Comments on the Interim Report of the Working Group on Unification Referendums on the Island of Ireland

Dr Lea Raible, University of Glasgow
lea.raible@glasgow.ac.uk

Chapter 4

4.5 The sentence suggesting that the Agreement imposes no direct obligations on either parliament is misleading. From the point of view of international law, an international treaty binds the state party and all its institutions of government regardless of their function (this includes regional, sub-regional, and municipal governmental bodies, whatever their precise configuration).[1]

4.6 The information here is not correct. The fundamental provision on the bindingness of treaties is article 26 on the principle of *pacta sunt servanda* and reads: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The VCLT does not allow for a breach of treaty obligations if they impede national interests, even if they are vital. This terminology does not feature in the Convention. Neither does it allow a state party to invoke internal (read: domestic) law to justify a breach of a treaty. This is explicitly stated in its article 27.

Perhaps the idea was to refer to article 62 of the VCLT on fundamental change of circumstances (also known as *rebus sic stantibus* in practice and the literature). According to this provision unforeseen changes in circumstances may not be invoked as a reason for terminating or withdrawing from a treaty, unless '...the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and ... the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.' It is important to point out that no state has ever successfully relied on *rebus sic stantibus* before any international court or tribunal.

The terminology of vital national interests does not have any foundation in the VCLT and is instead based on recently emerging arguments by certain governments (including the UK's). A recent paper by Julian Kulaga[2] traces these arguments and explains that this state practice has its roots in early international law theory. It is also at this point uncertain if this recent state practice will change the interpretation of article 62 VCLT. If it does, there is an argument to be made that it represents dangerous backsliding.

Given this, I would strongly recommend rephrasing, or deleting, this paragraph.

4.29 This interpretation of concurrence is one I favour as well. While concurrent consent does seem to suggest that it be given to the same proposal/situation, it is also important to avoid setting too high a bar in terms of practicalities (simultaneity would be a concern in this regard). This is because changes in polity/territory of this sort are usually already subject to high practical bars owing to institutional entrenchment (whether formal or not). But the spirit of the Good Friday Agreement is precisely to set an appropriate bar for any change occurring and it is important not to raise it through interpretation.

---

[1] See also article 4(1) of the Draft articles on Responsibility of States for Internationally Wrongful Acts.
[2] Julian Kulaga, 'A Renaissance of the Doctrine of Rebus Sic Stantibus?' (2020) 69 International and Comparative Law Quarterly 477-97 (available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9122A30ADD637E495DCEBF99AEAB1F33/S0020589320000032a.pdf/renaissance_of_the_doctrine_of_rebus_sic_stantibus.pdf).

4.33 I want to make a point here that is not strictly referring to the legal context as we find it. In terms of clarity and resilience of any referendum, it would be advantageous to set the rules (including standards on that apply on choosing a question) before any such vote is called, and perhaps also independently of it. I say this because the most fruitful uses of popular votes on substantive questions rely on pre-determined rules and expectations – Ireland is an example of this, but Switzerland, and some US states including California and Oregon, come to mind. As such, it might be beneficial to think about and lay down rules on how to conduct a referendum independently of the question to be asked, or the timing. Such a strategy could contribute to minimising the risk of these discussions becoming too politically fraught.

4.36 The phrase 'without external impediment' could be seen to impose constraints on the 'truth' of campaign claims – for example by requiring standards on claims made by anyone campaigning, including – should this be allowed – the respective governments and civil services.

4.39 It seems to me the standard of good faith is the correct one (see also my comments on what the international law of treaties requires). It would further be good practice not to promise an implementation period that is too short to be practicable. Not leaving enough time for implementing unification could lead to significant disruption. An example of changing territorial allegiance that took a decade to implement is the creation of the Swiss Canton of Jura. Granted, this concerned the creation of a federal state, rather than the unification of two existing entities. Nevertheless, it would be preferable to understand unification as a whole as a process, of which the popular votes are just one part, and to communicate this fact along with realistic expectations for the practicalities. In my view, treating citizens as rational agents requires transparency in this matter.

Chapter 12

My comments here are general in nature and I will thus not refer to individual paragraphs. They focus on how to construct the franchise in Northern Ireland, as I am not an expert on Irish constitutional law.

I do not have a firm view on whether the franchise in Northern Ireland is already defined. My comments apply in case it is not. If there is the opportunity to define the franchise – as there seems to be in Northern Ireland, at least potentially – it is in my view warranted to use the resulting flexibility primarily to increase the legitimacy of the referendum. This is all the more important as it is fair to say that referendums are not widely used in the UK (although this may be changing). I agree that relying on the existing franchise for Assembly elections is a good starting point. One of the advantages of this franchise is that it is more inclusive than, say, the Westminster elections franchise. Any departure from the Assembly franchise – if it is contemplated – should err on the side of being more inclusive. For example, if in doubt, residency should be more important than citizenship requirements. This is in line with recent changes in other nations in the UK (for example Scotland), that give foreign born but legally resident individuals a vote.[3]

In my view, making the franchise inclusive is more important than stability in expectations. While I acknowledge the Venice recommendations, there is no expectation relating to referendums in Norther Ireland (and perhaps the UK generally) because the franchise has been determined ad hoc

[3] See section 1 of the Scottish Elections (Franchise and Representation) Act 2020, which extends the right to vote in Scottish elections to legally resident foreign nationals, regardless of citizenship (available at: https://www.legislation.gov.uk/asp/2020/6/section/1)

more often than not. While I agree that this is not ideal practice, I would like to point out that the flexibility it accords can also be an advantage because it allows the tailoring of the franchise to the question at hand. If this is done in good faith, it can improve the legitimacy of any vote carried out, which, as I say above, should be the aim.[4]

Chapter 14

This is not my area of specialisation and I have no firm views on issues such as spending limits or designated campaigners.

However, I would like to point to the Swiss practice of voter information ahead of referendums to provide some ideas on what we might think the role of government should be. The role of government in Swiss federal referendums is to run the process and to provide voter information. This takes the form of a booklet which contains the full text of any proposal to be voted on (usually a Bill or provisions of the Constitution), the position of the government and the main arguments thereof, space that can be taken up for campaign information opposing the government's view.[5]

This sort of voter information is not impartial and would accordingly not be well received in the UK or in Ireland. However, it is well worth thinking about providing voters with information in paper format that contains positions and arguments on both sides, as well as factual information on the background and consequences of a given result. It may even be possible (although not in all cases desirable) to agree on a set of information provided to voters in both jurisdictions. All of this is to say that some involvement of public bodies – especially specialised entities in the civil service – have a wealth of knowledge and information at their disposal and it would be desirable to find a way to make sure voters as well as the process of holding a referendum benefit from this fact.

[4] I argue elsewhere that the vote on Brexit was in this sense a missed opportunity: Lea Raible, 'Why Brexit shouldn't be the end of referendums', Law Blogs Maastricht, 19 June 2019 (available at: https://www.maastrichtuniversity.nl/blog/2019/06/why-brexit-shouldn't-be-end-referendums)

[5] For an example see the PDF 'Explications du Conseil fédéral' available here: https://www.admin.ch/gov/fr/accueil/documentation/votations/20210307.html.