

Response to Northern Ireland Affairs Committee ‘Northern Ireland and the EU Referendum’ inquiry (February 2016)

Author Biographies

Sylvia de Mars is a Lecturer in Law at Newcastle University. Her current research interests centre on EU Law, particularly the interplay of the EU free movement of persons rules and the organisation of public healthcare in the Member States.

Colin RG Murray is a Senior Lecturer in Law at Newcastle University. His current research is focused in the fields of national security law, legal history and public law. In 2013 he served as specialist adviser to the UK Parliament’s Joint Committee on the Voting Eligibility (Prisoners) Bill.

Aoife O’Donoghue is a Senior Lecturer in Durham Law School. Her current research interests centre on public international law, constitutionalism and international institutions. She is a founding member of Law and Global Justice at Durham.

Ben TC Warwick is a Graduate Teaching Assistant in Durham Law School. He has research interests across human rights, gender and international law. He currently serves as Deputy Convenor of the Durham Human Rights Centre and is an Associate Fellow of the Wolfson Research Institute.

Relevant work:

Colin RG Murray, Aoife O’Donoghue and Ben TC Warwick, ‘Policy Paper: The Place of Northern Ireland within UK Human Rights Reform’ (2015).

Aoife O’Donoghue and Ben TC Warwick, ‘Constitutionally Questioned: UK Debates, International Law, and Northern Ireland’ (2015) 66(1) Northern Ireland Legal Quarterly 93.

Roger Masterman and Colin RG Murray, *Exploring Constitutional and Administrative Law* (Harlow: Pearson, 2013).

Sylvia de Mars, ‘Economically inactive EU migrants and the United Kingdom’s National Health Service: unreasonable burdens without real links?’ (2014) 39(6) European Law Review 770.

Summary of key points

- i. The terms and themes of political debate in relation to the EU have an added meaning in the NI context (eg, sovereignty).
- ii. While there are issues unique to NI, the NI-specific impacts of the mainstream issues must also be considered.
- iii. The EU issues should be considered in the context of other constitutional changes currently bedding in (eg, English Votes for English Laws).
- iv. The continued membership of the EU by both the UK and Ireland is perceived by some as implied by the Good Friday Agreement. The EU has acted as a stabilising external force throughout the peace process.
- v. EU membership is connected to human rights protections which themselves are essential for compliance with the Good Friday Agreement. This interaction of issues is significant in light of plans to change the Human Rights Act.
- vi. The potential consequences of the EU referendum result should be foreseen and accounted for in a UK-Ireland Bilateral Interpretive Agreement.
- vii. Brexit could necessitate customs checks and passport checks at the NI-ROI border.
- viii. The possible impacts on the UK-Ireland border might be ameliorated by UK and Irish membership of Schengen (possible for non-EU member states), or a new UK-EU trade agreement that took proper account of the border.
- ix. There are a number of funding programmes to which NI access would be lost if Brexit occurred. This would especially impact border areas and would leave a significant funding shortfall in those areas.
- x. The UK's loss of the preferential trade agreements that come through the EU could lead to disparities of economic performance and competitiveness between NI and the ROI.
- xi. Brexit might particularly affect farming and US investment in NI, as both are current beneficiaries of EU agreements.

1. What Northern Ireland-specific issues should be considered as part of the debate on UK membership of the EU?

The particularities of the NI situation mean that proposed constitutional changes such as exiting the EU require specialised attention. There is a need for UK political, economic and legal actors to take account of the legacy of NI's historical experience. Key underpinning terms and themes of the referendum debates such as independence, national self-reliance, borders, sovereignty and nationalism all resound differently in the NI context and will have an added (positive or negative) connotation for many living in NI.

Not only is a consideration of issues distinctive to NI necessary, but also of the impacts of UK-wide "Brexit" issues. For example, while the political/diplomatic relationships with neighbours might change for all parts of the UK, those changes will be of a qualitatively different nature for NI in its relationship with the ROI. It is therefore essential that impacts are not assumed to be homogeneous, and it is crucial that debates are not led by overly centralised entities (be they media, political or campaigning organisations).

In particular, NI-specific impacts and views need to be emphasised with regard to the perception of 'foreign' or 'imposing' European bodies and courts. It is possible that the aversion to the external influence expressed of such 'foreign courts' by the London-based media is less prevalent in NI. In a region long accustomed to, and indeed as a beneficiary of, international attention and cooperation on sensitive peace-process matters many actors regard such 'impositions' with less hostility.¹

The Committee should not consider the EU issues in isolation. Many interconnected² constitutional changes are currently being discussed or introduced, including increased powers for devolved governments (in the aftermath of the Scottish Independence referendum); English Votes for English Laws; Devolution within England; reform of the upper chamber; changed relationships with human rights and with the EU. With such diverse, complex and (in some cases) radical changes taking place there is a danger that the combined impact of the changes upon Northern Ireland will not be considered ahead of their entering effect.

2. Would leaving the EU have implications for the peace process?

We would draw attention three specific implications of Brexit for the peace process.

a. Multilateralism at Westminster

For some years now, issues relevant to the Northern Ireland peace process³ have enjoyed multilateral support from the main Westminster political parties. The peace process has benefited from this

¹ An indication of this may be opinion polls which (in November 2015) indicated that the proportion of leave/remain voters was tied in Great Britain, while in NI the split was 56/28 in favour of remaining; 'How Will Northern Ireland Vote in the Upcoming EU Referendum?' (*Belfast Telegraph*, 6 November 2015). Available at: <http://www.belfasttelegraph.co.uk/opinion/debateni/bill-white/how-will-northern-ireland-vote-in-the-upcoming-eu-referendum-34176966.html>.

² The threat of Scottish independence is clearly a factor in the offer of increased powers for devolved governments, which itself is clearly linked to debates about a new English assembly. An exit from the EU and the ECHR might be seen as precipitating a further disjuncture between Scottish and English political identity.

³ There is no formal definition of which issues demand cross-party support, but it is clear that far-reaching constitutional issues would fall within the bounds of any meaningful commitment to multilateralism.

position largely (though not entirely) outside of the usual ‘cut and thrust’ party politics. Although it is not the express intention of the current Conservative Government to change this understanding, a number of (controversial) constitutional changes are likely to divide opinion and have implications for NI. This might put the multilateral approach at Westminster at risk.

Media attention has recently focussed on the Eurosceptic position of the Secretary of State for NI, Theresa Villiers, in the referendum campaign.⁴ Her position raises issues of ministerial responsibility (i.e. should ministers campaign on behalf of themselves and/or their constituents, or in line with the best interests of their ministerial brief). However, it also touches on the issue of multilateralism. Were the Secretary of State for NI to take any strong campaigning position (in favour of leave or remain) it would negate the role often played by Secretaries of State in moderating and stabilising political disagreement within NI. Similar considerations also apply to activity by the Shadow Secretary of State.

In addition, as has been more often recognised in the Scottish context, Brexit that does not enjoy the support of all of the UK’s four constituent nations would be symbolically important.⁵ In the 1975 EEC membership referendum all four constituent nations of the UK backed EU membership (with Northern Ireland having the narrowest majority in favour). If the people of NI adopt a position on EU membership at variance from the remainder of the UK such a vote could exacerbate tensions surrounding the constitutional position of NI.

Even if the EU referendum does not lead to Brexit, the UK Government’s negotiating platform could exacerbate tensions in the relations between the Westminster and the devolved legislatures. As they stand, the proposals for national parliaments to “red card” EU policy proposals (like the existing “yellow card” and “orange card” mechanisms) could be operated by the UK Government without any need to seek the agreement of the devolved institutions. Given the importance of agriculture within the Northern Ireland economy, for example, Northern Ireland’s interests could diverge from those of the UK as a whole in shared competence areas related to agriculture.⁶

b. EU and the Good Friday Agreement

Within the Good Friday Agreement, the UK and Ireland’s relationship as ‘as partners in the European Union’ and Council of Europe membership (and with it adherence to the European Convention on Human Rights) provided much of the deal’s supranational architecture.⁷ As Mark Durkan has recognised in Parliament:

⁴ Henry McDonald and Toby Helm, ‘Theresa Villiers Called upon to Quit If She Campaigns to Leave EU’ *The Guardian* (9 January 2016). Available at: <http://www.theguardian.com/politics/2016/jan/09/theresa-villiers-called-upon-to-quit-if-she-campaigns-to-leave-eu>.

⁵ Simon Johnson, ‘Nicola Sturgeon Warns Second Scottish Independence Referendum “Unstoppable” If UK Leaves EU’ (15 October 2015). Available at: <http://www.telegraph.co.uk/news/politics/nicola-sturgeon/11933486/Nicola-Sturgeon-warns-second-Scottish-independence-referendum-unstoppable-if-UK-leaves-EU.html>.

⁶ Article 4(2)(d) TFEU establishes ‘agriculture and fisheries, excluding the conservation of marine biological resources’ as shared competences.

⁷ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (n.2), preamble. The place of both the UK and Ireland in the EU provides much of the workload of the North-South Ministerial Council (Strand II, para.17) and the British-Irish Council (Strand III, para.5).

[T]he institutions of the Good Friday agreement do not take as givens just the human rights provisions of the Human Rights Act and the European convention on human rights, but the common EU membership of the UK and Ireland.⁸

There are two brief points to note here. First, the intricacy with which (at least) three sets of international law obligations are intertwined. The EU, the European Convention and the Good Friday Agreement are essentially interdependent in their application to NI. Second is the perceived importance of the EU as a peace-sustaining enterprise playing a stabilising role within NI. Many within NI regard the connection of the UK and Ireland through the EU as underpinning the Good Friday Agreement.

c. The EU and Human Rights

The referendum also poses significant and complex questions for the position of human rights protections in Northern Ireland. There exists an overlap between the Government's human rights plans and EU questions. EU membership is connected to human rights protections which themselves are essential for compliance with the Good Friday Agreement. As such, to practically 'escape' ECHR standards, the UK would have to part company with both the EU and the ECHR. There is therefore a crucial interaction between EU membership debates and any forthcoming changes to the UK's human rights architecture.

Brexit will not remove the influence of pan-European governance structures within NI. Efforts by the EU to sign up to the articles of the European Convention on Human Rights⁹ have followed extensive negotiations and an increasing emphasis on human rights in the EU.¹⁰ Although a recent and controversial¹¹ opinion of the Court of Justice of the European Union¹² raised doubts over whether it was legally possible for the EU to become a party to the European Convention, these international legal orders are likely to continue to intertwine. These interrelationships have been scarcely considered in the context of debates over the UK's place in Europe.

Human rights have been a central plank of the peace process in Northern Ireland. The degree to which shortfalls in enforceable human rights standards within Northern Ireland law exacerbated and sustained the Troubles¹³ is marked by the importance of human rights safeguards within the Good Friday/Belfast Agreement.¹⁴ The EU-human rights interaction should be considered important in light of plans to change the Human Rights Act.

These three issues and others mentioned above are capable of generating uncertainty within the province. This uncertainty should be *managed* to the greatest extent possible and not left to *ad hoc*

⁸ Mark Durkan, HC Debs, vol.596, col.1104 (9 Jun 2015)

⁹ A move protested by the UK; Stian Oby Johansen, 'Negotiations on the EU's Accession to the ECHR to Be Finalized "without Delay"'. Available at: http://blogg.uio.no/jus/smr/multirights/content/negotiations-on-the-eu-accession-to-the-echr-to-be-finalized-without-delay#_ftn3.

¹⁰ See generally; Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014).

¹¹ See for example; Se-shauna Wheatle, 'Opinion 2/13 and Its UK Human Rights Effects'. Available at: <https://delilawblog.wordpress.com/2015/05/01/se-shauna-wheatle-opinion-213-and-its-uk-human-rights-effects/>.

¹² Opinion 2/13 (Court of Justice of the European Union, 18 December 2014).

¹³ See Brice Dickson, 'The Protection of human rights – lessons from Northern Ireland' (2000) 3 *European Human Rights Law Review* 213, 214.

¹⁴ The Belfast Agreement 1998 (also known as the Good Friday Agreement). Available at: <https://www.gov.uk/government/publications/the-belfast-agreement>.

solutions (or indeed, political crises). This uncertainty should be managed through the UK seeking a Bilateral Interpretive Agreement with Ireland in advance of the EU Referendum. Ireland sought a similar agreement before its 2004 citizenship referendum. Such an Agreement would allow both countries to establish, in advance of Brexit, how UK withdrawal from the EU would impact upon the Good Friday arrangements and NI's constitutional arrangements more generally. Such an Agreement would be in keeping with Ireland's position as co-guarantor of the peace process.¹⁵

3. What are the potential implications for Northern Ireland's land border with the Republic of Ireland?

The land border between the ROI and the UK is over 300 miles long. During the 'Troubles' travel between the two countries typically involved long queues relating to security checks. Before the 1965 Anglo-Irish Free Trade Agreement customs checks also took place. While the rationale for extensive security checks has subsided, should the UK leave the EU the need to re-introduce customs checks would have implications for both states, particularly in areas such as agriculture and tourism where there are cross-border arrangements. The Irish Taoiseach has remarked upon the "serious difficulties" relating to economic matters across the border should the UK choose to leave.¹⁶

Neither the ROI nor the UK is part of the Schengen area (both having secured an opt-out).¹⁷ Nonetheless, the border between the ROI and Northern Ireland is completely open in light of both states retaining border controls with other EU states.¹⁸ The Irish Republic's decision to remain outside Schengen was based on two rationales; the high proportion of its trade conducted with the UK and the presence of a land border with its neighbour. Should the UK leave the EU the ROI may re-evaluate whether to join the Schengen area.

There are several possible outcomes for the border that are dependent on what would happen after a vote to leave the EU and on the continuing operation of the Schengen area in its current form.

a. The UK leaves the EU and the ROI joins the Schengen area

While the UK remains the Irish Republic's single most important state trading partner, in 2015 combined trade with other EU members was worth more to the Irish economy.¹⁹ As such, given that the ROI's current position outside Schengen is based mainly on trade concerns, it is possible it may opt to join the Schengen area in order to facilitate trade with its EU partners. The UK currently sells more to the ROI than to India and China combined.²⁰

Should Ireland enter the Schengen area it would mean the end of the Common Trade Area that currently exists between the UK and the ROI. The open border as it currently operates would not be able to function if Ireland maintains its obligations as part of the EU's advanced customs union

¹⁵ See further; CRG Murray, Aoife O'Donoghue and Ben TC Warwick, 'Policy Paper: The Place of Northern Ireland within UK Human Rights Reform' (2015) 46. Available at: <http://ssrn.com/abstract=2643464>.

¹⁶ Brexit 'would create serious difficulties for NI' says Enda Kenny'. Available at: <http://www.bbc.co.uk/news/uk-northern-ireland-35395135>.

¹⁷ EU Treaty of Amsterdam 1997, 140–1.

¹⁸ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (agreed 14 June 1985).

¹⁹ 'Trade Statistics October 2015' (Central Statistics Office, Ireland 2016). Available at: http://www.cso.ie/en/media/csoie/releasespublications/documents/externaltrade/2015/trade_oct2015.pdf.

²⁰ Charlie Flanagan, TD, Minister for Foreign Affairs, 'Brexit: The Irish Question'. Available at: <http://www.bbc.co.uk/programmes/b06zqq9l>.

because, in addition to immigration checks, customs checks would have to be introduced. Ireland's commitments to the EU, which have been adopted into the Irish Constitution, would take precedent over any other treaty-based trade commitment. Even if the ROI does not enter the Schengen agreement, the UK's access to the EU for goods, services and capital would be subject to the same restrictions as for other non-Schengen non-EU states. At a minimum a customs check would be required at the border, if not passport controls. While it would be possible to exempt Irish and UK citizens from the passport requirements (even if it would be practically very difficult to have no passport checks for citizens) there would still need to be a customs check at the border.

Further, as one of the stated aims of UK Government policy is to restrict inward migration, it would be counter-productive for the border to remain as porous. Citizens of the ROI are not, at present, treated by the UK as 'foreigners' under the Ireland Act 1949. However, other EU citizens would be entitled to continue to go to Ireland and their access to the land border may pose practical and political difficulties for the UK if travel between the countries remained fully open.²¹ While having a land border does not pose particular legal difficulties, it highlights the unique position of those living on the island of Ireland and makes the border an important part of the understanding of a post-EU UK. The UK will not become cut off from international migration flows by leaving the EU.

b. The UK leaves the EU and both the UK and the ROI join the Schengen area

It would be possible for the UK to join the Schengen area even if it left the EU. Liechtenstein, Iceland, Norway and Switzerland are all non-EU countries that sit within the Schengen area. If both countries choose to join this would make the land border much less problematic. However, given some of the underlying rationales for leaving the EU are related to migration this is a highly unlikely course for the UK to adopt.²²

c. The UK leaves the EU and both the UK and the ROI remain outside Schengen

Ireland may also choose not to join Schengen, but UK policy does not dictate the response of the Irish Government (as it once did in effectively compelling the Irish application for EEC membership²³). In that circumstance the free movement of persons, goods and services would still create difficulties for the land border as UK goods, services and persons would be outside the customs area and as such, subject to travel restrictions and tariffs. As a parenthetical point if, following a border poll, Northern Ireland chose to join the Republic, following the example of Germany, it is highly unlikely that this would impact upon Irish membership of the EU.

These issues may be ameliorated by the negotiation of a customs union or a free trade area between the UK and the EU. If the UK is outside Schengen any negotiation regarding the UK's relationship with the EU, for example regarding the creation of a free trade area, would necessarily include consideration of the land border with the Irish Republic. Until the terms of this re-negotiation are determined the impact on the border would remain an open question and would lead to uncertainty and potential disruption for all those who regularly cross the border including passport and customs checks.

²¹ Ireland Act 1949, s 2(1).

²² For discussion, see Andrés Delgado Casteleiro, 'Relations between the European Union and Switzerland: A Laboratory for EU External Relations?' in Francesco Maiani, et al (eds), *European Integration without EU Membership: Models, Experiences, Perspectives* (European University Institute 2009) 108ff.

²³ See Brian Girvan, *From Union to Union: Nationalism, Democracy and Religion in Ireland – Act of Union to EU* (Gill & Macmillan, 2002) 203-206.

4. Does EU membership benefit Northern Ireland's relationship with the ROI economically, politically and socially?

Both the ROI and Northern Ireland benefit from several funding streams available through the EU. Under the EU Cohesion Policy (2014-2020) Northern Ireland is designated as a region in transition, whereas ROI is in the more developed category. Thus the border separates different funding regimes. Under this categorisation Northern Ireland is currently able to access more funding than the ROI.

There are specific programmes which follow from the peace process which are aimed at increasing cross-border co-operation. The Special EU Programmes Body (PEACE IV Programme (2014-2020)) provides funding to manage cross-border European Union Structural Funds programmes in Northern Ireland, the Border Region of Ireland and parts of Western Scotland.²⁴ The programme was agreed between the Government in the ROI and the Northern Ireland Executive and covers the entire border region.²⁵ Over the course of the programme €229m will be made available, 85% of which comes from the EU with the remainder from the ROI and Northern Ireland budgets.

INTERREG IVA provides structural funding for border regions.²⁶ Ireland and Northern Ireland fall within several of the designated regions, North West Europe, Northern Periphery and Arctic and the Atlantic Area. Under the Programme, Ireland/Northern Ireland/Scotland is a specific region that is recognised as requiring specific funding. This programme is worth €240 million, with €42 million of matching funding from the ROI and the UK. Should the UK leave the EU there would again be a substantial shortfall in the funds available for this scheme. Both of these schemes are aimed at providing benefits, economic political and social across the border regions of the island. While it is possible that additional funding may be available as the UK will no longer be required to contribute to the EU budget, this money has not been earmarked and there is no guarantee that equivalent schemes would be funded.

The entitlement of those born in Northern Ireland to dual citizenship of the UK and Ireland will cause some anomalies should the UK leave the EU.²⁷ If an individual chose to register for an Irish passport, they would be able to maintain their EU citizenship even if the UK left the EU. This would be in stark contrast to other UK passport-holders in Scotland, England or Wales who would not retain the right to free movement of people, services or capital that those born in Northern Ireland would retain.

Leaving the EU would obviously exclude the UK from the Transatlantic Trade and Investment Agreement currently being negotiated with the USA. A UK that sat outside of the EU would be unable to benefit from this preferential trade agreement. Such a scenario would leave Northern Ireland without privileged access to US markets whilst the Republic would benefit from its access as part of the EU. This may lead to more disparity between the regions from an economic perspective. It also may make attracting US companies wishing to access to EU market more problematic for Northern Ireland as the ROI will gain a comparative advantage.

Leaving the EU would also change the UK's position within the World Trade Organization (WTO). Notwithstanding the UK's individual membership of the WTO, all of its negotiations are currently

²⁴ The programme began in 1995 and has been renewed since that time. 'PEACE IV Programme: Overview' (Special EU Programmes Body). Available at: http://www.seupb.eu/2014-2020Programmes/PEACEIV_Programme/PEACEIV_Overview.aspx.

²⁵ 'Programme Factsheet' (Special EU Programmes Body). Available at: http://www.seupb.eu/Libraries/2014-2020_Programmes/9806_-_PEACE_IV_Programme_Factsheet_Final_3.sflb.ashx.

²⁶ INTERREG IVA Programme for Northern Ireland. Available at: <http://www.seupb.eu/programmes2007-2013/interregivaprogramme/interregoverview.aspx>.

²⁷ Irish Nationality and Citizenship Act 2004, s 4.

conducted as part of one EU block. Therefore, while the UK would stay as a member of the WTO, it would negotiate as a standalone state rather than as part of the world's biggest market. It is unlikely that the UK would be able to leave the EU and continue with the trade agreements concluded by the EU within the WTO. Again, as the ROI would remain part of the EU's block in the WTO, it would maintain the many and varied benefits that the EU holds due to its global economic power. Although the EU's negotiations cannot always be said to be fair or equitable to developing states, from a domestic perspective, they do currently provide beneficial access for Northern Ireland. It would also add to the comparative advantage of the ROI in attracting foreign investment from companies as there would be direct access to the EU market through the already negotiated WTO agreements.

In the short and medium term, the loss of direct access to these markets on a preferential basis would be economically problematic for Northern Ireland. In particular, in contrast to most of the UK, in Northern Ireland agriculture remains an extremely important element of the economy. Northern Ireland's farmers would have to compete in the global agri-foods market without the protection of the Common Agricultural Policy or the myriad other concessions that EU farmers have negotiated for themselves as a powerful customs union within the WTO.

Sylvia de Mars (sylvia.de-mars@ncl.ac.uk)

Colin RG Murray (colin.murray@newcastle.ac.uk)

Aoife O'Donoghue (aoife.o'donoghue@durham.ac.uk)

Ben TC Warwick (b.t.c.warwick@durham.ac.uk)