberations”, *supra* note 14, at 439

directly shape outcomes.¹⁷ Indeed, the only mechanism whereby argument might affect action is a negative one. Not all justifications will be acceptable to the relevant interpretive community, so agents committed to justifying actions are limited to those that can be justified.¹⁸ Legal argument is, on this account, essentially second- and third-personal; agent and audience are distinct, and it is through its acceptability to the audience, rather than its force for the agent, that argument shapes action.¹⁹

Legal argument thus possesses, in Johnstone's account, an unavoidably public and performative quality. This is perhaps unsurprising, given his empirical focus on legal argument in public venues including the UN Security Council and WTO Dispute Settlement Body. However, legal argument is not limited to such contexts. Rather, while harder to observe, it forms a substantial component in the confidential bilateral interactions, negotiations and lobbying through which international politics proceeds. Some of this might be understood as negotiating 'in the shadow of law', but this simply begs the question against constructivist models of action. A better approach would consider, at least pending empirical resolution, whether such bilateral argument is what it appears to be: an attempt to persuade the addressee of the truth and force of some proposition, and to act accordingly.

A key issue is therefore how we should understand the link from legal argument to political action, in both first- and third-person contexts. In the case studies that follow, I investigate the hypothesis that we can understand international legal argument as, at least in part, an example of what Habermas labels communicative action, and that we can thereby shift our focus, from agents exchanging arguments, to agents being shaped by and acting upon arguments.²⁰ We thus move beyond the study of speech, to the relation between speech and action.

¹⁷ For this point, and the consequent challenges in demonstrating that link in practice: Anna Holzscheiter, "Between Communicative Interaction and Structures of Signification: Discourse Theory and Analysis in International Relations" (2014) 15:2 *INTERNATIONAL STUDIES PERSPECTIVES*, 142 at 157-158. A similar objection applies to e.g. Nicholas J. Wheeler, "The Kosovo Bombing Campaign" in Christian Reus-Smit ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004). Cf. Dino Kristiosis, "When states use armed force", in Reus Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004). Chayes and Chayes do highlight the persuasive effect of legal argument in advocating for or against actions by others; CHAYES & CHAYES, *The new sovereignty*, *supra* note 10 at 119

¹⁸ Johnstone does advert to the possibility of listeners responding communicatively, but this is not pursued in subsequent discussions: Johnstone, "Security Council Deliberations", *supra* note 14 at 455

¹⁹ Similar mechanisms are emphasized in: MARC LYNCH, "Lie to me: sanctions on Iraq, moral argument and the international politics of hypocrisy", in Richard M. Price ed., *Moral Limit and Possibility in World Politics* (Cambridge: Cambridge University Press, 2008); Jon ELSTER, "Strategic Uses of Argument", in KJ Arrow et al, eds, *Barriers to Conflict Resolution*, (New York: WW Norton, 1995) 237 at 250. Some scholars, of course, might deny that there is a distinction between motivation and justification. E.g. KRATOCHWIL, *supra* note 7, at 67

²⁰ The approach outlined here builds on existing efforts to translate Habermas to international relations, including *inter alia*: THOMAS RISSE, "'Let's Argue!': Communicative Action in World Politics", (2000) 54:1 *International Organization* 1; HARALD MULLER, "Arguing, Bargaining and all that: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations", 10:3 *European Journal of International Relations* 395. On argument in international relations more generally, Neta Crawford, *Argument and Change in World Politics: ethics*,

This requires introducing four concepts: strategic and communicative action; and arguing and bargaining.

Communicative action is defined as a mode of action that seeks consensus through a readiness to submit to the better argument²¹. When acting communicatively, Risse suggests, ‘actors seek to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding action’²². Communication is characterised by openness to changing positions based on rational argument²³. Whether, and to what extent, agents act communicatively will presumably vary across contexts²⁴. However, where they do, their behaviour is directly shaped by the process of argument, as they come to act towards the world in terms of changed factual and normative understandings. Action, including norm-driven action, is thus understood as rational, grounded in reasons and subject to revision based on rational argument.²⁵ Identifying communicative action requires tracking changes in actors’ views and/or preferences, and the associated processes of persuasion and deliberation²⁶.

decolonization and humanitarian intervention (Cambridge: Cambridge University Press, 2002) at 11-81. The influence of Habermas in Reus-Smit’s work is prominent: see in particular CHRISTIAN REUS-SMIT, “Human rights and the social construction of sovereignty” (2001) 27 *Review of International Studies* 519; CHRISTIAN REUS-SMIT, “The Constitutional Structure of International Society and the Nature of Fundamental Institutions”, (1997) 51 *International Organization* 555. Analogues are also present in Kratochwil, in particular his distinction between ‘bargaining’ and the norm-structured ‘discourse of grievances’: KRATOCHWIL, *Rules, norms and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge: Cambridge University Press, 1989) at 181 and Chs. 1, 5 and 7 generally. On the distinction between communicative action approaches and other discourse theories: Holzsheiter, *supra* note 17.

²¹ For a more complete discussion of communicative action in international relations, MATHIAS ALBERT, et al., *On order and conflict: International Relations and the ‘communicative turn’*, 34 *Review of International Studies* 43 (2008).

²² RISSE, *supra* note 20, at 7.

²³ MULLER, *supra* note 20, at 405; LARS G. LOSE, “Communicative Action and the World of Diplomacy”, in Karim M Fierke and Knud Erik Jorgensen, eds, *Constructing International Relations: the next generation* (Armonk: M.E. Sharpe, 2001) at 184

²⁴ Muller emphasises that the modes of action are ideal types, which in practice are likely to occur simultaneously: HARALD MULLER, “International Relations as Communicative Action”, in Karim M Fierke and Knud Erik Jorgensen, eds, *Constructing International Relations: the next generation* (Armonk: M.E. Sharpe, 2001) at 162

²⁵ This contrasts with models of norm acquisition that distinguish reasoning, understood instrumentally, from socially acquired and non-rational normative motivation (e.g. taboo). See e.g. Nina Tannenwald, *The Nuclear Taboo: The United States and the non-use of nuclear weapons since 1945* (Cambridge: Cambridge University Press, 2007)

²⁶ On the difficulties of operationalizing communicative action, NICOLE DEITELHOFF & HARALD MULLER, “Theoretical paradise; empirically lost? Arguing with Habermas”, (2005) 31 *Review of International Studies* 167 at 170-171. Crawford suggests that ‘[w]e can infer that ... arguments were causally important if actors change their beliefs and behaviour after they have heard arguments and if other explanations fail to account for the change’: CRAWFORD, *supra* note 20, at 36.

Communication contrasts with strategic action, which ‘aims at making one’s own preferences prevail, using all instruments available for achieving this objective’²⁷. We may still observe behaviours that outwardly seem like communication and argument; but actors use these to obtain information, and to induce others to change their positions, without being themselves open to movement, except instrumentally. Hypothesizing communicative action does not mean denying the concurrent, and often predominant, role of strategic action in many cases.

Given these distinct logics of action, arguing and bargaining are in turn defined as specific types of speech act²⁸. Arguing, Muller suggests ‘proposes the truth of a factual, or the normative validity of a moral, proposition with a view to convince the target (listener, receiver) of the claim made by the speaker. Truth and normative validity are proposed by resting the proposition on a second one that is meant to prove the validity of the claim’. By contrast, ‘[b]argaining contains promises and threats and intends to change behaviour’²⁹. Actors seek to achieve their goals by ‘exchanging demands backed by credible promises, threats, or exit opportunities’ and communication is limited to the making of such demands³⁰. So defined, bargaining is the quintessential strategic negotiating behaviour. Neither arguing nor bargaining is necessarily limited to explicit statements; institutional actions (and indeed non-institutional actions) may also function as discrete arguments, or as part of a bargaining process.

If politics is understood as a locus of strategic and communicative action, then we might in turn understand *legal* argument as a distinctive sub-set of such action. Legal claims may constitute argument, in so far as they open a legal-normative discourse around the rules applicable in a given situation. However, they may also be used in a bargaining mode, in which the threat of legal action, or the possibility of conceding a legal point, constitutes a stick or carrot. In neither case should we expect to see them used to the exclusion of other, political, arguments. Where argument, legal or non-legal, is observed, this may be communicative or strategic. More likely, we will see a mix; actors might initially argue both to convince others, and to justify positions to themselves, domestic audiences, and third parties; but may subsequently, through processes of simple learning, rhetorical entrapment or communicative action, find

²⁷ MULLER, *supra* note 20, at 397. Risse further distinguishes communicative action from the logic of appropriateness, arguing that the three logics represent overlapping ideal types: RISSE, *supra* note 20, at 22-23.

²⁸ On the concept of a speech act: MULLER, *supra* note 20, at 397. Cf. KRATOCHWIL, *supra* note 20, at 6-9.

²⁹ MULLER, *supra* note 20, at 397. Kratochwil’s distinction between bargaining and the ‘discourse of grievances’ is similar, but not directly analagous: KRATOCHWIL, *supra* note 20, at 181.

³⁰ RISSE, *supra* 8.

their preferences, whether over immediate actions or long-term outcomes, change based others' arguments³¹.

One question raised by this turn to argument is how we should distinguish 'legal' from 'non-legal' or 'political' argument. For compliance theorists, law can be conceived as a body of rules distinct from political practice. Having rejected compliance's dualism, we must instead distinguish the 'legal' as a particular style of reasoning, with and about rules.³² Kratochwil, for example, identifies as a critical feature of legal argument 'the principled character of application': "legality" requires the even-handed application of rules in "like" situations³³. Arguments in terms of generally applicable principles, rules and categories, rather than of specific instances and discretionary decisions, are distinctive of legal discourse. The emphases which legal reasoning places on precedent and analogy are specific manifestations of this ideal of principled application³⁴. Reus-Smit expresses a similar, albeit broader, idea when he characterises international law as 'a distinctive type of argument in which principles and actions must be justified in terms of established, socially sanctioned, normative precepts'³⁵. Law thus involves, not only reasoning in terms of principle, but also appeals to the authority of particular socially mandated sources, whether this be particular documents (treaties, resolutions, legislation), practices (custom, precedent) or agents (judges, arbitrators); we need not embrace legal positivism to recognise such appeals to authority as distinctive of legal reasoning.³⁶ There is no definition of 'law' or 'legal' here. However, these features suffice for my purposes, allowing me to provisionally distinguish legal argument from the broader category of political argument in my case studies.

Legal argument, then, is conceived as an aspect of deliberative discourse, linked to outcomes through logics of communicative and strategic action. Implicit in this approach is the assumption agents can evaluate alternative arguments and, in cases of conflict, determine which should prevail. In consequence, argument cannot proceed in a social or normative vacuum; even as it challenges factual and normative assumptions, it can do so only by reference to further such assumptions. Habermas labels as the 'life-world' the store of shared meanings and interpretations on the basis

³¹ On rhetorical entrapment, LYNCH, *supra* note 19; RISSE, *supra* note 20, at 8-9. Cf. JOHNSTONE, "Security Council Deliberations", *supra* note 14, at 454. On argument as self-validation, RS BARKER, *Legitimizing identities: the self-presentation of rulers and subjects* (Cambridge: Cambridge University Press, 2001)

³² KRATOCHWIL, *supra* note 20, at 211. Cf. TOOPE, *supra* 102

³³ KRATOCHWIL, *supra* note 20, at 208

³⁴ *Ibid.* at 221, 223-228. Cf. CHAYES & CHAYES, *supra* note 10, at 131-133

³⁵ REUS-SMIT, *The politics of international law*, *supra* note 17, at 41

³⁶ They remain, for example, central to the leading contemporary anti-positivist theory of law: Ronald Dworkin, *Laws Empire* (Oxford: Hart, 1986)

of which argument proceeds.³⁷ The non-existence of such a shared life-world is a common objection to attempts to apply communicative action theory in international relations. However it is doubtful how far that objection can be sustained³⁸. The existence of a wealth of widely accepted treaties (supplemented by resolutions of international organisations), addressing issues from human rights and the non-use of force to international trade and postal cooperation, suggests there is an extensive store of at least rhetorically shared meanings and values to which agents can appeal. Risse and Muller point variously to institutions and the diplomatic community as *foci* of overlapping life-worlds³⁹; while Risse suggests that in thinly institutionalised contexts such a life-world can be strengthened through pre-negotiation narration of ‘shared experiences, common historical memories, and the like’⁴⁰. Further, it may not be necessary that interests and values be shared, as opposed to merely mutually comprehensible, to ground communicative action. Actors with very different understandings of the world might still engage in, and act upon, communicative argument, provided they can recognise the values of the other, and offer accounts that relate to those values.⁴¹

In the context of legal argument, the specific legal norms invoked provide a ready store of shared meanings. Rejecting compliance’s static conception of law as rules does not require jettisoning the vast corpus of existing legal texts and practices; rather, we understand these as the raw materials of deliberative discourse. As Reus-Smit argues, where actors perceive themselves as acting in a legal context they give priority to legal arguments, and legal modes of reasoning⁴². These may not prevail to the exclusion of others, but they have a prima-facie legitimacy⁴³. Absent any deeper commonalities, we can expect argument to proceed at this level. However, where other values are shared, we may expect to see the existing legal rules, or the manner in which they are interpreted or applied in a given context, challenged by reference to

³⁷ RISSE, *supra* note 20, at 10, 14. Similar ideas appear in: THOMAS FRANCK *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) at 12; REUS-SMIT, “Constitutional Structure”, *supra* note 20, at 564; Crawford, *supra* note 20, at 68-78.

³⁸ LOSE, *supra* note 23, at 183

³⁹ Different international organizations, institutionalizing different shared norms and values, may provide quite different deliberative contexts, in which different arguments will succeed or fail.

⁴⁰ RISSE, *supra* note 20, at 14-16; MULLER, *supra* note 20, at 419-421.

⁴¹ LOSE, *supra* note 23, at 187. The extent to which underlying interests and values are shared will be reflected in the types of principles on which states can agree. This links to the pluralist/solidarist debate in English School scholarship: ANDREW HURRELL, *On global order : power, values, and the constitution of international society* (Oxford: Oxford University Press, 2007) 25-94. Reus-Smit identifies ‘a dialogue between pluralist and solidarist principles’ in the discourse of law as a communicative process: REUS-SMIT, *supra* note 17, at 277. Cf. JOHNSTONE, *supra* 456; REUS-SMIT, *The moral purpose of the state*, (Cambridge: Cambridge University Press, 2004) at 36-39.

⁴² REUS-SMIT, *The politics of international law*, *supra* note 17, at 37.

⁴³ FRIEDRICH V. KRATOCHWIL, “Constructivism as an Approach to Interdisciplinary Study”, in Karim M Fierke and Knud Erik Jorgensen, eds, *Constructing International Relations: the next generation* (Armonk: M.E. Sharpe, 2001)

such values.⁴⁴ Argument involves not only the appeal to norms, but also the possibility of challenging normative arguments and frames by reference to other facts or values. Legal arguments may be challenged on extra-legal grounds, and normative conflict can be expected around the framing of situations, which will determine whether and how legal arguments become relevant⁴⁵. Challenges to the salience of legal norms may be particularly prominent at moments of crisis, when the default quality of legal solutions seems less compelling. Law and politics are thus integrated as aspects of a single discursive practice; and where they are understood as distinct, we are drawn to consider the discursive constitution, maintenance and contestation of that distinction.⁴⁶ The scope for legal and political considerations to interact through argument means that neither can be considered a discrete phenomenon. Rather, we must be sensitive to the interactions between legal and political arguments, and across ostensibly legal and political domains.

A related challenge is the multiple contexts in which actors participate simultaneously. Whereas diplomats may share an international diplomatic life-world, they are also deeply embedded in their domestic political cultures. Actions and arguments in the international sphere must also resonate within the domestic sphere; foreign policy constitutes a ‘two-level discourse’, and the rules and reference systems in the domestic and international discourses are likely to diverge, limiting the scope for communicative action at the international level⁴⁷. However, rather than assume that this pre-empts any potential for international communicative action, I approach these cases open to the possibility that domestic and international deliberative discourses exist in parallel. Their terms will differ. Unquestioned premises in one context may be controversial, or indeed unthinkable, in another. The need to manage this dissonance will limit the arguments that can be made, or accepted, in each. However, there may still be scope for communicative action to proceed. And indeed law may provide a shared vocabulary in which the particularistic values of domestic discourse can be translated into internationally shared, and hence mutually comprehensible, terms.⁴⁸ As with the relation between legal and non-legal, we must be sensitive to the

⁴⁴ Chayes and Chayes highlight that legal norms are not the only means of justification available: CHAYES & CHAYES, *supra* note 10, at 120.

⁴⁵ In Muller’s terms, framing ‘demarcates the borderline between bargaining and arguing’. MULLER, *supra* note 20, at 415. Cf. CRAWFORD, *supra* note 20, at 19-22.

⁴⁶ Reus-Smit articulates this idea in terms of law’s “discourse of institutional autonomy”, albeit he places less emphasis that I do on the way that autonomy is itself subject to challenge: REUS-SMIT, *supra* note 17, at 37

⁴⁷ LOSE, *supra* note 23, at 165. Cf. ROBERT D. PUTNAM, “Diplomacy and Domestic Politics: The Logic of Two-Level Games”, (1988) 42:3 *International Organization* 427. Muller argues that such two-level discourses may also result in a shift in the domestic discourse: MULLER, *supra* note 20, at 423. Cf. MARKUS KORNPROBST, “Episteme, nation-builders and national identity: the re-construction of Irishness”, (2005) 11:3 *Nations and Nationalism* 403; MARKUS KORNPROBST, “Dejustification and Dispute Settlement: Irredentism in European Politics”, (2007) 13:4 *European Journal of International Relations* 459.

⁴⁸ Johnstone makes a similar point, labelling law as the language of international society: JOHNSTONE, “Security Council Deliberations”, *supra* note 14, at 461.

relationship between deliberative discourses at domestic and international levels, rather than assuming in advance that one trumps the other.

This model of law as communicative action goes beyond existing discursive models to hypothesise, not only the structure of argument within a given legal discourse, but also the relation between legal and non-legal argument, between domestic and international discourses, and between legal argument and political action. On each dimension, it emphasises the first personal quality of legal argument, whether for speaker or listener. Legal argument, it suggests, is not just about how we explain ourselves, or evaluate others. Rather, it directly implicates our own choices and actions.

These claims cannot be readily tested by examining public statements. Such statements inevitably address audiences beyond the immediate interlocutors, making it impossible to disaggregate the effects of argument on participants from their concerns to legitimise actions in the eyes of third parties, whether domestic publics or third states.⁴⁹ We might try to get behind them through research interviews and memoirs, but observation effects make it difficult to draw robust motivational conclusions.⁵⁰ To address this, I rely instead on government archives, examining contemporaneous diplomatic communications and confidential analyses to trace motivations, strategies and interactions, with a view to identifying how far the hypothesised mechanisms are present in these cases. This involved an exhaustive review of files from: in Ireland, the Irish Department of External Affairs / Foreign Affairs⁵¹ and Department of the Taoiseach (Prime Minister); and in the UK, the Foreign and Commonwealth Office and the Prime Minister's Office.⁵² The archival

⁴⁹ While focusing on such third-person concerns suggests audiences are themselves open to communication, it assumes agents directly involved express only a logic of consequences. On the ontological premises of such argument: RISSE, *supra* 8-9; JON ELSTER, *Strategic Uses of Argument, in Barriers to Conflict Resolution* 248 (Kenneth J. Arrow, et al. eds., 1995); MULLER, *Arguing, Bargaining and all that*, 404-407.

⁵⁰ DEITELHOFF & MULLER. *supra* note 26. Cf. RISSE, *supra* note 20, at 26. CECILIA ALBIN, *Justice and fairness in international negotiation* 20 (Cambridge: Cambridge University Press, 2001)

⁵¹ The name of this department was changed in 1971, during the period covered by these case studies.

⁵² Both states release almost all government files to public archives after a fixed period. The vast majority of relevant documentation for these case studies appears to be in the archives. A full list of files reviewed appears as an annex to the online version of this article, available at <http://www.jilir.org>. Where archival materials are cited below, they include a file reference (e.g. "PREM/15/2141") specifying the file in the relevant archive in which the original document is held. References including "PREM" or "FCO" refer to documents in the UK National Archives, Kew, Richmond, Surrey, TW9 4DU, United Kingdom. References including "NA" refer to documents in the National Archives of Ireland, Bishop Street, Dublin 8, Ireland.

I am not aware of any published study examining these materials in detail. Two studies of Irish policy towards Northern Ireland make reference to the materials in respect of the UN initiatives: MICHAEL KENNEDY, *Division and consensus: the politics of cross-border relations in Ireland, 1925-1969* (Dublin: Institute of Public Administration, 2000); RONAN FANNING, "Playing it cool: The response of the British and Irish governments to the crisis in Northern Ireland, 1968-9", (2002) 12 *Irish Studies in International Affairs* 57. However neither focuses on the UN processes, or on the role of law or argument. One study examines the UN initiatives from a US perspective, based on US Archives: DANIEL C. WILLIAMSON, "Taking the Troubles across the Atlantic: Ireland's UN Initiatives and Irish-US Diplomatic Relations in the early years of the Conflict in Northern Ireland, 1969-72", (2007) 18

method has limits, both in the cases it can investigate and the empirical claims it can support; but more than any other technique, it allows us to look ‘inside the heads’ of political agents, and thereby opens the possibility of distinguishing between modes of action, and identifying the relations between legal argument and action. It is with this goal in mind that I now turn to my two case studies.

3. Ireland at the UN Security Council and General Assembly

In August 1969, against the backdrop of sectarian rioting in Belfast and Londonderry and the deployment of British Army troops to maintain order, the Irish government took the unprecedented step of seeking to internationalise the Northern Ireland question through the political fora of the United Nations. Responding to the deteriorating security situation over previous months, this represented an attempt to assert the legitimacy of Irish interests in Northern Ireland, and to challenge UK assertions of exclusive competence. This section examines this initiative, and in particular the role of legal argument within and around the Security Council and General Assembly, in light of the framework outlined above.

The initiatives described in this Part took place within and around the two main political organs of the UN, the Security Council (SC) and General Assembly (GA)⁵³. In both GA and SC, the majority of argument takes place not in public debate, but rather in informal meetings and diplomatic lobbying⁵⁴. Public statements in these fora are important, and merit examination in their own right, but the inter-state politics through which consensus is built and decisions reached can be understood only through examining that informal lobbying⁵⁵.

In both fora substantive debate was forestalled by the UK without the issue coming to a vote. The arguments and lobbying discussed below are therefore primarily addressed to the preliminary question of whether the relevant agenda item should be adopted (referred to as ‘inscription’). However, the fact that the decision is procedural

Irish Studies in International Affairs 175. The Security Council initiative is also discussed briefly, based on public documents, in: ANDREW BOYD, *Fifteen men on a powder keg : a history of the UN Security Council* (Toronto: Methuen, 1971). While the ECHR case features prominently in legal texts, it has not been examined in detail in its political context. Cf. ADRIAN GUELKE, *Northern Ireland : the international perspective* 165-167 (Dublin: Gill and Macmillan, 1988); MALCOLM D. EVANS & RODNEY MORGAN, *Preventing torture : a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Cambridge: Clarendon Press, 1998).

⁵³ For an overview of the relevant political processes: MICHAEL BARNETT & MARTHA FINNEMORE, “Political Approaches”, in Thomas G. Weill and Sam Daws eds., *The Oxford handbook on the United Nations* (Oxford: Oxford University Press, 2007).

⁵⁴ MJ PETERSON, *The UN General Assembly*, (New York: Routledge, 2006) at 79; BOYD, *supra* note 51; WAYNE SANDHOLTZ & ALEC STONE SWEET, “Law, politics, and international governance”, in Christian Reus-Smit ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

⁵⁵ As Barnett and Finnemore note, there is a shortage of specific research on the internal politics of the UN organs. BARNETT & FINNEMORE, *supra* note 52, at 52.

should not detract from its significance; in a context of contested sovereignty, this preliminary question of whether an issue is appropriate for international rather than purely domestic consideration itself goes to the heart of the substantive disagreement between the contending states⁵⁶.

In both fora, the arguments crystallised around the implications of Article 2(7) of the UN Charter, which precludes UN intervention in ‘matters which are essentially within the domestic jurisdiction of any state’. The UK claim was that Article 2(7) precluded UN discussion of the issue, an argument which had enjoyed only limited success in other cases⁵⁷. Irish arguments challenged this claim, both by directly challenging the image of Northern Ireland as a domestic concern, and by relying on alternative legal bases, including Articles 33 and 34 (dealing with the pacific settlement of disputes), Article 55 (dealing with human rights), and GA Resolution 1514(XV) (on the granting of independence to colonial countries and peoples).

3.1 Northern Ireland and the United Nations: Emerging Thinking

These initiatives represent the only formal attempt by an Irish government to raise Northern Ireland at the UN⁵⁸. Given the duration of the issue, as a semi-dormant territorial claim before 1969, and as a violent sectarian conflict for almost three decades thereafter, this might seem somewhat surprising⁵⁹. A territorial claim to Northern Ireland had been a fixture in Irish political discourse since independence in 1921, and in 1937 that claim was incorporated in the state’s constitution⁶⁰. The issue had been pressed extensively, to little effect, by Irish representatives at the Council of Europe in the 1940s⁶¹. However, while it was occasionally mentioned in Irish contributions at the UN, it was never sought to raise it formally.

This reflected a recognition on the part of successive governments that there was little which the UN could do to end partition, together with a more general reluctance to press the issue too hard⁶². This point was recognised in 1946, when joining the UN

⁵⁶ UK analyses implicitly recognised this point: Letter Crowe to Stratton (27 September 1971) Foreign and Commonwealth Office (FCO58/614/33).

⁵⁷ See PETERSON, *supra* note 53, at 69; ROSALYN HIGGINS, “Intervention in International Law”, in Hedley Bull ed., *Intervention in World Politics* (Oxford: Oxford University Press, 1984) 36

⁵⁸ GUELKE, *supra* note 51, at 111-112.

⁵⁹ On partition in Anglo-Irish relations, RONAN FANNING, “Anglo-Irish Relations : Partition and the British Dimension in Historical Perspective”, (1985) 2 *Irish Studies in International Affairs* 1

⁶⁰ KORNPORST, “Episteme, nation-builders and national identity”, *supra* note 47, at 411; GARETH IVORY, “Revisions in nationalist discourse among Irish political parties”, (1999) 14 *Irish Political Studies* 84, at 85.

⁶¹ JOSEPH MORRISON SKELLY, *Irish diplomacy at the United Nations, 1945-1965 : national interests and the international order* (Dublin: Irish Academic Press, 1997) at 22

⁶² *Ibid.*, 88. CONOR CRUISE O'BRIEN & FELIKS TOPOLSKI, *The United Nations: sacred drama* (London: Hutchison, 1968) at 118

was first considered, and as late as April 1969, Minister of External Affairs Frank Aiken was arguing that ‘the adoption of a United Nations resolution would [not] contribute to the restoration of Irish unity’⁶³.

The deteriorating security situation was the catalyst for subsequent shifts in Irish government attitudes towards the UN option, and in its Northern Ireland policy generally⁶⁴. Public order and inter-community relations in Northern Ireland had been deteriorating over a number of years, a process stimulated by the emergence of a Catholic civil rights movement, and serious rioting had occurred on a number of occasions in 1968 and earlier in 1969⁶⁵. These developments were reflected in a shift in Irish government attitudes, from a conciliatory policy in the mid-1960s towards a more explicitly anti-partitionist and irredentist position.

An initial step towards internationalising the issue was taken in April 1969 when, in response to unrest and troop deployments in Northern Ireland, Aiken met with Secretary General U Thant to brief him on the situation. However, no attempt was made to raise the issue formally in any UN organ on the basis that this was unlikely to achieve meaningful international action, and would potentially jeopardise North/South relations⁶⁶.

Two developments occurred over the next four months which led directly to the UN initiatives. The first was the increasing linkage in Irish thinking of the short-term question of civil rights for the Catholic minority in Northern Ireland with the wider question of partition, which came to be characterised as the root cause of the civil rights problems⁶⁷. The second, closely linked, was a loss of confidence in the possibility of substantial reforms, and a continued reluctance on the part of the London government to engage with Dublin on the issue⁶⁸.

The immediate background to the decision to raise the issue at the SC was the outbreak on 12 August of the worst sectarian rioting to date, and the deployment of British Army troops to maintain order in Northern Ireland. It followed a public request, made during an emergency Irish cabinet meeting on 13 August, that the UK itself seek a UN peace-keeping force, or alternatively accept a joint British-Irish force in Northern Ireland⁶⁹. The urgent nature of that meeting, characterised by political divisions within the cabinet, the absence of (recently appointed) Minister for External

⁶³ Irish Parliament *Dáil Debates* vol. 240 col. 6 (29 April 1969).

⁶⁴ KENNEDY, *supra* note 51, at 301 *et seq.*

⁶⁵ JOSEPH LEE, *Ireland, 1912-1985 : politics and society* (Cambridge: Cambridge University Press, 1989) at 420 *et seq.*

⁶⁶ KENNEDY, *supra* note 51, at 325-327; FANNING, *supra* note 51, at 69.

⁶⁷ KENNEDY, *supra* note 51, at 309, 311.

⁶⁸ Memorandum ‘Assessment of the initiative taken in London and in the United Nations’ (9 September 1969), Department of External Affairs (NA2002/19/427).

⁶⁹ KENNEDY, *supra* note 51, at 336.

Affairs Patrick Hillery, and reliance on limited and apparently exaggerated accounts of the situation in Northern Ireland, makes it difficult to see this move as part of a considered political strategy. Its primary purpose seems to have been to reassure both the Irish public and the cabinet themselves that the government could take effective action in respect of the Northern Ireland situation.

However, the subsequent decision to raise the issue formally at the SC, and thereafter at the GA, reflects a broader objective⁷⁰. The initiative at the SC was framed as a request for the despatch of a UN peace-keeping force to Northern Ireland, something which it was recognised was impossible over the objections of the UK⁷¹. However, it was argued that the UN ‘was an international forum and it would be of help to have the matter discussed and considered there’⁷². In part, no doubt, this reflects a further attempt to reassure domestic opinion. However, it also reflects an attempt to reframe the Anglo-Irish dialogue on Northern Ireland through the UN⁷³. The UK’s reluctance to discuss Northern Ireland affairs with Dublin had been an issue since earlier in the year, and would continue to be so⁷⁴. When Hillery sought to discuss the deteriorating situation with UK ministers, both before and after 12 August, they made a point of arguing that Northern Ireland was a domestic matter and that, in the words of Foreign Secretary Michael Stewart, ‘there is a limit to the extent to which we can discuss with outsiders, even our nearest neighbours, this internal matter’⁷⁵. There is a fundamental disconnect evident in accounts of these meetings between this UK characterisation, and the Irish view that the two jurisdictions were linked, and that the Irish government had a legitimate interest in the situation. Contemporary analyses from both states highlight the extent to which the Irish saw the UN as a means of engaging the UK, and pressing them to respond to Irish concerns, whether directly or through their lobbying of third-states; and Irish accounts highlight British engagement with third-states as a significant benefit which the initiatives yielded⁷⁶. The UN initiatives represent an attempt to shift the Anglo-Irish dialogue to a different forum, where the UK could not simply refuse discussion.

⁷⁰ FANNING, *supra* note 51, at 80.

⁷¹ ‘Hillery’s late night report to cabinet’ *Irish Times*, (16 August 1973)

⁷² *Ibid.*

⁷³ Hillery expressed both domestic and international motivations in contemporaneous discussions with UK representatives: Telegram New York to FCO (16 September 1969) Foreign and Commonwealth Office (FCO33/774/282).

⁷⁴ KENNEDY, *supra* note 51, at 318; FANNING, *supra* note 51, at 84.

⁷⁵ Memorandum ‘Note of discussion at the Foreign Office Friday, 1st August, 1969’ (4 August 1969) Department of External Affairs (NA2002/19/536); Memorandum ‘Report of Discussion at Foreign and Commonwealth Office London 15th August 1969’ (undated) Department of External Affairs (NA2002/19/536).

⁷⁶ Letter Hillery to Lynch (September 1969) Department of External Affairs (NA2002/19/427); Memorandum (Illegible) to Secretary (28 October 1969) Department of External Affairs, (NA2002/19/534); Telegram New York to FCO (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/62); Telegram New York to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/244).

3.2 From Domestic Discourse to International Law as Common Language

By shifting that dialogue to the UN, these initiatives also shifted it, at least in part, from the political to the legal field. How far this was the Irish objective is unclear; certainly there was a recognition that, in many respects, a political rather than a legal consideration would better serve the Irish case⁷⁷. However, by invoking Article 2(7), the UK characterised the Irish initiatives in legal terms; thereafter, other states also came to perceive themselves as acting within a legalised environment, and so engaged with it in those terms.

International law provided a framework of concepts within which each state sought to build support for its position. The relevant concepts, including human rights, sovereignty, territoriality and intervention, are of course also intensely political; but to the extent that states interpreted the situation in generalized terms, and advocated or opposed action on the basis of those interpretations and of their relation to Article 2(7), the discourse can be properly characterised as legal. To build support for discussion, the Irish government characterised the issue in terms of human rights, self determination and colonialism, categories which might be accepted as justifying UN involvement; while the UK characterised it as domestic, and the Irish reference as inappropriately political, in order to forestall discussion.

However, neither state could address their claims solely to the legal context of the UN organs; they were also concerned that the arguments invoked be compatible with their broader international and domestic characterisation of the issue. Arguments made in the international sphere both reflect and constitute arguments made to domestic constituents, and as such must be compatible not only with the categories adopted in the international context, but also with the overriding themes in domestic discourse. In the Irish case, this generated a tension between the human rights and political issues, while for the UK it manifested in a particular concern to stand on Article 2(7).

Both recognised that the Northern Ireland situation could be characterised in two ways: as a humanitarian issue, whether with respect to civil rights generally or to the immediate crisis; or as a political issue, involving partition and the Irish territorial claim over Northern Ireland. Both also recognised that it would be more difficult for the UK to oppose discussion of the humanitarian issue⁷⁸. This reflected a rapidly developing UN consensus that human rights were an issue of legitimate international concern⁷⁹. However, given that at least part of the Irish objective was to reframe the

⁷⁷ Memorandum Hillery to Lynch (26 August 1969), Department of External Affairs, (NA2002/19/427); Letter Cremin to Ronan (9 September 1969), Department of External Affairs, (NA2001/43/848).

⁷⁸ BRENDAN O'DUFFY, *British-Irish relations and Northern Ireland : from violent politics to conflict regulation* (Dublin: Irish Academic Press, 2007) at 76; Memorandum, 'Background Brief on Northern Ireland' (24 August 1972), Foreign and Commonwealth Office, (FCO58/691/38); Memorandum Hillery to Lynch (26 August 1969), Department of External Affairs, (NA2002/19/427).

⁷⁹ Simon Chesterman, Thomas M Franck & David M Malone, *Law and Practice of the United Nations: Documents and Commentary* (Oxford: Oxford University Press, 2008) at 457-460..

debate on the political question and challenge the idea that Northern Ireland was a purely internal matter, an exclusive focus on humanitarian issues would have defeated that purpose⁸⁰. Further, domestic pressure from both within and outside government to raise the wider political questions was intense⁸¹. A subsequent Irish analysis notes that ‘to have ignored partition altogether and dealt only with civil rights would have been a repudiation of our own beliefs, an invitation to the British to try to solve the problem without any regard to political considerations, and an admission to all the people living in [Northern Ireland] that we could contemplate an acceptable solution of their problems which did not in any way upset the constitutional arrangements existing over the past fifty years’⁸².

There was thus a divergence between the characterisation of this issue in Irish domestic thinking and the international law framework in which the case fell to be made. The Irish response was to collapse the humanitarian and constitutional questions together, building from a focus on human rights, and in the SC on international peace and security, to challenge the broader political settlement. Thus, the request for discussion in the SC highlights the connection between the outbreak of violence in the preceding days, and the ‘treatment which a high proportion of the inhabitants of the area have suffered over a period of almost fifty years’⁸³. Similarly, the GA Explanatory Memorandum argues that ‘the root cause of the demonstrations and unrest in the North is the unjust partition of Ireland’; ‘reunification ... gives the only hope for the evolution of balanced political and social relations ... in accordance with the principles of the Charter, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples’⁸⁴. The political argument is linked inevitably to the legal bases, in terms of charter principles, human rights and decolonisation, which justify consideration by the Assembly⁸⁵.

This attempt to link the two aspects also features prominently in Irish confidential lobbying. Thus, ahead of the SC meeting Irish representatives were arguing that the constitutional question ‘was at the root of the matter and no long term solution could be found without tackling this basic issue’⁸⁶. Hillery himself noted that ‘I have been

⁸⁰ WILLIAMSON, *supra* note 51, at 179. Cf. LEE, *supra* note 64, at 458.

⁸¹ FRANK FOLEY, *North-South Relations and the Outbreak of the Troubles in Northern Ireland, 1968-9: the Response of the Irish Press*, (2003) 14 *Irish Studies in International Affairs* 9 at 27-28. Cf. IVORY, *supra* note 59, at 3-5.

⁸² Memorandum (Illegible) to Secretary, (28 October 1969), Department of External Affairs, (NA2002/19/534).

⁸³ Telegram New York to FCO, (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/31).

⁸⁴ Explanatory Memorandum (6 September 1969), Department of External Affairs, (NA2001/43/848).

⁸⁵ The rhetorical structure of this argument is highlighted in contemporary UK analyses: Telegram FCO to Monrovia (11 September 1969), Foreign and Commonwealth Office. (FCO33/773/191).

⁸⁶ Political Report Brussels to DEA (18 August 1969), Department of External Affairs, (NA2002/19/536).

stressing all the time [in private lobbying] that the Human Rights questions had their origin in the political and would have their solution in a political solution⁸⁷. To argue directly for consideration of the political question would be exceptional, but by casting it in terms of human rights it is brought within an accepted basis of jurisdiction. There is evidence that a number of states were swayed by this analysis⁸⁸; and that challenging this framing was a significant focus of UK lobbying⁸⁹.

The need for coherence between the international and domestic discourses also explains why, while the Explanatory Memorandum refers to colonialism, Irish representatives did not emphasise this argument, either publicly or privately. This partly reflected doubts about the argument's credibility; however, given the power of anti-colonial arguments in the GA in this period, this explanation is insufficient⁹⁰. More significant in Irish thinking was concern at the prejudicial effect that characterising Northern Ireland Unionists as colonists would have in domestic and North-South relations⁹¹. A powerful international argument was discounted for domestic political reasons.

The UK, in its lobbying, stood firmly on Article 2(7), emphasising the status of Northern Ireland as an integral part of the UK. This was not simply a tactical move. Any suggestion that Northern Ireland was not an integral part of the UK has historically raised serious concerns for Northern Ireland's Unionist community.⁹² Invoking Article 2(7) reflected a commitment given to the Unionist government of Northern Ireland that the UK would assert its domestic jurisdiction in all international relationships⁹³. In considering responses to the Irish initiatives, a number were rejected on the basis that, while desirable from an international point of view, they would contradict that domestic imperative⁹⁴. Article 2(7) becomes a powerful

⁸⁷ Memorandum Hillery to Lynch (September 1969), Department of External Affairs, (NA2002/19/427).

⁸⁸ Telegram New York to FCO (13 September 1969), Foreign and Commonwealth Office, (FCO33/773/214); Telegram Canberra to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/773/221); Telegram New York to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/237).

⁸⁹ Telegram New York to FCO (17 September 1969), Foreign and Commonwealth Office, (FCO33/774/300).

⁹⁰ For a colonial analysis of Northern Ireland, STEPHEN HOWE, *Ireland and empire : colonial legacies in Irish history and culture* (Oxford: Oxford University Press) at 169-192

⁹¹ Memorandum 'Case for raising the North of Ireland situation in the UN' (undated), Department of External Affairs, (NA2000/19/534).

⁹² PAUL ARTHUR, *Special relationships : Britain, Ireland and the Northern Ireland problem* (Belfast: Blackstaff, 2000) at 29, 55

⁹³ UK, *Text of a Communique and Declaration issued after a meeting held at 10 Downing Street on 19 August 1969*, (Cmnd 4154) (London: Her Majesty's Stationery Office, 1969).

⁹⁴ Memorandum 'Northern Ireland: Security Council' (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/82); Telegram New York to FCO (9 September 1969), Foreign and Commonwealth Office, (FCO33/773/171).

domestic symbol, which the UK is compelled to invoke, even where doing so may undermine its international position.

In order to sustain this position on article 2(7), UK lobbying drew a sharp distinction between the humanitarian and political aspects of the situation. The humanitarian issue, they accepted, was within the jurisdiction of the General Assembly (but not the Security Council); the political question was strictly a domestic matter⁹⁵. In order to address the humanitarian aspects, emphasis was placed on the fact that the UK was competent to restore order, while the potential colonial and self-determination arguments were forestalled by reference to Northern Ireland's position within the UK, and Irish acceptance of partition since 1921⁹⁶. In each case, the rhetorical strategy involved the identification of Northern Ireland with, or its distinction from, a legally relevant class of situations; and the argument that this classification placed it outside the UN's jurisdiction. A recurring theme was that action, and even consideration, by the UN was 'neither necessary (since the UK is capable of restoring order and is in fact doing so) or appropriate (since the affairs of NI are an internal matter within the domestic jurisdiction of the UK)'⁹⁷; there were neither legal nor pragmatic grounds for the UN to become involved.

Thus, the arguments made by each state in the UN fora, both publicly and privately, reflected a tension between their domestic characterisations of the issue and the available legal concepts. They represent an attempt to translate particularist domestic perspectives, reflected in the quotes which opened this Part, into the shared normative framework of international law. The very different legal interpretations offered represent not only tactical manoeuvring at the international level, but also fundamentally different domestic political interpretations of the Northern Ireland situation.

Why does this process matter?

The importance of expressing arguments in shared legal terms lies in the fact that it is at least partly in these terms that other states came to understand, and to respond to, the issue. Thus, for example, in discussions with the UK, Danish officials noted that Irish arguments had failed to address Article 2(7)⁹⁸. Even though Denmark was

⁹⁵ Telegram New York to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/19); Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).

⁹⁶ Telegram New York to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/19); Telegram FCO to Bogota (18 August 1969), Telegram New York to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/49); Telegram FCO to Certain Missions (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/73).

⁹⁷ Telegram FCO to New York (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/33).

⁹⁸ Telegram Copenhagen to FCO (12 September 1969), Foreign and Commonwealth Office, (FCO33/773/205).

traditionally very liberal on inscription, and so sympathetic to the Irish case, they still approached the issue in these terms; therefore, it was in these terms that they needed to be convinced. Conversely the Netherlands, while accepting the political and practical merit of UK arguments, sought further explanation of how what was characterised as a human rights case could legitimately be denied discussion under Article 2(7)⁹⁹; only after further lobbying highlighting the distinctions between the political and humanitarian issues did they agree to support the UK position¹⁰⁰.

Demonstrating the significance of these legal accounts in shaping third-state attitudes is difficult. While it is possible to show states changing their positions in the course of the lobbying, it is impossible to control for extraneous factors shaping those positions.

The nuanced positions which many states adopted suggest that they were influenced by these arguments. Thus, United States representatives indicated to both delegations that they could not support discussion of the Irish request in the GA, on the basis that it emphasised the political aspect of the Northern Ireland question, and so brought it within Article 2(7). However, they indicated their position might be different if it were focussed more clearly on the humanitarian aspects¹⁰¹. A number of other states took similarly nuanced positions, drawing fine distinctions over the classification of the issue as either political or humanitarian, and the appropriate treatment of it¹⁰².

It is difficult to explain these attitudes without assuming that legal arguments carry some weight. None represents a complete acceptance and support of either state's view. Rather, they represent reasoned understandings, suggesting that different positions will be adopted on the question, depending on how it is framed and what action the UN is asked to take. It is important to note that the inscription of a specific human rights item would still represent a defeat for the UK, against which they were lobbying hard¹⁰³; however, whereas many states conceded the merit of the UK's arguments against a political item, they were not prepared to oppose a human rights item. While definite evidence of the causal impact of competing arguments is unavailable, the responses of other states suggest that they were at least significant.

⁹⁹ Telegram FCO to Hague (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/294).

¹⁰⁰ Telegram Hague to FCO (17 September 1969), Foreign and Commonwealth Office, (FCO33/774/297).

¹⁰¹ Memorandum Cremin to Hillery (1 October 1969), Foreign and Commonwealth Office, (NA2002/19/534); Telegram New York to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/237); Telegram Washington to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/240).

¹⁰² e.g. Letter Copenhagen to DEA (19 September 1969), Department of External Affairs, (NA2002/19/536); Telegram Belgrade to FCO (18 September 1969), Foreign and Commonwealth Office, (FCO33/774/314).

¹⁰³ Memorandum 'Northern Ireland' (17 September 1969), Foreign and Commonwealth Office, (FCO33/774/1338).

3.3 Precedent and the Dynamics of Legal Argument

[NAME] Peters distinguishes two classes of discourse in modern legal systems: ‘On the one hand we have political discourses which aim at legislation – that is, at forward-looking changes in the law ... On the other hand we have a multiplicity of discourses where interpretation of pre-given law is at stake’¹⁰⁴. In the relatively underdeveloped international legal system, the legislative and interpretive processes intersect through concerns and arguments about precedent¹⁰⁵. These guide specific choices, by directing attention backwards, to the context of previous situations, and forwards, to potential implications in future cases. This is not an automatic process; in the same way that common-law advocates argue over the *ratio decidendi* of a case, international actors will invoke, and distinguish, previous decisions which they argue are of a type, and draw attention to potential future decisions which might fall to be decided by analogy¹⁰⁶. Further, as the discussion below highlights, precedential argument is important in understanding states’ decisions, but it cannot uniquely determine these. Rather, by linking specific issues to underlying interests and values it shapes how they understand their choices.

The precedential arguments in this case can be divided into two classes, prospective and retrospective: prospective arguments invoke hypothetical future decisions; retrospective arguments reference specific prior statements, decisions and practices.

Prospective arguments may be addressed either to the special interests of particular states, or to a more diffuse sense of states’ common interests. Thus, UK arguments focussed explicitly on potential parallels with situations in other member states; the lobbying instructions at the SC suggested that representatives ‘ask whether a UN force would be welcome in some local city or area merely because of civil disturbances with which the government was quite competent to deal’¹⁰⁷. Prior to the GA they suggested ‘[r]eference might be made to a particular minority problem in the territory of the state concerned’¹⁰⁸. Precedent serves to link disparate instances of a common kind, forcing states to consider how the present decision may impact on

¹⁰⁴ Bernhard Peters, "On reconstructive legal and political theory" in Mathieu Deflem, ed, *Habermas, Modernity and Law* (London: Sage Publications, 1996) at 103.

¹⁰⁵ Readers may object to my use of the term precedent, on the basis that binding precedent is foreign to international law. However, my concern is not whether international legal doctrine recognises such a rule, but rather how states, making political decisions, act towards their prior decisions, and anticipate the future consequences of their present actions. Cf. KRATOCHWIL, *supra* note 20, at 223.

¹⁰⁶ *Ratio decidendi* refers to the core principles which constitute the binding precedent in a case.

¹⁰⁷ Telegram FCO to Certain Missions (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/73).

¹⁰⁸ Telegram FCO to Monrovia (11 September 1969), Foreign and Commonwealth Office, (FCO 33/773/192); Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).

other cases within the relevant class.¹⁰⁹ The UK thus sought to draw the relevant class as widely as possible, so emphasizing the precedent's disruptive potential. It was framed as 'UN intervention in cases where a home government is handling a difficult internal security problem'¹¹⁰. It raised 'a "minorities question" on the classical pattern'; and '[i]f this precedent were once to be established, there could hardly be a member of the UN who would not have a domestic problem of its own similarly eligible for examination'¹¹¹. A similar rhetorical strategy was evident in the SC where the UK representative argued that 'to breach the principle of domestic jurisdiction would have most serious consequences not only for individual members of this Council but for the United Nations itself'¹¹². What is at stake is more than a narrow UK concern; it is a matter of principle on which all states share an interest.

The effectiveness of such arguments is evident from the records. Nigeria may be clearest example; the Irish analysis notes that 'Nigeria was standing rigidly on Article 2(7) ... to prevent discussion of [the Nigeria-Biafra civil war] at the United Nations'; in these circumstances, Nigerian support for inscription was not expected¹¹³. If Article 2(7) permitted discussion of the civil disturbances in Northern Ireland then *a fortiori* it must permit discussion of the far more serious situation in Biafra. In response to British lobbying drawing explicit parallels to Biafra, Nigeria did indeed agree to oppose inscription¹¹⁴.

Even in states without an ongoing interest in Article 2(7), precedent featured prominently. Thus, for example, the UK concluded that, 'because of the analogy with the South Tyrol', Austria was unlikely support the British position; whereas Italy, on the opposite side of that dispute, argued Northern Ireland 'should not be discussed at the UN as a question of "self-determination" because of the implications for [South Tyrol]'¹¹⁵.

¹⁰⁹ This might be understood in instrumental terms, or as an effort to evoke empathy among states facing similar challenges.

¹¹⁰ Telegram FCO to Washington (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/66).

¹¹¹ Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).

¹¹² Security Council 'Provisional verbatim record of the fifteen-hundred and third meeting' (20 August 1969), Foreign and Commonwealth Office, (FCO33/773/139).

¹¹³ Letter Lagos to DEA (24 April 1970), Department of External Affairs, (NA2002/19/536)

¹¹⁴ Telegram Lagos to FCO (13 September 1969), Foreign and Commonwealth Office, (FCO33/773/211)

¹¹⁵ Telegram Vienna to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/267); Telegram Rome to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/250). South-Tyrol was a subject of dispute between Italy and Austria for much of the post-war period: ROLF STEININGER, *South Tyrol : a minority conflict of the twentieth century* (New Brunswick: Transaction Publishers, 2003). Like the Northern Ireland situation, it was the source of an inter-state complaint under the ECHR (*Austria v Italy* (1960)). The analogy between the two situations was recognised (and exploited) when South Tyrol was discussed in the GA in 1960-61: JOSEPH MORRISON SKELLY, "National Interests and International Mediation: Ireland's South Tyrol Initiative in

In the view of the officials involved, a number of other states were also moved by these prospective arguments¹¹⁶; even the United States, in subsequent discussions, placed some weight on them¹¹⁷.

One might argue that this behaviour, while it indicates the importance of precedent, does not necessarily support the importance of argument. The effect of precedent may be simply to lengthen the shadow of the future, allowing cooperation to develop on the basis of mutual self-interest¹¹⁸. However, in this respect the process by which the precedent is defined and interpreted is important. To be concerned that a precedent may subsequently be invoked against them, an agent must first connect the specific issue under consideration both to the wider class of issues of which it forms part, and to their own particular interests. It is through the process of argument, in terms of shared international law concepts, that these links are made.

This links to another point raised earlier: it is not necessary that states share underlying values or interests, provided they share a common frame of reference, and can comprehend one another's interests. Thus, for example, UK lobbying by reference to Biafra need not represent a common understanding of that conflict; rather, it represents a recognition that agreement could be built precisely on the basis of disparate understandings.

This point is perhaps clearest in discussions of lobbying the Soviet Union. Standing UK practice in this period was not to lobby Eastern bloc states. However, recognising that they had 'strong feelings' on the question of domestic jurisdiction, a decision was made to approach them in this instance¹¹⁹. Subsequent analyses outline the thinking behind this decision. First, it was recognised that the value the Soviets placed on domestic jurisdiction might lead them to support the UK, notwithstanding the propaganda value of a UN discussion of Northern Ireland. Second, it was felt that 'if [the Soviet Union] were to refuse to support us on this issue, we could the more easily refuse to pay regard to any representations they make to us about action taken at the UN over human rights questions within the USSR'¹²⁰; 'whatever decision they took, [Britain] could profit from it now (if they voted against inscription) or later (if they

the United Nations, 1960-61", in Michael Kennedy & Joseph Morrison Skelly eds, *Irish Foreign Policy, 1919-66: From Independence to Internationalism* (Dublin: Four Courts Press, 2000)

¹¹⁶ e.g. Telegram Rio de Janeiro to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/774/248); Telegram Rawalpindi to FCO (13 September 1969), Foreign and Commonwealth Office, (FCO33/773/213).

¹¹⁷ Memorandum 'Informal background talks at State Department' (24 September 1969), Department of External Affairs, (NA2002/19/534).

¹¹⁸ ROBERT AXELROD, *The Evolution of Cooperation* (New York: Basic Books, 1984)

¹¹⁹ Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).

¹²⁰ Memorandum Cambridge to Warburton (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/75).

voted for inscription)¹²¹. The legal context of the UN, in which precedents carry significant weight, meant that the Soviets would be forced to choose between attacking the UK and supporting a principle which they valued; while the UK sought to build agreement at the level of principle despite diametrically opposed interests in the specific case. Or, putting the same point in different terms, the prevalence of precedential reasoning forces states to reconceive their interests in terms of legal principles rather than specific instances. The dilemma is political; but it is through legal discourse that the dilemma is constituted.

The second class of precedential arguments identified are retrospective, suggesting that current decisions are constrained by past practice.

These include, for example, UK concern at arguments made by the Foreign Secretary at the previous GA that ‘no country can say that the human rights of its citizens are an exclusively domestic concern. A country that denies its citizens the basic human rights is ... in breach of an international obligation’. From the time UN involvement was first mooted in April 1969, UK officials recognised that this statement might pose difficulties; once having pressed this argument, it would be difficult for the UK now to oppose discussion of its own human rights issues¹²². Irish representatives made liberal use of this precedent in lobbying at both SC and GA; and responses from other delegations suggest it carried significant weight¹²³. The UK, on the other hand, sought to distinguish it, arguing the Irish initiatives raised a different and wider issue.¹²⁴

The logic of this point is worth highlighting. It is not simply about the UK complying with a norm that it previously espoused, although UK officials clearly felt the need to be consistent¹²⁵; rather, other states oriented themselves towards the question by reference to previous UK views. While the UK could, and did, argue that these specific humanitarian issues should not be discussed, the perceived inconsistency reduced the force of its argument.

States can also invoke their own precedents to justify their behaviour, arguing that they are constrained by past practice. Thus, both France and the US argued, prior to the SC discussion, that their positions on inscription were constrained by past practice;

¹²¹ Letter Warner to Hayman (25 August 1969), Foreign and Commonwealth Office, (FCO33/772/160).

¹²² Memorandum ‘Ulster and the United Nations’ Warburton to Mac Glashan (22 April 1969), Foreign and Commonwealth Office, (FCO33/772/1).

¹²³ GA Note No 1 ‘The Situation in Northern Ireland at 24th Session of the General Assembly’ (10 September 1969), Department of External Affairs, (NA2002/19/534).

¹²⁴ Telegram New York to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/19); Telegram FCO to Paris (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/34).

¹²⁵ Telegram FCO to New York (20 August 1969), Foreign and Commonwealth Office, (FCO33/772/107).

France was bound to oppose it, and the US to support¹²⁶. In both cases, these legal arguments in part served as justifications for avoiding a politically difficult issue; the legal argument inoculates these states from political pressure. The US correspondence is particularly instructive in this regard. US representatives argued their past record on inscription meant they must support the Irish item; they supported the UK politically, but this was a matter of legal principle. The UK, in response, highlighted two occasions when the US had opposed inscription of agenda items¹²⁷. This hardly constituted a significant practice. However, it served to disrupt the purported legal constraint on the US, shifting the question back from the legal to the political field. This argument, together with a strongly worded message from the Foreign Secretary, served to convince the US to abstain¹²⁸.

The precedents in these cases are not simply regulative, in the sense of guiding states to adopt particular positions; they are also constitutive, in that they define positions ‘on principle’, thereby inoculating them from political challenge. When positions are defended in these terms, it is by questioning their legal basis, rather than simply through political pressure, that they must be challenged.

3.4 The Limits of Law: Politics and Power

Precedent, then, ties specific instances to more general questions about the rules states want. It represents a broadening of the question to consider not only immediate implications, but also implications for other decisions that have been or will be made. However, legal principles are also interpreted, and indeed challenged, by reference not to the general but to the specific; by focussing not on the rule, but on the facts of the case at issue, and the implications action will have in that case. At the extreme, legal principles are excluded entirely, and a decision falls to be made on purely pragmatic grounds.

This interaction of legal and political arguments is prominent in both lobbying and third-state decision-making in this case. Thus, for example, in discussions with US representatives, UK officials emphasised ‘the incalculable dangers of any action which could appear to reopen the “Irish Question” after half a century’¹²⁹. In a subsequent appeal from the Foreign Secretary, the argument proceeded from the strictly legal claim about Article 2(7), through a precedential argument about

¹²⁶ Memorandum ‘Note on talk with French Minister of Foreign Affairs’ (20 August 1969), Department of External Affairs, (NA2002/19/536); Telegram Washington to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/772/22).

¹²⁷ Telegram FCO to Washington (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/57).

¹²⁸ Telegram Washington to FCO (18 August 1969) Foreign and Commonwealth Office, (FCO33/772/58).

¹²⁹ Telegram Washington to FCO (17 August 1969), Foreign and Commonwealth Office, (FCO33/773/22).

intervening in domestic disturbances, to a broadly drawn pragmatic claim that '[a] debate in the Security Council at the present time will make our task of restoring law and order in Northern Ireland all the more difficult'.¹³⁰ Political values are set in opposition to any legalistic analysis which might allow discussion. This and similar arguments substantially impressed a number of governments; some appear to have focussed almost entirely on the practical issues, while others saw the two sets of arguments as complementary¹³¹. Irish efforts similarly emphasised the potential value, for the people of Northern Ireland, of U.N. involvement, sidestepping the legal difficulties posed by Article 2(7) by reference to the overriding humanitarian question¹³². These points illustrate the extent to which the legal and political discourses are mutually implicated. Arguments and justifications move between the two, as actors seek to build support and challenge the positions adopted by others. Legal arguments may be discounted for practical reasons; but equally the importance of principle may provide a response to practical appeals.

It is not only through recourse to non-legal argument that politics intrudes on deliberative discourse. It is also, more directly, through political influence and the explicit or implicit invocation of carrot and stick, moving from communication and argument towards strategic action and bargaining.

The archival record is of limited assistance here, as there is little direct evidence of such factors. In a few cases the possibility of an explicit quid pro quo is mentioned, and in others there are suggestions that amicable relationships may sway support one way or another¹³³. This lack of evidence does not show that such considerations were not relevant. Rather, it reflects the limits of archival research, which is very effective

¹³⁰ Telegram FCO to Washington (18 August 1969), Foreign and Commonwealth Office, (FCO 33/772/66).

¹³¹ See e.g. Telegram Paris to FCO (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/35); Telegram Algiers to FCO (18 August 1969), Foreign and Commonwealth Office, (FCO33/772/37); Telegram Rio de Janeiro to FCO (12 September 1969), Foreign and Commonwealth Office, (FCO33/772/199); Telegram Rome to FCO (16 September 1969) Foreign and Commonwealth Office, (FCO33/773/250).

¹³² See e.g. Political Report Brussels to DEA (18 August 1969), Department of External Affairs, (NA2002/19/536).

¹³³ Telegram Djakarta to FCO (15 September 1969), Foreign and Commonwealth Office, (FCO33/773/214) (possibility of Indonesian support in exchange for UK support over West Irian); GA Note No 1 'The Situation in Northern Ireland at 24th Session of the General Assembly' (10 September 1969), Department of External Affairs, (NA2002/19/534) (possibility of various African states' support for Ireland in exchange for some quid pro quo); Telegram Lusaka to FCO 18 August 1969), Foreign and Commonwealth Office, (FCO33/772/23 (likelihood that Zambian solidarity with Ireland and interest in challenging UK over Rhodesia would affect attitude); Telegram Vienna to FCO (16 September 1969), Foreign and Commonwealth Office, (FCO33/774/267) (likelihood that Austrian gratitude to Ireland may affect position); Letter Lagos to DEA (24 April 1970), Department of External Affairs, (NA2002/19/536) (likelihood that Nigerian military and political dependence on the UK would affect position).

at uncovering explicit claims made by agents, but less effective in identifying the rationales for decisions of states other than those whose archives are examined.

By looking beyond this specific case, we can find indirect evidence that such influence was important, but not determinative.

First, having regard to UN practice in this period generally, this case stands out as a relatively rare example of a failure to have an issue inscribed¹³⁴. The exceptional nature of such cases leads Simma to explain them in terms of ‘specific political alliances’ rather than ‘principled legal assessment’¹³⁵. Both their rarity, and the fact they have generally occurred only where leading western states have opposed discussion, suggests political influence is an important explanation.

Second, potentially instructive, albeit indirect, evidence comes from a historical post-script in the UK records. Having pre-empted these initiatives, the UK continued to monitor both the situation in Northern Ireland and the mood at the UN to be prepared if a further initiative were taken¹³⁶. This seemed especially likely in the tense period following the introduction of internment in 1971, and various assessments of this possibility were prepared. These highlight three developments that suggested a new initiative might be more successful: first, a decline in UK influence at the UN generally; second, the worsening situation in Northern Ireland, and in particular border incidents and refugee flows which gave it an international quality; and third, the involvement of the UN in Bangladesh, with UK concurrence, which implied some widening of UN jurisdiction under Article 2(7)¹³⁷. There is a clear recognition that the loss of influence generally might weaken the UK case, leading others to ‘reinterpret’ the Northern Ireland situation in colonial terms. However, these assessments also suggest that the legal analysis is crucial; it is not just the diminution of UK influence, but also changes in the legal background and in the legal implications of events in Northern Ireland, which are a cause for concern.

4. *Ireland v United Kingdom at the European Convention on Human Rights*

In December 1971, the Irish government took the first steps in a case against the United Kingdom under the European Convention on Human Rights (the ECHR). The case related to the introduction of internment without trial and the interrogation of terrorist suspects in Northern Ireland. It would ultimately be the subject of a report by

¹³⁴ On UN practice on Article 2(7) see United Nations Office of Legal Affairs, *Repertory of practice of United Nations organs* (New York: United Nations, 1955), and supplements thereto. <[http://legal.un.org/repertory/art2\(7\).html](http://legal.un.org/repertory/art2(7).html)>.

¹³⁵ Bruno Simma et al, eds, *The Charter of the United Nations: A Commentary*, vol 1, 2nd ed (New York: Oxford University Press, 2002) at 67, 153.

¹³⁶ As well as the possibility of further discussion in the SC/GA, a regular series of petitions to the Human Rights Committee meant Northern Ireland was never entirely off the UN agenda.

¹³⁷ Telegram FCO to Dublin (24 August 1971), Foreign and Commonwealth Office, (FCO58/614/3).

the European Commission on Human Rights (1976) finding that the UK had engaged in torture; and a judgement by the European Court of Human Rights (1978), the first such judgement in an inter-state case, replacing that finding with one of inhuman and degrading treatment. This was the second significant attempt by an Irish government to use international institutions to intervene in Northern Ireland affairs, and the first to use explicitly judicial procedures.

4.1 Political Background

Individual complaints have made up the vast majority of cases under the ECHR; between 1950 and 1999 there were 53,000 individual complaints, and only 21 inter-state complaints¹³⁸. Many of the interstate complaints have been made in the context of wider disputes, and thus have had strong political overtones; the human rights claims have been subsumed within the wider dispute, and become instrumental to that dispute¹³⁹. Nine have related to territories the sovereignty of which was contested by the complaining state, and have been brought by smaller states against larger and more powerful ones¹⁴⁰.

The catalyst for Ireland's decision to bring an intersate complaint was the introduction of internment without trial by the Northern Ireland government on 9 August 1971. The background was a rapidly deteriorating security situation in Northern Ireland over the previous two years; the re-emergence of the Irish Republican Army (IRA) as an active paramilitary organisation; and the limited success of the British Army's counter-insurgency efforts. While internment may have temporarily strengthened the Unionist government in Northern Ireland, it further alienated the Catholic minority. The one-sided way it was implemented, initially directed entirely against members of the minority, was perhaps justified by the IRA's position as the most active paramilitary group at the time; but it also reinforced perceptions of discrimination on the part of the security services¹⁴¹.

In addition, allegations of brutality by army and police officers, and the use of controversial 'deep interrogation' techniques (known as the 'five techniques'), involving hooding and the subjection of detainees to white noise and physical stress,

¹³⁸ SOREN C. PREBENSEN, *Interstate complaints under treaty provisions - The Experience under the European Convention on Human Rights*, (1999) 20 Human Rights Law Journal 446 at 449

¹³⁹ *Id.*, 454. The literature on inter-state cases is limited. Two useful case studies are, on the Greek cases against the UK, SIMPSON, *supra*, 924-1053. and, on the first two Cypriot cases against Turkey, VAN COUFOUDAKIS, *Cyprus and the European Convention of Human Rights: The Law and Politics of Applications Cyprus v Turkey, 6780/74 and 6950/75*, (1982) 4 Human Rights Quarterly 450.

¹⁴⁰ *Greece v United Kingdom (1956/1957)* in respect of Cyprus; *Austria v Italy (1960)* in respect of South Tyrol; *Ireland v United Kingdom (1971/1972)* in respect of Northern Ireland; *Cyprus v Turkey (1974/1975/1977/1996)* in respect of Northern Cyprus. Cf. *Georgia v Russia (2007)* in respect of Georgians living in Russia.

¹⁴¹ NEUMANN, *supra* note 3, at 57; LEE, *supra* note 64, at 437. Cf. BRIAN FAULKNER, *Memoirs of a statesman* (London: Weidenfeld and Nicholson, 1978) 119

rapidly generated public outrage within Ireland, Northern Ireland and Great Britain¹⁴². A combination of domestic public pressure and Irish diplomatic pressure led to a series of public inquiries to consider those allegations. These ultimately concluded that ill-treatment had occurred; however, the first of these, the Compton Report, went to great lengths to argue that this ill-treatment had not amounted to ‘brutality’, a conclusion heavily criticised by Lord Gardiner in his minority report for the subsequent Parker Committee¹⁴³.

On the same day that internment was introduced in Northern Ireland, Sean MacBride, a former Irish Minister of External Affairs and chairman of Amnesty International, wrote to Taoiseach (Prime Minister) Jack Lynch urging him to consider bringing a case under the ECHR¹⁴⁴. While that letter did not refer specifically to internment, over subsequent weeks the possibility of bringing a case was repeatedly urged on the government, both publicly and privately¹⁴⁵.

The evolution of government thinking is well illustrated by the responses to this correspondence. On 12 August, Lynch wrote to MacBride indicating that, due to the perceived legal impediments, the likely delay involved, and ‘relevant political considerations’, the Government did not ‘consider that it would be advisable, at least at the present’, to bring a case¹⁴⁶. This line was maintained through August and September 1971. However, by October it had shifted, with correspondence indicating that ‘the question of torture or other ill-treatment of people in the North, [was] being actively pursued by the Government’¹⁴⁷. On 21 October Patrick Hillery indicated in parliament that the possibility of bringing a case was being seriously considered, but that no final decision had been reached¹⁴⁸. However, government thinking clearly remained mixed; as late as 23 November the Tanaiste (Deputy Prime Minister) Erskine Childers was arguing that diplomatic pressure, in respect of both internment and the wider constitutional situation of Northern Ireland, should be prioritised over the ‘lengthy and time consuming’ procedure under the ECHR¹⁴⁹.

¹⁴² NEUMANN, *supra* note 3, at 57; FAULKNER, *supra* note 140, at 124.

¹⁴³ MICHAEL J. CUNNINGHAM, *British government policy in Northern Ireland 1969-1989 : its nature and execution* (Manchester: Manchester University Press, 1991) at 60. TIM PAT COOGAN, *The Troubles : Ireland's ordeal 1966-1995 and the search for peace* (New York: Palgrave, 1995) at 128. On the UK inquiries, EVANS & MORGAN, *supra* note 51, at 32-41

¹⁴⁴ Letter MacBride to Lynch (9 August 1971), Department of an Taoiseach, (NA2002/8/493).

¹⁴⁵ See e.g. Letter Northern Ireland Civil Rights Association to Lynch (15 August 1971), Department of an Taoiseach, (NA2002/8/493); Letter Association for Legal Justice to Lynch (20 August 1971), Department of an Taoiseach, (NA2002/8/493); ‘Letters to the Editor’ Irish Times 18 August 1971, ‘Inquiry sought into torture allegations’ Irish Times 19 August 1971, ‘Priest’s account of torture allegations’ Irish Times 22 September 1971

¹⁴⁶ Letter Lynch to MacBride (12 August 1971), Department of an Taoiseach, (NA2002/8/493).

¹⁴⁷ Letter NicFhionnain to (deleted) (21 October 1971), Department of an Taoiseach, (NA2002/8/493).

¹⁴⁸ Irish Parliament Dáil Debates vol.256 col.270 (21 October 1971).

¹⁴⁹ Irish Parliament Dáil Debates vol.257 col.2 (23 November 1971).

What explains these shifting attitudes? Part of the answer lies in the failure of diplomatic approaches in respect of internment and the treatment of detainees. The draft notification of the case to the UK Government refers to previous contacts between Lynch and Prime Minister Ted Heath, and the fact that the Taoiseach ‘had hoped that his remarks on this subject ... would have had the effect of eliminating the alleged behaviour’¹⁵⁰. Internment was raised with British ministers, both publicly and privately, on a number of occasions between August and November 1971, and the Irish felt that their views were not being taken on board¹⁵¹. The procedures under the ECHR offered a chance to raise these issues in a forum where British representatives could not simply refuse discussion, and where claims of necessity could be directly challenged. However, the case was also seen as a way of raising broader political and constitutional questions, as evidenced by the argument in the same draft that ‘the fundamental causes of strife in the North will yield only to political initiatives [which] should be designed to pull the North together and to set general Anglo-Irish relations on a progressive road to a better future’. While both references were deleted from the final letter, to avoid suggesting the case was being brought as a ‘bargaining counter’, they clearly demonstrate the extent to which it did indeed represent an attempt to bring additional pressure to bear on the UK government¹⁵².

A second substantial objective was to respond to domestic pressure for action on these politically contentious issues. The failure to take a successful initiative in respect of internment and human rights during the autumn of 1971 resulted in increasing pressure on the government from both opposition and media sources¹⁵³.

The decision to bring the case was taken on 30 November, two weeks after the publication of the Compton Report, widely regarded as a whitewash.¹⁵⁴ It also came a few days after the main opposition party, Fine Gael, itself sought to raise the issue by petition to the Council of Europe. A memorandum circulated at the cabinet meeting when the decision was taken highlights the diverse pressures on the government¹⁵⁵. It notes that bringing a case would likely provoke a negative response from the UK, and was unlikely to be welcomed by the members of the EEC (to which both states were in the process of acceding). On the positive side, it would ‘inevitably make the British much more careful in their handling of detainees and internees in the North’, while at the same time being popular with public opinion, both in Ireland and among the

¹⁵⁰ Draft with Letter McCann to O’Sullivan (18 October 1971), Department of an Taoiseach, (NA2002/8/493).

¹⁵¹ See e.g. Memorandum ‘Report of Meeting at Home Office on 11 August 1971’ (15 August 1971), Department of Foreign Affairs, (NA2002/19/427); Letter Blatherwick to Bone (24 July 1972), Foreign and Commonwealth Office, (FCO87/140/197); Heath, *Supra*, 432.

¹⁵² Memorandum O’Sullivan to Lynch (19 October 1971), Department of an Taoiseach, (NA2002/8/493); Letter McCann to Peck (19 October 1971), Department of an Taoiseach, (NA2002/8/494).

¹⁵³ See e.g. Irish Parliament Dáil Debates vol.257 cols.1-7 (23 November 1971).

¹⁵⁴ Coogan, *supra*, 129

¹⁵⁵ Minute McCann (18 November 1971), Department of an Taoiseach, (NA2002/8/495).

minority in Northern Ireland. There is also a suggestion that a human rights case would make a security solution to the situation in Northern Ireland less viable, and so make a political initiative more likely.

4.2 Translating Politics to Law

A week later, on 7 December 1972, the Irish cabinet took an informal decision on the scope of the case, determining that claims should be brought under Articles 1, 2, 3 and 14 of the ECHR¹⁵⁶. These relate, respectively, to: the obligation to secure to everyone within the jurisdiction the rights and freedoms in the ECHR; the right to life; the prohibition on torture, inhuman and degrading treatment; and the prohibition on discrimination. Claims in respect of Articles 5 and 6 relating to the deprivation of liberty and the right to a fair trial were subsequently added.

This represents a significantly broader claim than that previously canvassed in media or parliamentary debates. In shaping the case in these terms, the Irish government sought to legalise its challenge to a broad swathe of Northern Ireland policy, a point brought out in a memorandum prepared ahead of the 7 December cabinet meeting¹⁵⁷. This notes various considerations affecting whether to bring claims under particular articles. Thus, in respect of Article 2, relating to the right to life, the advantages of a claim include the fact that it is very sought after by Northern Nationalists, and that it has special appeal to the public. The popular appeal of claims is also canvassed in respect of Articles 3 (torture) and 14 (discrimination).

However, a broader interest in challenging the legitimacy of the Northern Ireland state is evident in the claim under Article 1. This claim was acknowledged as speculative and somewhat legalistic, and ultimately was rejected by both the Commission and the Court. However, including it was justified on the basis that '[t]he entire scope of the Special Powers Acts, with their regulations, could be opened before the Commission', and further that it 'demonstrates the general legal "atmosphere" which prevails'. The Special Powers Acts constituted a central plank of the security apparatus of the Northern Ireland state, and were a major grievance of the Catholic civil rights movement¹⁵⁸. Therefore, the opportunity to challenge those Acts represented an opportunity to impugn the legitimacy of a major facet of the Northern Ireland state. As noted in contemporary UK analyses, the Special Powers Acts were 'regarded in Southern mythology as the second pillar ... of the Unionist state', and as such a challenge to them constituted part of a wider effort to 'discredit the Stormont

¹⁵⁶ Government Minute 'Six Counties: Reference to Commission of Human Rights' (7 December 1971), Department of an Taoiseach, (NA2002/8/495).

¹⁵⁷ Memorandum 'Possible applications' (Undated), Department of an Taoiseach, (NA2002/8/495).

¹⁵⁸ The Special Powers Acts refers to the Civil Authorities (Special Powers) Acts 1922-43. See generally, LAURA K. DONOHUE, "Regulating Northern Ireland : The Special Powers Acts, 1922 – 1972", (1998) 41 *The Historical Journal* 1089

[Northern Ireland government] system and ensure that a Stormont with control over security will never return¹⁵⁹. By casting the claim in broad terms, the legal challenge in respect of human rights became a political challenge to the legitimacy of the Northern Ireland state.¹⁶⁰

It seems clear from this analysis that actually winning any point was of secondary importance. The Article 1 claim was recognised as somewhat speculative, with the result impossible to anticipate. No real chance of success was anticipated on Article 2, on unlawful killings. On Article 14, non-discrimination, the evidence does not seem even to have been assessed. Rather, the value of the ECHR machinery was as a forum where claims could be made, and legitimacy contested, regardless of the ultimate legal result. Law is communicative, not regulative. Further, the contest for legitimacy is not simply legal; rather, it reflects a broader opportunity to co-opt the international institutions of political legitimacy in support of Irish positions¹⁶¹.

The interaction between the political and legal context of the case is also evident in UK analyses, and in particular in discussions about how the UK case should be presented.

This issue first arises in planning for the admissibility hearings in September 1972. The legal analysis of the British case was distinctly pessimistic, concluding that most, if not all, of the complaints would be found admissible. However, it was recognised that the rationale for making arguments at this stage extended beyond the purely legal, and that it ‘would be politically undesirable to appear to be conceding the truth of the Irish allegation by failing to contest them ... [O]n balance this consideration outweighed the disadvantage of apparently losing this stage of the argument’¹⁶². The potential embarrassment of being seen to be publicly defeated was outweighed by the value of ensuring that the political arguments are fully aired.

A similar tension emerges in discussions about making politically sensitive counter-allegations in the proceedings, and in particular introducing material in the UK defence implying at least partial Irish responsibility for the emergency situation in

¹⁵⁹ Letter Blatherwick to Thorpe (13 November 1972), Foreign and Commonwealth Office, (FCO87/144/410).

¹⁶⁰ On linking human rights and state legitimacy: CHRISTIAN REUS-SMIT, “Human rights and the social construction of sovereignty”, (2001) 27 *Review of International Studies* 519

¹⁶¹ This point is also evident in later analyses considering whether to refer the Commission’s report to the Court or the Committee of Ministers for decision. The Attorney General argued that ‘[a] favourable decision by a political body [the Committee] confirming the legal opinion of the Commission would be more valuable than a favourable decision of the Court which might be represented as legalistic’: ‘Memorandum for Government’ Attorney General’s Office (February 1976), Department of Foreign Affairs, (NA2006/131/1422).

¹⁶² Memorandum ‘Northern Ireland: European Commission of Human Rights’ (22 February 1972), Foreign and Commonwealth Office, (FCO87/136/33).

Northern Ireland¹⁶³. These arguments, while legally irrelevant, were seen as potentially valuable in '[pinning] a share of the blame' on the Irish government, and thereby tempering the effect of the case on international opinion¹⁶⁴. However, it was also recognised that responding to the Irish allegations in kind and doing so in a wide-ranging and emotive manner was likely to further damage Anglo-Irish relations and future cooperation in respect of a Northern Ireland settlement.

The concern that arguments made in Strasbourg would have implications for Anglo-Irish relations and stability in Northern Ireland was a recurring theme in UK thinking, significantly tempering the presentation of the UK case. Thus, for example, in planning for the first stage of substantive hearings in October 1973, internal UK correspondence expresses concerns about the possible impact on the formation of a power-sharing executive in Northern Ireland in the same period. One possibility mooted was that, to avoid these tensions, the UK would simply refuse to take part in hearings. This was rejected, however, on the basis that 'the Commission could proceed without us [the UK] and some part of allegations against us on which we might win would go against us by default'¹⁶⁵. This tension, between answering allegations that are made, strengthening the Anglo-Irish relationship, and reducing tensions on the ground in Northern Ireland, recurs throughout the proceedings. That there were contradictions inherent in the effort was recognised, but it was felt important that allegations made in a legal context be answered in kind¹⁶⁶. The interaction of a legal process, which requires that claims be answered, and a political context, in which strengthening relationships and reducing tensions are paramount, generates a dilemma in which neither logic can fully control either the process or the outcomes.

4.3 Evolving Thinking: The Threat and the Promise of Strasbourg

Having initiated the proceedings at Strasbourg, the Irish government struggled to understand how the legal process could be brought to bear on the political situation in Northern Ireland. At the same time, UK analysis sought to understand the Irish motivations, both for bringing the case and for continuing it in the face of significant pressure, and the implications the case had from a UK perspective.

¹⁶³ Letter Thorpe to Blatherwick (2 June 1972), Foreign and Commonwealth Office, (FCO87/138/122); Letter Thorpe to de Winton (21 September 1972), Foreign and Commonwealth Office, (FCO87/142/324); Letter Alexander to Roberts (24 August 1973), Prime Minister's Office, (PREM15/2141). The possibility of bringing a retaliatory case against Ireland was considered but rejected: Letter Thorpe to Cox (9 November 1972), Foreign and Commonwealth Office, (FCO87/144/409).

¹⁶⁴ Letter Blatherwick to Thorpe (3 July 1972), Foreign and Commonwealth Office, (FCO87/140/181).

¹⁶⁵ Letter Alexander to Roberts (24 August 1973), Prime Minister's Office, (PREM15/2141).

¹⁶⁶ Letter Alexander to Roberts (23 May 1973), Prime Minister's Office, (PREM15/2141).

Thus, shortly after the admissibility stage, the Irish Attorney General pressed the view that the case ‘gave the Irish Government leverage in Anglo-Irish relations generally, and specifically a seat at the table in relation to discussions on the settlement of the NI difficulties’¹⁶⁷. The case, and in particular the friendly settlement procedure, presented the prospect of direct bilateral discussions about the domestic administration of Northern Ireland. The ECHR, it was hoped, could provide both a forum and a normative framework for those discussions.

The Irish government were also conscious that the case might, if allowed to run its course, yield limited practical benefit: in June 1973 Declan Costello, who had taken over as Attorney General under a Fine Gael/Labour coalition government earlier that year, noted that there were serious legal problems to be overcome, and further that ‘[e]ven if we do succeed ... the result will be merely a declaration relating to a breach or breaches by the UK Government’¹⁶⁸. In these circumstances, a settlement was to be preferred if one could be obtained; and the best way to obtain such a settlement was to ensure that the case caused as much political difficulty as possible for the UK Government.

Despite this analysis, which sees the case more in terms of strategic bargaining than any reasoned discourse, the Irish government also recognised that negotiations in respect of the case must be conducted within the framework, both institutional and normative, of the ECHR itself. Thus, while referring to the case as a ‘stick’, whose principal benefit was its embarrassment to the UK in their domestic, European and foreign policies, the terms of settlement which were anticipated related to such matters as compensation for the victims of abuse, incorporation of the ECHR in the domestic law of both Ireland and Northern Ireland, and ‘[t]he setting up of an All Ireland Court (Commission) on Human Rights’¹⁶⁹. The case constituted leverage, but it was a very particular type of leverage, which could be used only to achieve very particular objectives.

The idea that the terms of settlement would need to be closely tied to the normative context of the ECHR recurs in later Irish thinking. Thus, immediately before the Commission issued its report, which the parties had been informed would find against the UK in respect of the torture claims but reject the broader Irish claims on internment and discrimination, Costello was still arguing that the only worthwhile settlement would be one in which the UK agreed to enact a bill of rights in Northern Irish law, and to establish an international tribunal to hear complaints under it. However, he also recognised that, if the UK were prepared to take such steps, they were more likely to be taken in the context of domestic political reform in Northern

¹⁶⁷ Minute O’Suilleabhain (2 October 1972), Department of an Taoiseach, (NA2003/16/478).

¹⁶⁸ Letter Costello to FitzGerald (6 June 1973), Department of an Taoiseach, (NA2004/21/471).

¹⁶⁹ Memorandum D.Q. to Costello (5 June 1973), Department of an Taoiseach, (NA2004/21/471); Memorandum Costello to Cosgrave (22 June 1973), Department of an Taoiseach, (NA2004/21/471).

Ireland than in settlement negotiations with the Irish government¹⁷⁰. In these circumstances, pressing the case to a judgement was more valuable than any lesser settlement that might plausibly be offered.

This represents a significant shift from the initial position outlined above. The case is no longer simply a bargaining chip, to be conceded in exchange for such concessions as can be obtained. Rather, it is seen as having autonomous value; only substantial concessions would justify foregoing the significant symbolic value of a decision.

British analyses of the case focus on two issues: first, the motivations underlying the Irish position; and second, how the UK should respond.

On the first point, a recurring theme was the recognition of the powerful domestic constraints on the Irish government. These were variously attributed to pressures from media and opposition sources, from nationalist opinion in Northern Ireland, and, under the Fianna Fáil government prior to 1973, from hard-line back bench TDs (members of parliament)¹⁷¹. However, there was also a recognition that the case was, for Ireland, a way of engaging with the UK. One of the clearest UK assessments suggests seven distinct Irish objectives, of which only one related to domestic politics. The major objectives were seen as (a) discrediting the system of government in Northern Ireland and ensuring a devolved administration with control of security would not return; (b) showing up ill-treatment by Northern Irish and British security forces, and ensuring it does not recur; (c) establishing a 'negotiating position' vis-a-vis the UK government on Northern Ireland affairs, in the form of a 'right to be consulted'; (d) '[making] public the whole dirty affair and [pricking] the consciences' of the British public, the UK government, and world opinion generally; (e) affording a point of pressure against the UK Government; (f) appeasing domestic audiences; and (g) 'giving the Brits one in the eye'¹⁷².

Only one of these, point (e), assumes the case will be used as a bargaining chip. The rest focus on its communicative potential: conveying and supporting ethical judgements about right behaviour; legitimising an Irish input into the Northern situation; and de-legitimising the previous administration in Northern Ireland. The perceived aim is not, or at least not primarily, to secure compliance or seek a quid-

¹⁷⁰ Letter Costello to FitzGerald (15 August 1975), Department of an Taoiseach, (NA2005/151/715). UK arguments in the friendly settlement context were also closely tied to the specific abuses alleged: Telegram Kruger to Hayes (16 September 1975), Department of an Taoiseach, (NA2006/131/423).

¹⁷¹ E.g. Letter Peck to Crawford (26 June 1972), Foreign and Commonwealth Office, (FCO87/139/179); Telegram Dublin to FCO (11 August 1972), Foreign and Commonwealth Office, (FCO87/141/237); Telegram Dublin to FCO 29 September 1973), Prime Minister's Office, (PREM15/2141).

¹⁷² Letter Blatherwick to Thorpe (13 November 1972), Foreign and Commonwealth Office, (FCO87/144/410). Similarly, Letter Bone to Blatherwick (14 April 1972), Foreign and Commonwealth Office, (FCO87/138/86); Letter Thom to White (12 October 1972), Foreign and Commonwealth Office, (FCO87/143/370).

pro-quo; rather, it is to change the way the UK government, and UK and world opinion, think about the Northern Ireland situation and appropriate measures to respond to it.

While the Irish government at all stages perceived significant potential value in the case, the British recognised it as potentially destabilising, but rejected the idea that it could be a source of leverage over them. This latter view is reiterated in public statements, in diplomatic correspondence, and in internal UK memoranda, in which the case is variously characterised as ‘mutually embarrassing’, an ‘irritant’ or an ‘irrelevance’¹⁷³.

However, while denying its significance, the UK was also faced with the question of how to respond to it. A range of options were canvassed at various stages, from refusing to participate in the proceedings to denouncing the ECHR as a whole¹⁷⁴. There was a genuine concern that the case itself could become not only a source of friction in the Anglo-Irish relationship, but also a destabilising influence within Northern Ireland¹⁷⁵. However, there was also a view, which ultimately prevailed, that Irish claims could not be allowed to go unanswered: ‘This short term necessity [to fight the case ‘every inch of the way’] would run counter to [the] long term aim of a better working relationship with the Irish, but that better relationship would be more difficult to achieve if we did not dispute the allegations in the Irish State Case at Strasbourg’¹⁷⁶. This need to contest the case is variously tied to the need to uphold morale in the security services, to avoid conceding a point to Dublin, and to protect the UK government’s international reputation¹⁷⁷. However, what is recognised at all stages is that legal claims, by their nature, require to be answered. To argue the point and lose would be a set-back; but it would be worse still to allow the point to go by default¹⁷⁸.

4.4 Constructing and Contesting the Legal Sphere

¹⁷³ Telegram Dublin to FCO (11 August 1972), Foreign and Commonwealth Office, (FCO87/141/237); Letter Thorpe to White (2 October 1972), Foreign and Commonwealth Office, (FCO87/143/335); Letter Thorpe to White (22 October 1972), Foreign and Commonwealth Office, (FCO87/144/405).

¹⁷⁴ Letter White to Cox (15 September 1972), Foreign and Commonwealth Office, (FCO87/142/289); Letter Lee to White (9 October 1972), Foreign and Commonwealth Office, (FCO87/143/362); Letter Alexander to Roberts (24 August 1973), Prime Minister’s Office, (PREM15/2141).

¹⁷⁵ Minute Roberts to Alexander (15 October 1973), Foreign and Commonwealth Office, (FCO87/277/458).

¹⁷⁶ Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141).

¹⁷⁷ See e.g. Minute Watson to James 11 April 1975), Foreign and Commonwealth Office, (FCO87/480/51).

¹⁷⁸ Letter Thorpe to Blatherwick 24 November 1972), Foreign and Commonwealth Office, (FCO87/144/427).

As in the UN case, the relation between law and politics, and the salience of legal analysis, was itself an object of discursive contestation. The UK government sought at all times to emphasise the connection between developments within the case at Strasbourg and the wider Northern Ireland and Anglo-Irish context. Whereas the Irish account of the case sought to establish the legal and political as distinct spheres, the UK argued for a holistic view, highlighting the negative impact the legal case could have, and thereby shifting the discussion from strictly legal questions, on which their position was weak, towards a focus on shared concerns and political contexts, where they could make a stronger case¹⁷⁹.

This approach appears in the first substantial prime-ministerial correspondence about the case in May 1973¹⁸⁰. The political situation in Northern Ireland had developed significantly by this stage; the Northern Ireland parliament had been suspended the previous year, and the UK government was in the process of implementing plans, broadly supported by the Irish government, for a new devolved power-sharing administration¹⁸¹. The Fianna Fáil government which had been in power in 1971 had been replaced by a coalition of Fine Gael and Labour, marking a shift away from the irredentist rhetoric of earlier periods¹⁸². In these circumstances, it was thought worthwhile to approach the Irish government with a view to having the case withdrawn¹⁸³.

The terms in which this approach was framed illustrate the extent to which the UK sought to link the legal and political processes, and so to deny the autonomy of the legal field¹⁸⁴. It begins by reciting in broad terms the range of ongoing political initiatives, cast in terms of common duties and joint hopes, arguing that these developments are themselves dependent on ‘passive cooperation’ and the avoidance of ‘situations likely to bring [the] two governments into collision’. It thus seeks to reframe the adversarial structure of the legal process in cooperative political terms.

¹⁷⁹ On the previous occasion when the UK was the object of an interstate case, brought by Greece over Cyprus, the case was treated purely as a legal matter: SIMPSON, *supra* note 1, at 933.

¹⁸⁰ The case was discussed briefly and inconclusively at a prime-ministerial meeting in March 1973: Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141). The framing of the legal process had previously been contested in official-level contacts and third-state diplomatic briefings: Letter Blatherwick to Bone (24 July 1972), Foreign and Commonwealth Office, (FCO87/140/W196); Telegram FCO to Certain Missions (6 December 1971), Foreign and Commonwealth Office, (FCO87/136/W47) arguing that ‘if the object of the whole exercise is to contribute to peace in Northern Ireland, Mr Lynch could have more usefully undertaken to do more to contain the IRA south of the border’.

¹⁸¹ LEE, *supra* note 64, at 435-445.

¹⁸² For the evolution of Irish official discourse on Northern Ireland, KORNPÖBST, “Episteme, nation-builders and national identity” *supra* note 43; KORNPÖBST, “Dejustification and Dispute Settlement” *supra* note 43; IVORY, *supra* note 59; KATY HAYWARD, “The politics of nuance: Irish official discourse on Northern Ireland”, (2004) 19 *Irish Political Studies* 18

¹⁸³ Letter Alexander to Roberts (23 May 1973), Prime Minister’s Office, (PREM15/2141).

¹⁸⁴ Telegram FCO to Dublin (30 May 1973), Prime Minister’s Office, (PREM15/2141).

It goes on to make a number of arguments, some in legal or quasi-legal terms, and others which are firmly political and prudential.

Remaining within the terms of the legal discourse constituted by the proceedings, it argues that the effect of the suspension of the Northern Ireland government has been to implicitly vary the terms of the complaint, so that it is no longer directed against that government, which was its original target, but rather against the ministers of the London government, something which it suggests they ‘bitterly resent’. However, it is not on the justice or injustice of these allegations that the primary weight of the argument is based. Rather, it is in the consequential argument that ‘to pursue a policy of cooperation with HMG [Her Majesty’s Government] while simultaneously pursuing allegations of torture and discrimination against HMG seems to me contradictory: and – which is even more important – the contradiction will be seen, and used, by others’. The Strasbourg process runs in parallel with the reform program in Northern Ireland ‘and one cannot help but influence the other’. Contrasting the highly contentious allegations at Strasbourg with the need to reduce tensions in Northern Ireland, it suggests that ‘[the] incompatibility of the two processes is such that we should surely not allow this situation to develop’. The political and legal spheres cannot be divorced; and the vital importance of political developments means that the legal process must in these circumstances be compromised.

This rhetorical strategy, building on the idea of shared interests while denying the autonomy of the legal field, recurs in UK arguments in subsequent months and years. Thus, approaches in September 1973, with a view to initiating a friendly settlement, focussed on the stated Irish desire ‘to work for a peaceful and constructive solution in Northern Ireland’, and the risk of ‘acrimonious exchanges’, which could both upset the delicate state of affairs in Northern Ireland, and also make any subsequent settlement of the proceedings more difficult¹⁸⁵.

UK arguments against the Irish decision in March 1976 to refer the Commission’s report to the Court reflect a similar structure. The failure of the power-sharing initiative mentioned above and the bleaker political situation which followed meant there was less scope for focussing on common interests and initiatives, but the denial of an autonomous legal field remained central. The UK government, it argued, had never accepted the view ‘that the state case could be kept separate from other aspects of Anglo/Irish relations’; the decision to refer the matter to the court would inevitably excite public and parliamentary opinion against the Dublin government and undermine Anglo-Irish cooperation, while at the same time strengthening the positions of extremists in both communities in Northern Ireland¹⁸⁶.

¹⁸⁵ Telegram FCO to Dublin (27 September 1973), Prime Minister’s Office, (PREM15/2141).

¹⁸⁶ Telegram FCO to Dublin (12 March 1976), Prime Minister’s Office, (PREM16/975).

The power of this argument lies in the way it de-legitimises the legal process by reference to an alternative, and implicitly superior, set of political values around cooperation, stability and development. By defining the legal process as a barrier to political progress, it allows extra-legal pressure to be brought to bear in response to the specifically legal arguments within the ECHR context. It ultimately found expression within the Court itself in Attorney General Sam Silkin's argument opening the UK case before the Court; 'Prolonged international litigation', he argued, 'even before this court, may impair rather than improve the protection of human rights, especially within a situation as complex, volatile and dangerous as that in Northern Ireland'¹⁸⁷. The legal process is instrumental; its ultimate end is the improvement of the human condition, and where it ceases to serve that end, it is subject to challenge on the basis of that underlying objective.

This analysis of the relationship between the legal and political processes is not simply a rhetorical strategy; at least in the early stages of the case, it is reflected in internal UK memoranda questioning the tenability of the Irish approach, and the danger that it may have negative repercussions. As the case progressed, and did not seem to substantially impact either the security situation or the relationship between the governments, this judgement began to be questioned internally¹⁸⁸. However, it remained a powerful rhetorical device which continued to be used in challenging the Irish approach.

Thus, the UK's rhetorical position on the links between the legal and political fields was clear: the two were intrinsically linked, and any attempt to disaggregate them should be strongly resisted. The Irish position, by contrast, reflected the tensions and contradictions inherent in the reasons for bringing the case. As noted above, the Strasbourg case was initially brought following the failure of diplomatic initiatives to adequately resolve the issues of internment and mistreatment of prisoners. It represented, at least in part, a strategic shifting of these issues from the political to the legal field, in an effort to compel engagement and obtain a better overall outcome. However a rhetorical strategy of insulating the legal from the political began soon after; certainly, by the time of the Commission's hearings on admissibility in October 1972, Irish diplomats were already expressing surprise at the overtly political way the case was being conducted by the UK, arguing that 'the Irish saw the case as a legal process to establish points of law and had no intention to attack HMG'¹⁸⁹. There was, on this analysis, no contradiction between conflict within the legal sphere and cooperation outside it.

¹⁸⁷ *Ireland v United Kingdom, (1978) (5310/71) 23-II Eur Court HR Series B 339 (Oral argument, Respondent)*

¹⁸⁸ Memorandum Donnelly to White (3 December 1973), Foreign and Commonwealth Office, (FCO87/279/568).

¹⁸⁹ Letter Thom to White (16 October 1972), Foreign and Commonwealth Office, (FCO87/143/370).

The idea that the legal sphere is a distinct field, and that moves within it need not correspond with the wider political context recurs frequently in Irish analyses of the case¹⁹⁰. It is evident, for example, in submissions to the Commission in 1973 on the timing of the merits hearings. Responding to a UK proposal that hearings be delayed to avoid exacerbating tensions at a particularly delicate moment in Northern Ireland, the Dublin government emphasised that ‘the objects for which its claim ... has been brought could best be served by an early hearing of the case’¹⁹¹. They were forced to weigh ‘the advantages which would accrue to the people of Northern Ireland by a postponement and the disadvantages which might result from the consequent delay’. While a large part of this Irish framing may have been addressed to domestic concerns, it also highlights the extent to which they sought to segregate the specifically legal aspects of the case, highlighting the distinct benefits which would flow from the legal process, and which could be jeopardised if it were subordinated to political considerations¹⁹².

As between these contending accounts of the relationship between the legal and political fields, it was the Irish analysis which largely prevailed. While the UK continued to challenge the ‘schizophrenia’ of the Irish approach, the perceived autonomy of the legal sphere meant that they were eventually constrained to accept it. From a relatively early stage, views were canvassed with the UK administration on potential ways of exerting political pressure on the Irish government to withdraw the case. Options considered ranged from threats to Irish interests in respect of Northern Ireland to retaliations in the wider Anglo-Irish relationship, including economic cooperation, nationality laws and EEC matters¹⁹³. By bringing pressure to bear outside the mechanisms of the ECHR, power resources could be deployed which were unavailable within the legal field. As reflected in the quote opening this Part, if the Irish framing in terms of a distinct and autonomous legal field were accepted, the UK would be placed at an immediate disadvantage.¹⁹⁴ Strength in the wider political setting must be brought to bear to compensate for relative weakness within the legal context.

However, no such political retaliation was ever undertaken, reflecting the prevalence of an alternative view of how the case should be related to the wider political process. This latter view included a recognition that politicizing the Strasbourg case would

¹⁹⁰ See e.g. Telegram Dublin to FCO (13 October 1973), Foreign and Commonwealth Office, (FCO87/276/454); Minute O’Suilleabhain to Taoiseach (5 December 1975), Office of an Taoiseach, (NA2005/151/701).

¹⁹¹ Telex Hayes to McNulty (29 June 1973), Prime Minister’s Office, (PREM15/2141).

¹⁹² Letter de Winton to Woodfield (19 June 1973), Prime Minister’s Office, (PREM15/2141); ‘Draft Instructions to Ambassador in London’ (15 June 1973), Department of an Taoiseach, (NA2004/21/471).

¹⁹³ Draft with Letter Thorpe to Cox (17 October 1972), Foreign and Commonwealth Office, (FCO87/143/369).

¹⁹⁴ Memorandum ‘The Irish State Case’ (21 November 1973), Foreign and Commonwealth Office, (FCO87/278/534); Letter Arthur to Woodfield (26 November 1973), Foreign and Commonwealth Office, (FCO87/278/535).

make it more difficult for the British government to achieve its diplomatic and political objectives; that progress in resolving the political situation must take precedence over challenging the Strasbourg process; and that to a great extent, the legal process could achieve, and indeed had achieved, autonomy from the political one¹⁹⁵. While segregating the Strasbourg case limited the resources which the UK could bring to bear, it also limited the damage which the case could do¹⁹⁶. If the UK was prepared to invest significant political capital in stopping the case, this might be possible; but if it were not, there was little option but to concede the Irish argument that Strasbourg was quite apart from the rest of Northern Ireland's problems, and that different rules did indeed apply.

4.5 From International Law to Domestic Narrative

The idea of a distinct legal field is also important in understanding the role of Irish domestic opinion in this case. Reference has already been made to the role of domestic pressure in initiating the case. Concern about the domestic audience, and about reactions among the minority community in Northern Ireland, remained a significant factor in Irish thinking at all stages¹⁹⁷. However, to explain the case on this basis simply begs the question of why these groups viewed it as important, particularly once many of the issues it raised had begun to be addressed. Part of the answer lies in the straightforward need of the Irish government to be seen to be doing something in respect of Northern Ireland, particularly in periods when progress appeared slow¹⁹⁸. However, the specific significance of the legal route still needs to be explained.

In this respect, the idea of the case as a legal process, and the underlying idea of an autonomous legal field, is relevant to the domestic debate. While a key purpose of the Irish government in bringing the case was to put political pressure on the UK, it came to be seen in Irish public discourse as having a non-instrumental value in 'putting Britain on trial'¹⁹⁹. Thus, for example, when the Irish government agreed for at least

¹⁹⁵ See in particular Telegram Dublin to FCO (1 December 1973), Foreign and Commonwealth Office, (FCO87/278/550); Memorandum Donnelly to White (3 December 1973), Foreign and Commonwealth Office, (FCO87/279/568).

¹⁹⁶ A similar view appears in Irish analyses: Press Interview Dr G.FitzGerald (undated 1977), Department of Foreign Affairs, (NA2007/111/1899).

¹⁹⁷ See e.g. Letter Galsworthy to White (31 December 1973), Foreign and Commonwealth Office, (FCO87/279/593); Telegram Dublin to FCO (13 March 1976), Prime Minister's Office, (PREM16/975); Telegram Dublin to FCO (13 March 1976), Prime Minister's Office, (PREM16/975).

¹⁹⁸ This point was clearly recognised in UK analysis: Telegram Dublin to FCO (12 November 1974), Foreign and Commonwealth Office, (FCO87/404/311).

¹⁹⁹ See e.g. Telegram Dublin to FCO (11 August 1972), Foreign and Commonwealth Office, (FCO87/141/235); Telegram Dublin to FCO (13 October 1973), Foreign and Commonwealth Office, (FCO87/276/454). Cf. 'Editorial: Moral Pressure' Irish Times, 26 August 1973; Memorandum 'Brief for Taoiseach's London Talks' (4 April 1974), Department of an Taoiseach, (NA2005/7/608).

partially strategic reasons to delay hearings on the merits, they were attacked for seeming to ‘sell out’ the Northern minority. In later thinking, a recurring concern was that any settlement would be seen as a betrayal of those on whose behalf the case was initially taken²⁰⁰. As the case came to be identified with questions of justice, rather than of politics, it became more difficult to leverage for political purposes. The same process of segregation of the legal and political spheres which was being actively pursued at the international level had the effect of tying the government’s hands domestically. While internationally the Irish argued that, as a legal process, the case was divorced from politics, within Irish public opinion it was its identification with the law, and the values which the law purports to embody, which made it so politically difficult.

This point was recognised early in UK analyses, where discussions of settlement were conditioned on the need not only to convince the Irish government, but also to allow them to sell a settlement domestically²⁰¹. Even if it was possible to engage the Dublin government in a communicative process, that government was also embedded in a parallel domestic discourse, and any settlement must be justifiable in domestic terms. There was less concern about British domestic opinion; the principal UK objective in this respect was to play down the case’s overall significance and, where necessary, to ensure that the UK position was painted in the best possible light²⁰².

The Irish government, however, argued that the case could fulfil a valuable function in helping the British government to deal with its domestic constituents, and in particular the Unionist community in Northern Ireland. Thus, there are repeated references to the possibility that the case could allow the UK to go further on human rights reforms in Northern Ireland than might otherwise be possible²⁰³. By co-opting the legitimacy of the Commission behind reform proposals, these could more easily be sold to the recalcitrant Unionist community. However, a combination of a reluctance to move in response to Irish pressure, and scepticism about the political advisability of being seen to do so, meant that this argument was never tested in practice.

²⁰⁰ See e.g. Letter Alexander to Armstrong (14 June 1973), Prime Minister’s Office, (PREM15/2141); Memorandum Secretary to Taoiseach (20 February 1976), Department of an Taoiseach, (NA2006/133/706).

²⁰¹ Letter Bone to Blatherwick (14 April 1972), Foreign and Commonwealth Office, (FCO87/138/86); Letter Peck to Crawford (26 June 1972), Foreign and Commonwealth Office, (FCO87/139/179) (arguing that it was necessary ‘both to persuade [Lynch] that it is in the Irish interest to drop the case and to provide him with persuasive arguments to use against those who oppose him’).

²⁰² Memorandum ‘Implications of an adverse decision in the Irish State Case’ Donnelly to Harding (26 November 1974), Foreign and Commonwealth Office, (FCO87/404/321); Memorandum ‘Irish State Case’ Rees to Wilson (10 February 1976), Prime Minister’s Office, (PREM16/975).

²⁰³ Human rights reforms, including the incorporation of the ECHR in domestic law, were also an issue in the parallel constitutional reform processes in Northern Ireland. Cf. Sunningdale Communique 1973, Par.11.

5. Conclusion

This paper began by sketching a model of international law as deliberative discourse, emphasising its communicative function, and the relations between legal and non-legal argument, and between the international and domestic discourses in which agents are simultaneously embedded. It then examined two historical cases at the law/politics boundary to illustrate the relevance of this framework. At various points, I noted aspects of the case studies that seemed particularly relevant to this model. I here bring these together, to consider how far the model is in fact borne out in the cases.

The aspect that is perhaps most clearly borne out is the mutual implication of legal and political argument. In neither case is law distinct from politics. Rather, it constitutes a mode of politics. In the UN case, we see this in the invocation of legal arguments in the context of political lobbying, and in appeals to precedent to both inoculate and undermine politically difficult positions. In the ECHR case, we see argument in both legal and political modes; but we also, revealingly, see argument about the relation between these modes. The legal field is not only a locus of discourse: its existence is itself an object of discursive contestation. This reflects the second order nature of legal reasons, which may be pre-empted if the first-order reasons that support them do not in fact apply in a given case, particularly where that case can itself be constructed as exceptional. We thus see, in this contestation of the legal sphere, the extent to which international legal argument is simply a particular subset of, and constantly interacting with, international political argument; while at the same time recognising how understanding an issue in distinctively legal terms can lead political processes towards different conclusions.

The relation between international and domestic discourses is also clear. We thus find, in the UN case, states constrained in the arguments they can make internationally by the need to maintain certain domestic shiboleths. In the ECHR case the process runs in two directions: initially, Irish domestic narratives shape the ECHR case; but that case in turn comes to be incorporated into those domestic narratives, a kind of discursive blow-back. Further, the relation between domestic and international is not simply restrictive. Rather, we see in both cases states translating their domestic concerns into the shared language of international law. Law thus makes possible reasoned exchanges that could not proceed in purely political and particularistic terms.

The claim that legal argument plays a communicative role is less readily demonstrated. Certainly, we can identify behaviour on the part of states in both cases that seems motivated by the possibility of changing other states' attitudes through arguments. Implicit in that behaviour is the assumption that communicative action through the medium of law is at least possible at the international level. Legal argument, and legal process, are used not simply as threats or bargaining chips, but also as vehicles for promoting and challenging normative frames and assumptions.

Further, in the UN case we see various examples of third states reassessing their positions following argument, suggesting these states are engaging communicatively. This is less evident in the ECHR case, which may reflect the judicial structure of the ECHR's institutions: legal argument is more clearly addressed to impartial decision-makers than political interlocutors. However, we do see very clearly in the ECHR case attempts, particularly by the UK, to engage the other government in a conversation about the ways shared goals and values might support particular actions. Further, we see on both sides a process of learning, and a reconstitution of positions, particularly in respect of the relation between the case and the political process. That relation is itself, as noted above, an object of discursive contestation, and it seems likely this plays at least some role in the two states' evolving understandings of it. There is nothing that can be unequivocally identified as communicative action, but there is much that is at least suggestive of its possibility.

What does come out unequivocally from these cases is the inadequacy of international law frameworks, whether rationalist or constructivist, that seek to distinguish norm from agent, focussing on contestation around norms to the exclusion of contestation around agents. International political discourse, in which legal discourse is embedded, is in part an example of practical reasoning, hinging on the question of what I/you/we *should do*? Law, and social norms more generally, play an important role in answering that question, but they do so as part of a wider political process. In seeking the distinctive role of law, we must be careful not to lose sight of that embeddedness.