Brexit and the changing international and domestic perspectives of sovereignty over Northern Ireland

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ABSTRACT

This article argues that the recognition of sovereignty over Northern Ireland, internationally, and within Ireland, has shifted in the aftermath of the 2016 Brexit referendum. The framework that governs this relationship between Ireland, the UK and Northern Ireland was redefined with the signing of the Good Friday Agreement (GFA) in 1998. In the altered political circumstances of the Brexit negotiations, this redefinition has produced unanticipated consequences. First, it underpinned the high level of support given to the Irish government and to the provisions of the GFA by the EU as an institution, and by EU member states, manifested in the refusal of the EU to negotiate a land border on the island of Ireland. For the UK this was an unforeseen outcome as its negotiation strategy was based on the EU prioritising the importance of accessing the UK economy over Irish claims under the GFA. Second, the undermining of the political stability and relative consensus created by the GFA has led to a new discourse on Irish unity across the island of Ireland, including on the potential shape of a new Ireland. This is visible in the mainstream media, on social media and in the findings of opinion polls. Whether or not these changes will lead to a united Ireland in the short term is uncertain, but the manner in which the sovereignty of the UK over Northern Ireland is recognised has already undergone a fundamental shift, internationally and within Ireland.

INTRODUCTION

One consequence of the 2016 referendum in the UK on membership of the European Union and the subsequent negotiation process has been a significant shift in discourse on Irish unity in the two jurisdictions on the island of Ireland. This change has been visible in the mainstream media, on social media and in the findings of opinion polls. This shift has been driven by the undermining of the status quo that the Good Friday Agreement embodied, and by the perceived damage that the re-imposition of a land border on the island would do to the economy north and south. The tangible negative impacts which have shaped this debate have been re-inforced by a shift in the way in which sovereignty over Northern Ireland is recognised internationally. This is demonstrated by the EU's collective opposition to a negotiated deal that included the imposition of a land border on the island of Ireland, based on its support for the provisions of the GFA. The question of sovereignty over Northern Ireland, and the nature of that sovereignty, has been fundamental to Ireland's relationship with Northern Ireland and with the UK government since the partition of the island in 1920. Until the signing of the Good Friday Agreement in 1998, the Irish government faced an international consensus that the UK government was the sovereign power in Northern Ireland and that the Irish government had no role in the territory. As an international treaty, the Good Friday Agreement redefined this relationship, however, the full significance of this redefinition only became apparent during the period of negotiations between the UK and the EU that followed the Brexit referendum.

This article analyses the changes in perspectives on the nature of sovereignty over Northern Ireland, in terms of the UK as the sovereign power and the right of the Irish government and citizens of Northern Ireland under the GFA, in the context of the debate on the UK's withdrawal from the European Union. It discusses the way in which the Brexit negotiations were shaped by the question of an Irish land border, and how this aspect of the negotiations elucidates the changes in the way in which the overlapping dimensions of sovereignty in relation to Northern Ireland were recognised internationally. The article then focuses on the impact of the fallout from the Brexit referendum on public opinion and public debate on the island of Ireland on the question of Irish unity. But, firstly, the article looks at the changing discourse on sovereignty and recognition from the foundation of the Irish state to the signing of the GFA, to contextualise the significance of the events following the 2016 referendum and the novelty, in terms of Anglo-Irish relations, of the current situation.

PERCEPTIONS OF SOVEREIGNTY BEFORE AND AFTER THE GOOD FRIDAY AGREEMENT

In the decades that followed independence, the Irish state unilaterally strengthened its own sovereignty and also looked for international recognition of its sovereign status, seeking to overturn the limitations of the 1921 Anglo Irish Treaty and Free State Constitution that established the state.[1] This assertion of independence from the influence of Britain included the abolition of the Oath of Allegiance to the British monarchy in 1933, and the post of Governor General (the British monarch's representative) in 1936 followed by the adoption of a new Constitution in 1937, which asserted that the name of the state was Ireland.[2] The Irish state received international recognition of its status as a fully independent state though its membership of international organisations such as the League of Nations in 1923, the Council of Europe in 1949 (which it joined as a founding state), and the United Nations in 1955. At the same time, Ireland also sought international recognition for its claim that the partition of the island was illegal, that it was carried out against the will of the majority of the population of the island.[3] This was part of Ireland's assertion of the right to sovereignty over Northern Ireland, which had been enshrined as a territorial claim in the 1937 Constitution. Ireland's repeated attempts to raise partition, bilaterally with individual states, or in the League of Nations and the Council of Europe, and also later in the United Nations, received almost no international support.[4] UK sovereignty over Northern Ireland was fully recognised, the Irish state was not able to re-open this question diplomatically.

This meant that at the beginning of the modern conflict at the end of the 1960s, British sovereignty in Northern Ireland was undisputed. Consequently, in the first three years of the conflict when there was a high level of deaths and the displacement of thousands of families, the Irish government could not get support from either the UN or the USA for international action to maintain peace and help resolve the conflict.[5] At this point the Northern Ireland conflict was internationally considered to be the UK's internal problem. In 1973, at the height of the Troubles, and in the context of the negotiation of the Sunningdale Agreement, the UK and Ireland joined the EU on the basis of their existing borders.[6] The Sunningdale Agreement was an attempt to respond to the civil

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[1]Donnacha Ó Beacháin, *From partition to Brexit: the Irish government and Northern Ireland* (Manchester, 2018).

[2]Ó Beacháin, *From partition to Brexit*.

[3]Ó Beacháin, *From partition to Brexit*.

[4]Michael Kennedy and Eunan O'Halpin, *Ireland and the Council of Europe: from isolation towards integration* (Strasbourg, 2000), 41–2; Michael Kennedy, '"This tragic and most intractable problem": the reaction of the Department of External Affairs to the outbreak of the Troubles in Northern Ireland', *Irish Studies in International Affairs* 12 (2001), 87–95.

[5]Daniel C. Williamson, *Anglo-Irish Relations in the Early Troubles 1969–1972* (London, 2017).

[6]For full text of the Sunningdale Agreement, see: http://cain.ulst.ac.uk/events/sunningdale/agreement.htm (2 December 2019).

rights movement, the collapse of the Stormont administration and the emerging conflict. It established a power-sharing government between nationalists in the Social Democratic and Labour Party (SDLP), unionists from the Ulster Unionist Party and the Alliance Party. The agreement also gave a consultative role to the Irish government though an all-island Council of Ireland and in return for this the Irish government declared that it accepted 'that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status', while the British government agreed to respect any future decision on the status of the territory.[7] The settlement was ultimately opposed by the majority of the unionist population, and collapsed by the end of May 1974, in the face of the ongoing unionist protests culminating in a general strike. Even after the collapse of this initiative, the UK successfully resisted any significant international intervention either in the form of UN peacekeepers or external mediation.[8] Despite pressure for action from Irish American lobby groups, the US government declined to intervene in the Northern conflict, and consistently prioritised its relationship with its closest NATO ally.[9]

The British government did face international criticism in non-governmental fora. The most significant being a campaign in the USA in the 1980s, in support of the MacBride Principles. These 'Nine Principles' were an attempt to use the financial weight of large pension funds to force companies in Northern Ireland to adhere to fair employment practices and end the discrimination against nationalists. In the USA, 19 US state assemblies, over 40 City Councils and a number of influential charities, passed resolutions requiring their pension funds to ensure that they did not invest in any companies operating in Northern Ireland that did not practice 'fair employment', leading to the introduction of new legislation by the UK government to monitor discrimination in employment.[10] There was also some pressure from the European parliament, following representations by Irish nationalists, leading to a fact-finding study visit to Northern Ireland by MEPs in 1983. The UK refused to cooperate with the MEPs and strongly condemned the visit as interference in the UK's internal affairs. The final report from this initiative was mild in its criticisms, calling for the establishment of joint British-Irish responsibilities in a number of fields, 'politically, legally and otherwise', as a way of removing the underlying reasons for the conflict.[11] This initiative and other European Parliament resolutions on

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[7]The Sunningdale Agreement, para 5.
[8]Adrian Guelke, *Northern Ireland: the international perspective* (Dublin, 1988); Joseph Ruane and Jennifer Todd, *The dynamics of conflict in Northern Ireland, power, conflict and emancipation* (Cambridge, 1996).
[9]Sean Cronin, *Washington's Irish policy: independence, partition, neutrality* (Dublin, 1987).
[10]John Doyle, 'Workers and outlaws: unionism and fair employment in Northern Ireland', *Irish Political Studies* 9 (1994), 41–60.
[11]Nils Haagerup, 'Report drawn up on behalf of the Political Affairs Committee on the situation in Northern Ireland', European Parliament Working Document 1-1526/83, 9 March 1984.

human rights in Northern Ireland in the 1980s had no impact on the actions of the UK government, but they did increase Ireland's international status vis-a-vis the UK, strengthening Ireland's claim for a formal role in Northern Ireland.[12]

In the 1980s, at the time of these initiatives, the idea of an internationally brokered solution to the Northern Ireland conflict did not seem possible. Relations between the Irish and British governments became closer than they had been, in the context of EEC / EU membership, but neither this improved relationship or the process of increased European integration in the 1980s and 1990s weakened the negative impact of the Irish border on the island as a whole. As a security barrier the border deterred the movement of people and the development of economic relations between the two parts of the island.[13] This situation only changed when the radical shift in the international environment that followed the end of the Cold War created the conditions for a potentially successful peace process.[14] This new context, together with a number of key factors, including a change in leadership in the UK and USA, facilitated the pursuit of a negotiated settlement.[15] The result was the first IRA ceasefire in 1994 and the tortuous process towards an agreement in 1998.

The 1998 Good Friday Agreement created a framework that recognised the de facto bi-national character of Northern Ireland.[16] At the time it was debated whether or not the ultimate achievement of the Agreement was to cement the Britishness of Northern Ireland, as the Irish people voted to remove the territorial claim from the Irish Constitution. Alternatively, it was claimed that the Britishness of Northern Ireland had been undermined, as the Agreement recognised the rights to an Irish identity for the nationalist population and also that the Irish government had a formal role in protecting the interests of that community. As the success of the Agreement rested on its creative ambiguity and the ongoing process of negotiation on core issues of conflict, such as policing and disarmament, which it put in place, its long-term implications at this stage were not clear. However, the UK government, under the terms of the Good Friday Agreement, formally accepted that Northern Ireland's place within the UK rested on the desire of a majority of the population. If, in the future, there was evidence that a majority in Northern Ireland wanted to 'form part of a united

[12]Guelke, *Northern Ireland*, 161.

[13]IBEC-CBI Joint Business Council, Position Paper on Strand Two of the Belfast Agreement (North/South Ministerial Council) (Dublin and Belfast, 1989).

[14]Michael Cox, 'Northern Ireland: the war that came in from the cold', *Irish Studies in International Affairs* 9 (1998), 73–84.

[15]Eileen Connolly and John Doyle, 'Ripe moments for exiting political violence: an analysis of the Northern Ireland case', *Irish Studies in International Affairs* 26 (2015), 147–62.

[16]John Doyle, '"Towards a lasting peace?": the Northern Ireland multi-party agreement, referendum and Assembly elections of 1998', *Scottish Affairs* 25 (1998), 1–20; John Doyle, 'Governance and citizenship in contested states: the Northern Ireland peace agreement as internationalised governance', *Irish Studies in International Affairs* 10 (1999), 201–19.

Ireland', the British government committed to holding a referendum[17] and in the event of a vote for Irish unity to legislate for a united Ireland.[18] The Irish government, and the Irish nationalist community in Northern Ireland, retained the political objective of Irish unity, but recognised this required the consent of a majority of voters in Northern Ireland. Irish nationalists recognised that the fluidity of the Agreement on the ultimate end point is central to its success, as it has allowed both unionists and nationalists to work within its framework.[19]

The peace process was facilitated by the integration of the Irish state and the UK in the EU, including the open borders and cross-border co-operation which is part of that wider EU integration process. Although as an institution the EU had not played a substantial role during the conflict nor been involved in the peace negotiations,[20] the structural organisation of the EU and its policy framework was essential to the operation of the GFA, as it underpinned all aspects of cross-border co-operation. The EU recognised and also financially supported the peace process and peace agreement, giving ongoing support to post-conflict reconstruction, reconciliation and cross-border initiatives. As a result of this ongoing process the level of economic and social integration between the two parts of the island was positively transformed in terms of economic integration, the rationalisation of some public services and crucially the free movement of people.

NEGOTIATING THE BREXIT WITHDRAWAL AGREEMENT—THE CHANGING INTERNATIONAL DIMENSION OF SOVEREIGNTY

In the 2016 UK referendum on Brexit, Northern Ireland voted to remain in the EU with 56% voting against Brexit. The division on Brexit reflected the political division between Unionists and Nationalists, while voters from the 'middle ground' also voted for continued membership of the EU.[21] This voting behaviour aligns with the positions of the Northern Ireland political parties. The two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), supported continued EU membership, as did the centrist Alliance Party. The major unionist party, the Democratic Unionist Party (DUP), campaigned to leave. The Ulster Unionist Party officially supported 'remain' but a majority of its supporters voted to leave and the party changed its leader and its policy position after the referendum.

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[17]Good Friday Agreement (1998) Annex A.
[18]Good Friday Agreement (1998) Annex A.
[19]Jennifer Todd, *Identity change after conflict ethnicity, boundaries and belonging in the two Irelands* (London, 2018).
[20]Adrian Guelke, *Northern Ireland*; John Doyle, 'The European Union and conflict resolution', in Rajendra K. Jain (ed.), *India, Europe and conflict resolution in South Asia* (New Delhi, 2015), 28–48.
[21]John Garry, 'The EU referendum vote in Northern Ireland: implications for our understanding of citizens' political views and behaviour' (2016), Northern Ireland Assembly Knowledge Exchange Seminar Series, 2.

While the referendum campaign in Northern Ireland was dominated by discussion on the economic implications for a fragile post-conflict economy, the loss of the open land border on the island and the impact on the peace process; in the rest of the UK the Irish border was hardly discussed during the referendum campaign, nor did it feature in the initial post-referendum statements of the UK government.[22] A major speech by Prime Minister Theresa May in January 2017 referred to the relationship between the UK and Ireland but only as a commitment to 'the maintenance of the Common Travel Area with the Republic'.[23] The UK government made it clear that they wished to leave both the EU single market and the customs union, and ruled out free movement of labour with the EU. The UK's Article 50 letter of March 2017, which triggered the two-year negotiation period, underlined the conflicting aims of the UK government. The letter stated that the UK wanted to 'avoid a return to a hard border' on the island of Ireland and to ensure that the peace process was not jeopardised.[24] The prime minister also strongly stated that a hard border between Northern Ireland and the rest of the UK was 'unacceptable'.[25] Even at this early stage in negotiations this position was contradictory as it was clear that in the event of Brexit a hard border would be required either between the north and south of Ireland, or in the event of Northern Ireland being given a special status, between Northern Ireland and the rest of the UK.[26]

Given the contradictions in the UK government's position, the nature of the border on the island of Ireland become the major issue which prevented an agreement between the UK and the EU that was acceptable to both sides. It was clear from the start of the process that unless there were special provisions for Northern Ireland, if the UK left both the customs union and single market, this would inevitably result in a closed border on the island of Ireland. Alternatives to a customs border were proposed, for example, drawing on the way in which the EU treats the island of Cyprus, where flexible rules are applied that allow goods from the Turkish Cypriot part of the island to enter the EU as EU goods.[27] While the Cypriot border remains closed for political reasons, the same legal

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[22]Gerard McCann and Paul Hainsworth, 'Brexit and Northern Ireland: the 2016 referendum on the United Kingdom's membership of the European Union', *Irish Political Studies* 32 (2) (2017), 327–42.

[23]Speech by Theresa May, Lancaster House, 17 January 2017: https://www.independent.ie/business/brexit/theresa-mays-brexit-speech-in-full-35374214.html (2 December 2019).

[24]See: https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50 (2 December 2019)

[25]Theresa May's speech on future UK-EU relations, 2 March 2018, see: https://www.bbc.com/news/uk-politics-43256183 (2 December 2019).

[26]Peter Sutherland, former director of the World Trade Organisation, *Irish Times*, 2 September 2016; Michael Barnier, EU chief negotiator with the United Kingdom, in a speech to the Irish Oireachtas (parliament), 11 May 2017 said 'Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards', see: https://static.rasset.ie/documents/news/michel-barnier-address-to-the-oireachtas.pdf (2 December 2019).

[27]Nikos Skoutaris, *From Britain and Ireland to Cyprus: accommodating 'divided islands' in the EU political and legal order* (European University Institute, Academy of European Law AEL 2016/ 02, 2016), see: http://cadmus.eui.eu/ bitstream/ handle/ 1814/ 42484/ AEL_ 2016_ 02.pdf?sequence=1 (2 December 2019).

flexibility in Ireland could have allowed an open border—but only with special provisions for Northern Ireland. In the Brexit discussions the solution that received the most attention involved either the whole of the UK remaining in the single market (for a limited time period) or Northern Ireland only remaining in the single market, with a de facto customs and regulatory border on the Irish Sea, between Northern Ireland and Britain. The 'Irish Sea' solution proposed a unique economic status for Northern Ireland in relation to the EU which was different to the rest of the UK, but which would not alter the current position where the territory is part of the UK sovereign state. Given the very small scale of the private sector in Northern Ireland and the importance of the peace process, an agreement to leave the land border open and keep regulatory checks to the sea and air crossings of the Irish Sea was acceptable to both the EU Commission and EU member states and it would also not be subject to a WTO challenge.[28] The idea of an Irish Sea border was acceptable to the nationalist parties in Northern Ireland, and the Irish government. However, this solution was vehemently opposed by the Democratic Unionist Party and hard-line supporters of Brexit in the British Conservative Party, as they believed it would create a symbolic barrier between Northern Ireland and the rest of Britain and consequently weaken British sovereignty.

The Irish government had from September 2016 lobbied intensely on the negative impact that a post-Brexit hard border would have on Ireland and on the Northern Ireland 'peace process'.[29] The Irish government and Irish nationalists in Northern Ireland feared that the declared UK position would lead to a closed border and the weakening of the cross-border institutions that facilitated economic and social integration. The Irish government also feared that the combination of the disruption to the slowly emerging post-conflict, all-island economic integration[30] and the loss of EU subsidies[31] would have a significant impact on the economy of Northern Ireland which might have serious consequences for political stability. It was also feared that if custom posts and security installations were built on the border, they would be used by groups who have opposed

[28]Federico Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford, 2017).

[29]See formal Government of Ireland press release on Brexit strategy, 2 May 2017, referencing as priorities, the land-border, the Common Travel Area with the UK and the peace process (para 2). See: http://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_Statement_on_Brexit_Preparations.html (2 December 2019); see also European Council statement on Article 50 negotiation guidelines, 29 April 2017, which also include references to these three issues, see: http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/ (2 December 2019).

[30]Northern Ireland is more reliant on the EU as an export market than the rest of the UK and will be more affected by a withdrawal from the EU and from the single market. The Republic of Ireland is Northern Ireland's largest single destination for exports, accounting for 21% of all exports and 37% of EU exports. UK Parliament, Northern Ireland Affairs Committee, 'Northern Ireland and the EU referendum' (2016).

[31]Direct EU funding, including subsidies from the Common Agricultural Policy and the designated Peace Funds, was equivalent to approximately 8.4% of Northern Ireland's GDP, in the period 2007 to 2013. Leslie Budd, 'The consequences for the Northern Ireland economy from a United Kingdom exit from the European Union', Briefing note: Committee for Enterprise, Trade and Investment (The Open University, 2015).

the peace process, as a strong mobilisation tool, seeking to collapse the peace process in its entirety. For Irish nationalists, a hard border would symbolise the collapse of the peace process and would be seen to mark an end to a process of gradual reform and integration. For unionists it would strengthen demands to abandon the reform process embedded in the Good Friday Agreement and in particular its North-South dimension. The EU's initial response reflected the case made by the Irish government, when on 29 April 2017 the European Council agreed that the EU's article 50 negotiation guidelines would include the Irish border question as one of three key issues to be addressed in the initial phase of negotiations. [32]

These guidelines defined the phased nature of the EU's approach to the negotiations, with a requirement to finalise the Withdrawal Agreement before any discussion on the future EU-UK relationship. This meant that there had to be substantial progress on the arrangement to avoid a hard border on the island of Ireland before the negotiations could move to the framework of future EU-UK relations.[33] The EU also expressed concerns about the impact of Brexit on Northern Ireland: its negotiation directives published on 22 May 2017 explicitly stated that nothing in the final agreement with the UK should 'undermine the objectives and commitments set out in the Good Friday Agreement' and that negotiations should 'in particular aim to avoid the creation of a hard border on the island of Ireland', while respecting the Union's legal order.[34] The position of the Irish government was also strengthened by the formal decision of the European Council that in the event of a future vote in favour of Irish unity, Northern Ireland would be deemed to be automatically within the EU, without the need for a Treaty agreement or a vote of other members.[35] The UK government was surprised at these decisions and was even more surprised that both the EU negotiation team and the wider EU27 remained united on this issue even when the talks became difficult.[36]

Theresa May in a bid to secure a larger majority for her negotiation strategy with the European Union called a general election in June 2017. However, the result weakened her position as the British Conservatives failed to secure a majority in the new parliament and in order to form a government, they reached an agreement with Northern Ireland's Democratic Unionist Party (DUP) who

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[32]Council of The European Union, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, published 22 May 2017, see: https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en (2 December 2019).

[33]Etain Tannam, *Brexit and the British-Irish Relationship, DCU Brexit Institute Working Paper* (Dublin, 2018), see: http://dcubrexitinstitute.eu/2018/01/brexit-and-british-irish-relationship/.

[34]Council of The European Union, 'Directives for the negotiation of an agreement', para 14.

[35]European Parliament, Outcome of the special European Council (Article 50) meeting of 29 April 2017, see: http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS_ATA(2017)603226_EN.pdf (2 December 2019).

[36]See: https://www.rte.ie/news/2017/0428/871185-brexit-northern-ireland-eu/ (2 December 2019).

committed to voting with the government. This gave the DUP a privileged position in Downing Street and a disproportionate influence on the Brexit negotiations. Given the lack of clarity in the UK's position the EU proposed to postpone a decision on the precise solution to the Irish border question, while at the same time legally committing both sides to keep the border open. This commitment to keep the Irish land border open, regardless of what future relationship the UK had with the single market, was agreed between the EU and the UK negotiators and became known as the 'Irish back-stop'. Initially the EU wanted this to only apply to Northern Ireland, but in order to reach a draft agreement reluctantly extended it to the entire UK, at the suggestion of the British government. As a result, the draft withdrawal agreement, finalised in November 2018, included a lengthy Protocol on Northern Ireland, to avoid a hard border on the island of Ireland. [37] If no long-term trade deal has been agreed by the end of 2020 (or by the end of the agreed extension period), then a backstop consisting of 'a single customs territory between the (European) Union and the United Kingdom' would be triggered. In this case Northern Ireland would remain aligned with the rules and regulations of the EU single market, even if the regulatory framework in place in the rest of the UK deviated from that of the EU, in order to avoid regulatory checks on the Irish border. In these circumstances checks on Irish Sea crossings, in addition to those already in place regarding animal and plant health and safety, could be required if the rest of the UK was not conforming to the rules of the single market. Either side could request a review of the backstop, but it requires a joint decision of both the UK and the EU to end it.

The 'Irish back stop' solution was opposed by hard-line pro-Brexit leaders in the Conservative government as it would prevent the UK from leaving the customs union if it applied to all the UK, and they saw it as an infringement of the UK's sovereignty and territorial integrity if it applied only to Northern Ireland. As a result, the agreement was defeated in the UK parliament on 15 January 2019. Following this parliamentary defeat, the British government adopted a position of refusing to agree to any deal that included a special status for Northern Ireland in the context of Brexit, leading to a further parliamentary rejection of the withdrawal agreement on 12 March 2019. The support given to the Irish government's position by the other EU member states and the mechanism to avoid a hard border drew intense criticism from pro-Brexit MPs, who made the special 'backstop' arrangement for Northern Ireland, and its implications for the rest of the UK, the focus of their attacks on the prime minister's negotiating position and on the draft agreement.

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[37]European Union (2018), see: https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en (2 December 2019).

When the UK parliament failed in early 2019 to approve the withdrawal agreement, or any other approach to managing their withdrawal, the EU and the Irish government re-affirmed that an open Irish border was not negotiable, with Michel Barnier saying that the

> backstop is currently the only solution we have found to maintain the status quo on the island of Ireland…Let me be very clear. We would not discuss anything with the UK until there is an agreement for Ireland and Northern Ireland.[38]

The EU also insisted that even in the event of 'no deal', the question of Northern Ireland would be reflected in EU terms for any future trade agreement. These views were also reflected in the US, where the Speaker of the House of Representatives, Nancy Pelosi said in a speech to the Irish parliament that 'if the Brexit deal undermines the Good Friday accords there will be no chance of a US-UK trade agreement' and she repeated this view in August 2019.[39] European media, reflecting the turmoil in the UK political system, reported the British debate in increasingly negative terms with words like 'madness', 'crisis' and 'uncertainty' being used in normally sober and conservative newspapers.[40] The failed attempt by new British Prime Minister Boris Johnston in autumn 2019 to secure parliamentary support for an agreement that moved back to a Northern Ireland only backstop did little to enhance Britain's image in Europe.

In the debate on the question of the Irish border there was a conflict between a traditional model of UK territorial sovereignty, in which only the UK government had the right to determine the future relationship of Northern Ireland to the EU and to the Irish state, and that of the EU, which rested on an international treaty (the GFA) between the UK and another EU member state. The EU drew on that treaty to justify its negotiating position with regard to the question of the Irish border. From this position the UK's assertion that its sovereignty would be weakened by the Irish backstop solution was countered by the EU with the argument that Ireland and Irish citizens in Northern Ireland had a right to have the terms of the GFA honoured. It was on this basis that the EU supported the Irish government's perspective. This is a very significant shift in international attitudes to Northern Ireland from the position that existed prior to the GFA. This change was not internalised or understood within the British political establishment, which was unprepared for the EU's attitude and consistently underestimated the EU's resilience on this point.

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[38] *Guardian*, 8 April 2019, see: https://www.theguardian.com/world/2019/apr/08/barnier-eu-support-backstop-ireland-no-deal-brexit (2 December 2019).

[39] *Financial Times*, 17 April 2019; *Irish Times*, 14 August 2019.

[40] See for example summaries of major European newspapers' coverage in the *Guardian* on 28 and 30 March 2019, https://www.theguardian.com/politics/2019/mar/28/european-press-view-on-brexit and https://www.theguardian.com/politics/2019/mar/30/from-shock-to-shrugs-europes-press-react-to-third-brexit-deal-defeat (2 December 2019).

THE BREXIT REFERENDUM AND ITS IMPACT ON OPINIONS ON IRISH UNITY

The second impact of Brexit on the recognition of sovereignty rights over Northern Ireland was seen in the changed perceptions of the public in both parts of the island, with the referendum debate and subsequent negotiations igniting a debate on the future of the island and on reunification.

As a result of the Northern Ireland Assembly elections of March 2017, for the first time since partition there was a representative Assembly in Northern Ireland which did not contain a majority of members who could be described as unequivocally unionist, that is, those committed in every circumstance to Northern Ireland remaining in the United Kingdom. In the election, only 45% of the population voted for traditional unionist parties; 40% voted for parties committed to Irish unity, with 15% voting for smaller parties and independents, many of them defining themselves as 'cross community', or campaigning on 'anti-economic austerity' or the environment.[41] This result is also driven by the on-going demographic trends, where the nationalist community is rising as a proportion of the total population.[42]

The fact that less than 50% of the population voted for parties for whom opposition to Irish unity is a core policy is a significant symbolic and practical change, especially in the context of the post-referendum debates. The significance of the election result is supported by evidence from opinion polls. In the aftermath of Brexit, a number of polls indicated, the Irish nationalist population in Northern Ireland facing Brexit and the possibility of border controls has become both more unified and more militant in its views. Polling data on support for a United Ireland is very sensitive to the precise wording of the questions, to the methodology and to the political context at time of polling. The post-referendum polls, however, show Irish nationalists willing to positively support a referendum on Irish unity, marking a distinct break with previous polling trends. In the aftermath of the Good Friday Agreement, opinion polls suggested that many Irish nationalists in Northern Ireland were content with the evolving status quo. They were not seeking a border poll in the short term and would not vote for unity if such a referendum was held.[43] In response to a 2002 opinion poll, which asked respondents how they would vote if a referendum was held 'tomorrow', only 58% of Catholics said they would vote yes, 20% would vote no and the rest were either undecided or did not reply. In the same poll, only 3% of Protestants and 18% of those who did not identify with either of the main religious communities said they would vote for unity 'tomorrow'. By comparison,

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[41]Éamon Phoenix, 'Unionism shocked to the core', *Irish News*, 6 March 2017.
[42]Northern Ireland Executive (2017), Statistical Labour Force Survey Religion Report 2015 (Belfast, 2017).
[43]See for example NI Life and Times 2002 poll, https://www.ark.ac.uk/nilt/2002/Political_Attitudes/REFUNIFY.html and Colin Irwin, *The people's peace process in Northern Ireland* (London, 2002).

following the Brexit referendum a December 2018 poll found that 35% of nationalists wanted a border poll to be held in 2019, 79% wanted one within 5 years, and 89% wanted a poll within 10 years.[44] In the same survey, 93% of nationalists said they would vote to leave the UK, and a further 5% of nationalists 'probably would', if the poll was held in 2019, in the context of a 'no deal' Brexit.[45] In another opinion poll in January 2019, 94% of nationalists, 32% of unionists, and 71% of 'others' thought Brexit would make a united Ireland 'more likely in the next 10 years'.[46] A poll in March 2019, which framed the question differently, asking for opinion on a border referendum to be held 'now' and without mentioning Brexit or a hard border in the question, also recorded increased support for a poll among nationalists and a large number of 'don't knows', in particular among those not identifying as either Catholic or Protestant.[47] The poll asked respondents to identify as Catholic, Protestant or other, rather than using the political terms nationalist and unionist which are considered to reflect voting intentions more accurately. With these qualifications—which would be expected to reduce the percentage of those indicating support for Irish unity—of those self-defining as 'Catholic', 58% would vote for unity 'now', 18% would vote against, with 23% undecided. While 75% of self-defining Protestants would vote no, 9% would vote yes and 16% were undecided. A third poll in September 2019 confirms a very significant shift in opinion—regardless of polling methodology employed.[48] In that poll, 45% of respondents said they would vote to stay in the UK, and 46% said they would choose to leave and join the Republic of Ireland—a lead of 51% to 49% for Irish unification when 'don't knows' and those who say they would not vote are excluded. While within the margin of error, the political impact of a serious poll showing that Northern Ireland public opinion was so finely balanced marked a watershed.

A common trend in these polls is that nationalist opinion is shown to have become more united. In the September 2019 poll 98% of nationalists say they would vote for unity if a poll was held 'tomorrow'—and in this survey there is no mention of hard Brexit in the question wording. Of self-declared 'unionists' 5% also said they would vote for Irish unity, with 6% saying they were uncertain. Reflecting the importance of demographic trends, a clear majority of those under 45 years of age would vote for Irish unity, as would 60% of those in the 18 to 24 age group. The over-65 age group was the only cohort with a clear pro-UK majority (55% to 34%). Although not all polls allowed respondents to self-declare as 'neither' nationalist or unionist, there is evidence that a majority

[44]*Lucid Talk*, Tracker polling in Northern Ireland, 2018, see: https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018; https://docs.wixstatic.com/ugd/024943_b89b42d-32364461298ba5fe7867d82e1.pdf (2 December 2019).

[45]*Lucid Talk*, https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf.

[46]*Lucid Talk*, https://docs.wixstatic.com/ugd/024943_b195541bffa647a7882be133023ff803.pdf.

[47]*Irish Times*, 7 March 2019.

[48]See: https://lordashcroftpolls.com/2019/09/my-northern-ireland-survey-finds-the-union-on-a-knife-edge/.

of the centrist 15% of the population in Northern Ireland who do not vote for mainstream Unionist or Irish nationalist parties would, in the context of a 'hard' or 'no-deal' Brexit, shift their support from the status quo within the UK and would in those circumstances consider voting for Irish unity in order to stay in the EU.[49] In 2018, 37% of 'others' in Northern Ireland wanted a border poll within 5 years, with 68% wanting this within 10 years. If there was no deal, 70% of such voters said they were certain or likely to vote for Irish unity, whereas if Brexit did not proceed their responses moved to 'uncertain' or 'probably remain in the UK'.[50]

Opinion poll data on attitudes in Northern Ireland to a 'Northern Ireland-only backstop' proposal (with checks on the Irish Sea crossing), reflected the 2016 referendum result. In June 2019, 58.4% of respondents said they would support a Northern Ireland-only backstop, with Northern Ireland more closely aligned with the EU than the rest of the UK.[51] Broken down by party support, a Northern Ireland backstop and checks in the Irish Sea were supported by 98% of supporters of the two major Irish nationalist parties, Sinn Féin and the SDLP, 89% of Alliance Party voters, 86% of Green Party voters, 27% of Ulster Unionist voters, and 5% of DUP voters. By self-defined community membership, this represented approximately 93% of self-defined Irish nationalists, 20% of self-defined unionists, and 71% of those who do not self-define as nationalist or unionist. In the September 2019 Ashcroft poll, 60% of respondents, including 96% of nationalists and 21% of unionists, supported a Northern Ireland only backstop over leaving with 'no deal'. This pattern of Irish nationalists and 'others' strongly supporting a Northern Ireland backstop largely reflects the breakdown of the 2016 referendum vote—with a marginal increase in the 'pro-EU' position.

The overall picture from post-referendum opinion polls is that Northern Irish nationalists have become more supportive of Irish unity in the context of Brexit, even in the short term, while the traditionally pro-UK union bloc has become more fragmented at the margins. This fragmentation is reflected in the publicly stated views of individuals from a unionist background, involved in business, trade or cross-border engagement, who campaigned in Northern Ireland for the UK to remain in the EU.[52] For the first time since modern polling has been conducted in Northern Ireland, credible opinion polls are showing that in the event of a 'hard Brexit', a majority of the population could vote to join a united Ireland in order to re-join the EU.[53]

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[49]*Lucid Talk*, 'Tracker polling in Northern Ireland' (2018), see: https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018; *Irish Times*, 7 March 2019.
[50]See: https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf (2 December 2019).
[51]See: https://www.lucidtalk.co.uk/single-post/2019/08/20/LT-NI-Opinion-Panel-Quarterly-Tracker-Poll-%E2%80%93-August-2019.
[52]McCann and Hainsworth, 'Brexit and Northern Ireland', 333.
[53]*Lucid Talk*, poll data, see: https://www.lucidtalk.co.uk/.

In Ireland there has historically been an attachment to the ideal of a united Ireland. For example, in a 2010 poll asking do you 'favour a united Ireland', with no indication of time scale, a majority of people (57%), were in favour with 22% saying that they were opposed to the idea while 21% were undecided.[54] The issue of timing and preparation are important factors in the level of support. In December 2016, in the context of the Brexit debate, RTÉ's Claire Byrne Live/ Amárach Research panel asked the question 'Is it time for a united Ireland?;' This was as much a question of whether a border poll should be held in the short term as whether or not a united Ireland was desirable at some stage; 46% of respondents said yes while 32% said no and 22% said that they didn't know. Support was highest among those aged 25–34 with 54% saying yes.[55] The issue of the saliency of timing and preparation was also reflected in the Exit Poll conducted by RTÉ and TG4 in May 2019. The poll surveyed 3,000 people at polling stations after they had cast their ballots in local and European elections. Respondents were asked whether they would vote for or against a united Ireland if a vote was held 'tomorrow'.[56] In this poll 65% said yes, 19% said no and 15% were either undecided or gave no answer. Excluding undecided voters and those who refused to answer, over 77% said they would vote in favour of a united Ireland if a vote were held 'tomorrow', a similar result to a February 2019 tracking poll in which 80.5% said they would vote in favour of a united Ireland.[57]

A new discourse has emerged in Ireland that is discussing reunification as a possibility. Key aspects of this discussion are what a future united Ireland would look like, the need to prepare for a united Ireland, how would it be negotiated and the timing of a border poll.[58] For example, a letter signed by more than 1,000 Irish citizens, calling on Taoiseach Leo Varadkar to convene a citizens' assembly or forum to discuss constitutional change in Ireland was published in newspapers north and south in November 2019.[59] This discourse is taking place in a variety of fora outside of the political parties, including the mainstream print media, social media and the universities. For example, the Twitter account 'Think 32', which calls itself cross-community and non-party, has over 12,500 followers and hosts a wide ranging debate on the future of the island and the

[54]See: https://www.thetimes.co.uk/article/smaller-majority-in-republic-supports-united-ireland-fglm560q 6gg (2 December 2019).
[55]See: https://www.rte.ie/news/analysis-and-comment/2016/1216/839321-sinn-feins-santa-list/ (2 December 2019).
[56]See: https://www.rte.ie/news/elections-2019/2019/0525/1051603-rte-tg4-exit-poll/ (2 December 2019).
[57]See: https://senatormarkdaly.org/category/a-united-ireland-in-peace-and-prosperity/tracking-polls/ (2 December 2019).
[58]See for example David McWilliams, 'Why the idea of a United Ireland is back in play', *Financial Times*, 30 November 2018; David McWilliams Podcast: https://podtail.com/en/podcast/the-david-mcwilliams-pod-cast/exploring-the-ramifications-of-a-united-ireland/; Seamus McGuinness and Adele Bergin, 'The political economy of a United Ireland poll', IZA: Institute of Labor Economics (Bonn, 2019). Richard Humphries, *Beyond the border: the Good Friday Agreement and Irish unity after Brexit* (Dublin 2018).
[59]*Irish Times*, 4 November 2019.

preparations necessary for reunification.[60] A debate of this nature and on this scale was not only absent, but seemed very unlikely to occur before 2016 and this indicates the shift in perception of the role of the Irish state in Northern Ireland and of what futures are now possible and also desirable.

CONCLUSION

The support given by the EU, and the governments of its member states, during the Brexit negotiation process, for Ireland's demand that there a should be no hard border on the island, was a demonstration of the impact of the change in the recognition of sovereignty embedded in the Good Friday Agreement. The support Ireland received was not just the expected level of support for a member state against a state in the process of leaving, it was strongly based on the recognition of the rights of the Irish government, and of the nationalist population of Northern Ireland, under the Good Friday Agreement, and it reflects the EU's own self-image as a peace-building organisation.[61] The key aspects of the Agreement, the open border, the ongoing peace process and the increased level of cross-border integration, were treated by the EU as matters of international concern, with which they had the right to engage, as they rested on an international treaty signed by Ireland, a member state of the European Union. From this perspective Northern Ireland was no longer purely a domestic matter for the UK, and although it was still recognised as the sovereign government, this sovereignty was qualified. Compared to the historic pattern of international and European lack of engagement, from Ireland's independence to the Good Friday Agreement, this was a significant shift in the international recognition of sovereignty over Northern Ireland.

In parallel to this European dimension, there has been a change in the internal recognition of sovereignty in Ireland, demonstrated by the shift in public discourse and by the results of opinion polls. Before the Brexit referendum, opinion polls suggested a majority of those who voted for Irish nationalist parties did not want to call a referendum on unity in the short run and if a referendum were called they would vote against immediate change, fearing the uncertainty involved and a potential violent back-lash from loyalists. Polls now suggest in the context of Brexit and the possible return of a hard border, that almost the entire Irish nationalist community in Northern Ireland would vote for Irish unity, and that the 15% of the population who did not self-define as nationalist or unionist, would in certain circumstances vote for unity in order to rejoin the European Union. This is matched by a public discourse in both parts

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[60]See: https://twitter.com/think32_?lang=en (2 December 2019).
[61]Gëzim Visoka and John Doyle, 'Neo-functional peace: the European Union way of resolving conflicts', *Journal of Common Market Studies* 54 (4) (2016), 862–77.

of Ireland on the need to prepare for possible reunification and also on the form that reunification may take.

The Brexit negotiations demonstrate how perceptions of sovereignty and international practice on sovereignty related issues are strongly contextual. Attempts by Ireland from the 1920s to the 1960s to raise British sovereignty over Northern Ireland in international organisations were ineffectual, as the UK's position as the sovereign state was undisputed internationally. The majority of Irish nationalists, north and south, consented to the settlement provided by the Good Friday Agreement, and were willing to allow the process of ongoing negotiation to evolve over time without a pre-determined end point. Brexit, and the threat of a hard border, has undermined this consensus in a manner that may not be possible to restore, even if a withdrawal agreement without a hard land border is concluded, or if Brexit is reversed. The way in which the provisions of the Good Friday Agreement and majority opinion in Northern Ireland were ignored, in order to pursue a concept of Brexit based on a narrow form of English nationalism, supported by a section of Ulster unionism, has started a debate on the future of the island which has gained momentum. This discourse on the island of Ireland is more significant as it is taking place in the context of the EU's assertion of its right to uphold the provisions of the Good Friday Agreement, creating what is now a new international status quo.