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**THE NORTHERN IRELAND QUESTION: ALL-  
IRELAND SELF-DETERMINATION POST-BELFAST  
AGREEMENT**

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# The Northern Ireland Question: All-Ireland Self-Determination post-Belfast Agreement

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*By the Belfast Agreement of 1998, the major parties involved in the Northern Ireland conflict agreed that the territorial status of Northern Ireland would be determined by the Northern Irish people, and the people of the island of Ireland collectively. Although this Agreement is significant in shaping the right to self-determination in the all-Irish context, it contains within it many ambiguities. Many questions as to the nature, extent and effects of the right to self-determination in the all-Irish context still remain. These questions and issues which arise within the Agreement are resolvable with recourse to the customary international law of self-determination, particularly the law and practice relating to referenda. The Belfast Agreement is not simply of relevance in the Irish context. Rather, it has the potential to serve as a model to see the resolution of territorial and self-determination conflicts.*

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*Key words: Northern Ireland; Belfast Agreement; Self-Determination; Referenda; International Law*

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## I Introduction

Writing of the conflict known as the ‘Troubles’, which concerned the status of the six counties of Northern Ireland, Desmond Egan posed the “Northern Ireland Question”: “two *wee* girls/were playing tig [sic] near a car.../how many counties would you say/are worth their scattered fingers?”<sup>1</sup>

Years later, but too late for the 3,600 people who were killed in the conflict between pro-Irish ‘nationalists’ and pro-British ‘unionists’,<sup>2</sup> these two traditions answered this question with a resounding “none”. By the Belfast Agreement of 1998, the use of violence for the furtherance of political goals was completely rejected.<sup>3</sup> The Agreement is comprised of two agreements: the first being between the Northern Irish political parties (*Multi-Party Agreement*); the second being between Ireland and the United Kingdom (UK) (*British-Irish Agreement*). It outlines several developments aimed at securing peace and cross-community cooperation in Northern Ireland. Significantly, it poses an answer to another Northern Ireland Question: how can two opposing, yet equally legitimate, self-determination aspirations be recognised? The answer found in the Agreement is that “it is for the people of the island of Ireland alone” to exercise their right to self-determination to create a united Ireland should they wish,<sup>4</sup> provided that the choice “freely exercised by a majority of the people of Northern Ireland” as to the territory’s status would be respected.<sup>5</sup>

Yeats’ remarks on the failed 1916 Irish Uprising, that a “terrible beauty is born”<sup>6</sup> are an apt description of these provisions. Although the Agreement provided some answer to the

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<sup>1</sup> Desmond Egan “The Northern Ireland Question” in *Terre et Paix: Poèmes d’Irlande* (Presses Universitaires de Lille, Lille, 1988) 24 at 24 (translation: *Earth and Peace: Poems of Ireland*).

<sup>2</sup> David McKittrick and David McVea *Making Sense of the Troubles: A History of the Northern Ireland Conflict* (Viking, London, 2012) at 377.

<sup>3</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 2114 UNTS 474 (signed 10 April 1998, entered into force 2 December 1999) [British-Irish Agreement] (annex I) *Agreement Reached in the Multi-Party Negotiations* [*Multi-Party Agreement*] at 478 (note: page numbers refer to the pages in the UNTS annex).

<sup>4</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement* at 479.

<sup>5</sup> British-Irish Agreement, art 1(i); *Multi-Party Agreement* at 479.

<sup>6</sup> WB Yeats “Easter 1916” in Augustine Martin (ed) *Vintage Yeats: Collected Poems* (Vintage Books, London, 1992) 176 at 176, 177 and 178.

Northern Ireland Question, much remains ambiguous.<sup>7</sup> Little academic commentary on these provisions exists.<sup>8</sup> This essay, therefore, shall seek an answer to the question as to the nature, extent and effects of self-determination in post-Agreement Ireland. Seeking this answer requires an examination of the general law of self-determination; how this can resolve ambiguities within the Agreement; and the effects of the Agreement's self-determination provisions, both in Ireland and more broadly.

## *II The Belfast Agreement*

### *A Background*

The Agreement was a peace agreement to bring an end to the conflict known as the 'Troubles'.<sup>9</sup> Although the conflict had complex routes, it was, at its core, a conflict of status,<sup>10</sup> sparked by an Irish civil rights movement.<sup>11</sup> Northern Ireland was, and is, part of the UK, and contains within it two communities divided by ethnicity, culture, religion and politics. The majority of the population are 'unionist'.<sup>12</sup> Traditionally of Protestant denomination, unionists identify as British and support Northern Ireland remaining part of the UK.<sup>13</sup> Nationalists, on the other hand, form an increasingly growing minority.<sup>14</sup> Traditionally Catholic and of Irish identity, nationalists support the creation of a united Ireland.<sup>15</sup>

The Troubles occurred between 1969 and 1998, and resulted in over 3,600 deaths.<sup>16</sup> The British armed forces were deployed. Unionist and nationalist paramilitaries committed acts

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<sup>7</sup> Christine Bell and Kathleen Cavanaugh "‘Constructive Ambiguity’ or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement" (1998) 22 *Fordham Int'l LJ* 1345.

<sup>8</sup> Amy Maguire "Self-Determination, Justice, and a 'Peace Process': Irish Nationalism, the Contemporary Colonial Experience and the Good Friday Agreement" (2014) 13 *Seattle J for Soc Just* 537 at 563.

<sup>9</sup> McKittrick and McVea, above n 2, at 255–256.

<sup>10</sup> At 1–2.

<sup>11</sup> Rainer Grote "Northern Ireland" in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 7 816 at [13].

<sup>12</sup> McKittrick and McVea, above n 2, at 1.

<sup>13</sup> At 1.

<sup>14</sup> David Young "Protestant-Catholic gap narrows as census results revealed" (11 December 2012) *Belfast Telegraph* <[www.belfasttelegraph.co.uk](http://www.belfasttelegraph.co.uk)>.

<sup>15</sup> McKittrick and McVea, above n 2, at 1–2.

<sup>16</sup> At 377.

of violence to push their agendas. Human rights violations were also committed by both the UK and Ireland.<sup>17</sup>

Peace processes began in the 1990s, resulting in the Belfast Agreement.<sup>18</sup> The Agreement contains provisions on justice, human rights, governance and cross-border institutions. In contrast to the self-determination provisions, these have been analysed extensively.<sup>19</sup>

The Agreement was reached not simply through State negotiations, but largely by the major Northern Irish nationalist and unionist political parties.<sup>20</sup> As previous conflict resolution attempts had largely excluded these groups,<sup>21</sup> this itself was a major development. The Agreement was accepted by the populations of both Ireland and Northern Ireland by referendum.<sup>22</sup>

### ***B The Agreement's Self-Determination Provisions***

The self-determination provisions are contained in both the British-Irish Agreement and the *Multi-Party Agreement*. The provisions therefore represent not only an inter-State consensus, but also a social and political consensus, between the peoples of Northern Ireland.

The Agreement acknowledges the legitimacy “of whatever choice is freely exercised by a majority of people of Northern Ireland” regarding the retention of ties with Britain or the formation of united Ireland,<sup>23</sup> and states that to change Northern Ireland’s status other than

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<sup>17</sup> See for example Peter Smithwick *Report of the Tribunal of Inquiry into Suggestions that Members of An Garda Síochána or other Employees of the State colluded in the Fatal Shooting of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989* (Government of Ireland Stationery Office, Dublin, 2013); Lord Saville, William Hoyt and John Toohey *Report of the Bloody Sunday Inquiry* (Stationery Office, London, 2010); Brice Dickson *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, Oxford, 2010).

<sup>18</sup> McKittrick and McVea, above n 2, at 255–256.

<sup>19</sup> See for example Austen Morgan *The Belfast Agreement: A practical legal analysis* (The Belfast Press, London, 2000).

<sup>20</sup> At [1.18].

<sup>21</sup> Bernadette C Hayes and Ian McAllister “Who Voted for Peace? Public Support for the 1998 Northern Ireland Agreement” (2001) 16 *Irish Political Studies* 73 at 73.

<sup>22</sup> At 79.

<sup>23</sup> British-Irish Agreement, art 1(i); *Multi-Party Agreement* at 479.

by majority consent would be “wrong”.<sup>24</sup> The Agreement further states that “it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment” to bring about a united Ireland should they wish.<sup>25</sup> Therefore, the consent of the population in both jurisdictions on the island is a prerequisite to the formation of a united Ireland. Should the “people of the island of Ireland” wish to create a united Ireland, both Ireland and the UK are bound by this wish.<sup>26</sup>

Regardless of Northern Ireland’s status, government there must be “exercised with rigorous impartiality”,<sup>27</sup> and the “birthright of all the people of Northern Ireland” to Irish and British identity and citizenship is affirmed.<sup>28</sup>

The means by which the wishes of the people are to be obtained cannot be properly assessed without reference to the Northern Ireland Act 1998 (UK), which states that this is to be assessed by a poll, or referendum.<sup>29</sup> Limited additional guidance as to the poll’s nature is given.<sup>30</sup>

Whilst there are no present plans to hold a referendum, four factors indicate that the holding of one is not unlikely in the future. First, following the recent self-determination referendum in Scotland, nationalists have called for a referendum on the North’s status.<sup>31</sup> Second, the centenary of the 1916 Irish Uprising, which set into motion the events leading to Irish independence, is approaching, creating a climate of increased nationalistic pride amongst parts of the population.<sup>32</sup> Third, although the traditionally nationalist Catholics within Northern Ireland remain a minority, the population gap between Protestants and

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<sup>24</sup> British-Irish Agreement, art 1(iii); *Multi-Party Agreement* at 479.

<sup>25</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement* at 479.

<sup>26</sup> British-Irish Agreement, art 1(iv); *Multi-Party Agreement* at 479.

<sup>27</sup> British-Irish Agreement, art 1(v); *Multi-Party Agreement* at 479.

<sup>28</sup> British-Irish Agreement, art 1(vi); *Multi-Party Agreement* at 479.

<sup>29</sup> Northern Ireland Act 1998 (UK), s 1(2).

<sup>30</sup> Schedule 1.

<sup>31</sup> Martin McGuinness “McGuinness calls for border poll” (19 September 2014) Sinn Féin <[www.sinnfein.ie](http://www.sinnfein.ie)>; “Scottish referendum: Sinn Féin’s Martin McGuinness calls for Northern Ireland border poll following Scotland result” (19 September 2014) Belfast Telegraph <[www.belfasttelegraph.co.uk](http://www.belfasttelegraph.co.uk)>.

<sup>32</sup> Ruth Dudley Edwards “Still obediently following Fenian instruction booklet: Gerry Adams wants to put the 1981 hunger strikers on a par with the men of 1916” (30 August 2015) Belfast Telegraph <[www.belfasttelegraph.co.uk](http://www.belfasttelegraph.co.uk)>.

Catholics is rapidly decreasing.<sup>33</sup> Fourth, the UK government has shown its willingness to permit self-determination referenda, as shown in Scotland. Taken together, these factors suggest that discourse surrounding self-determination and the Agreement will become increasingly important. In such discourse, the resolution of the Agreement's ambiguities will be crucial.

### *C The Agreement and Politics*

The lack of precision within the self-determination provisions is unsurprising. Law is inherently political, especially where minority rights<sup>34</sup> and self-determination<sup>35</sup> are concerned. Such is true of the entire Belfast Agreement,<sup>36</sup> in particular its self-determination provisions.<sup>37</sup> However, despite the Agreement's political nature<sup>38</sup> it is a legally binding treaty between the UK and Ireland. Ambiguities must therefore be resolved by the law, not politics.<sup>39</sup> Although much has been written on the political desirability of the Agreement,<sup>40</sup> these issues are *legally* irrelevant. What *is* relevant is how the Agreement's provisions can be interpreted and implemented in light of legal principles,<sup>41</sup> particularly the general law of self-determination.

## *III General Self-Determination*

### *A Scope*

Self-determination concerns the right of people “freely to determine, without external interference, their political status and to pursue their economic, social and cultural

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<sup>33</sup> Young, above n 14.

<sup>34</sup> *Reference re Manitoba Language Rights* [1985] 1 SCR 721 (Can) at 728.

<sup>35</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217 (Can) at [1].

<sup>36</sup> *Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252 (SC) at 254 per Keane CJ; *Re Northern Ireland Human Rights Commission* [2002] NI 236 (HL) at [66] per Lord Hobhouse of Woodborough dissenting.

<sup>37</sup> Bell and Cavanaugh, above n 7, at 1335.

<sup>38</sup> *Doherty*, above n 36, at 254 per Keane CJ; *Re Northern Ireland Human Rights Commission*, above n 36, at [66] per Lord Hobhouse of Woodborough dissenting.

<sup>39</sup> Morgan, above n 19, at [1.27].

<sup>40</sup> See for example Gerry Adams “To Cherish a Just and Lasting Peace” (1998) 22 *Fordham Int'l LJ* 1179; Ian Paisley “Peace Agreement — Or Last Piece in a Sellout Agreement?” (1998) 22 *Fordham Int'l LJ* 1273.

<sup>41</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31.

development”.<sup>42</sup> This “requires a free and genuine expression of the will of the peoples concerned”.<sup>43</sup> Self-determination is a fundamental, *erga omnes*, legal principle.<sup>44</sup>

Self-determination has internal and external aspects.<sup>45</sup> Internally, it concerns the pursuit of political goals within an existing State.<sup>46</sup> The State’s population has the right to determine its own destiny and to choose representative government.<sup>47</sup> Distinct groups have the right to participation in the State’s political life, representation in its government and to non-discrimination.<sup>48</sup>

External self-determination concerns a territory leaving a State.<sup>49</sup> This right arises in limited circumstances. It is applicable to trust territories<sup>50</sup> and non-self-governing territories “whose peoples have not yet attained a full measure of self-government”.<sup>51</sup> Outside these contexts, its application remains unclear,<sup>52</sup> although the scope of its application is widening. It has been applied in the context of State dissolution<sup>53</sup> and

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<sup>42</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625, XXV (1970) [*Friendly Relations Declaration*], principle 5.

<sup>43</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at [55].

<sup>44</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 1(1); International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 26 March 1976), art 1(1); *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90 at [29].

<sup>45</sup> John Dugard “The Secession of States and Their Recognition in the Wake of Kosovo” (2011) 357 *Recueil des Cours* 9 at 85–86.

<sup>46</sup> *Reference re Quebec*, above n 35, at [126].

<sup>47</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at 621, [9] per Judge Yusuf (separate opinion).

<sup>48</sup> At 621, [9] per Judge Yusuf (separate opinion).

<sup>49</sup> *Reference re Quebec*, above n 35, at [126].

<sup>50</sup> Charter of the United Nations, ch XII; James Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 116.

<sup>51</sup> Charter of the United Nations, art 73; Crawford, above n 50, at 116.

<sup>52</sup> Daniel Thürer and Thomas Burri “Self-Determination” in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 9 113 at [34]; *Opinion No 2* (1992) 92 ILR 167 (Conference on Yugoslavia Arbitration Commission) at 168.

<sup>53</sup> Thürer and Burri, above n 52, at [34]; *Opinion No 2*, above n 52, at 168–169.

occupation.<sup>54</sup> Furthermore, it has also been argued that a right of ‘remedial secession’ may exist in some circumstances. The *Friendly Relations Declaration* of 1970 states that self-determination cannot authorise any action which impairs the unity of “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples”.<sup>55</sup> This apparent proviso has been controversially interpreted as permitting a people to secede from a State which grossly violates their self-determination rights.<sup>56</sup> For present purposes, the relevance of this controversy is that it highlights the contestable nature of self-determination.

Of course, self-determination is applicable where a State willingly adopts it to resolve a particular dispute,<sup>57</sup> which is what the Belfast Agreement does in terms.<sup>58</sup>

## **B Peoples**

The right to self-determination attaches to ‘people’.<sup>59</sup> However, the definition of people remains unclear.<sup>60</sup> Such uncertainties have led to self-determination being described as “ridiculous because the people cannot decide until somebody decides who are the people.”<sup>61</sup>

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<sup>54</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [118].

<sup>55</sup> *Friendly Relations Declaration*, above n 42, principle 5.

<sup>56</sup> *Kosovo (Advisory Opinion)*, above n 47, at 622, [11] per Judge Yusuf (separate opinion); Dugard, above n 45, at 117.

<sup>57</sup> Crawford, above n 50, at 117.

<sup>58</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement* at 479.

<sup>59</sup> See for example Charter of the United Nations, art 1(2); International Covenant on Economic, Social and Cultural Rights, art 1(1); International Covenant on Civil and Political Rights, art 1(1); *Friendly Relations Declaration*, above n 42, principle 5.

<sup>60</sup> Hilary Charlesworth “Democracy and International Law” (2014) 371 *Recueil des Cours* 42 at 84; Anne Peters “The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum” in Christian Calliess (ed) *Herausforderungen an Staat und Verfassung: Völkerrecht - Europarecht - Menschenrechte: Liber Amicorum für Torsten Stein zum 70 Geburtstag* (Nomos, Baden-Baden, 2015) 278 at 281 (translation: *Challenges to State and Constitution: International Law – European Law – Human Rights: Liber Amicorum for Torsten Stein’s 70th Birthday*); Crawford, above n 50, at 120–121.

<sup>61</sup> Ivor Jennings *The Approach to Self-Government* (Beacon Press, Boston, 1956) at 56.

Despite this, there are several accepted indicia of a people. A group classified as a people will generally share common elements, such as language,<sup>62</sup> culture,<sup>63</sup> ethnic identity<sup>64</sup> and ideology.<sup>65</sup> Minority groups are not precluded from the definition,<sup>66</sup> although people generally form a majority within a distinct territory.<sup>67</sup> More than one people may exist within a territory.<sup>68</sup> As they “are the masters of the country”,<sup>69</sup> and have the right to determine the status of destiny of the territory,<sup>70</sup> the determination of whether a group amounts to a people is crucial.

### ***C Territorial Integrity***

States who act in accordance with, and respect the right to, internal self-determination are entitled to the protection of their territorial integrity.<sup>71</sup> Territorial integrity limits external self-determination, as a general right of secession “would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations.”<sup>72</sup>

### ***D Referenda***

The will of the people is best established through referenda.<sup>73</sup> As was observed by the French Conseil Constitutionnel, the result of a referendum constitutes a direct expression of

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<sup>62</sup> *Reference re Quebec*, above n 35, at [125].

<sup>63</sup> At [125].

<sup>64</sup> *Gunme v Cameroon* [2009] AHRLR 9 (ACHPR) at [170].

<sup>65</sup> At [170].

<sup>66</sup> *Kosovo (Advisory Opinion)*, above n 47, at 621, at [9] per Judge Yusuf (separate opinion); Crawford, above n 50, at 121.

<sup>67</sup> Dugard, above n 45, at 91–92; *Gunme*, above n 64, at para 170.

<sup>68</sup> Dugard, above n 45, at 97; *Reference re Quebec*, above n 35, at [124]; *Kosovo (Advisory Opinion)*, above n 47, at [109].

<sup>69</sup> Kim Dae-jung (President, Republic of Korea) and Kim Jong-il (Chairman, Democratic People’s Republic of Korea) *South-North Joint Declaration* (2000) at [1].

<sup>70</sup> *Western Sahara*, above n 43, at 114 per Judge Dillard (separate opinion).

<sup>71</sup> *Reference re Quebec*, above n 35, at [130].

<sup>72</sup> *Kosovo (Advisory Opinion)*, above n 47, at 622, [9] per Judge Yusuf (separate opinion).

<sup>73</sup> Antonio Cassese *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, Cambridge, 1995) at 213; Jure Vidmar “The Scottish Independence Referendum in an International Context” (2013) 51 *Can YB Int’l L* 259 at 261–262; Peters, above n 60, at 286.

national sovereignty.<sup>74</sup> In the Irish context, a referendum is required before any change in Northern Ireland's status will be lawful.<sup>75</sup>

In this regard, the Belfast Agreement is not unique. Numerous referenda have been employed internationally, and customary international law now requires a referendum before any territorial change is lawful.<sup>76</sup>

However, even if referendum results favour secession, this does not give rise to independence as a right.<sup>77</sup> Rather, such results trigger an obligation to enter into negotiations to discuss the future status of the territory, whether that be independence or otherwise.<sup>78</sup> The exception to this rule, which applies explicitly under the Belfast Agreement,<sup>79</sup> is where a State commits to allowing independence prior to the holding of the referendum, and is therefore bound to honour this.<sup>80</sup>

From the numerous referenda which have taken place, numerous principles as to their conduct have emerged. Rather than being merely good practice, these are principles of customary international law.<sup>81</sup> The existence of a customary rule is demonstrated by general State practice, which is accepted as law,<sup>82</sup> and can be established by academic

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<sup>74</sup> *Décision n° 62-20 DC* [1962] Recueil 27 (Fr Conseil Constitutionnel) at [2] (translation: *Decision n° 62-20 DC*).

<sup>75</sup> Northern Ireland Act, s 1.

<sup>76</sup> Peters, above n 60, at 288; İlker Gökhan Şen *Sovereignty Referendums in International and Constitutional Law* (Springer, Heidelberg, 2015) at 85.

<sup>77</sup> Vidmar, above n 73, at 259; Víctor Ferreres Comella "The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comment on the Judgment 42/2014)" (2014) 10 *EuConst* 571 at 580–581; *Sentencia 42/2014* (2014) 87 *Boletín Oficial del Estado* 77 (Esp Tribunal Constitucional) at 95 (translation: *Judgment 42/2014*).

<sup>78</sup> *Reference re Quebec*, above n 35, at [91]; *Sentencia 42/2014*, above n 77, at 98; Vidmar, above n 73, at 263.

<sup>79</sup> British-Irish Agreement, art 1(iv); *Multi-Party Agreement* at 479.

<sup>80</sup> Vidmar, above n 73, at 263.

<sup>81</sup> Sarah Wambaugh "La Pratique des Plébiscites Internationaux" (1927) 18 *Recueil des Cours* 149 at 232 (translation: "The Practice of International Plebiscites").

<sup>82</sup> International Law Commission *Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee A/CN.4/L.869* (2015), draft conclusion 2; *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3 at [77].

opinion as a subsidiary means.<sup>83</sup> In the specific context of referenda, three points also serve to support the argument that the principles discussed below are custom,

First, as self-determination is customary international law,<sup>84</sup> the rules of referenda must also be custom. To suggest otherwise would undermine the logical application of self-determination. Self-determination requires a genuine expression of the people's will,<sup>85</sup> and this is best determined through referenda.<sup>86</sup> As the principles relating to referenda, like self-determination as a whole, are aimed at ensuring the will of the people is freely and genuinely expressed, they form a subset of the law of self-determination.<sup>87</sup> As a matter of logic, the principles must be customary law, too.

Second, analogies may be drawn to international human rights law. Established human rights law requires free and genuine elections.<sup>88</sup> Such elections are at the foundation of the democratic system,<sup>89</sup> and are crucial for establishing and maintaining legal, democratic regimes.<sup>90</sup> These underlying rationales apply equally in the context of referenda, such that human rights bodies have not hesitated to apply electoral human rights in referendum contexts.<sup>91</sup> This cross-applicability also has scholarly support.<sup>92</sup> Due to this cross-applicability with the established legal principles of election rights, the principles of referenda are also principles of law.

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<sup>83</sup> *Identification of customary international law*, above n 82, draft conclusion 14.

<sup>84</sup> *East Timor*, above n 44, at [29].

<sup>85</sup> *Western Sahara*, above n 43, at [55].

<sup>86</sup> Cassese, above n 73, at 213; Vidmar, above n 73, at 261–262; Peters, above n 60, at 286.

<sup>87</sup> Peters, above n 60, at 288; Şen, above n 76, at 85.

<sup>88</sup> *Universal Declaration of Human Rights* GA Res 217(III)A, III (1948), art 21(3); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 262 (opened for signature 20 March 1952, entered into force 18 May 1954), art 3; International Covenant on Civil and Political Rights, art 25.

<sup>89</sup> *Oran v Turkey* (28881/07) Section II, ECHR 15 April 2014 at [51].

<sup>90</sup> *Dicle et Sadak c Turquie* (48621/07) Section II, ECHR 16 June 2015 at [76] (translation: *Dicle and Sadak v Turkey*).

<sup>91</sup> Human Rights Council *General Comment 25* CCPR/C/21/Rev.1/Add.7 (1996) at [6]; *Gillot v France* UNHRC CCPR/C/75/D/932/2000, 21 July 2002 at [12.2].

<sup>92</sup> Yves Beigbeder “Referendum” in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 8 696 at [46]; Peters, above n 60, at 297–298.

Third, the Venice Commission, a Council of Europe body, released a *Code of Good Practice on Referendums*,<sup>93</sup> and the principles outlined below are mostly contained within it. Whilst this cannot establish custom of itself, the *Code* was readily adopted by the Member States of the Council of Europe,<sup>94</sup> this being a significant piece of practice.

With these general propositions in mind, State practice establishes that the following norms are principles of customary international law which will be relevant in a referendum under the Agreement.

### 1 *Good Faith*

That ambiguities in the Agreement must be interpreted in good faith is uncontroversial, as all treaties must be so interpreted.<sup>95</sup> The good faith rule has also been explicitly applied in a referendum context.<sup>96</sup>

Good faith obligations require the resolution of differences by negotiations.<sup>97</sup> When the General Assembly condemned Crimea's 2014 referendum as unlawful,<sup>98</sup> it called on parties to enter into "direct political dialogue" to resolve the dispute as to Crimea's status.<sup>99</sup> This obligation was also reflected in the debate leading to the resolution's adoption,<sup>100</sup> and in a draft Security Council resolution.<sup>101</sup>

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<sup>93</sup> *Code of Good Practice on Referendums* (Study No 371/2006; Document No CDL-AD(2007)008rev) European Commission for Democracy through Law (Venice Commission), 19 March 2007.

<sup>94</sup> "*Code of Good Practice on Referendums*" — *Parliamentary Assembly Recommendation 1821 (2007)* Council of Europe, Committee of Ministers, 1044th meeting, 10 December 2008.

<sup>95</sup> Vienna Convention on the Law of Treaties, art 31(1).

<sup>96</sup> *Tacna-Arica Question (Chile v Peru) (Award)* (1925) 2 RIAA 921 at 929.

<sup>97</sup> At 933; *Reference re Quebec*, above n 35, at [91]; Vidmar, above n 73, at 263; Clarity Act SC 2000, c 26, s 2(1); Cassese, above n 73, at 212.

<sup>98</sup> *Territorial Integrity of Ukraine* GA Res 68/262, A/RES/68/262 (2014) at [5].

<sup>99</sup> At [3].

<sup>100</sup> See for example *United Nations General Assembly: 80th Plenary Meeting* UN GAOR, 68th Session, 80th plenary meeting, A/68/PV.80 (2014) at 9 per Mr Ulibarri (Costa Rica).

<sup>101</sup> *Draft Security Council Resolution S/2014/189* (2014) at [2].

## 2 *The Will of the People*

It is a fundamental rule of customary international law that self-determination referenda permit the free expression of the will of the people.<sup>102</sup> The Irish Chief Justice, in the context of a municipal referendum, aptly stated that the people's will expressed in a referendum "is sacrosanct and if freely give, cannot be interfered with. The decision is [theirs] and [theirs] alone."<sup>103</sup> Even in what is perhaps the earliest treaty envisaging a referendum in the context of territorial reunification, it was stated that the reunification was to take place without constraining the population's will.<sup>104</sup>

The customary nature of this norm is clear. Following the dissolution of the Former Yugoslavia, recognition of Bosnia-Herzegovina was declined in the absence of a free referendum on independence.<sup>105</sup> Further evidence of the norm's legal status is found in the Crimean context. Although much criticism was directed at the Crimean referendum's municipal unlawfulness,<sup>106</sup> States were more concerned with the fact that the referendum was conducted in a manner so as not to establish the free will of the people. The European Union's (EU) refusal to recognise the referendum as lawful stemmed from its failure to

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<sup>102</sup> Peters, above n 60, at 287–298; *The situation of human rights in the Sudan* A/HRC/15/L.3 (2010) at [7]; Wambaugh, above n 81, at 242.

<sup>103</sup> *Hanafin v Minister for the Environment* [1996] 2 IR 321 (SC) at 425 per Hamilton CJ.

<sup>104</sup> *Traité relatif à la réunion de la Savoie et de l'arrondissement de Nice à la France*, France–Sardaigne 122 CTS 23 (signed 24 March 1860, entered into force 30 March 1860) [Treaty of Turin], art 1 (translation: Treaty concerning the reunion of Savoy and of the borough of Nice to France, France–Sardinia).

<sup>105</sup> *Opinion No 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States* (1992) 92 ILR 173 (Conference on Yugoslavia Arbitration Commission) at 178.

<sup>106</sup> *Compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Verkhovna Rada of the Autonomous Republic Crimea "on holding of the all-Crimean referendum"* Const C Kyiv № 2-rp/2014, 14 March 2014 (Ukr); *Opinion on "Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles"* (Opinion No 762/2014; Document No CDL(2014)019) European Commission for Democracy through Law (Venice Commission), 21 March 2014 [*Venice Commission Crimea Referendum Opinion*] at [27].

adhere to “democratic standards of free expression and free will”,<sup>107</sup> a position also echoed by other States before the Security Council and General Assembly.<sup>108</sup>

Significantly, Russia’s conduct in relation to Crimea also provides evidence of the binding nature of the norm. Rather than argue that the territory could be transferred without freely given consent, the Russian delegation argued that the referendum permitted the people of Crimea to express their free will,<sup>109</sup> and that the referendum was undertaken in “strict compliance with international law and democratic procedure, without outside interference and through a free referendum”.<sup>110</sup> The fact that Russia refuted allegations of a breach of law by attempting to use the law to justify the referendum’s legality only serves to emphasise the customary nature of the rule.<sup>111</sup>

### 3 *Peacefulness*

The Crimean referendum also highlights the requirement that the territory be at peace at the time of a self-determination referendum.<sup>112</sup> Again, part of the rationale for the international community’s refusal to recognise the referendum’s results was the presence of military forces in the region.<sup>113</sup> The reason for this norm is that where armed forces,

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<sup>107</sup> Question for written answer P-003209/14 to the Commission (Vice-President/High Representative) Lorenzo Fontana (EFD): VP/HR - Consequences of the referendum in Crimea [2014] OJ C 335/149.

<sup>108</sup> *United Nations Security Council: 7134th Meeting S/PV.7134* (2014) at 8 per Sir Mark Lyall Grant; *United Nations Security Council: 7144th Meeting S/PV.7144* (2014) at 7 per Mr Araud (France), at 16 per Ms Murmokaitė (Lithuania); *United Nations General Assembly: 80th Plenary Meeting*, above n 100, at 9 per Mr Ulibarri (Costa Rica), at 22 per Mr Lupan (Republic of Moldova).

<sup>109</sup> *Security Council 7134th Meeting*, above n 108, at 16 per Mr Churkin (Russian Federation); *Security Council 7144th Meeting*, above n 108, at 8 per Mr Churkin (Russian Federation).

<sup>110</sup> *Security Council 7144th Meeting*, above n 108, at 8 per Mr Churkin (Russian Federation).

<sup>111</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [186].

<sup>112</sup> Peters, above n 60, at 297.

<sup>113</sup> *United Nations Security Council: 7157th Meeting S/PV.7157* (2014) at 13 per Mr Araud (France), at 16 per Ms Lucas (Luxembourg); *Security Council 7134th Meeting*, above n 108, at 6 per Ms Power (United States of America), at 8 per Sir Mark Lyall Grant (United Kingdom), at 14 per Mr Quinlan (Australia); *Security Council 7144th Meeting*, above n 108, at 7 per Mr Araud (France), at 13 per Mr Quinlan, (Australia), at 16 per Ms Murmokaitė (Lithuania), at 17 per Ms Lucas (Luxembourg); *United Nations General Assembly: 80th Plenary Meeting*, above n 100, at 9 per Mr Rishchynski (Canada), at 12 per Ms Gunnarsdóttir (Iceland).

whether government or otherwise, are present in the territory, some degree of undue influence over voters is inherent, meaning the expression of the people's will may not be free and genuine.<sup>114</sup> The requirement of a territory being at peace at the time of a referendum is also borne out in practice relating to other referenda<sup>115</sup> and academic opinion.<sup>116</sup>

#### 4 Clarity

The requirement of clarity is twofold. First, the question asked must be as clear as possible,<sup>117</sup> and free from ambiguity.<sup>118</sup> It must allow the retention of the status quo as an option. The international illegality of Crimea's secession also stems from the referendum question's failure in this regard.<sup>119</sup> Likewise, State practice in other contexts also indicates that a clear question is crucial for the establishment of the genuine will of the people.<sup>120</sup> Similarly, only one question should be posed in a single ballot paper in order to increase clarity.<sup>121</sup>

Examples of clear questions can be found in relation to Montenegro and Scotland. In the Montenegro independence referendum of 2006, voters were asked "Do you want the Republic of Montenegro to be an independent state with full international and legal personality?"<sup>122</sup> The question asked of Scottish voters was "exemplary in its clarity",<sup>123</sup> with voters asked "Should Scotland be an independent country?"<sup>124</sup>

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<sup>114</sup> Wambaugh, above n 81, at 241.

<sup>115</sup> *The situation of human rights in the Sudan*, above n 102, at [7].

<sup>116</sup> Wambaugh, above n 81, at 241.

<sup>117</sup> *Code of Good Practice on Referendums*, above n 93, s III.2.

<sup>118</sup> *Reference re Quebec*, above n 35, at [87].

<sup>119</sup> *Security Council 7134th Meeting*, above n 108, at 6 per Ms Power (United States of America), at 8 per Mr Araud (France).

<sup>120</sup> Clarity Act, s 1(4)(b).

<sup>121</sup> *Re Law Relating to the Consultation of the Populations of New Caledonia and its Dependencies* (1987) 89 ILR 19 (Fr Const C) at 21–22; *Venice Commission Crimea Referendum Opinion*, above n 106, at [22].

<sup>122</sup> Law on the Referendum on State-Legal Status of the Republic of Montenegro 2006, Official Gazette of the Republic of Montenegro, No 12/06, art 5.

<sup>123</sup> Vidmar, above n 73, at 227.

<sup>124</sup> Scottish Independence Referendum Act 2013 (UK), s 1(2).

Second, the turnout and majority thresholds must be clear. Although the Venice Commission has advised against the imposition of a turnout thresholds or thresholds of more than a simple majority of votes,<sup>125</sup> State practice indicates that such thresholds are permissible.<sup>126</sup> There is no universally prescribed threshold in law. Rather, there is a general requirement of a clear and unambiguous majority.<sup>127</sup> In this regard, Canadian State practice helpfully states that the determination of whether a majority is “clear” shall be considered with regard to the size of the majority,<sup>128</sup> the percentage of eligible voters partaking,<sup>129</sup> and any other matters which are relevant.<sup>130</sup> The difficulty with applying this to Northern Ireland will be that the Irish referendum is binding, whereas those envisaged in Canadian practice are not.<sup>131</sup>

### 5 *Voter Eligibility*

Although universal suffrage is the most appropriate solution to voter eligibility in the context of referenda,<sup>132</sup> restrictions placed upon eligibility, particularly on the basis of a residential period, are not unlawful.<sup>133</sup> Any restrictions on the electoral rights must not be discriminatory or unreasonable,<sup>134</sup> and must take account of local requirements and circumstances.<sup>135</sup> In order to lawfully restrict voting rights, States must have a legitimate aim.<sup>136</sup>

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<sup>125</sup> *Code of Good Practice on Referendums*, above n 93, s II.7.

<sup>126</sup> Law on the Referendum on State-Legal Status of the Republic of Montenegro 2006, Official Gazette of the Republic of Montenegro, No 12/06, art 6.

<sup>127</sup> Vidmar, above n 73, at 271.

<sup>128</sup> Clarity Act, s 2(2)(a).

<sup>129</sup> Section 2(2)(b).

<sup>130</sup> Section 2(2)(c).

<sup>131</sup> Vidmar, above n 73, at 272.

<sup>132</sup> *Question of the future of Western Samoa* GA Res 1569, XV (1960) at [3].

<sup>133</sup> *Code of Good Practice on Referendums*, above n 93, at s II.1.d; *Tacna-Arica Question*, above n 96, at 945; *Py v France* (2006) 42 EHRR 26 (Section II, ECHR) at [45]–[52].

<sup>134</sup> *Gillot*, above n 91 at [12.2].

<sup>135</sup> *Py*, above n 133, at [64].

<sup>136</sup> *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR) at [74]–[75].

## 6 *The Role of States*

States should take a minimum role in referenda, in that they should not promote one agenda to the exclusion of another.<sup>137</sup> Although States can support one side of a proposition, such intervention cannot result in excessive, one-sided campaigning.<sup>138</sup> States remain obliged to inform voters of the effects of the various outcomes available.<sup>139</sup> The rationale underpinning this is that although law and politics are often intertwined,<sup>140</sup> referenda themselves should not be used as a “political weapon” by the State.<sup>141</sup>

Notably, both Irish and UK municipal law support this proposition. Under Irish law, the government is restricted, on the basis of equality, from providing a particular side of the issue with public funding.<sup>142</sup> There is also authority from the UK to the same effect.<sup>143</sup>

## 7 *International Observation*

International observation is crucial to ensure that the international community will accept the result of a referendum.<sup>144</sup> It was called for as a condition of a referendum in the context of Bosnia-Herzegovina, so that the free will of the peoples could be properly obtained.<sup>145</sup> Particularly in the context of a post-conflict society, international scrutiny adds to the legitimacy of the outcome of any referendum.<sup>146</sup> As with many of the other principles discussed thus far, part of the international rationale for the unlawfulness of the Crimean referendum was the lack of international observation of it.<sup>147</sup>

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<sup>137</sup> *Code of Good Practice on Referendums*, above n 93, s I22.a.iii.

<sup>138</sup> Section I.3.1.b; Peters, above n 60, at 298.

<sup>139</sup> *Code of Good Practice on Referendums*, above n 93, s I.3.1.c.

<sup>140</sup> *Reference re Quebec*, above n 35, at [1].

<sup>141</sup> *Impeachment of the President (Roh Moo-hyun) Case* (2004) 2004Hun-Na1, 16–1 KCCR 609 (Sth K Const C) at 173.

<sup>142</sup> *McKenna v An Taoiseach* [1995] 2 IR 10 (SC) at 41 per Hamilton CJ.

<sup>143</sup> See for example *Wilson v Independent Broadcasting Authority* 1979 SC 351 (OH).

<sup>144</sup> *Code of Good Practice on Referendums*, above n 93, s II.3.2.a; *Question of the future of Western Samoa*, above n 132, at [5].

<sup>145</sup> *Opinion No 4 on Recognition of Bosnia-Herzegovina*, above n 105, at 178.

<sup>146</sup> Peters, above n 60, at 298–299.

<sup>147</sup> *Security Council 7144th Meeting*, above n 108, at 7 per Mr Araud (France), at 16 per Ms Murmokaitė (Lithuania), at 17 per Ms Lucas (Luxembourg).

#### *IV Self-Determination Post-Belfast Agreement*

Thus far, the self-determination provisions of the Agreement have been outlined, as have key principles of the law of self-determination which will impact the exercise of the right under the Agreement. In combining these two sets of legal principles, the nature, extent and effects of self-determination in the all-Irish context can be established. In order to establish the nature of this right to self-determination, issues with the Belfast Agreement, and the mechanisms of the referendum under it, call for exploration.

##### *A Issues*

###### *1 Post-Conflict Society*

Northern Ireland is in a post-conflict period. This will present difficulties in the context of self-determination. The conflict was one of status,<sup>148</sup> and where in the global order Northern Ireland properly belonged. Although the Agreement contained provisions on the decommissioning of paramilitary organisations, and completely rejected the use of violence in all circumstances, sectarian violence has continued.<sup>149</sup> Tensions remain,<sup>150</sup> and unless peace and reconciliation measures are implemented, there remains a risk that the territory will enter into a state of conflict once more.<sup>151</sup>

Although any suggestion that Northern Ireland will enter into conflict again is speculative, it must be appreciated that this is a genuine risk, as evidenced by recent events. Following the emergence of evidence suggesting the Provisional Irish Republican Army (PIRA) had not fully decommissioned, the Ulster Unionist Party (UUP) accused Sinn Féin of being involved in the PIRA's continued existence.<sup>152</sup> Sinn Féin denied this,<sup>153</sup> and accused the

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<sup>148</sup> McKittrick and McVea, above n 2, at 1–2.

<sup>149</sup> William A Schabas and Peter G Fitzmaurice *Respect, Protect and Fulfil: A Human Rights-Based Approach to Peacebuilding and Reconciliation* (Border Action, Monaghan, 2007) at 12.

<sup>150</sup> At 12.

<sup>151</sup> At 13.

<sup>152</sup> Mike Nesbitt “Statement by Ulster Unionist Party Leader” (26 August 2015) Ulster Unionist Party <uup.org>; Tom Elliott and Danny Kinahan “Ulster Unionist MPs call on the Secretary of State to make statement in Parliament on status of PIRA” (27 August 2015) Ulster Unionist Party <uup.org>.

<sup>153</sup> Jonathan Bell “UUP to walk out of Northern Ireland Executive after ruling body endorses Mike Nesbitt proposal” (29 August 2015) <www.belfasttelegraph.co.uk>.

UUP of undermining the Agreement.<sup>154</sup> Further, the UUP has announced its intention to withdraw from the Northern Ireland Assembly, an institution set up by the Belfast Agreement.<sup>155</sup> This latest series of events highlights the fragility of peace in Northern Ireland. The ramifications of this series of events, particularly the UUP's withdrawal of support for an institute created by the Agreement, cannot yet be known. However, these recent events are concerning, and highlight the need for increased measures aimed at building and ensuring peace.

Given that the Troubles was a conflict concerning Northern Ireland's status, a referendum on this issue may trigger underlying tensions. A referendum in Northern Ireland would differ from most post-conflict referenda, wherein there is often an overwhelming majority in support of independence, or some form of constitutional collapse which makes secession the only viable option.<sup>156</sup> Likewise, Northern Ireland is contextually different from referenda in Scotland and Quebec, wherein the same background of sectarian conflict was absent.<sup>157</sup> There are, therefore, few useful precedents in addressing how to deal with the implementation of a self-determination referendum in a post-conflict society wherein the majority are not clearly in favour of secession.

To ensure that any future referendum is undertaken in peaceful conditions, as required by law,<sup>158</sup> it is crucial that measures are implemented in Northern Ireland to deal with the past. Not only is this crucial in a referendum context, but the resolving of these issues will go some way to ensuring a just and lasting peace, regardless of Northern Ireland's status. The failure of the UK government to prioritise addressing the past has drawn criticism from human rights proponents,<sup>159</sup> who have called for the establishment of appropriate mechanisms for addressing the past,<sup>160</sup> protecting human rights,<sup>161</sup> building peace,<sup>162</sup> and encouraging reconciliation.<sup>163</sup>

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<sup>154</sup> Conor Murphy "Nesbitt leading UUP on a road to no town" (28 August 2015) Sinn Féin <[www.sinnfein.ie](http://www.sinnfein.ie)>.

<sup>155</sup> Bell, above n 153.

<sup>156</sup> Vidmar, above n 73, at 273.

<sup>157</sup> At 273.

<sup>158</sup> Wambaugh, above n 81, at 241.

<sup>159</sup> Amnesty International *Northern Ireland: Time to Deal with the Past* (Amnesty International Ltd, London, 2013) at 5.

<sup>160</sup> At 59; Maguire, above n 8, at 571.

The implementation of appropriate mechanisms to deal with the controversies of the past is therefore crucial, not only in the context of self-determination, but to ensure a lasting peace. Contrary to recently expressed opinion that peace and reconciliation processes cannot occur “while Britain continues to occupy even one square [millimetre] of Ireland”,<sup>164</sup> peace and reconciliation are not dependent on a united Ireland, they are a prerequisite to it. To suggest that such processes cannot occur if Northern Ireland remains a part of the UK is irrational, particularly given the fact that there is no guarantee of the creation of a united Ireland, and given the fundamental obligation of States to ensure that their citizens live in peace. In implementing measures for adequately dealing with the past, the two governments will not only make significant progress to ensuring lasting peace, but, should the circumstances arise where a self-determination referendum is to occur, they will have gone a significant way to creating conditions wherein it can be undertaken in more just, equitable and peaceful conditions, regardless of the outcome.

## 2 *The Unit of Self-Determination*

The identification of the self-determination unit in the present case is a matter of great importance. Although the “people of the island of Ireland alone” have the right to bring about a united Ireland,<sup>165</sup> this cannot happen without the consent of the “people of Northern Ireland”.<sup>166</sup>

The “people of the island of Ireland alone” will include a population which is overwhelmingly in support of a united Ireland, as it includes persons from the Republic of Ireland. In recognising that the “people of the island of Ireland” may collectively bring about a united Ireland, the Agreement vests the right of external self-determination in this unit. The right to self-determination of people of the island of Ireland, however, is not absolute. Rather, it is inherently tied to the right of another self-determination unit, the people of Northern Ireland. Indeed, there will be cross-over between these two groups: a

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<sup>161</sup> Schabas and Fitzmaurice, above n 149, at 39.

<sup>162</sup> At 39–40.

<sup>163</sup> At 40–49; Maguire, above n 8, at 571.

<sup>164</sup> Francis Boyle *United Ireland, Human Rights and International Law* (Clarity Press, Atlanta, 2012) at 194.

<sup>165</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement*, at 479.

<sup>166</sup> British-Irish Agreement, art 1(i); *Multi-Party Agreement*, at 479.

person who is a person of Northern Ireland will also be a person of the island of Ireland, although the converse will not always be true.

In this regard, the Belfast Agreement differs from the general law of self-determination. In the context of external self-determination in the all-Irish context, the provisions of the Belfast Agreement with regards to who constitutes a self-determination unit are *lex specialis* provisions – that is to say that by their specificity, they take precedence over the general law of self-determination.<sup>167</sup> This means that in the Irish context, the right to external self-determination does not vest in nationalists or unionists per se. Rather it invests in them as a collective.

That said, the fact that the nationalist and unionist populations both have characteristics of a people in their own right<sup>168</sup> per the customary international legal definition<sup>169</sup> is significant. Although the Agreement's provisions are *lex specialis* with regards to external self-determination, customary international law will remain relevant for matters that are not covered by it.<sup>170</sup> The Agreement's provisions relate only to *external* self-determination. Therefore, for the purposes of the *internal* right to self-determination, the nationalist and unionist populations still constitute different peoples, as they would in customary international law.

The point is not of mere academic interest. As the right of internal self-determination grants a right to peoples to take an active part in the political life of the State and to be free from discrimination,<sup>171</sup> this means that unionists and nationalists, in their own right rather than as collective, must be granted these rights internally regardless of the status of Northern Ireland.

The right of self-determination in the Irish context, therefore, operates in two ways. The first means by which the right operates is externally. The people of the island of Ireland are entitled to form a united Ireland as a unit of self-determination, subject to the requirement that a majority of the people of Northern Ireland, being a subset of the people of the island

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<sup>167</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* [2006] vol 2, pt 2 YILC 175, conclusion 5.

<sup>168</sup> McKittrick and McVea, above n 2, at 1–2.

<sup>169</sup> *Reference re Quebec*, above n 35, at [125].

<sup>170</sup> *Fragmentation Study*, above n 167, conclusion 9.

<sup>171</sup> *Kosovo (Advisory Opinion)*, above n 47, at 621, at [9] per Judge Yusuf (separate opinion).

of Ireland, also share this wish. The second mechanism of operation is internal self-determination. Rather than attaching to the people of the island of Ireland, or Northern Ireland, it attaches to the nationalist and unionist populations. As such, although nationalists and unionists are entitled to customary legal protection of their right to internal self-determination, the right to external self-determination is vested in the people of Ireland and Northern Ireland, and is not delineated on the basis of traditional customary international law divisions.

## ***B Referendum Mechanisms***

The nature and extent of the right to self-determination under the Belfast Agreement can only be properly understood by examining the mechanisms of the referendum envisaged in the Agreement. The Agreement is largely silent on the mechanisms of the envisaged referendum. However, by reference to customary international law, a fuller understanding of the referendum processes can be established.

### *1 Pre-Referendum*

#### (a) Calling the referendum

The British-Irish Agreement itself is silent on when a referendum is to be held. This matter is provided for in the Northern Ireland Act, which implemented the Agreement into the UK's municipal law. The Act states that Northern Ireland is a part of the UK, and shall remain so unless a "poll" indicates that the majority of the people of Northern Ireland do not wish for it to remain so.<sup>172</sup> Such a poll, or referendum, is to be called by the Secretary of State. It *may* be called at any time,<sup>173</sup> but *must* be done if it appears "likely" that a majority of Northern Irish voters would vote in favour of a united Ireland.<sup>174</sup> As the Act implements the Belfast Agreement, the failure to call a referendum where it appears likely that a vote in favour of a united Ireland would result would be an internationally wrongful act for which State responsibility could be invoked, and an action for which remedies in judicial review would lie.<sup>175</sup> Should a referendum be called, and lead to a vote in favour of

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<sup>172</sup> Northern Ireland Act 1998, s 1.

<sup>173</sup> Schedule 1, cl 1.

<sup>174</sup> Schedule 1, cl 2.

<sup>175</sup> Richard Humphreys *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin, 2009) at 122.

retaining Northern Ireland's current status, another self-determination cannot be called until the passing of seven years.<sup>176</sup>

Neither the Act nor the Agreement contain an express obligation for the UK to consult with Ireland before calling a referendum. To not do so, however, would be unlawful. The Agreement requires that consent to form a united Ireland be "freely and concurrently given" on both sides of the border.<sup>177</sup> The implication of this is that the referendum must be held at the same time in both parts of Ireland. Given this, and the good faith obligations on the parties,<sup>178</sup> before the statutory power to call a referendum is exercised, negotiations with the Irish government must take place.

(b) Amending the Constitution of Ireland

Prior to the referendum, amendment to Irish constitutional law may be required. Any law which is inconsistent with the Irish constitution is invalid.<sup>179</sup> This may present difficulties in relation to the implementation of the Belfast Agreement in a united Ireland. Although the present study has focused mainly on the implementation of the Agreement's self-determination provisions, many other issues are addressed in the Agreement. Significantly, the *Multi-Party Agreement* contains provisions on an agreed, devolved governmental structure for Northern Ireland.<sup>180</sup> If, as it will be argued in section V, the Belfast Agreement would continue in force should a united Ireland be created, Ireland must allow regional government in Northern Ireland on these terms. Such a change will require change to the Irish constitution, which itself is only amendable by referendum.<sup>181</sup> This means that the changes to the constitution necessary to enable the continuation of the Northern Ireland government will need to be made either at the time of the self-determination referendum, or beforehand.

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<sup>176</sup> Northern Ireland Act, sch 1, cl 3.

<sup>177</sup> British-Irish Agreement, art 1(i); *Multi-Party Agreement*, at 479.

<sup>178</sup> *Tacna-Arica Question*, above n 96, at 933; *Reference re Quebec*, above n 35, at [91]; Vidmar, above n 73, at 263; Clarity Act, s 2(1); Cassese, above n 73, at 212.

<sup>179</sup> Bunreacht na hÉireann 1937 (Ire), art 15(4)(2) (translation: Constitution of Ireland).

<sup>180</sup> *Multi-Party Agreement*, at 483-488.

<sup>181</sup> Bunreacht na hÉireann, art 46(2).

To do so beforehand is preferable, as it means the terms on which the Northern Irish people would be accepted into a united Ireland would be made fully known to them.<sup>182</sup> This is in keeping with the State's obligation to ensure that voters are fully informed of the implication of the referendum results.<sup>183</sup> Furthermore, to change the constitution at the time of a self-determination referendum would be contrary to best practice, as it would mean that voters would be voting on multiple issues in one referendum,<sup>184</sup> and the requirement of clarity would be greatly undermined. As the Irish parliament is not competent to legislate in respect of Northern Ireland,<sup>185</sup> these amendments would have to be done on the basis that they would have no force unless Northern Ireland were to become a part of a united Ireland.

(c) Voter eligibility

With regards to voter eligibility, only restrictions with a valid reason may be placed on the right to vote.<sup>186</sup> Particularly, residency requirements would be both lawful<sup>187</sup> and advisable. The right to self-determination is not vested in the inhabitants of the island of Ireland, but in the *people*.<sup>188</sup> The implication of this is that those who are entitled to vote are those who can demonstrate a permanent connection with the island of Ireland, not merely presence there, or even British or Irish citizenship. As such, imposing a restriction so that persons who are eligible to vote are only those who have resided on the island of Ireland for a time agreed by both States is a legitimate objective, so as to protect the interests of the identified self-determination units.

Even within the island of Ireland, restrictions on voter eligibility on the basis of residency will mitigate the risk, however marginal it may be, that the Northern Irish vote could be affected by nationalist migration to the North. Given the openness of the Irish border, there is a, albeit rather minimal, risk that persons of more extreme political views will attempt to

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<sup>182</sup> Humphreys, above n 175, at 84–85.

<sup>183</sup> *Code of Good Practice on Referendums*, above n 93, s I.3.1.c.

<sup>184</sup> *Re New Caledonia Consultation Law*, above n 121, at 21–22; *Venice Commission Crimea Referendum Opinion*, above n 106, at [22].

<sup>185</sup> Bunreacht na hÉireann, art 3(1).

<sup>186</sup> *Hirst (No 2)*, above n 136, at [74]–[75].

<sup>187</sup> *Code of Good Practice on Referendums*, above n 93, at s I11.d; *Tacna-Arica Question*, above n 96, at 945; *Py*, above n 133, at [45]–[52].

<sup>188</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement*, at 479.

affect referendum results by casting their vote on the opposing side of the border. This history of political tension is a sufficient local circumstance<sup>189</sup> to justify the imposition of an ordinary residence requirement, so that a person who has been residing in either Ireland or the North for an agreed period of time will have their vote counted in that territory, regardless of which side of the border they are on come polling day.

(d) The required threshold

As to the imposition of a threshold which must be met to ensure territorial change, a simple majority threshold is appropriate. Although State practice does not set a defined threshold which must be met,<sup>190</sup> thresholds of more than a mere majority are permissible,<sup>191</sup> although not advisable.<sup>192</sup> However, the Agreement, and the Northern Ireland Act, are not silent on the threshold which must be met: both state that territorial change will occur if a “majority” of voters favour it.<sup>193</sup> This shows that it is envisaged in the Agreement that a simple majority of the Northern and Republic votes would be a sufficient indication of the free will of the people so as to change Northern Ireland’s status. The imposition of a higher threshold, as occurred in Montenegro,<sup>194</sup> would be contrary to the Agreement.

(e) The question

Finally, the question must also be determined. In order to meet the requirements of clarity and unambiguity,<sup>195</sup> the question posed on both sides of the border should be identical. As the Scottish referendum question<sup>196</sup> was so “exemplary in its clarity”,<sup>197</sup> it is proposed that the Scottish question be adapted so as to fit the Irish context, the suggested question being “Should Northern Ireland form part of a united Ireland?”

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<sup>189</sup> Py, above n 133, at [64].

<sup>190</sup> Vidmar, above n 73, at 271.

<sup>191</sup> Law on the Referendum on State-Legal Status of the Republic of Montenegro, art 6.

<sup>192</sup> *Code of Good Practice on Referendums*, above n 93, s II.7.

<sup>193</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement*, at 479; Northern Ireland Act, s 1(2).

<sup>194</sup> Law on the Referendum on State-Legal Status of the Republic of Montenegro, art 6.

<sup>195</sup> *Reference re Quebec*, above n 35, at [87]; *Code of Good Practice on Referendums*, above n 93, s III.2.

<sup>196</sup> Scottish Independence Referendum Act, s 1(2).

<sup>197</sup> Vidmar, above n 73, at 227.

## 2 *The Referendum*

Two key issues will need to be addressed in relation to the actual referendum process: the first being the role of the States; the second the role of international observation.

### (a) The role of the States

States should generally restrain from excessively campaigning for one outcome in a referendum.<sup>198</sup> The UK has stated that it has “no selfish strategic or economic interest in Northern Ireland”,<sup>199</sup> and the Agreement states in terms that it is for the “people of the island of Ireland alone... without external impediment” to determine Northern Ireland’s status.<sup>200</sup> The implication of this is that both States should refrain from excessive campaigning in favour of one result or the other.

However, the role of Ireland is more complex. Although the UK has declared it has no interest in Northern Ireland’s status,<sup>201</sup> Ireland has historically pursued a claim to it, in both the international<sup>202</sup> and municipal spheres.<sup>203</sup> These claims, rather than being political, were legal. There was a “constitutional imperative” to seek unification.<sup>204</sup> Although Ireland’s constitution was amended under the *Multi-Party Agreement* so as to not make such claims,<sup>205</sup> it has been argued that the constitutional imperative to seek unification remains.<sup>206</sup> Were this the case, the Irish government’s role during the referendum would be mandated by this constitutional imperative, as well as international law.

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<sup>198</sup> *Code of Good Practice on Referendums*, above n 93, at s 122.a.iii; *McKenna*, above n 142, at 41 per Hamilton CJ; *Wilson*, above n 143.

<sup>199</sup> Albert Reynolds (Taoiseach, Republic of Ireland) and John Major (Prime Minister, United Kingdom) *Joint Declaration on Peace* (1993) at [4].

<sup>200</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement*, at 479.

<sup>201</sup> *Joint Declaration on Peace*, above n 199, at [4].

<sup>202</sup> *United Nations Security Council: Fifteen Hundred and Third Meeting* UN SCOR, 24th Year, 1503rd Meeting, S/PV.1503 (1969) at [25] per Mr P Hillery (Ireland).

<sup>203</sup> Bunreacht na hÉireann, art 2 (as enacted).

<sup>204</sup> *Russell v Fanning* [1988] IR 505 (SC) at 537 per Hederman J; *McGimpsey v Ireland* [1990] 1 IR 110 (SC) at 119 per Finlay CJ.

<sup>205</sup> *Multi-Party Agreement* at 481; Nineteenth Amendment to the Constitution Act 1998 (Ire), sch, cl 7(3).

<sup>206</sup> Rory Brady “Foreword” in Richard Humphreys *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin, 2009) xi at xi–xii.

However, this proposition cannot be sustained. The Agreement specifically vests the future of the territory in the hands of the people,<sup>207</sup> not in either State. On a constitutional level, the Irish people are the source from whom the State's power is derived, and it is the people's right "to decide all questions of national policy",<sup>208</sup> not the right of the State. Taken together, these provisions imply that Ireland has not only withdrawn her legal claim of right to the North, but also that she is no longer under a constitutional imperative to seek unification. To hold otherwise would be to use any referendum as a political instrument, which would be impermissible<sup>209</sup> and contrary to good faith.

(b) International observation

The second key issue to be resolved is the role of international observation. Northern Ireland has been beseeched by conflict for most of its existence. Tensions and distrust remain high within the territory.<sup>210</sup> Given this, impartial international observation and monitoring, conducted by either the EU or United Nations, will help to ensure the results are open, free and trusted.<sup>211</sup>

## V *Post-Referendum*

There are three possible results to any self-determination in Ireland: first, a majority in Northern Ireland vote for the retention of Northern Ireland's current status; second, the island of Ireland is divided, in that the Northern Irish majority supports a united Ireland, whereas Republic voters do not; and third, a majority on both sides of the border vote in favour of a united Ireland. Each of these possible outcomes has different legal ramifications. In other words, the effects of Irish self-determination depends on the outcome of any future referendum.

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<sup>207</sup> British-Irish Agreement, art 1(ii); *Multi-Party Agreement*, at 479.

<sup>208</sup> Bunreacht na hÉireann, art 6(1).

<sup>209</sup> *Impeachment Case*, above n 141, at 173.

<sup>210</sup> Schabas and Fitzmaurice, above n 149, at 12.

<sup>211</sup> Peters, above n 60, at 298–299.

## **A A United Kingdom**

Should a majority vote to retain ties with the UK, there shall be no change in the status of Northern Ireland.<sup>212</sup> This does not mean, however, that the obligations to respect the right to self-determination will cease. The unionist and nationalist populations remain ‘people’ entitled to the customary protections of internal self-determination. The UK remains under an obligation to respect this right, which encompasses the pursuit of political participation within the State.<sup>213</sup>

In Northern Ireland, internal self-determination is crucial. Although Northern Ireland is not a colony in a legal sense, the nationalist population within the territory have still experienced many of the negative effects traditionally associated with colonialism, such as marginalisation, discrimination, cultural alienation and social disadvantage.<sup>214</sup> Whilst the devolved government now in place in Northern Ireland goes a long way to remedy this,<sup>215</sup> it is crucial that the right to internal self-determination continues to play a role in government and discourse.

## **B A Divided Ireland**

If the Republic votes in favour of unity, but the North does not, there shall be no change in Northern Ireland’s status.<sup>216</sup> The same is true in the unlikely event that Northern Ireland supports a united Ireland, but the Irish electorate does not. The right to external self-determination in the Agreement is limited to a right to retain the status quo or form a united Ireland. Solutions such as independence or joint sovereignty are indirectly ruled out.<sup>217</sup> Such a result is not unprecedented. In the *Northern Cameroons* case, the International Court of Justice observed that where a referendum envisages only two

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<sup>212</sup> British-Irish Agreement, arts 1(i) and 1(v); *Multi-Party Agreement* at 479.

<sup>213</sup> *Reference re Quebec*, above n 35, at [126]; Charlesworth, above n 60, at 84; *Kosovo (Advisory Opinion)*, above n 47, at 621, [9] per Judge Yusuf (separate opinion).

<sup>214</sup> Maguire, above n 8, at 555–557; Grote, above n 11, at [13].

<sup>215</sup> *Multi-Party Agreement*, at 483–488; Northern Ireland Act.

<sup>216</sup> British-Irish Agreement, art 1(iii); *Multi-Party Agreement* at 479.

<sup>217</sup> Humphreys, above n 175, at 108; Bell and Cavanaugh, above n 7, at 1357.

possible results, with there having been no prior discussion of a third possible outcome, it is “indisputable” that third options cannot be achieved.<sup>218</sup>

### *C A United Ireland*

The effects of a vote in favour of a united Ireland, on the other hand, are more complex. In this case, both governments are obliged to introduce legislation to enable a united Ireland.<sup>219</sup> Should the people of the island of Ireland vote for this option, many issues of law will arise.

#### *1 Statehood*

One of the key areas of concern in the exercise of external self-determination is the effects this has on international legal personality. In the context of the 2014 Scottish referendum, major scholarship was done on this matter.<sup>220</sup>

Fortunately, such issues are simpler to resolve in relation to Ireland. Whereas the Scottish referendum concerned State creation,<sup>221</sup> the Belfast Agreement concerns the transfer of territory from one State to another. This means that issues of personality are unlikely to arise. Mere territorial change does not affect the international personality of States,<sup>222</sup> a point relevantly demonstrated by the fact that Ireland’s independence did not change the UK’s international status.<sup>223</sup>

#### *2 International Organisations*

The continuing international personality of both States means that membership of international organisations, such as the UN, will be unaffected. Likewise, EU rights and obligations will continue unimpeded. The EU does not define the scope of a State’s

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<sup>218</sup> *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15 at 28–29.

<sup>219</sup> British-Irish Agreement, art 1(iv); *Multi-Party Agreement* at 479.

<sup>220</sup> See for example James Crawford and Alan Boyle “Annex A Opinion: Referendum on the Independence of Scotland - International Law Aspects” in *Scotland analysis: Devolution and the implications of Scottish independence* (Her Majesty’s Stationery Office, 2013) 64.

<sup>221</sup> At [1].

<sup>222</sup> At [53].

<sup>223</sup> At [65]–[66].

territory.<sup>224</sup> Although the EU is a “new legal order of international law”,<sup>225</sup> it remains bound by custom,<sup>226</sup> under which the Statehood of both Ireland and the UK would continue.<sup>227</sup> Therefore, provided the proposed referendum on continued UK membership in the EU<sup>228</sup> does not result in withdrawal, the exercise of self-determination will not cause difficulties as to EU rights and obligations.

### 3 *The Continuation of the Agreement*

Of major significance is the effect that the creation of a united Ireland would have on the continuity of the Belfast Agreement. There are contending views on this matter. On one hand, the Agreement has been described as a transitional, rather than final, settlement,<sup>229</sup> the implication being that the Agreement would not continue post-unity. On the other hand, it has also been argued that the Agreement’s provisions will continue indefinitely.<sup>230</sup> The resolution of this issue is of crucial importance. If the Agreement would continue in force, the obligations of the Irish State would include a continuation, in some form or another, of the Agreement’s devolved government structure.

The Agreement would remain in force in a united Ireland. There is no sunset clause in the Agreement, and the plain wording of the text implies that it is intended to continue regardless of the North’s territorial status. The Agreement states that “whatever choice is freely exercised by a majority of the people of Northern Ireland”, government there is obliged to exercise jurisdiction impartially.<sup>231</sup> This creates an obligation that is clearly intended to continue even in the event of a united Ireland. This intent is also shown through the fact that the Agreement confers on the people of Northern Ireland a right to

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<sup>224</sup> Case 148/77 *Hansen v Hauptzollamt (Principal Customs Office) Flensburg* [1978] ECR 1787 at 1805; Crawford and Boyle, above n 220, at [159].

<sup>225</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 at 12.

<sup>226</sup> Case C-162/96 *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655 at [51]–[52]; Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-1375 at [107].

<sup>227</sup> Crawford and Boyle, above n 220, at [53].

<sup>228</sup> European Union Referendum Bill 2015 (HC Bill 6) (UK), cl 1.

<sup>229</sup> Maguire, above n 8, at 567.

<sup>230</sup> Humphreys, above n 175, at 84–85.

<sup>231</sup> British-Irish Agreement, art 1(v); *Multi-Party Agreement*, at 479.

Irish and British identity and citizenship, regardless of the North's status.<sup>232</sup> As such, unless the parties agree to terminate the Agreement by consent,<sup>233</sup> the Agreement would remain in force.

#### 4 *State Restructuring*

The fact that the Agreement will continue in force means that there would be an obligation on Ireland to continue a regional government, for her sovereignty over her territory would be limited by the treaty.<sup>234</sup> Scholars have proposed that a federal Northern Irish State within a united Ireland would be an appropriate solution to alleviate concerns about power imbalances.<sup>235</sup> If the Agreement would continue in force, a devolved regime of this manner is not merely good policy, but legally imperative.<sup>236</sup>

Even if the Agreement does not continue, or is terminated, a federal Northern Irish State is an appropriate means by which to protect internal self-determination. The regional distribution of governmental power in federal systems<sup>237</sup> means that the right to internal self-determination can be readily fulfilled within them.<sup>238</sup> As federal systems encourage greater participation in government decisions within minority populations,<sup>239</sup> such an approach would have significant merit in a united Ireland.

#### 5 *Continued UK Involvement*

Should a united Ireland eventuate, this does not mean that the role of the UK in the North will cease. It will be continued in at least two ways, both of which will ensure that the interests of unionists are aptly protected.

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<sup>232</sup> British-Irish Agreement, art 1(vi); *Multi-Party Agreement*, at 479.

<sup>233</sup> Vienna Convention on the Law of Treaties, art 54.

<sup>234</sup> *Lake Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101 (Arbitral Tribunal) at 120; *The Iron Rhine ("Ijzeren Rijn") Railway (Kingdom of Belgium v Kingdom of the Netherlands) (Award)* (2005) 27 RIAA 35 at [54].

<sup>235</sup> Humphreys, above n 175, at 86.

<sup>236</sup> At 84–86.

<sup>237</sup> Brian R Opeskin "International Law and Federal States" in Brian R Opeskin and Donald R Rothwell (eds) *International Law and Australian Federalism* (Melbourne University Press, Carlton South, 1997) 1 at 1–2.

<sup>238</sup> Thüerer and Burri, above n 52, at [38].

<sup>239</sup> Opeskin, above n 237, at 4–5.

First, the Agreement creates cross-border bodies and forums, which allow the discussion of matters of mutual concern.<sup>240</sup> As the Agreement will continue in force, these entities, too, will continue to exist.

Second, the people of Northern Ireland will remain entitled to British citizenship.<sup>241</sup> States have a right to invoke the responsibility of another State for wrongful acts done to one of their nationals.<sup>242</sup> Theoretically, the UK could therefore invoke the responsibility of Ireland for any violations of the right to self-determination, or other fundamental rights, of unionists therein.

The difficulty with this is that the people of Northern Ireland are dual nationals. A State may invoke diplomatic protection against another State of nationality only where the former State is the State of predominant nationality.<sup>243</sup> There is no set criteria for what determines the predominant nationality, the assessment is largely circumstantial.<sup>244</sup>

Even if it could not be shown that a person is predominantly of British nationality, the role that inter-State applications before the Strasbourg Court have played in allowing diplomatic protection of a form must be noted. When it was alleged that the UK was torturing nationalist prisoners, Ireland brought a case before the Court, and had some limited success in holding the UK accountable.<sup>245</sup> As withheld evidence emerged, the matter will be reheard in Strasbourg, again on Ireland's initiative,<sup>246</sup> thus indicating that mechanisms of some effect for State accountability do exist.

Where a right to diplomatic protection exists, there is also a common law duty on the Crown to exercise it in certain circumstances. Although there is no international obligation to pursue diplomatic protection,<sup>247</sup> the Crown owes a duty of protection to its citizens,<sup>248</sup> from which stems an obligation on the Crown to consider undertaking diplomatic

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<sup>240</sup> British-Irish Agreement, art 2.

<sup>241</sup> British-Irish Agreement, art 1(vi); *Multi-Party Agreement*, at 479.

<sup>242</sup> *Draft Articles on Diplomatic Protection* [2006] vol 2, pt II YILC 23, arts 1-2.

<sup>243</sup> Article 7.

<sup>244</sup> Article 7, commentary at [5].

<sup>245</sup> *Ireland v United Kingdom* (1978) 2 EHRR 25 (ECHR) at [174].

<sup>246</sup> Charlie Flanagan "Statement by Minister Flanagan on the 'Hooded Men' case" (2 December 2014) An Roinn Gnóthaí Eachtracha agus Trádála (Department of Foreign Affairs and Trade) <[www.dfa.ie](http://www.dfa.ie)>.

<sup>247</sup> Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014), at [9.09].

<sup>248</sup> At [9.19].

protection,<sup>249</sup> enforceable by judicial review.<sup>250</sup> That said, the executive retains a high degree of discretion as to the exercise or non-exercise of diplomatic protection.<sup>251</sup>

## VI *The Wider Implications of the Belfast Agreement*

The discussion of the Belfast Agreement thus far has focused on the interpretation of the Agreement in light of the general law of self-determination. However, the Agreement, as a piece of State practice, may also impact the general law of self-determination.

It is oft-stated that Northern Ireland is exceptional. Although this argument has been convincingly rejected,<sup>252</sup> there remains an exceptional innovation within the Agreement, in its mixing of international and constitutional law, so as to accommodate two competing self-determination goals.<sup>253</sup>

Particularly innovative is the role that various actors have had, and will have, under the Agreement. To date, State practice has recognised that there is an obligation for States to enter into good faith negotiations with each other with regards to referenda in territories over which they both have a claim.<sup>254</sup> Customary international law also establishes an obligation on States to enter into negotiations with a territory wishing to become independent.<sup>255</sup> The Belfast Agreement, however, was reached by a mixture of both of these. The right to self-determination truly was given to the people, as it was the people themselves who determined the scope of their right, with the consent of both States. By recognising the legitimacy of nationalist and unionist aspirations, and forfeiting any vested interests in Northern Ireland, the UK and Ireland have created a settlement to a long and bitter conflict. Whilst the peace is uneasy and imperfect, few would deny that it is an

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<sup>249</sup> *Regina (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2000] EWCA Civ 1598, (2002) 126 ILR 685 at [106].

<sup>250</sup> McLachlan, above n 247, at [9.81].

<sup>251</sup> At [9.85].

<sup>252</sup> See generally Brian M Walker “The Case against Northern Ireland Exceptionalism: the ‘Academy’, Religion and Politics” in John Wolffe (ed) *Irish Religious Conflict in Comparative Perspective: Catholics, Protestants and Muslims* (Palgrave Macmillan, Hampshire, 2014) 93.

<sup>253</sup> Grote, above n 11, at [43].

<sup>254</sup> *Tacna-Arica Question*, above n 96, at 933.

<sup>255</sup> *Reference re Quebec*, above n 35, at [91]; Vidmar, above n 73, at 263; Clarity Act, s 2(1); Cassese, above n 73, at 212.

improvement to the conflict years. Should this approach be adopted elsewhere, it could have a significant impact on the way in which self-determination is realised in post-conflict contexts.

Secession movements remain prevalent around the world, the Crimean crisis being the obvious example. Aside from the flaws in the Crimean referendum which have been already been noted, a comparison of the Belfast and Crimean mechanisms highlights the merits of the Belfast approach to self-determination. At a basic level, the two situations have similarities: two neighbouring States with historic and present interests in a territory, in which there are competing nationalist and unionist movements. Had the two governments involved in Crimea, particularly Russia, followed the approach adopted under the Belfast Agreement, the free will of the territory's people, on which Russia placed so much importance,<sup>256</sup> could have been properly obtained.

Given the reluctance of States to forfeit their territorial integrity, to expect such a result is idealistic. However, if States are prepared to do so, the people truly become the "masters of the country",<sup>257</sup> and the people "determine the destiny of the territory",<sup>258</sup> rather than having their destiny determined by it. The Belfast Agreement is a testament to this.

## *VII Conclusion*

The Belfast Agreement is outstanding for having ushered in a new era of peace in Northern Ireland. Although recent events have highlighted the fragility of this peace,<sup>259</sup> the Agreement has survived such difficulties before. Provided the parties recall their firm commitment to non-violence, and are resolved to act in good faith towards each other, such difficulties can undoubtedly be overcome again.

Through its provisions on self-determination, the Agreement recognises the legitimacy of conflicting aspirations as to Northern Ireland's status. Although ambiguous in parts, the Agreement, being a creature of the law, must be interpreted in light of it, which enables the resolution of any issues which may arise.

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<sup>256</sup> *Security Council 7134th Meeting*, above n 108, at 16 per Mr Churkin (Russian Federation); *Security Council 7144th Meeting*, above n 108, at 8 per Mr Churkin (Russian Federation).

<sup>257</sup> *South-North Joint Declaration*, above n 69, at [1].

<sup>258</sup> *Western Sahara*, above n 43, at 114 per Judge Dillard (separate opinion).

<sup>259</sup> Murphy, above n 154; Bell, above n 153; Elliott and Kinahan, above n 152.

Although the Belfast Agreement has made significant advances in the context of Irish self-determination, its innovative approach is also more widely significant. The Agreement stands testimony to what may be achieved when States forfeit their interests, and work alongside, not against, conflicting self-determination aspirations. Far from being applicable merely in Ireland, the principles and mechanisms underpinning the Agreement serve as a model by which secessionist disputes may be resolved in post-conflict territories. The Agreement, therefore, will remain significant in the future, whether or not a future referendum results in a united Ireland.

### *VIII Word Count*

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,956 words.

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