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A RESPONSE TO 'GETTING READY', BY BRENDAN O'LEARY

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I have lived in important places, times
When great events were decided; who owned
That half a rood of rock, a no-man's land[1]

Borders are notoriously tricky things. They have long been the object of dispute, negotiation and interpretation by international law. In responding to Professor O'Leary's provocative and timely article I reflect on what international law and the prior practice of states has to tell us about the sanctity of borders and the means to plan for their dissolution. Despite decades of decolonisation, formal affirmation of the right to self-determination in international treaty law, recognition of indigenous claims over territories, and acknowledgment of the harms following territorial conquest without meaningful consent of the governed, borders remain trenchantly immovable in international law theory and practice.

[1] Patrick Kavanagh, 'Epic'.

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The doctrine of *uti possidetis, ita possidetis*[2] is one of the more insidious leftovers of bygone colonial eras that has managed to embed itself firmly as a pre-eminent doctrine of international law, affirming the sanctity of existing borders even when unjustly drawn or inconsistent with other competing values of international law.[3] In a sorry series of cases adjudicated by the International Court of Justice, disputing the validity of primarily colonial borders, the Court has consistently sided with the existing certainty of borders, upholding the existing sovereignty of the state which has held territory continuously, even if the means of possession raise uncomfortable questions about the tolerance for acquisition through brute force or subjugation. In parallel, states have assiduously clung onto doctrines of territorial integrity, repudiated and fought against secession,[4] and the principle of self-determination, while rhetorically lauded,[5] is in practice relegated to the sidelines of state support whenever it inconveniently manifests itself. This short tour of trenchant opposition to boundary reversals underscores an essential point about the elusive nature of contemporary practice on sovereignty and border shifts with a couple of notable exceptions.[6]

In this band of exceptions,[7] the inexorable lean of the Good Friday Agreement presses towards adjudication of borders with a meaningful spectre of merger with the Republic of Ireland in sight.[8] O'Leary encourages sufficiency in planning, a position I share given the long and doleful histories of the failures to anticipate territorial changes and the consequences that can be fateful in economic, political and social terms. I underscore the extent to which the shift in territorial affiliation, territorial boundaries and sovereignty is exceptional in international law practice, and the pull is against such changes as anchored by law, political power, and the fear of unintended consequences. Equally, recognising that international law has, in parallel, affirmed the right to political participation by individuals as an obligation of

[2] 'You may keep what you had', *Frontier Dispute Case* (Burkina Faso/Republic of Mali, 1986), 554 and 565.

[3] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994); See Gino Naldi, 'The Aouzou Strip dispute: a legal analysis', *Journal of African Law* 1 (33) (1989), 72–77.

[4] Aland Island Case (1920) L.N.O.J. Spec. Supp. No. 3; Reference Re Secession of Quebec [1998] 2 SCR 217.

[5] General Assembly Resolution 1514 (XV), 14 December 1960.

[6] See e.g. Czechoslovakia, or Czecho-Slovakia, a sovereign Central-European state which existed from October 1918, when it declared its independence from the Austro-Hungarian Empire, until its peaceful dissolution into the Czech Republic and Slovakia on 1 January 1993.

[7] The Berlin Wall fell in November 1989, and less than a year later, a treaty was signed that formally united the German Democratic Republic (GDR) with the Federal Republic.

[8] Merger is a particular species of state formation. See James Crawford, *The creation of states in international law* (Oxford, 1979), 290–95.

international human rights, the very fact of a referendum creates the means by which standing equilibriums favouring existing borders and state sovereignties are moved and shifted. These are shifted by the obligations to enforce the treaty agreement which mandates ascertaining the views of the governed on the political status of the territory in which they live. This may in fact be one of the most significant and revolutionary clauses of the Agreement, one in which the individual lies at the core of the bargain between states and not merely subject to it. Thus 'planning' which, in O'Leary's analysis, is broadly framed as a concern of two acerbic neighbouring islands, instead has much broader implications for dispute settlement on borders and undoing the habit of forceful acquisition by states. In tandem, if the revolutionary heart of the Agreement lies in its 'power to the people' clause,[9] the implications for peoples wishing to exercise their right to self-determine (however that lands) in other places will not be lost in other roods of rock in other parts of the world.

Read Brendan O'Leary,
'Getting Ready: The Need to Prepare for a
Referendum on Reunification',
https://doi.org/10.3318/ISIA.2021.32b.1
and the response by Christopher McCrudden,
'The Hermeneutics of the Good Friday Agreement'
https://doi.org/10.3318/ISIA.2021.32b.2
and the reply by O'Leary,
https://doi.org/10.3318/ISIA.2021.32b.4

[9] The Northern Ireland Act 1998 translates the requirement to Statute setting out that 'if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland', the secretary of state shall make an Order in Council enabling a border poll.