

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

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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).<sup>1</sup>

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<sup>2</sup> 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.

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<sup>1</sup> See also article 4(1) of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

<sup>2</sup> 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](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9122A30ADD637E495DCEBF99AEAB1F33/S0020589320000032a.pdf/renaissance_of_the_doctrine_of_rebus_sic_stantibus.pdf)).



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.<sup>4</sup>

## 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.