A Reply

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A REPLY

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To have been treated with such dignity by Fionnuala Ní Aoláin and Christopher McCrudden is an honour. It is also a relief to survive the scrutiny of two distinguished professors of law with no overt suggestion that I have made a legal error—an assessment on which I cannot rely without taking counsel.

Ní Aoláin's snapshot history of the international law on territorial integrity and self-determination is fluent and compelling. The biases she identifies have a source: states, generally spelled with a small 's' in political science, make international law; and we still call the most powerful states the 'great powers'—not the great guardians, let alone the great judges—because it is difficult to bind them by law. Upon becoming members of the club of states at the United Nations, nouveaux governments resist what they now deem the quasi-anarchic doctrine of self-determination. On its face, that doctrine would allow peoples to identify themselves as constitutive legal subjects, and to determine whether they are currently subject to colonial rule, alien occupation, or a racist regime, findings which would not only make peaceful resistance lawful, but also armed resistance—and which would oblige international assistance for their cause. The 'house-training' of self-determination—so that the right of 'external self-determination' applies solely, and just once, to the whole people in places named as a colony of a European empire *c.* 1948, or to non-white people under apartheid, or to a people under illegal military occupation—is a judicial accomplishment, mightily encouraged by the sovereign governments of the world. Handled by prudent judges, self-determination has generally become the (unenforceable) right to have a democratic government that respects human rights. A right of secession

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exists only if the state being questioned acknowledges that right, in its constitution or law; the abuser, in short, determines if the abused can break their tacit contract to be united in perpetuity with their government.

This short story is among the reasons why international law has rarely dramatically aided the resolution of deep national, ethnic, racial, religious or linguistic conflicts. It is especially silent or partisan before rivalrous peoples' claims to self-determination. But international law is not inconsequential. The making and the breaking of treaties matter; and international human rights standards matter. When political agreements, with self-determination components, are made by governments then their protection by treaty may provide some insurance that the pledges will be enforced, especially if dispute-resolution mechanisms are agreed. International bills of rights, or subsets thereof, may also be useful resources when remaking states with fresh constitutional settlements or new power-sharing bargains.

The medieval world was reminded of the Psalm that advised 'Put not your trust in princes.' In our world, national, ethnic, racial, religious or linguistic minorities have to be instructed 'Put not your trust in international law.' Government lawyers exist in abundance to advise on how to bypass or break a treaty—'necessity' and 'proportionality' will do a lot of work. Judges, especially those sitting on international human rights courts, may misunderstand constitutional settlements, especially consociational power-sharing bargains, partly because they are too focused on individuals, and may not recognise that corporate rights and corporate bodies may be essential to achieve good power-sharing—and democratic government.[1] The point is that so far international law has not been made for the likes of Northern Ireland as Ní Aoláin knows.

McCrudden, by contrast, raises the important question of the interpretation of the Good Friday Agreement, especially its future interpretation. Having spent many words on this subject, including in replies and rebuttals, I will not make the mistake of suggesting that any of my reading(s) is correct, or has been universally agreed,[2] even among political scientists. Perhaps we can agree that the biggest practical difference over the interpretation of the Agreement, in the long-run, is not among lawyers, political scientists,

[1] That is among the arguments advanced in Christopher McCrudden and Brendan O'Leary, *Courts and consociations: human rights versus power-sharing* (Oxford, 2013).

[2] Most recently in Brendan O'Leary, *A treatise on Northern Ireland: consociation and confederation. From antagonism to accommodation?* (III Vols. Vol. III. Oxford, 2019). For engagements with my work with John McGarry see Rupert Taylor (ed.), *Consociational theory: McGarry and O'Leary and the Northern Ireland conflict* (London, 2009).

or historians over textual hermeneutics. It is over whether the Agreement has a telos. Is it permanent—a settlement within Northern Ireland, which is institutionally linked to Ireland, or is it transitional—paving the way for the reunification of Ireland? Or does it allow both readings to be right until one is proven wrong by referendum(s)? Only time and political contestation will tell. The second biggest interpretive question that may be deeply consequential is whether the Agreement obliges a minimal or maximal transfer of its own securities and institutions if future referendums favour reunification. Legally, I believe the answer is clear. Subject to future negotiations, rigorously impartial government, and the protection of all the rights provided for in the Agreement, including British citizenship rights, are obliged to be carried forward into any model of a reunified Ireland. But, by contrast, the permanent territorial existence of Northern Ireland, and/or its domestic consociational arrangements, are not constitutionally or legally binding on any future united Ireland—though Ireland may choose to make them so through future constitutional amendment or replacement.

The title of one of my compositions summarises my approach, namely, 'Complex power-sharing in and over Northern Ireland: a self-determination agreement, a treaty, a consociation, a federacy, matching confederal institutions, inter-governmentalism and a peace process'.[3] Given the space available I cannot elaborate all these headings, but I shall pick out the most neglected, 'federacy,' in my response to McCrudden, because I think it will be the more pertinent in the period ahead—in which I have called for preparation for a referendum, especially in the south. A federacy is a constitutional autonomy arrangement in which the Union government is constitutionally, and also perhaps by treaty, bound in a manner in which it is not bound by its devolved, regional or local governments, all of which it may unilaterally reshape by statute. The distinguishing trait of a federacy is that any change to the autonomy of the federacy requires bilateral consent: the agreement of those in the federacy assembly and in the Union parliament. In short, the relationship of the Union government and the autonomous government becomes 'federal' in nature. Optimistically, in 1998–99, I read the Good Friday Agreement as making Northern Ireland a federacy—even though the word cannot be found

[3] In Marc Weller, Barbara Metzger and Niall Johnson (eds), *Settling self-determination disputes: complex power-sharing in theory and practice* (Leiden and Boston, 2008), 61–124.

in the text of the Agreement.[4] I argued that British pledges in the Agreement, and in the 1999 treaty incorporating it, and in the Joint Declaration for Peace (1993) and in the Framework Documents (1995), meant that the Westminster government had bound itself to respect all the institutions and rights provisions in the Agreement, endorsed in two referendums, north and south, as exercises of Irish self-determination. This reading was shattered when in 2000 Peter Mandelson successfully passed an act, without the consent of the Northern Ireland Assembly, and against the wishes of the Irish government, breaking the recent treaty with Ireland, suspending the Northern institutions and the north-south bodies. He pled necessity.[5] In the St Andrews Agreement of 2006 this suspension power was deleted, but, as we all know, no Westminster Parliament can bind its successor. Though no one may have overtly intended to make a federacy in 1998 I had argued that it was latent and partly manifest in the Agreement, expecting the protection by treaty to do the needful.

In the new world initiated by the UK's secession from the European Union this interpretive argument can be revived, but with a twist. The UK Supreme Court failed to protect the Good Friday Agreement in a crucial test in the *Miller* case. The UK's secession from the EU took place against the wishes of a majority of those voting in Northern Ireland, without the consent of the Northern Ireland Assembly, and in clear tension with the text of the 1998 Agreement and the treaty protecting it, which both presumed that the UK and Ireland were and would be partners in the European Union. It also took place without respecting the Sewel convention even though that convention had been put into statute form. The UK Supreme Court supervised the UK's planned exit from the EU in only one regard: only Parliament, not her Majesty's Government, could take away or modify rights.[6] Once again, it looked as if the federacy idea was dead at the hands of the sovereignty of the mother of parliaments. But, as we all now know, the 'Protocol' agreed between the UK and the European Union is a binding part of the UK's withdrawal treaty with its former European partners, whether or not a trade agreement is reached between them. That Protocol formally pledges support for the Good Friday Agreement in all its parts. It brings in Europe

[4] Brendan O'Leary, 'The nature of the Agreement', *Fordham Journal of International Law* 22 (4) (April 1999), 1628–67.

[5] The Government of Ireland did not recognise the lawfulness of the suspension.

[6] Christopher McCrudden and Daniel Halberstam, '*Miller* and Northern Ireland: a critical constitutional response', *Michigan Law: Public Law and Legal Theory Research Paper Series, Paper 575* (October 2017), also published in the UK Supreme Court Yearbook, Volume 8.

to rebalance British-Irish relations, that is to say, it brings in a confederated great power to balance against an old imperial power. The enforcement of the Protocol and the functioning of its dispute resolution mechanisms will tell us whether Northern Ireland has become a federacy, at least for a while, and in due course the Northern Ireland Assembly will decide on whether to continue it.[7] That Assembly decision will be about many things, power, ideology, trade and commerce, and national identity, but it will also be about whether Northern Ireland is to remain a federacy pending future referendums which will decide whether Ireland will be reunified. If the Protocol makes Northern Ireland function as a federacy it will be because the EU, with Ireland as a member state in good standing, is more powerful than the UK, and therefore more likely to get its treaties respected.

Read Brendan O'Leary's article, 'Getting Ready:
The Need to Prepare for a Referendum on Reunification'
https://doi.org/10.3318/ISIA.2021.32b.1
and the responses by Christopher McCrudden,
https://doi.org/10.3318/ISIA.2021.32b.2
and Fionnuala Ní Aoláin
https://doi.org/10.3318/ISIA.2021.32b.3

[7] John McGarry and Brendan O'Leary, 'Matters of consent: the withdrawal agreement does not violate the Good Friday Agreement', *LSE: British Politics & Policy*, 28 October 2019, available at: https://blogs.lse.ac.uk/politicsandpolicy/brexit-good-friday-agreement/ (5 December 2020).