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**Policy Paper:**

**The Place of Northern Ireland within UK Human Rights Reform**

August 2015

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## **Executive Summary**

Considerable speculation has surrounded the impact of the Good Friday Agreement's provisions on human rights upon the Conservative Government's proposals for repeal of the Human Rights Act 1998. This Policy Paper seeks to demystify this aspect of the debate over the future of the Human Rights Act, examining the terms of the Good Friday Agreement as an international treaty and peace agreement and explaining its interrelationship with both the Human Rights Act and the Devolution Acts. Once some of the hyperbole that surrounds the Agreement and its attendant domestic legislation is removed, it can be seen that the impact of the Agreement is in some regards more extensive than has to date been recognised, whilst in other respects the Agreement has less impact than some of the supporters of the Human Rights Act claim. Reform of arrangements so fundamental to governance in the UK should not be taken lightly, but at present the offhand treatment of the place of the incorporation of the European Convention on Human Rights in the Northern Ireland settlement generates just such a danger.

**Key Findings**

- 1.1. Human rights protections have been central to the Northern Ireland peace process. This is despite disagreement about the appropriate extent of human rights protections.
  - 1.2. Those in favour of repealing the Human Rights Act have diverse motivations, but the Northern Irish picture is not adequately reflected in the generalised anti-Human Rights Act sentiment.
  - 1.3. The UK's devolution settlement adds significant complexity to any reforms. The Sewel convention would require the consent of the NI Assembly before any repeal of the Human Right Act.
  - 1.4. The authority of the NI Assembly to legislate relies upon a functioning link to the European Convention and its accompanying jurisprudence.
  - 1.5. The Good Friday Agreement binds the UK under international law and is clear in its requirement for an 'ECHR-plus' arrangement for Northern Ireland.
  - 1.6. The UK must act in good faith when considering the potential impacts of reforms upon the Agreement.
  - 1.7. The Irish government is entitled to monitor and require performance of the UK's obligations. It should make clear its position on any reform proposals.
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- 2.1 There is a complex array of reform options available to the Conservative Government. However, many of these options would put the UK into conflict with the Good Friday Agreement and/or devolution legislation.
  - 2.2 The UK Government needs to take account of the special legal and political situation of Northern Ireland in its reforms.
  - 2.3 Human rights provision in Northern Ireland cannot be handled as an add-on but rather must be the core of any proposed reforms.

- 2.4 Extensive consultation with the public and politicians of Northern Ireland is required prior to the enactment of reforms.
  - 2.5 The UK could avoid the difficulties posed by the Good Friday Agreement through a renegotiation of its terms relating to human rights. This option, however, is likely to generate near insurmountable political disagreement in Northern Ireland.
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- 3.1 Reforms to the Human Rights Act would not negate the UK's responsibilities under a number of international human rights treaties.
  - 3.2 The potential of the European Union accession to the European Convention, means that the UK that remains within the EU might still be under the influence of the Convention.
  - 3.3 Far-reaching reforms to human rights in the UK could potentially result in an inter-state complaint between the UK and Ireland.
  - 3.4 The Irish Government holds significant 'bargaining chips' which it might make use of in fulfilling its role as a 'guarantor' of the Agreement and the peace process.

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## SECTION ONE – HUMAN RIGHTS REFORM IN THE NORTHERN IRELAND CONTEXT

### 1. Introduction

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 Troubles<sup>1</sup> is marked by the importance of human rights safeguards within the Good Friday/Belfast Agreement (GFA).<sup>2</sup> In the GFA ‘many of the major players in the peace process picked up the human rights ball and ran with it’,<sup>3</sup> with the result that the human rights commitments enshrined therein became a prominent part of the post-Agreement legislative settlement. Many of the rights contained within the European Convention on Human Rights (ECHR) were incorporated into the law of Northern Ireland through the Northern Ireland Act 1998 (making these rights enforceable with regard to the legislation of the Northern Ireland Assembly and the activities of the Northern Ireland Executive) and the Human Rights Act 1998 (making these rights enforceable with regard to Westminster legislation and the activities of public bodies throughout the UK).

Despite these developments the position of human rights within Northern Ireland’s legal order remains contested. Whilst human rights commitments enshrined in the GFA and have been a prominent part of the legislative settlement post-Agreement, the issue became a rallying point for the anti-Agreement faction within the Unionist community. This opposition drew upon Unionism’s long-standing associations with the political settlement resultant from the Glorious Revolution of 1688-89 (and the place of

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<sup>1</sup> See B. Dickson, ‘The Protection of human rights – lessons from Northern Ireland’ (2000) 3 European Human Rights Law Review 213, 214.

<sup>2</sup> The Belfast Agreement 1998 (also known as the Good Friday Agreement). Available at: <https://www.gov.uk/government/publications/the-belfast-agreement>.

<sup>3</sup> P. Mageean and M. O’Brien, ‘From the Margins to the Mainstream: Human Rights and the Good Friday Agreement’ (1998) 22 Fordham ILJ 1499, 1538.

parliamentary sovereignty within that settlement),<sup>4</sup> but it was also grounded in antipathy towards judgments by the European Court in the course of the Troubles which were regarded as prioritising human rights concerns over security considerations.<sup>5</sup>

The divergence between Northern Ireland's two largest political parties can be seen in the following statements before the Northern Ireland Assembly on proposals to scrap the Human Rights Act. Sinn Féin's representatives were uniformly critical of the proposals:

It is ... a direct attack on the Good Friday Agreement and the international treaty signed by the British and Irish Governments, which gives legal effect to the agreement.<sup>6</sup>

Any repeal of the Human Rights Act will have enormous implications, particularly for compliance with the Good Friday Agreement.<sup>7</sup>

DUP MLAs, by contrast, were broadly supportive of the reform, in line with the party's opposition to the human rights obligations at the time of the GFA:

The concept that the Human Rights Act 1998 was in some way central either to the Good Friday Agreement or to its passage by way of referendum is a high level of revisionist history.<sup>8</sup>

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<sup>4</sup> See A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000) 358-359.

<sup>5</sup> For examples, see *Ireland v United Kingdom* [1978] 2 EHRR 25 (inhuman and degrading treatment of internees suspected of involvement in IRA activity); *Brogan v United Kingdom* (1989) 11 EHRR 117 (in which police pre-charge detention powers in Northern Ireland were found to breach the right to liberty); *McCann v United Kingdom* (1996) 21 EHRR 97 (breach of the right to life as a result of inadequate planning in an SAS operation in which three IRA members were shot dead).

<sup>6</sup> Caitríona Ruane MLA, NIA Deb, vol 105, no. 2, page 41 (1 Jun 2015).

<sup>7</sup> Martin McGuinness MLA, NIA Deb, vol 105, no. 4, page 24 (8 Jun 2015).

<sup>8</sup> Peter Weir MLA, NIA Deb, vol 105, no. 2, page 48 (1 Jun 2015).



[P]art of the reason for changes to the Human Rights Act being demanded is that, particularly in GB [Great Britain], there have been a number of instances where legal representations have been made on behalf of people who have been guilty of very serious criminal and terrorist acts and have used the Human Rights Act to try to mitigate their heinous actions?<sup>9</sup>

For some years now, issues relevant to the Northern Ireland peace process have enjoyed multilateral support from the main political parties at Westminster. The peace process has benefited from this 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, the effect of its proposals to repeal the Human Rights Act militates against the search for consensus on human rights issues in Northern Ireland. Efforts to repeal this Act at Westminster also, as the Equality and Human Rights Commission has identified, raises serious issues concerning Westminster's relationship with the Northern Ireland Assembly and the other devolved legislatures:

The devolution implications for any possible repeal of the Human Rights Act and replacement by a British Bill of Rights are complex given the degree to which the HRA is embedded in the devolution legislation. Even if the devolution settlements in Scotland, Wales and Northern Ireland do not represent formal legal impediments to any such proposals, it is likely that the agreed conventions which have emerged since 1998 would require the consent of the devolved institutions to any major change.<sup>10</sup>

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<sup>9</sup> Gregory Campbell MLA, NIA Deb, vol 105, no. 4, page 25 (8 Jun 2015).

<sup>10</sup> Equality and Human Rights Commission, *The Case for the Human Rights Act: Part 1 of 3 Responses to the Commission on a Bill of Rights: HRA Plus not Minus* (2011) 86. Available at: <http://www.equalityhumanrights.com/legal-and-policy/legislation/bill-rights/case-human-rights-act>.

The confluence of the GFA's obligations upon the UK, the ongoing insolubility of divisions between the Northern Ireland parties regarding the role of human rights within Northern Ireland's governance and the relationship between Westminster and the devolved institutions has produced an 'obscure yet systemic constitutional conundrum'.<sup>11</sup> In this paper we examine these constitutional arrangements and their impact upon the proposals to scrap the Human Rights Act, focusing upon three research questions:

- [1] What obligations does the Good Friday Agreement (as a peace settlement and international agreement) impose upon the UK Government with regard to reform or repeal of the Human Rights Act 1998?
- [2] To what extent does the UK Government need to act with the consent of the Northern Ireland Assembly in reforming or repealing of the Human Rights Act 1998?
- [3] If the UK Government proceeds to act in contravention of these obligations, what remedies exist under international law or under the devolution settlement?

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<sup>11</sup> P. England and A. Barnett, 'Why does the UK need a constitutional convention? An interview with Anthony King' *Our Kingdom* (29 July 2015) Available at: <https://www.opendemocracy.net/ourkingdom/anthony-barnett/why-does-uk-need-constitutional-convention-interview-with-anthony-barnett>.

### 2. Pressure for Repeal of the Human Rights Act 1998

The UK's Human Rights Act was enacted in 1998 and entered into force in 2000. Although this development was part of a wider package of constitutional reform by Tony Blair's Labour Government, a considerable degree of cross-party consensus attended to the Human Rights Act at the time. The consultation process on the Human Rights Bill was framed as 'Bringing Rights Home',<sup>12</sup> and, as such, the legislation was a response to the long-recognised need to align the UK's domestic rights protections with its international law obligations under the European Convention on Human Rights (ECHR).<sup>13</sup>

The inability of parties before the UK's domestic courts to rely (directly) on the European Convention, or the European Court of Human Rights' jurisprudence, before the Human Rights Act entered force had serious consequences. That an individual seeking to invoke their Convention rights had to take a case to Strasbourg meant that only those able to find finance, health and perseverance to go to the European Court could seek a human rights remedy.<sup>14</sup> Not only was it harder for individuals to vindicate their rights, without the Human Rights Act rights-based disputes could not be addressed before they escalated to the European Court. As a result of the inability of domestic courts to resolve many rights claims, under the pre-Human Rights Act system the UK was the subject to many adverse judgments at Strasbourg. Far from transferring power to Strasbourg, the Human Rights Act therefore increased the human-rights role of the UK's domestic courts.

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<sup>12</sup> J. Straw and P. Boateng, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' (London: HMSO, 1996).

<sup>13</sup> The Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill' (October 1997), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263526/rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf).

<sup>14</sup> Individuals, then and now, have to 'exhaust domestic remedies' before their case can be heard at the ECtHR. Pre-Human Rights Act, this often meant progressing through several levels of appeal before taking the case to Europe.

Notwithstanding this, dissatisfaction with the operation of human rights law led the Coalition Government to establish a Commission on a Bill of Rights in March 2011. The Commission deliberated for nineteen months at a cost of £700,000.<sup>15</sup> The commissioners agreed that there was an ‘ownership issue’ over human rights, particularly amongst sections of the electorate in England.<sup>16</sup> This disaffection is fuelled by sections of the media which are hostile to the Act<sup>17</sup> and which perpetuate misunderstandings over the role and influence of the European Court within UK law. For example, UK courts are not ‘bound’ by the Human Rights Act to ‘follow’ the European Court’s jurisprudence. The Act instead requires domestic courts to ‘take into account’ Strasbourg’s case law.<sup>18</sup> This provision has proved controversial, with the Conservative Party claiming that it ‘means problematic Strasbourg jurisprudence is often being applied in UK law’.<sup>19</sup> Nonetheless, even where a UK court concludes that an aspect of UK law is in conflict with the Convention, it enjoys no US Constitution-style power to ‘strike down’ legislation. If a domestic court cannot read legislation in a manner which is Convention-compatible<sup>20</sup> a notification known as a Declaration of Incompatibility will result.<sup>21</sup> Only 20 such declarations have been made since the Human Rights Act’s introduction<sup>22</sup> and the Government and Parliament are able to ignore declarations and

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<sup>15</sup> The Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Dec 2012) vol.1, para.1.23.

<sup>16</sup> See The Commission on a Bill of Rights (n. 15), para 80-81.

<sup>17</sup> Lord Faulks QC and Jonathan Fisher QC, ‘Unfinished Business’ in The Commission on a Bill of Rights (n. 15), para 183; Lord Lester of Herne Hill QC, ‘A Personal Explanatory Note’ in Members of the Commission on a Bill of Rights (n. 15), para 232.

<sup>18</sup> Human Rights Act, s.2(1). Roger Masterman argues that the act does not require UK courts to ‘slavishly’ follow or mirror the European Court. For a short briefing see; R. Masterman, ‘Are UK Courts bound by the European Court of Human Rights?’ (2014) Durham Law School Briefing Document, Durham University. Available at: <https://www.dur.ac.uk/resources/law/research/AreUKCourtsboundbytheEuropeanCourtofHumanRights.pdf>. For a fuller exposition of this argument see; R. Masterman, ‘Deconstructing the Mirror Principle’ in R. Masterman and I. Leigh (eds) *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013).

<sup>19</sup> Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (October 2014) 4.

<sup>20</sup> Human Rights Act 1998, s.3(1).

<sup>21</sup> Human Rights Act 1998, s.4(1).

<sup>22</sup> Human Rights Joint Committee, ‘Seventh Report: Human Rights Judgments’ (4 March 2015) Available at: <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm>, para 4.1.

maintain legislation that is incompatible with the ECHR. For example, successive Governments have chosen not to act upon a Declaration of Incompatibility on the issue of prisoner disenfranchisement issued some eight years ago.<sup>23</sup> Even these limited powers have led to accusations from the Conservative Party that the Human Rights Act is an affront to parliamentary sovereignty, on the basis that UK courts, in the use of the Act's re-interpretation provision, 'have gone to artificial lengths to change the meaning of legislation so that it complies with their interpretation of Convention rights, most often following Strasbourg's interpretation'.<sup>24</sup> This complaint belies the fact that in doing so the courts are giving effect to the intention of Parliament as enacted in the Human Rights Act.

There are also misconceptions regarding the number of UK cases that reach and are lost at the European Court. *The Sun*, for example, has reported that the UK loses to applicants in 3 out of 5 cases,<sup>25</sup> whilst the *Daily Mail* puts the UK's loss rate at 3 out of 4 cases.<sup>26</sup> Such reporting, however, involves a misreading of the statistics by ignoring the large number of cases rejected by Strasbourg as inadmissible. When these are taken into account the percentage of cases lost by the UK between 1959 and 2014 stands at 1.32% (or about 1 in every 100 claims).<sup>27</sup>

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<sup>23</sup> Human Rights Joint Committee (n. 22), para 4.13.

<sup>24</sup> Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (October 2014) 4.

<sup>25</sup> Adam Wagner, 'No, The Sun, "Euro Judges" Do Not "Go against UK in 3 out of 5 Cases". More like 1 in 100.'. Available at: <http://ukhumanrightsblog.com/2014/08/27/no-the-sun-euro-judges-do-not-go-against-uk-in-3-out-of-5-cases-more-like-1-in-100/>.

<sup>26</sup> Adam Wagner, 'UK Loses 3 out of 4 European Human Rights Cases? More like 1 in 50, Actually'. Available at: <http://ukhumanrightsblog.com/2012/01/12/uk-loses-3-out-of-4-european-human-rights-cases-more-like-1-in-50-actually/>.

<sup>27</sup> Cases lost by the UK- 301, applications made against the UK - 22,781; Public Relations Unit of the European Court of Human Rights, 'Overview: 1959-2014' (2015) 7-8. Available at: [http://www.echr.coe.int/Documents/Overview\\_19592014\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf).

### 3. Human Rights and Devolution

Two members of the Commission on a Bill of Rights, Helena Kennedy QC and Philippe Sands QC, noted that the negative perceptions of the Human Rights Act were not necessarily UK-wide:

It is abundantly clear that there is no “ownership” issue in Northern Ireland, Wales and Scotland (or large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported.<sup>28</sup>

Human rights operate within the political context of devolution of power to institutions in Scotland, Wales and Northern Ireland. The generally favourable public disposition towards the incorporation of the European Convention within the domestic legal systems in these constituent parts of the UK, and ‘strong degree of opposition’ to proposals for their reform,<sup>29</sup> may in part mark a collective differentiation from the dominant narrative in England.

The GFA envisaged that the authority of the Northern Ireland Assembly to legislate would be bound up with its compliance with the ECHR<sup>30</sup> and that the judiciary would determine when Assembly legislation violates the ECHR (with any identified breach invalidating the legislative provisions in question). Under the GFA:

The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to:

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<sup>28</sup> The Commission on a Bill of Rights (n.15), para.88(v).

<sup>29</sup> The Commission on a Bill of Rights (n.15), para.71.

<sup>30</sup> Good Friday Agreement (n.2), Strand I, para.5(b).

(a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void...<sup>31</sup>

The Human Rights Act 1998 in combination with the Northern Ireland Act 1998, presently uphold these aspects of the GFA.<sup>32</sup> The Northern Ireland Assembly can legislate to build up rights protections within Northern Ireland's law (in Wales, for example, the Assembly in Cardiff legislated to extend the protections for children's rights, imposing a duty upon Welsh ministers to have due regard to the UN Convention on the Rights of the Child in their decision-making<sup>33</sup>), but cannot breach the minimum standard of the incorporated ECHR rights.

This system does not mean that human rights are uniform in all parts of the UK. As Lord Neuberger, President of the UK Supreme Court, has noted:

[E]ven part of the United Kingdom, Northern Ireland, has a significantly different legal position in respect of important social issues such as women's reproductive rights, blasphemy and gay marriage.<sup>34</sup>

As we have seen, at a Westminster level, the Human Rights Act 1998 introduced, by mechanisms like declarations of incompatibility, 'a delicate constitutional dialogue and a dance of deference between the judiciary and legislature but one where ultimately Parliament has the last word'.<sup>35</sup> By contrast, where Northern Ireland Assembly

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<sup>31</sup> Good Friday Agreement (n. 2), Strand I, para.26.

<sup>32</sup> Northern Ireland Act, s.6(1), s.6(2)(c) and s.7(1) place the ECHR rights and Human Rights Act arrangements outside the Northern Ireland Assembly's legislative competence. Under the Human Rights Act s3(2)b with s21(1), the Northern Ireland Assembly's legislation is of a 'secondary' nature. See R. Gordon and T. Ward, *Judicial Review & the Human Rights Act* (Routledge-Cavendish, 2000) 15.

<sup>33</sup> Rights of Children and Young Persons (Wales) Measure 2011.

<sup>34</sup> Lord Neuberger, 'Magna Carta and the Holy Grail' (12 May 2015) para.7.

<sup>35</sup> A. O'Neill, 'Stands Scotland Where it Did?' (2006) 57 NILQ 102, 106.

legislation conflicts with human rights, ‘the courts are supreme and are required to strike down all and any “unconstitutional” acts of the devolved legislature’.<sup>36</sup>

Westminster also has the legal power to legislate within the purview of the devolved institutions. The UK’s constitutional arrangements are not federal, featuring strictly demarked functions and powers for respective levels of governance. As a matter of legal theory, Westminster has loaned its law making power to the devolved institutions, but its ability to legislate remains unabridged.<sup>37</sup> This power has, however, been tempered as a matter of practice by constitutional convention. Here Lord Sewel, then responsible for piloting the devolution legislation through the House of Lords, set out the terms of the convention that would come to be named after him with regard to Westminster-Holyrood relations:

We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.<sup>38</sup>

This expectation that Westminster will seek the consent of a devolved legislature before legislating is not enforceable as a matter of law, but any effort by Westminster to act unilaterally would be at variance with the nature of the devolution settlement. A major legislative imposition within the realm of devolved matters would be labelled “unconstitutional”, and would consequently risk undermining the relationship between the constituent parts of the UK.

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<sup>36</sup> *ibid.*, 106.

<sup>37</sup> See Scotland Act 1998, s.28(7).

<sup>38</sup> HL Debs., vol.592, col.791 (21 Jul. 1998). See also *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (Oct 2013) para.14. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf).



#### 4. The Good Friday Agreement as an International and Bilateral Treaty

The GFA involved both a settlement between the parties in Northern Ireland whilst also a bilateral international treaty between Ireland and the United Kingdom.<sup>39</sup> In contemporary peace settlements this duality is not unusual, with state-only treaties and settlements having given way to inter-linked settlements between state and non-state actors.<sup>40</sup> This shift might well reflect broader changes within international law but it leaves aspects of the concept of a ‘peace agreement’ under-defined and under-explored.<sup>41</sup> Thus, whilst the agreement amongst the parties in Northern Ireland was and remains extremely significant, this section of our analysis focuses on the Bilateral Treaty between the UK and Ireland. Its terms are covered by customary international law and the Vienna Convention on the Law of Treaties (VCLT).<sup>42</sup>

The ‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes)’ comes firmly within the purview of public international law. That both Governments sought to have their bilateral agreement indexed with the UN Treaty Series demonstrates the intended ‘international’ character of the Treaty and its binding nature under international law.<sup>43</sup> The annexed provisions referred to in this Treaty’s title include the ‘Agreement Reached in the Multiparty Negotiations.’ Annexes are considered to be essential elements of a treaty and are thus not less binding than the main text unless an agreement indicates

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<sup>39</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes). Belfast, 10 April 1998, 2114 UNTS 473.

<sup>40</sup> A database of contemporary peace agreements is available at, [http://www.transitionaljustice.ulster.ac.uk/peace\\_agreements\\_database.html](http://www.transitionaljustice.ulster.ac.uk/peace_agreements_database.html).

<sup>41</sup> Christine Bell ‘Peace agreements: Their nature and legal status’ (2006) 100 *American Journal of International Law* 373, 374.

<sup>42</sup> Both parties are signatories to the Vienna Convention on the Law of Treaties 1969, (1980) 1155 UNTS 331. Although Ireland did not accede until 2006, by the mid-1990s at the latest the Vienna Convention had come to be regarded as reflective of customary international law; see I. Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> Ed, Manchester University Press, 1984) 5-10 and A. Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> Ed, CUP, 2013) 10-11.

<sup>43</sup> The title given to a treaty/agreement/protocol/convention is not relevant to its status under international law.

otherwise. The text of the Bilateral Treaty implies that the Annex ought to be considered binding upon the two Governments and itself forms part of the Treaty between the two states. The important text with regard to the commitments by both the UK and Ireland follows:

- (1) It shall be a requirement for entry into force of this Agreement that:
  - (a) British legislation shall have been enacted for the purpose of implementing the provisions of Annex A to the section entitled "Constitutional Issues" of the Multi-Party Agreement;
  - (b) the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement shall have been approved by Referendum;
  - (c) such legislation shall have been enacted as may be required to establish the institutions referred to in Article 2 of this Agreement.
- (2) Each Government shall notify the other in writing of the completion, so far as it is concerned, of the requirements for entry into force of this Agreement. This Agreement shall enter into force on the date of the receipt of the later of the two notifications.
- (3) Immediately on entry into force of this Agreement, the Irish Government shall ensure that the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement take effect.<sup>44</sup>

The material subject to implementing legislation in Annex A includes a section on 'Rights, Safeguards and Equality of Opportunity'. This section begins with the parties affirming a partial catalogue of 'the civil rights and the liberties of everyone in the community' which Austen Morgan characterises as having 'no legal effect in

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<sup>44</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes). Belfast, 10 April 1998, 2114 UNTS 473, Article 4.

international, much less, municipal law; it is purely aspirational as between the political parties'.<sup>45</sup> This section, however, proceeds to deal with the UK's legislative commitments:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.<sup>46</sup>

...

The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction.<sup>47</sup>

The conformity of the legislative arrangements enacted within the Republic of Ireland and the United Kingdom to the requirements of the GFA can therefore be evaluated, within international law, by reference to the terms of the Bilateral Treaty and its Annexes. International law provides two points of analysis for scrutinising the two countries' obligations; customary international law and the Vienna Convention on the Law of Treaties (VCLT). There is substantial overlap between the requirements of customary international law and the Vienna Convention and therefore the latter provides a convenient method of scrutinising the latitude available under the Bilateral Treaty.<sup>48</sup>

Under the doctrine of *pacta sunt servanda*, a core feature of treaty law, is the obligation borne by parties to act in good faith throughout negotiation and implementation and to

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<sup>45</sup> A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000) 376.

<sup>46</sup> Good Friday Agreement (n. 2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.2.

<sup>47</sup> Good Friday Agreement (n. 2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.9.

<sup>48</sup> See A. Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> Ed, CUP, 2013); E. Cannizzaro, (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011) and J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996).

abide by an operative treaty.<sup>49</sup> This obligation provides the basis for interpreting parties' behaviour in conforming to treaty obligations.<sup>50</sup> Once a treaty is in force, the parties – in this case Ireland and the UK – must act in good faith with regard to all elements of the Treaty. Not acting in good faith under international law would include the non-performance of a specific treaty term, such as a requirement to introduce domestic legislation or constitutional change. Thus a failure to introduce legislation incorporating the ECHR into the law of Northern Ireland would have been in breach of the good faith obligations. By the same token, a subsequent change which undermined the enforcement of ECHR rights in Northern Ireland could also be interpreted as a bad faith breach of international obligations. States cannot invoke changes in domestic political structures, for example, changes in the political direction of the executive or legislative branches of Government (what Irish Senator Hildegard Naughton termed 'narrow sectional political reasons'<sup>51</sup>) to defeat this requirement or as a basis for its unilateral re-interpretation. More generally, under Article 27 of the VLCT, states cannot invoke domestic law as a basis for failure to perform a treaty.<sup>52</sup>

The Annex to the Agreement does not make specific reference to the Human Rights Act, rather it references the incorporation of the ECHR into Northern Ireland (see further section 6 (Option 1) below). How this obligation ought to be interpreted comes under Article 31 of the VLCT which requires a good faith interpretation based on the ordinary meaning of the terms of the treaty in light of its object and purpose.<sup>53</sup> To ascertain the object and purpose, parties may not only use the terms of a treaty itself but also may also utilise the preamble and annexes (in the context of the Bilateral Treaty, the terms of the settlement contained in the Annex). Other relevant elements include instruments

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<sup>49</sup> J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996) 39. See also O. Schachter, *International Law in Theory and Practice* (M. Nijhoff Publishers, 1991).

<sup>50</sup> Vienna Convention on the Law of Treaties, Article 26.

<sup>51</sup> Seanad Debates, 14 May 2015.

<sup>52</sup> Vienna Convention on the Law of Treaties, Article 26.

<sup>53</sup> Vienna Convention on the Law of Treaties, Article 31; V. Crnic-Grotic, 'Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties' (1997) 7 *Asian Yearbook of International Law* 141.

made by one or more of the parties in the course of concluding a treaty and accepted by others as related to it, (which, in the context of the Bilateral Treaty could include the Human Rights Act's legislative process at the time it was concluded). Furthermore, the broader context of a treaty's operation may also be taken into account, including subsequent practice in the application of the treaty. For example, although the Human Rights Act and the Northern Ireland Act do not incorporate the ECHR in its entirety,<sup>54</sup> notably not including the right to an effective remedy,<sup>55</sup> Ireland has not questioned the fact that this substantial degree of incorporation satisfies the Bilateral Treaty's requirements. Statements made by both Governments with regard to the implementation of the GFA through the passage of the Human Rights Act are important (subsequent agreements like the St Andrews Agreement of 2006 or the Stormont House Agreement of 2014 would have been similarly important, had their provisions related to the overarching human rights protections<sup>56</sup>).

Article 32 also allows for the use of the supplementary materials such as preparatory work (*travaux préparatoires*) and the circumstance of an agreement's conclusion to aid interpretation of its obligations where their meaning is ambiguous or obscure, or if the Article 31 rules of interpretation lead to a manifestly absurd or unreasonable result.<sup>57</sup> *Travaux préparatoires* have been widely utilised by international and domestic courts and tribunals in other instances. However, without either Government releasing these materials it is unlikely that these will become available until the usual 30 year time has elapsed for the release of Government documents.<sup>58</sup>

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<sup>54</sup> See Human Rights Act 1998, Sch.1, Northern Ireland Act 1998, s.71(5).

<sup>55</sup> ECHR, Article 13.

<sup>56</sup> Irish Minister for Foreign Affairs Charles Flanagan has noted that 'I was somewhat disappointed that a renewed commitment to a Bill of Rights for Northern Ireland, based on the European Convention of Human Rights, as provided for by the Good Friday Agreement, was not included in the Stormont House Agreement, despite the best encouragement of this Government'. Seanad Debates, 14 May 2015.

<sup>57</sup> Vienna Convention on the Law of Treaties, Article 32.

<sup>58</sup> The UK Government has reduced this to 20 years but this will not become fully effective for several more years and there is currently a backlog in the system. Sensitive material may also be kept secret for longer.

Interpretation is part of the performance of a treaty. As such, the process of using materials to interpret the treaty must itself be conducted in good faith by the parties to the treaty.<sup>59</sup> On the face of the Treaty and Annex, these requirements of international law are not engaged beyond giving effect to the ordinary meaning of the text. Although the effectiveness of the Treaty ought also to be borne in mind,<sup>60</sup> as the ordinary meaning does not lead to ambiguity, absurdity or to the defeat the object and purpose of the Treaty there is no need for recourse to the more complex rules of interpretation. The critical element will be to examine the intention of the parties as seen through the ordinary meaning of the Agreement's text.

The Bilateral Treaty and its Annex evidently envisaged an "ECHR-plus" arrangement for Northern Ireland, whereby the obligations and justiciability of incorporated ECHR provisions would ultimately be supplemented by the work of the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland. If this is the case, any weakening of the degree of implementation of the ECHR (an "ECHR-minus" scenario for Northern Ireland) would appear to contravene the Treaty.

The GFA's ECHR incorporation provision must also be interpreted in light of other elements of the Treaty, including the requirement for reciprocal human rights arrangements imposed upon the Irish Government<sup>61</sup> and broader commitments by the UK Government.<sup>62</sup> As proposals for repeal of the UK Human Rights Act gathered pace,

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<sup>59</sup> A. Aust, *Modern Treaty Law and Practice* (3rd Ed, CUP, 2013) 208.

<sup>60</sup> A. McNair, *The Law of Treaties* (Clarendon, Oxford, 1961) 365.

<sup>61</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.9.

<sup>62</sup> See Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.8, which affirms that the Good Friday undertakings 'will build on existing protections in Westminster legislation in respect of the judiciary, the system of justice and policing'. This undertaking could be interpreted as extending to the UK as a whole, in light of the then UK Foreign Secretary's account of UK policy; if the UK 'is to carry credibility when we talk to other governments about their observance of human rights, we must command respect for our own human rights record', Robin Cook, Labour Party Conference Speech (July 1997).

Irish Minister for Foreign Affairs Charles Flanagan emphasised the reciprocity requirements under the GFA; ‘The Irish Government, for its part, took steps to strengthen the protection of human rights in this jurisdiction by enacting the European Convention on Human Rights Act 2003’.<sup>63</sup> Beyond this, however, it has been argued by Christine Bell that the GFA’s reciprocity provisions commit the UK to human rights protections throughout the UK and not simply in Northern Ireland.<sup>64</sup>

Within international law reciprocity is the acceptance that the obligations undertaken are balanced by the advantages gained and that this is mirrored by the other parties, (though not necessarily substantively the same obligations or advantages). Reciprocity does not necessarily require mirroring of each other’s acts or legislation and, as D.W. Greig has pointed out, its operation is often very much related to proportionality.<sup>65</sup> On the basis that different arrangements for implementation of the ECHR into law in the UK and Ireland were envisaged under the Bilateral Treaty, ongoing discrepancies in the levels of rights protections within Northern Ireland and the Republic of Ireland do not indicate a breakdown in the Treaty arrangements. Equally, however, it cannot be claimed that every adjustment in the standard of human rights protections will fulfil the Bilateral Treaty’s requirements of reciprocity.

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<sup>63</sup> Charles Flanagan TD, ‘Commencement Matters: International Agreements’ (Seanad, 14 May 2015).

<sup>64</sup> See C. Bell, ‘Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland’. Available at: <http://rightsni.org/2015/05/human-rights-act-repeal-and-devolution-quick-points-and-further-resources-on-scotland-and-northern-ireland/>.

<sup>65</sup> D.W. Greig, ‘Reciprocity, Proportionality, and the Law of Treaties’ (1994) 34 *Virginia Journal of International Law* 295, 298.

## 5. Situating Northern Ireland within the Good Friday Agreement

There is some complexity regarding the exact legal position of Northern Ireland's political parties within the GFA. Although the negotiating parties<sup>66</sup> reached agreement on the text of the document, the commitments within that document are only legalised between the UK and Ireland.<sup>67</sup> Christine Bell notes that the 1998 "Agreement" is in fact composed of two agreements; the multi-party agreement and the inter-state agreement.<sup>68</sup> These are respectively agreements between all of the negotiating and consenting parties at the Good Friday talks, and between the British and Irish states. As we have explained above, the UK's obligations under the GFA in international law are technically owed to Ireland, the Agreement also recognises the interests of the negotiating participants and individuals of Northern Ireland in the fulfilment of its terms.

There is a certain parallel with general human rights treaties in this regard. States parties to such international agreements do not merely owe obligations to each other, but also to individuals within their jurisdiction.<sup>69</sup> Accordingly, action by the UK Government which violates the terms of the GFA is not only a breach of the UK's obligations to Ireland, but also a violation of its commitments to the people of Northern Ireland. These commitments to individuals tend to be enforced in a much more diffuse way than would be the case with the commitments to other countries, but there are a number of monitoring bodies and organisations that will traditionally hold governments accountable for such breaches. In the Northern Irish context these bodies would range from the local to the international. With regard to the proposed repeal of the Human

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<sup>66</sup> Eight Northern Ireland political parties signed up to the GFA (in order of their then vote-share, the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party and Labour). The Democratic Unionist Party was the only major Northern Ireland Party to oppose the GFA.

<sup>67</sup> For full details of the complexities of peace agreement construction see; Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, 2008) 144 et seq.

<sup>68</sup> *ibid*, 146.

<sup>69</sup> On these obligations in the context of peace agreements and human rights see respectively; *ibid* 145; Malcolm Evans (ed), *International Law* (3rd edn, OUP, 2010) 800–801.



Rights Act the Northern Ireland Human Rights Commission has already expressed its concerns,<sup>70</sup> civil society organisations have issued statements,<sup>71</sup> and the United Nations Human Rights Committee has been alerted.<sup>72</sup> It is likely that other non-state bodies will also seek the enforcement of the Agreement, including the United Nations Human Rights Council, the Council of Europe and cross-border groups. These bodies are able individually and collectively to exert pressure upon the UK to comply with its undertakings.<sup>73</sup>

Human rights undertakings form a substantive part of the various Northern Ireland agreements. The ECHR underpins several aspects of the GFA. The Agreement, reflecting the significant mistrust of “British values” and the UK Government by many within Northern Ireland, does not base itself in ECHR-*equivalent* protections (to be defined and solely adjudicated in the UK), but in the ECHR itself. This reliance on the substance and process of the ECHR was intended to put distance between the negotiating parties and highly-disputed rights issues. The Convention was seen as common – and neutral – substantive ground and adjudicative space.

Later communiques by the UK and Irish Governments have built upon the GFA, including the Joint Declaration issued in 2003, which commended the progress made by the introduction of the Human Rights Act and discussed the extension of human rights protections beyond the ECHR.<sup>74</sup> The St Andrews Agreement also reaffirms the

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<sup>70</sup> Northern Ireland Human Rights Commission, ‘Chief Commissioner Responds to Human Rights Proposals’ (12 May 2015) Available at: <http://www.nihrc.org/news/detail/chief-commissioner-responds-to-human-rights-proposals>.

<sup>71</sup> Committee on the Administration of Justice, ‘Tory Plan to Repeal Human Rights Act in NI Would Constitute Flagrant Breach of GFA’ (11 May 2015). Available at: <http://www.caj.org.uk/contents/1293>; Amnesty International (Ireland), ‘Human Rights Act: Amnesty Warns Repeal Moves Could Undermine Peace In Northern Ireland’ (14 May 2015). Available at: <https://www.amnesty.ie/node/4293>.

<sup>72</sup> Northern Ireland Human Rights Commission, ‘UK Commissions Alert United Nations Committee on Human Rights Act’ (18 June 2015). Available at: <http://www.nihrc.org/news/detail/uk-commissions-alert-united-nations-on-human-rights-act>.

<sup>73</sup> For more see; Bell (n .67), 175.

<sup>74</sup> ‘Joint Declaration by the British and Irish Governments’ (April 2003), Annex 3 para 2.

importance of human rights protections.<sup>75</sup> In an annex dedicated to outlining the commitments of the UK Government relating to ‘Human Rights, Equality, Victims and Other Issues’, the importance of the Human Rights Act to the peace settlement is manifested through a specific commitment to give the Northern Ireland Human Rights Commission additional powers.<sup>76</sup> The (unagreed) final draft that resulted from the Haass talks in 2013 also placed significant emphasis on the ECHR as a touchstone of parading rights.<sup>77</sup> Furthermore, the recent Stormont House Agreement indicates the continued centrality of the ECHR in the peace process. In the context of parades<sup>78</sup> and the Historical Investigations Unit,<sup>79</sup> regard for, and compliance with, the Convention are required. Elsewhere, the Stormont House Agreement affirms the need for mechanisms for dealing with the past are ‘human rights compliant’,<sup>80</sup> and notes the role of the negotiating parties in promoting human rights values in lieu of an agreed Bill of Rights for Northern Ireland.<sup>81</sup> It is clear that the treatment of human rights is not an addendum or extraneous to the peace process, but a thread that runs through it.

This perhaps partially explains why, so far as Northern Ireland is concerned, the UK Bill of Rights Commission, established in 2011 under the Coalition Government, was equivocal about pressure on human rights in the Northern Ireland context:

‘For example, the Human Rights Consortium said... “we also fear that a [UK Bill of Rights] could be used as an excuse to undermine or replace the Human Rights Act

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<sup>75</sup> ‘Agreement at St Andrews’ (13 October 2006), ss 3, 8, and Annex E.

<sup>76</sup> *ibid*, Annex B. This annex additionally mentions the UK Bill of Rights Commission set up in 2011 to examine options for a Bill of Rights for the UK. The terms in which this Commission is mentioned emphasise human rights-based dialogue and do not suggest a pathway to reform of the Human Rights Act.

<sup>77</sup> ‘Proposed Agreement 31 December 2013: An Agreement Among The Parties Of The Northern Ireland Executive On Parades, Select Commemorations, And Related Protests; Flags And Emblems; And Contending With The Past’ [‘Haass Final Draft’] (31 December 2013) 4.

<sup>78</sup> ‘Stormont House Agreement’ (23 December 2014), s 19.

<sup>79</sup> *ibid*, s 31.

<sup>80</sup> *ibid*, s 21.

<sup>81</sup> *ibid*, s 69.

itself, with the very real risk that the people of Northern Ireland will have less, rather than more, human rights protections post-conflict.” ... These views were echoed by many in Northern Ireland.<sup>82</sup>

In general, it is unsurprising that there would be substantially different socio-cultural attitudes to human rights within Northern Ireland. For example, many of the concerns that are voiced in England around the rights of ‘prisoners’ and ‘terrorists’ are differently situated in the post-conflict context. It also possible that the aversion to external influence often expressed in the English (media) antipathy towards ‘foreign courts’, is less prevalent in Northern Ireland as a region accustomed to (and indeed as a beneficiary of) international attention and cooperation on sensitive matters.

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<sup>82</sup> Members of the Commission on a Bill of Rights, ‘A UK Bill of Rights? The Choice Before Us (Volume 2: Annexes)’ (December 2012), para.19 (footnote removed).

## SECTION TWO – OPTIONS FOR REFORM

### 6. An Overview of Reforms Options

The position of Northern Ireland in any reformed UK human rights arrangements remains uncertain. In response to pointed questions on the implications of the Good Friday Agreement for the Conservative Government's plans, Justice Minister Dominic Raab could only maintain that '[w]e will consider the implications of a Bill of Rights on devolution as we develop our proposals, and we will fully engage with the devolved administrations'.<sup>83</sup> In this phase of supposed indeterminacy, in which the range of options below supposedly remain open to the UK Government, the 1998 settlement imposes significant constraints upon its freedom of action.

#### **Option 1 – Cosmetic Change**

- *Replace the Human Rights Act with a "British Bill of Rights", which retains the rights incorporated into the UK's legal orders through the Human Rights Act and Devolution Legislation and retains the duty of domestic courts to have regard to Strasbourg jurisprudence and the right of individual petition to Strasbourg.*

The 2015 Conservative Party Manifesto pledged to 'scrap the Human Rights Act, and introduce a British Bill of Rights'<sup>84</sup>. The most limited way to give effect to this headline proposal would be a "rebadging" of the Human Rights Act which did not erode the ECHR

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<sup>83</sup> Dominic Raab, Written Answer 5209 (1 Jul 2015). Available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-01/5209/>

<sup>84</sup> This name is suggested in the Conservative Party's Manifesto; Conservative Party, 'The Conservative Party Manifesto 2015' 60. Available at <https://www.conservatives.com/manifesto>, accessed 24 June 2015.

protections or the role of ECHR institutions. Such a reform would allow the Conservative Government to circumvent the legal and political difficulties surrounding the GFA.

The Agreement has been read by some as requiring that the Human Rights Act continues in its present form.<sup>85</sup> The Human Rights Act had already made some progress through the UK's Parliament at time the GFA was concluded, which supporters claim implies that it would be the vehicle by which the UK's human rights obligations would be fulfilled.<sup>86</sup> The Irish Minister for Foreign Affairs, Charles Flanagan TD, recently informed the Seanad that the UK's obligations were 'given [effect] in the 1998 UK Human Rights Act'.<sup>87</sup> The Human Rights Act explicitly provides that its reach extends to Northern Ireland, whereas Wales and Scotland are not mentioned in the text (being covered by implication).<sup>88</sup> Under the text of the Agreement, however, the continued existence of the Human Rights Act itself is not required. The relevant section of the Good Friday Agreement reads:

'The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)...'<sup>89</sup>

The Agreement therefore requires only the incorporation of the ECHR in Northern Ireland's law (with certain rights being described as particularly important to the peace process), and not the enactment of the Human Rights Act *per se*. The substance of the connection established between Northern Ireland's domestic law the ECHR remains the key to fulfilling the GFA's requirement, not the legislative form. Indeed, given the remit

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<sup>85</sup> See, for example; Mr Steven Agnew, NIA Deb 1 June 2015, vol 105, no. 2, page 47.

<sup>86</sup> Anthony Speaight QC, 'Devolution Options' in Members of the Commission on a Bill of Rights (n.15), page 252.

<sup>87</sup> Charles Flanagan TD, 'Commencement Matters: International Agreements' (Seanad, 14 May 2015).

<sup>88</sup> Human Rights Act, s.22(6).

<sup>89</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.2

of the Northern Ireland Human Rights Commission to draft a Bill of Rights for Northern Ireland,<sup>90</sup> the Human Rights Act was likely initially envisaged as a placeholder measure.

Nonetheless, labelling any new enactment as ‘British’ would carry significant symbolism within Northern Ireland. Throughout the GFA, British and Irish are used dichotomously and as separated entities.<sup>91</sup> In this context, regardless of the substance of such legislation, a “British” Bill of Rights would inevitably be perceived as partisan in its operation. Entitling the new legislation a ‘United Kingdom’ Bill of Rights avoids this specific incongruence with the language of the GFA but any national appellation within the legislation’s title is likely to remain a point of contention in the Northern Ireland context.

### **Option 2 – Reforming the ECHR**

- *Leave the UK’s domestic framework as it currently stands or engage only in cosmetic alterations such as rebranding the Human Rights Act.*
- *Negotiate reforms to the Strasbourg system within the Council of Europe.*

The Coalition Government in office between 2010 and 2015 pursued the approach of reforming the UK’s obligations under the ECHR,<sup>92</sup> using the UK’s position as Chair of the Council of Europe in 2011/2012<sup>93</sup> to push for reforms to the European Court and to

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<sup>90</sup> See Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.4 and the Northern Ireland Act 1998, s.69(7).

<sup>91</sup> See for example British-Irish Council, British/Irish Agreement, British-Irish Intergovernmental Conference; Good Friday Agreement (n.2), Strand 3.

<sup>92</sup> Helen Fenwick, ‘The Conservative Stance in the 2015 Election on the UK’s Relationship with the Strasbourg Court and Its Jurisprudence – Bluff, Exit Strategy or Compromise on Both Sides? (Part II)’ Available at: <http://ukconstitutionallaw.org/2015/03/12/helen-fenwick-the-conservative-stance-in-the-2015-election-on-the-uks-relationship-with-the-strasbourg-court-part-ii/>.

<sup>93</sup> Foreign & Commonwealth Office, ‘Announcement: UK to Chair Council of Europe’. Available at: <https://www.gov.uk/government/news/uk-to-chair-council-of-europe>.

demand increased respect for the principle of subsidiarity in its jurisprudence.<sup>94</sup> The Coalition Government experienced success in this regard,<sup>95</sup> and the Conservative Government could continue this path of reforming the ECHR in partnership within the Council of Europe with confidence that doing so would leave the Good Friday Agreement and the devolution settlements intact.

### **Option 3 – “Breaking the Link” to the ECHR Institutions**

- *Repeal the Human Rights Act and enact a Bill of Rights with broadly equivalent protections, but without requiring the UK Courts to have regard to Strasbourg’s interpretation of those rights.*
- *Remain within the Council of Europe and the ECHR System.*

Opposition within the Conservative Party to the domestic courts’ adherence to Strasbourg case law has generated proposals to loosen the connection between the UK’s courts and the ECHR institutions. One of the objectives set out in the Conservative Manifesto was to ‘curtail the role of the European Court of Human Rights’,<sup>96</sup> which has developed the ECHR rights under the “living instrument” doctrine to give them more extensive interpretations than would have been envisaged when the ECHR was drafted.<sup>97</sup> This objective may prove difficult to achieve in light of the Government’s slender majority of at Westminster and in the face of opposition from within the three devolved administrations,<sup>98</sup> so three different variations upon this option and their

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<sup>94</sup> Committee of Ministers of the Council of Europe, ‘High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration)’ (2012). Available at: [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf).

<sup>95</sup> Ed Bates, ‘The Brighton Declaration and the “Meddling Court”’. Available at: <http://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/>.

<sup>96</sup> Conservative Party, ‘The Conservative Party Manifesto 2015’ 60. Available at <https://www.conservatives.com/manifesto>, accessed 24 June 2015.

<sup>97</sup> See *Tyrer v UK* (1978) 2 EHRR 1, para.31.

<sup>98</sup> See C. Murray, ‘Devolution and the Future of the UK’s Human Rights Act 1998’. Available at: <http://humanrights.ie/civil-liberties/devolution-and-the-future-of-the-uks-human-rights-act-1998/>; M.

potential impact upon the Good Friday Agreement are explored below. As noted above at section 4, the Good Friday Agreement requires the incorporation of the ECHR into the law of Northern Ireland.<sup>99</sup> A degree of substantive incorporation would continue under the options discussed below, leading many Parliamentarians to assume that they will be compatible with the GFA's arrangements:

A new Bill of Rights incorporating all the original articles of the European convention and other British rights such as trial by jury would be consistent with the Good Friday agreement and would allow Parliament, not Strasbourg, to decide where the balance between rights lies.<sup>100</sup>

*Option 3a)*

- *Modify the Human Rights Act to 'break the link' to Strasbourg jurisprudence as it applies to the interpretation of both Westminster and devolved legislation.*

Strasbourg's interpretation of ECHR applied to devolved legislation in:

Strasbourg's interpretation of ECHR applied to Westminster legislation as it affects:



The objective of breaking the link with Strasbourg jurisprudence implies maintaining in domestic law the rights set out in the 1950 Convention, but resiling from at least some elements of the Strasbourg Court's subsequent development of the ECHR rights. As scope already exists for divergent interpretations of rights requirements under the Human Rights Act, however, meaningful reform would have to either expressly prohibit reference to

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Elliot, 'Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights?'. Available at: <http://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/>; C. O'Conneide, 'Human Rights, Devolution and the Constrained Authority of the Westminster Parliament'. Available at: <http://ukconstitutionallaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament/>.

<sup>99</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para 2.

<sup>100</sup> Lord Flight, HL Deb, vol.762, col.269 (1 Jun 2015).



Strasbourg jurisprudence by UK courts or render such jurisprudence purely ‘advisory’.<sup>101</sup> A proposal which attempts to ‘break the formal link between the British Courts and the European Court of Human Rights’<sup>102</sup> is intended to draw a red line against any subsequent extensions of the ECHR rights by Strasbourg affecting the UK, on the basis that Strasbourg should grant leeway (in the language of Strasbourg jurisprudence, a “Margin of Appreciation”<sup>103</sup>) to the UK Parliament’s decision to restrict the ambit of human rights through clear legislation.

In pursuing the goal of completely breaking this link, as it applies to both Westminster legislation and the enactments of the devolved legislatures, the Conservative Party would face considerable difficulties with regard to the current devolution settlement. By constitutional convention (the Sewel Convention)<sup>104</sup> any Westminster legislation which modifies the devolution settlements for Wales, Scotland or Northern Ireland or impinges upon the remits of the devolved institutions (engages a “devolution matter”) should be assented to by the devolved legislatures by means of a Legislative Consent Motion. A “devolution matter” is defined in the Northern Ireland Assembly standing orders as:

- (a) a transferred matter, other than a transferred matter which is ancillary to other provisions (whether in the Bill or previously enacted) dealing with excepted or reserved matters;
- (b) a change to –

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<sup>101</sup> Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (October 2014) 5. Available at: [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf).

<sup>102</sup> Conservative Party, ‘The Conservative Party Manifesto 2015’ 60. Available at <https://www.conservatives.com/manifesto>, accessed 24 June 2015.

<sup>103</sup> *Connors v United Kingdom* (2005) 40 EHRR 9, para.82: ‘[A] margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions’.

<sup>104</sup>

- (i) the legislative competence of the Assembly;
- (ii) the executive functions of any Minister;
- (iii) the functions of any department.<sup>105</sup>

Restricting the courts' ability to 'take into account'<sup>106</sup> Strasbourg case law would restrict their ability to assess whether the Assembly's legislation is ECHR compliant. It would change the nature of the human rights constraints which bind the Northern Ireland Assembly. Breaking the link between Strasbourg and all aspects of the law affecting Northern Ireland would, therefore, undermine the incorporation of the ECHR into the law of Northern Ireland for the purposes of the Agreement. Attempts to impose such an arrangement from Westminster, without a Legislative Consent Motion from the Northern Ireland Assembly, would also amount to an affront to the GFA's institutional arrangements.

*Option 3b)*

- *Modify the Human Rights Act to 'break the formal link' with the Strasbourg Court in respect of all Westminster legislation.*
- *The existing incorporation of the ECHR as interpreted by the Strasbourg Court under the Human Rights Act/Devolution Acts would continue to apply to all legislation of the devolved administrations.*

Strasbourg's interpretation of ECHR applied to devolved legislation in:



Strasbourg's interpretation of ECHR applied to Westminster legislation as it affects:



The devolution issues which would blight any effort to impose Option 3a from Westminster were recognised even before the 2010 General Election, when Dominic Grieve QC pledged that a future Conservative Government's "British" Bill of Rights

<sup>105</sup> Northern Ireland Assembly, Standing Order 42A, para.10.

<sup>106</sup> Human Rights Act, s 2(1).

would not be imposed ‘against the will of devolved administrations in devolved matters’.<sup>107</sup> If this pledge is to be respected then, given the opposition to the Conservative Party’s reform proposals in Wales, Scotland and Northern Ireland, a new Bill of Rights would have to exclude matters within the legislative remits of the devolved institutions. As the obligations upon the devolved legislatures and executives stem from the Devolution Acts and not the Human Rights Act, such a reform would not generate the same constitutional difficulties as Option 3a.

Were the current plans on ‘English Votes on English Laws’ followed through, this reform would create a regionally bi-functional Westminster law-making process. Both UK-wide legislation (in areas where law-making competence is not transferred) and England-only legislation would be covered by the new Bill of Rights. UK-wide legislation touching upon devolved competences (such as the UK’s current counter-terrorism legislation, enacted at Westminster and applicable throughout the UK despite criminal justice being a devolved matter), however, would require a complex legislative consent process, whereby the devolved legislatures might seek the application of the fully-incorporated ECHR within their jurisdictions.

Whilst such a reform would respect the general devolution settlement, respect for the GFA as it affects Northern Ireland alone cannot be achieved simply by separating out the arrangements covering the devolved administrations from those covering Westminster legislation. The Agreement stipulates that ‘[t]here will be safeguards to ensure’ that ‘neither the Assembly nor public bodies can infringe’ the ECHR.<sup>108</sup> This emphasis upon ‘public bodies’<sup>109</sup> is a necessary part of the human rights arrangements under the GFA,

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<sup>107</sup> D. Grieve, ‘Can the Bill of Rights do better than the Human Rights Act?’ (30 Nov 2009). Available at: <http://www.dominicgrieve.org.uk/news/can-bill-rights-do-better-human-rights-act>. See also Lord Faulks, HL Deb, vo.762, col.2209 (2 Jul 2015).

<sup>108</sup> Good Friday Agreement (n.2), Strand One - Democratic Institutions In Northern Ireland, paras 5, 5(b).

<sup>109</sup> On the complexities of what constitutes a ‘public authority’ in the context of the Human Rights Act, see A. Williams, ‘A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] Public Law 139.

for it is through interaction between public bodies and individuals that human rights abuses will manifest themselves. In light of the opening words of the relevant paragraph 5 of Strand One of the Belfast Agreement, these requirements relate only to public bodies operating in, or in respect of, Northern Ireland (and not all UK public bodies).<sup>110</sup> Consequently, for public bodies constituted both under Assembly legislation and Westminster legislation which operate in respect of Northern Ireland, any reforms would need to retain protections equivalent to those in the Human Rights Act and Northern Ireland Act if they are to avoid conflict with the Good Friday Agreement.

*Option 3c)*

- *Modify the Human Rights Act to ‘break the formal link’ with the Strasbourg Court in respect of Westminster legislation passed only in respect of England.*
- *The existing incorporation of the ECHR as interpreted by the Strasbourg Court under the Human Rights Act/Devolution Acts would continue with regard to legislation of the devolved administrations, and in respect of Westminster legislation affecting the devolved jurisdictions.*

Strasbourg’s interpretation of ECHR applied to devolved legislation in:

Strasbourg’s interpretation of ECHR applied to Westminster legislation as it affects:



The problem created by the GFA cannot be resolved by any set of protections in a “British” Bill of Rights so long as those protections, insofar as they affect Northern Ireland, do not include a link to the case law of Strasbourg. Reforms which separated

<sup>110</sup> Paragraph 5 of Strand One uses a phrase - ‘all sections of the community’ - commonly used in the Northern Irish context. Additionally the paragraph discusses the ‘operation of these institutions’ in direct reference to the Assembly institutions to be newly created under the agreement and which exist only within Northern Ireland; Good Friday Agreement (n.2), Strand One - Democratic Institutions In Northern Ireland, para 5. See also the UK’s commitment to incorporate the ECHR into Northern Ireland’s (and not the whole of the UK’s) law; Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para 2.

out the arrangements covering the devolved nations and maintained the link to Strasbourg jurisprudence involved in the current settlement would, however, fulfil the requirement of the Good Friday Agreement that the ECHR should be incorporated into the law of Northern Ireland.

Such an “England-only” solution might, however, still not deal with the devolution issues raised above if the Human Rights Act was to be repealed without legislative consent motions from the devolved legislatures. The Human Rights Act explicitly extends to Northern Ireland<sup>111</sup> and is indeed entrenched under the Northern Ireland Act 1998 (beyond the competence of the Northern Ireland Assembly to alter).<sup>112</sup> Its repeal would therefore alter the legislative competence of the Northern Ireland Assembly and, under the Sewel Convention, require the Assembly’s consent.<sup>113</sup> Even if this was granted, this would not necessarily be the end of the Human Rights Act. Its repeal would remove the restriction on the competence of the devolved legislatures with regard to the ECHR rights. It would become possible for all of them to re-enact the Human Rights Act’s provisions into the law of their own jurisdictions.<sup>114</sup>

For Option 3c to circumvent the need for formal approval, the Human Rights Act would have to be not repealed, but amended to confine its geographic extent to Wales, Scotland and Northern Ireland. To proceed with their reform plans on this basis, the Conservative Government will have to accept that the Human Rights Act will remain, in

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<sup>111</sup> Human Rights Act 1998, s.22(6).

<sup>112</sup> Northern Ireland Act 1998, s.7(1)(b).

<sup>113</sup> This analysis of the implications of repeal of the Human Rights Act for devolution arrangements applies equally to Wales and Scotland. See I. Jamieson, ‘HRA Watch: Reform, Repeal, Replace? The Repeal of the Human Rights Act and the Sewel Convention in Scotland’ U.K. Const. L. Blog (11 Jun 2015). Available at: <http://ukconstitutionallaw.org/2015/06/11/hra-watch-reform-repeal-replace-iain-jamieson-the-repeal-of-the-human-rights-act-and-the-sewel-convention-in-scotland/>.

<sup>114</sup> See A. O’Donoghue and B.T.C. Warwick, ‘Constitutionally Questioned: UK Debates, International Law and Northern Ireland’ (2015) 66 NILQ 93, 99; ‘Northern Ireland could introduce an order that implements the ECHR for Northern Ireland alone’.

an amended form, on the statute book, and that a “British” Bill of Rights will not extend in effect beyond England.

#### **Option 4 – Repealing the ECHR’s Incorporation with No Comparable Replacement**

- *Repeal the Human Rights Act and ECHR-incorporation provisions in the Devolution Acts and either enact no replacement Bill of Rights or a Bill of Rights enforceable in UK law which are much more limited than the Human Rights Act.*
- *Remain within the Council of Europe and the ECHR System.*

The three variations discussed in Option 3 are predicated upon the Westminster’s repeal of the Human Rights Act occurring in tandem with the enactment of a “British” Bill of Rights with broadly equivalent rights provisions. Whilst little detail of the legislative proposal has been released at the time of writing, this assumption draws upon David Cameron’s pledge, at the 2014 Conservative Party Conference, to replace the Human Rights Act with provisions ‘passed in our Parliament rooted in our values’<sup>115</sup> and the 2014 Conservative Party Policy Paper on Human Rights, which stated that ‘at the heart of our plan is a new British Bill of Rights and Responsibilities’ which will include the original ECHR’s text.<sup>116</sup> Nonetheless, the vagary surrounding these proposals and delay in publishing a draft Bill means that we must consider the position if the Conservative Government opted to repeal the Human Rights Act without a replacement which includes a comparable catalogue of civil and political rights.

Any attempt to return to the “pre-1998” arrangements for rights protection in the UK would entail conflicts with the GFA. The 2014 Conservative Party Policy Paper on Human

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<sup>115</sup> David Cameron, Speech to the Conservative Party Conference (1 Oct 2014). Available at: <http://blogs.spectator.co.uk/coffeehouse/2014/10/david-camerons-speech-to-the-conservative-conference-full-text/>.

<sup>116</sup> Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (October 2014) 5. Available at: [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf).

Rights talks up the fact that ‘over the centuries through our Common Law tradition, the UK’s protection of human rights has always been grounded in real circumstance’.<sup>117</sup> But this tradition did little to curtail the litany of human-rights abuses perpetrated by the police, military and security agencies in the course of the Troubles and cannot substitute for the incorporation of the ECHR into Northern Ireland’s law. The common law may well have moved on since 1998, with an increasing number of appellate judgments emphasising rights inherent within the common law,<sup>118</sup> but this does not substitute for the ECHR’s enumerated rights provisions.

The ECHR system has also moved on since 1998. Conterminous with the enactment of the Human Rights Act, the jurisdiction of the European Court to hear individual claims became compulsory.<sup>119</sup> If the UK wished to remain within the ECHR without a general incorporation of the ECHR rights into domestic law, it could not do so on the basis of the temporary grants of jurisdiction to hear individual petitions it had employed into the 1990s (which could be used to exert leverage over the Court). Even if individual petition, and by extension the oversight of the Strasbourg Court, are now fixed features of the ECHR system, this does not suffice to address the GFA’s requirement for incorporated rights which can be employed before the domestic courts.

### Option 5 – The UK’s Withdrawal from the ECHR

- *Withdraw the UK from the Council of Europe and the Convention system.*
- *Enact a Bill of Rights with some overlap with the ECHR but without a link to Strasbourg.*

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<sup>117</sup> Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (October 2014) 2. Available at: [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf).

<sup>118</sup> See, for example, *AXA General Insurance Limited v Lord Advocate* [2011] UKSC 46.

<sup>119</sup> ECHR, Protocol 11.

At the height of the 2015 UK General Election campaign David Cameron refused to rule out the UK's withdrawal from the ECHR,<sup>120</sup> even though he maintained after the election that 'Our intention is very clear: it is to pass a British Bill of Rights, which we believe is compatible with our membership of the Council of Europe'.<sup>121</sup> Discussing the Conservative Government's plans before Parliament's Justice Committee, Minister for Justice Michael Gove affirmed his 'hope' that the UK would remain part of the ECHR, but warned that 'I cannot give a 100% guarantee'.<sup>122</sup> We must therefore examine the implications of a complete withdrawal from the ECHR for the UK's obligations under the GFA.

This approach would constitute a show of bad faith from the UK Government with regard to the GFA obligations. The ECHR underpins several aspects of the Good Friday Agreement and other aspects of the peace settlement. Even if the Conservative Government enacted a domestic Bill of Rights containing equivalents of all or many of the ECHR rights, to be adjudicated upon by the domestic courts, this would not meet the GFA's requirement that the ECHR be incorporated into the law of Northern Ireland. The Strasbourg Court is an essential element of the ECHR framework – indeed, the existence of such a powerful international tribunal with a highly-developed body of jurisprudence is what has, for much of its existence, marked the ECHR out as distinct from other international human rights documents which struggle with enforcement. The GFA's human rights provisions are predicated upon a neutral, and mutually trusted, third party adjudicating upon significant human rights disputes. Ireland, having amended its

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<sup>120</sup> For an example of the mooting of this option see; Matt Dathan, 'David Cameron Refuses to Rule out Quitting the European Convention on Human Rights' *The Independent* (6 Mar 2015). Available at: <http://www.independent.co.uk/news/uk/politics/david-cameron-refuses-to-rule-out-quitting-the-european-convention-on-human-rights-10294385.html>.

<sup>121</sup> D. Cameron, HC Debs., vol.598, col.311 (8 Jul 2015).

<sup>122</sup> Justice Committee, 'Oral evidence: The work of the Secretary of State for Justice' (17 Jul 2015) HC 335, Q54.



legislative framework in order to ‘incorporate’ the ECHR<sup>123</sup> would also be entitled to see such a move as a significant violation of the inter-state element of the Bilateral Treaty.

Whilst the ECHR’s colonies provision permits signatory states to exclude the effect of the ECHR from overseas territories,<sup>124</sup> this provision does not relate to the core jurisdiction and could not be used to exclude Great Britain from the ECHR, whilst maintaining the coverage of Northern Ireland.<sup>125</sup> Likewise, whilst the ECHR permits specific reservations, general reservations cannot be maintained to exclude wide areas of individual-state relations.<sup>126</sup>

### Option 6 – Exceptional Status for Northern Ireland

- *Modify the Human Rights Act to ‘break the formal link’ with the Strasbourg Court in respect of Westminster legislation affecting any of Great Britain and the legislation of the Welsh Assembly and Scottish Parliament.*
- *Enact a NI Bill of Rights maintaining at least the existing standards of rights protection and Strasbourg link applicable to Stormont legislation and Westminster legislation affecting Northern Ireland.*

Strasbourg’s interpretation of ECHR applied to devolved legislation in:



Strasbourg’s interpretation of ECHR applied to Westminster legislation as it affects:



The prominence of the link to the Strasbourg institutions within the Good Friday Agreement precludes any effort to simply sunder the link to Strasbourg or withdraw from the ECHR without taking account of the special position of Northern Ireland. In the

<sup>123</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para 9.

<sup>124</sup> ECHR, Article 56.

<sup>125</sup> ECHR, Article 1.

<sup>126</sup> ECHR, Article 57(1).

previous options we have considered UK-wide approaches or approaches which treat all of the devolved jurisdictions in the same manner, given the attitudes towards the current human rights arrangements in these parts of the UK and the similar nature of their systems of governance. The Good Friday Agreement, however, requires the ‘incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)’.<sup>127</sup> As a result, we must consider the possibility of whether compliance could be achieved by establishing a separate regime for Northern Ireland’s ‘particular political situation’,<sup>128</sup> and the difficulties inherent in an effort to separate out Northern Ireland from the model of rights protection governing the other devolved nations.

Some of the published Conservative Party thinking on the replacement for the Human Rights Act has proceeded on the basis of a separate regime for Northern Ireland. As Dominic Grieve QC acknowledged in 2009, ‘I can see no reason ... why our UK Bill of Rights should not make special provision for Northern Ireland to reflect its need to tackle the particular circumstances there’.<sup>129</sup> Much as the subsequent shift to the less-considered term “British Bill of Rights” and dismissal of Grieve from the Office of Attorney General in 2014 might be taken to mark the marginalisation of his position on Northern Ireland,<sup>130</sup> in legal terms a separate regime for Northern Ireland (not the “tagging on” of some Northern Ireland provisions to a UK-wide scheme<sup>131</sup>) would provide the most direct means of addressing the GFA’s requirements.

The sections of the Agreement that discuss a Northern Ireland Bill of Rights affirm that no matter what ‘supplementary’ protections might be added in such a process, the

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<sup>127</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para 2.

<sup>128</sup> Margaret Ritchie, HC Deb, vol.577, col.370 (12 Mar 2014).

<sup>129</sup> D. Grieve, ‘Can the Bill of Rights do better than the Human Rights Act?’ (30 Nov 2009). Available at: <http://www.dominicgrieve.org.uk/news/can-bill-rights-do-better-human-rights-act>.

<sup>130</sup> The latest ministerial responses indicate that the position of Northern Ireland within any British Bill of Rights remains undetermined; see Dominic Raab, Written Answer 1446 (15 Jun 2015), available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-06-08/1446/>.

<sup>131</sup> Hugo Swire, HC Deb, vol.541, col.832 (7 Mar 2012).

baseline of the relationship between the law of Northern Ireland and the ECHR should be maintained.<sup>132</sup> Even if this requirement is addressed, this solution would not necessarily facilitate the navigation of the constitutional concerns which mark out Westminster's relations with the devolved administrations. The NIHRC's proposals for a Bill of Rights for Northern Ireland<sup>133</sup> floundered upon the opposition of the Unionist Parties to extensions to the rights protections available within Northern Ireland. Under the Coalition Government the NIO refused to proceed with the Bill of Rights for Northern Ireland without consensus amongst the main parties in Northern Ireland:

[A] legislative consent motion must be passed by the assembly in circumstances where the government brings forward any legislation at Westminster such as a Bill of Rights which will have a significant impact on devolved policy. ... The British government is happy to move, but there is no point in moving until we have achieved some sort of consensus which is very much lacking at the moment.<sup>134</sup>

For his part in this constitutional game of pass the parcel, First Minister Peter Robinson has maintained that 'responsibility of a Bill of Rights lies with the UK Government'.<sup>135</sup> Now that it is looking for a means to unpick the human rights element in the Northern Ireland peace settlement from UK-wide human rights arrangements the Conservative Party might well regret its disinterest in the NIHRC proposals and the failure to address general human rights arrangements within the Stormont House Agreement.

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<sup>132</sup> Good Friday Agreement (n.2), Section 6 - Rights, Safeguards and Equality of Opportunity, para.4.

<sup>133</sup> NIHRC, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 Dec 2008). Available at: <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>.

<sup>134</sup> Owen Paterson (Secretary of State for Northern Ireland), reported in: M. Hennessy "'Stormont agreement" needed for rights Bill' *Irish Times* (23 Nov 2010). See also Theresa Villiers (Secretary of State for Northern Ireland), Westminster Hall, col.197WH (16 Jul 2013).

<sup>135</sup> Peter Robinson MLA, NIA Deb, vol.77, page 32 (17 Sep 2012).

Just as the Assembly divided 46-42 against Bill of Rights proposals in 2011,<sup>136</sup> with the Unionist Parties blocking extensions to the rights protections in Northern Ireland, so to might the Nationalist Parties reject a legislative consent motion which sought to separate out Northern Ireland's human rights protections in the context of diminishing the role for human rights in the UK as a whole.<sup>137</sup> Rights abuses against Irish people in the UK as a whole (such as the Birmingham Six and Guildford Four), and not simply in Northern Ireland, retain their totemic place in nationalist consciousness. Whilst, as we conclude above, UK-wide arrangements were not legally required by the GFA arrangements, the Nationalist Parties could make a cogent claim that their agreement of the Northern Ireland arrangements came in the context of the Human Rights Act. There would be little which could incentivise them to abandon their settled position in favour of extended human rights protections and their view that Northern Ireland arrangements 'cannot be covered by a UK Bill of Rights'.<sup>138</sup>

The consociationalism provisions of the Northern Ireland Act allow Sinn Féin and the SDLP to block a legislative consent motion even if they are in a minority.<sup>139</sup> An attempt by Westminster to ignore such an outcome (as the restraint upon Parliament's action rests in constitutional convention and not law) would likely have serious destabilising effects upon Northern Ireland's institutions. In sum, separating Northern Ireland's human rights regime out from the remainder of the UK will not *practically* allow the Conservative Government circumvent the problems posed by Northern Ireland for their manifesto proposals on human rights.

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<sup>136</sup> For the impact of this vote on the Coalition Government's approach, see H. Swire, HC Deb, vol.541, col.832 (7 Mar 2012).

<sup>137</sup> See A. Smith, M. McWilliams and P. Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (TJI, 2014) 45-46. Available at: [http://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0005/58271/Advancing\\_a\\_BOR\\_NI.pdf](http://www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a_BOR_NI.pdf).

<sup>138</sup> Margaret Ritchie, HC Deb, vol.577, col.370 (12 Mar 2014).

<sup>139</sup> Northern Ireland Act 1998, s.4(5).

## 7. Modification to the Good Friday Agreement

An alternate way to circumvent the Good Friday Agreement's restrictions on human rights reform would be for the UK Government to seek to renegotiate the human rights terms of the settlement. Treaties are, of course, not set in stone. Successor treaties, treaty amendments, engagement of severability provisions and fundamental changes in circumstance all provide recognised means by which the binding character of some or all of a treaty like the Bilateral Treaty can be altered. This, however, does not take account of the political questions which form part of the broader context of the Northern Ireland peace process.

The first issue arises with regard to the relationship between successor and predecessor treaties. While the Irish Government was present at the negotiation of the St. Andrews Agreement in 2006,<sup>140</sup> in the end the Agreement was concluded between the UK Government and the parties in Northern Ireland. This means that the Irish Government is not a party to this Agreement. However, in being present, Ireland would be regarded as having acquiesced to the amendments made to the GFA arrangements. Annex B of the St. Andrews Agreement, regarding human rights, specifically references the Human Rights Act, but does not mention the ECHR (putting into context the degree to which the Human Rights Act has come in practice to underpin the human rights aspects of the 1998 settlement). The language of Annex B appears to follow the GFA in regarding the ECHR as a human rights baseline and that in the specific context of Northern Ireland a form of "ECHR-plus" would be employed in the development of a Northern Ireland Bill of Rights by the Bill of Rights Forum.

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<sup>140</sup> Available at: <https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006>. It is on the other hand notable that the 1985 Anglo Irish Agreement was specifically rescinded by the Bilateral Treaty and cannot therefore modify the terms of the subsequent treaties.

The St. Andrews Agreement can be understood as subsequent practice of the UK and Irish Governments in understanding the implementation of their Bilateral Treaty and, as such, seems to reinforce the role of the ECHR, rather than undermining it. Article 59 of the VCLT allows treaties to be suspended or terminated, which as a matter of law remains an option available to both Governments.<sup>141</sup> The VCLT also allows for successive treaties, an option which is particularly straightforward with regard to bilateral treaties and which the Irish and UK Governments have employed since the establishment of the Free State in 1921.<sup>142</sup> In the circumstance of suspension or termination, the Bilateral Treaty including the Annex would be suspended or terminated, but the GFA as a political agreement within Northern Ireland would stand. Its political position would instead become a UK constitutional issue between the devolved Government and Westminster rather than a question of international law. In the circumstance of a successive treaty (as with the Anglo-Irish Agreement before) the Bilateral Treaty and Annex could be terminated between the two Governments and replacement terms agreed between the two parties. Nonetheless, it is extremely unlikely that such a change would be attempted without the consent of the Northern Ireland political parties.

The VCLT allows for the amendment of treaties. One of the issues arising from this option is that it is the Annex to the Treaty that requires amendment rather than the main part of the document. This Annex was of course subject to intense negotiation in Northern Ireland and thus, whilst international law would allow for its amendment, the political viability of such a course of action is a separate issue (in this regard, amendment would take place in the context of the emergent *lex post bellum* or *lex*

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<sup>141</sup> Vienna Convention on the Law of Treaties, Article 59.

<sup>142</sup> Vienna Convention on the Law of Treaties, Article 30. See the Government of Ireland Act 1920 and Treaty between Great Britain and Ireland, 1921, available from <http://treaty.nationalarchives.ie/document-gallery/anglo-irish-treaty-6-december-1921/>. For analysis of choice of names for the two parties and the nature of the Agreement as a treaty, see A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000) 64-66.

*pacifatoria*).<sup>143</sup> This pre-supposes that the Irish Government would be open to an amendment that would change obligation of the ‘ECHR-plus’ protection to one of ‘ECHR-minus’. The Irish Government, however, has affirmed that it regards the human rights provisions of the GFA as ‘clear and unchanged’:

The protection of human rights in Northern Ireland law, predicated on the European Convention of Human Rights, is one of the key principles underpinning the Agreement. As a guarantor of the Good Friday Agreement, the Government takes very seriously its responsibility to safeguard its institutions and principles.<sup>144</sup>

The VLCT allows for the separability of treaty provisions.<sup>145</sup> Under certain circumstances, clauses can be separated from the remainder of the treaty and its application. This can occur when these provisions were not regarded as essential or the continued performance of the treaty without these provisions would not be unjust. Such a claim could not be sustained with regard to the GFA as human rights protection was a fundamental element of the negotiation which generated reciprocal action in Ireland.

Under the VCLT the UK could attempt to argue that human rights reform is necessitated by a fundamental change in circumstances.<sup>146</sup> However, as Anthony Aust points out, due to historic abuse of this particular element of customary international law in the inter-war period, this ground is now extremely narrowly drawn.<sup>147</sup> In particular, a state cannot invoke its own conduct as a change in circumstances and it is highly unlikely that a change of Government or policy could be relied upon unless this reflected a fundamental change of circumstances in the UK. Such a change has not occurred since

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<sup>143</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacifatoria* (OUP 2008), Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014).

<sup>144</sup> Charles Flanagan TD, ‘Commencement Matters: International Agreements’ (Seanad, 14 May 2015).

<sup>145</sup> Vienna Convention on the Law of Treaties, article 44.

<sup>146</sup> Vienna Convention on the Law of Treaties, article 62.

<sup>147</sup> Anthony Aust, *Modern Treaty Law and Practice* (3rd Ed, CUP, 2013) 262.

the conclusion of the treaty that would be sufficient to invoke this article. Consequently, beside a major “constitutional moment” (such as a revolution), neither the UK nor Irish Governments could rely on this provision to terminate their obligations.

As such, whilst it is possible to pass a subsequent treaty, or to amend or sever provisions of the Bilateral Treaty, it is not possible to do this unilaterally in the present circumstances. Any modifications must be done through re-negotiation with the Irish Government and, given the circumstances of the GFA, in tandem with the parties in Northern Ireland. It would be near-impossible to reopen the human rights element of the 1998 settlement in isolation from other aspects of the Agreement. If, in spite of these obligations the UK did proceed to act unilaterally, several options would become available to Ireland under the VLCT.<sup>148</sup> If it considered the unilateral act to be a material breach – which is a valid interpretation of such action - Ireland would be entitled to terminate or suspend the whole or part of the treaty. Whilst the GFA’s Bilateral Treaty includes no dispute settlement clause several options remain open to Ireland if it believes the UK to be in violation of the Agreement.

One of the more obvious options – an action before the International Court of Justice – does not appear to be a possibility. Both states, in making their declarations of compulsory jurisdiction (the formal recognition of the Court’s authority), have included qualifications that could be interpreted as excluding the other.<sup>149</sup> The Irish Government has the most evident exclusion, which allows for all disputes to be heard at the International Court except those that arise between it and the UK with regard to Northern Ireland. The UK’s declaration is slightly more open in that it states ‘any dispute with the government of any other country which is or has been a Member of the Commonwealth.’

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<sup>148</sup> Vienna Convention on the Law of Treaties, article 60.

<sup>149</sup> Both states’ declarations are available at:

<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>



Whether the UK's exclusion would include Ireland is questionable. The Commonwealth is a *sui generis* organisation and if this clause were to be extensively interpreted it would include a vast number of countries which were once part of the British Empire. Which countries are considered a part of the 'Commonwealth' changes depending on the definition one uses. One definition of the Commonwealth can be interpreted to exclude those countries which were not part of the organisation in 1949 when the London Declaration made all member states "free and equal".<sup>150</sup> Ireland had passed the Republic of Ireland Act 1948 which came into effect 10 days before the London Declaration, thus it had left the Commonwealth before its modern incarnation. In any case, however, the Irish Government's declaration does appear to exclude an ICJ case with the UK regarding Northern Ireland. Although the Irish Government could choose to revoke its declaration, the UK could argue that it relied on the Irish Government's declaration in its dealings with the country including the GFA. This position is made more difficult by the date of Ireland's declaration of compulsory jurisdiction, which took place after the GFA negotiations.

Beyond the ICJ, remedies for breach may be available through the Law of State Responsibility. The International Law Commission's 2001 Articles on State Responsibility for Internationally Wrongful Acts have not been adopted as a treaty, though they are now largely regarded as reflecting binding customary international law.<sup>151</sup> An international wrongful act can be an act or omission which is attributable to a state and which constitutes a breach of an international obligation owed by that state. The

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<sup>150</sup> London Declaration 26 April 1949, available at: <http://thecommonwealth.org/sites/default/files/history-items/documents/London%20Declaration%20of%201949.pdf> It lists, the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon (Sri Lanka) as members.

<sup>151</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, GA Resolution A/56/10, available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). See also, James Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law* 874.

internal conditions or domestic law of a country are irrelevant to a determination of a breach.<sup>152</sup> The Bilateral Treaty imposes international obligations upon the UK, and any of the options for human rights reform which we indicated above would breach these obligations would trigger the Law of State Responsibility.

Under international law, the injury to Ireland would include both material and moral damage, which are subject to reparations including restitution, compensation and or satisfaction.<sup>153</sup> Ultimately if a state refuses to acknowledge its breach or provide reparations, the injured state can invoke proportionate 'countermeasures'.<sup>154</sup> Even if it is difficult to imagine such a collapse in relations between the UK and Ireland, if the UK does proceed to act unilaterally international law does not leave Ireland without recourse in such circumstances.<sup>155</sup>

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<sup>152</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts (n.151), article 1, 2 and 3.

<sup>153</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts (n.151), article 31 and 34.

<sup>154</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts (n.151), article 49 and 51.

<sup>155</sup> If Ireland were to consent to the UK breaching the Bilateral Treaty this would vitiate any claim to a wrongful act; Draft articles on Responsibility of States for Internationally Wrongful Acts (n.151), article 20.

### 8. Negotiating a New 'British-Irish Human Rights Protocol'

If the UK Government is not to fall foul of the obligations owed to Ireland under international law with regard to Northern Ireland and human rights in the course of the more far-reaching reform options which we have set out above, it will have to engage in a process of treaty renegotiation with regard to the 1998 settlement. The precedent for this process came in 2004, when, as a result of the citizenship referendum in Ireland, changes to Ireland's Constitution instituted in response to the GFA<sup>156</sup> were in part reversed. To maintain its international obligations, the Irish Government first sought the UK Government's agreement that 'that this proposed change to the Constitution is not a breach of the ... Agreement or the continuing obligation of good faith in the implementation of the said Agreement'.<sup>157</sup>

Although comparatively simple in legal terms, negotiating a new British-Irish Human Rights Protocol would undoubtedly face serious political challenges. Both Governments would operate under the pressure of perceptions from various constituencies, notably the Northern Ireland parties. The Irish Government's actions in renegotiations would attract pressure from the public in both the Republic and Northern Ireland. A key element of the settlement has been the inclusion of Northern Ireland's politicians in British-Irish negotiations which affect the region. In 2004 it is notable that the British-Irish Interpretive Declaration was negotiated in the absence of the Northern Ireland parties (and over the opposition of the SDLP and Sinn Féin). At the time, Mark Durkan alleged that '[t]he DUP can now cite a precedent which they can say shows you can unilaterally change, vary and alter the agreement, even going to its constitutional core'.<sup>158</sup> This claim, however, fails to take account of Interpretive Declaration's

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<sup>156</sup> Constitution of Ireland, Nineteenth Amendment.

<sup>157</sup> Citizenship Referendum: Interpretative Declaration by the Irish and British Governments regarding the British Irish Agreement, available at: <http://eudo-citizenship.eu/NationalDB/docs/IRE%20Citizenship%20Referendum%20Interpretation.pdf>.

<sup>158</sup> See W. Graham, 'Nationalists Concerned Over Referendum' Irish News (8 Jun 2004).

significance in international law. The centre of his complaint is that the Northern Ireland parties were not also involved. Much as they were excluded from the drafting of the Interpretive Declaration, negotiations on a new British-Irish Human Rights Protocol would be highly unlikely to follow this pattern. On an issue as central to the GFA as human rights, side-lining the democratically-elected representatives in Northern Ireland could not be countenanced by the Irish Government.

As noted above, the Northern Ireland parties' attitudes towards the human rights elements of the 1998 settlement are by no means uniform, with the DUP maintaining a stance as hostile to these provisions as they had presented in 1998. There seems no obvious route towards cross-party agreement on renegotiation. As such, although renegotiating the human rights elements of the 1998 settlement are a precursor to efforts to repeal the Human Rights Act, the necessary inclusion of Northern Ireland's parties in such negotiations will generate near insurmountable political difficulties.

### SECTION THREE – CONSEQUENCES AND COMPLEXITIES

#### 9. International Human Rights Obligations

The ‘State’ of the UK, in its international law meaning as ‘a single undivided entity’,<sup>159</sup> is obligated to protect human rights under a number of voluntarily ratified international human rights treaties in addition to the European Convention.<sup>160</sup> This means in effect that the central Government bears the responsibility for failures to protect and promote enumerated human rights whether or not the failure is directly attributable to central Government.<sup>161</sup> In this area at least, the geography of the reforms is simple. Whether the reforms affect one or all of the nations, the central Government will bear *de facto* responsibility for these treaty obligations. The UK’s performance of these obligations is monitored on a periodic basis, and specialised United Nations committees make recommendations to the State.<sup>162</sup> The continuing and many imperfections in the UK’s implementation of these obligations will not be dealt with here.

However, the proposed reforms to the Human Rights Act have potential to affect in a novel way the fulfilment of the UK’s international human rights obligations. As the

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<sup>159</sup> James Crawford, ‘Sovereignty as a Legal Value’, in James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (CUP 2012) 121.

<sup>160</sup> The UK is a party to; International Covenant on Economic, Social and Cultural Rights (993 UNTS 3); International Covenant on Civil and Political Rights (999 UNTS 171); Convention on the Rights of the Child (1577 UNTS 3); Convention on the Elimination of All Forms of Discrimination against Women (1249 UNTS 13); Convention on the Rights of Peoples with Disabilities (GA Res 61/106, 61 UN GAOR, Supp (No49), UN DocA/RES/61/106/AnnexII 65); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85); International Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195).

<sup>161</sup> It was affirmed by the Human Rights Committee that there was state responsibility even where there was no central government power to change the law (Human Rights Committee, ‘Waldman v Canada’ (1999) UN Doc CCPR/C/67/D/694/1996) and that there is responsibility for federal entities within the state (Human Rights Committee, ‘Toonen v Australia’ (1994) UN Doc CCPR/C/50/D/488/1992).

<sup>162</sup> For the most recent recommendation in relation to each treaty see; Office of the High Commissioner for Human Rights, ‘United Kingdom of Great Britain and Northern Ireland’. Available at: <http://www.ohchr.org/EN/countries/ENACARRegion/Pages/GBIndex.aspx>.

primary vehicle for the realisation of human rights in the UK,<sup>163</sup> substantial modifications to the Human Rights Act might affect the UK's international obligations. Examples of where modifications to the Human Rights Act would result in probable violations of the UK's international human rights obligations would be where the rights of prisoners were reduced, rights protections were removed from armed forces, or where safeguards were removed on the deportation of individuals to potentially abusive countries.<sup>164</sup>

Another proposal, which envisages 'breaking the formal link'<sup>165</sup> to the European Court of Human Rights or to the Convention itself would not in itself entail a violation of the UK's international human rights obligations. Instead, the UN human rights committees would look to the substance of rights protections, carefully scrutinising the level of rights entitlements and highlighting areas where rights standards had fallen below the level expected by the international treaties. Even without the incorporation of the ECHR or the Strasbourg Court's jurisprudence, it is possible that domestic courts and common law rights could be used to maintain a level of rights protections that prevent the UK falling foul of its international human rights obligations.<sup>166</sup>

Although breaking the link to the European Court or Convention would not violate the UK's international human rights obligations, it would be of high symbolic significance. The European Convention system is generally held in very high regard internationally, and this includes at the UN human rights bodies. In some areas there is a substantial overlap between the standards used at the UN Human Rights Committee and at the

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<sup>163</sup> The Human Rights Act is especially relevant to the implementation of civil and political rights, however it also tangentially implements some economic and social rights; Elizabeth Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) SSRN Paper. Available at: <http://papers.ssrn.com/abstract=1542674>.

<sup>164</sup> Proposals implied in; Conservative Party (n. 84), 60, 73, 77.

<sup>165</sup> Conservative Party (n. 84), 60.

<sup>166</sup> Roger Masterman and Se-shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' (2015) *European Human Rights Law Review* 57.

European Court. Denunciation or side-lining of the European system in (parts of) the UK would consequently also be viewed as indicative of a weakening commitment to the international system of human rights protections.

It would also be against the recommendations of many independent experts who monitor the UN human rights system. On the right to housing,<sup>167</sup> women's rights,<sup>168</sup> socio-economic rights,<sup>169</sup> the rights of disabled persons,<sup>170</sup> racial discrimination,<sup>171</sup> children's rights<sup>172</sup> and on traditional civil and political rights,<sup>173</sup> experts have noted the need for increased efforts and protections in the UK – not reductions in these protections.

Neither (as the argument sometimes runs) are these recommendations for improved human rights protection only emanating from a 'human rights elite'. A major *politically constituted* body at the UN – the Human Rights Council – made up of representatives from 47 countries including Ireland and the UK has also made recommendations to the UK that indicate the need for increased rights protections.<sup>174</sup> This body is not comprised of human rights experts (or elites), but rather can be seen as indicative of global political

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<sup>167</sup> Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, 'Mission to the United Kingdom of Great Britain and Northern Ireland' (UN Doc A/HRC/25/54/Add2 2013).

<sup>168</sup> Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 'Mission to the United Kingdom of Great Britain and Northern Ireland' (UN Doc A/HRC/29/27/Add2 2015).

<sup>169</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom* (UN Doc E/C12/GBR/CO/5 2009).

<sup>170</sup> 'Britain Faces UN Investigation over Systemic Violations of Disability Rights' *OpenDemocracy* (2 Sep 2014). Available at: <https://www.opendemocracy.net/ourkingdom/stuart-weir/britain-faces-un-investigation-over-systemic-violations-of-disability-rights> accessed 26 June 2015.

<sup>171</sup> Working Group of Experts on People of African Descent on its twelfth session, 'Mission to the United Kingdom of Great Britain and Northern Ireland' (UN Doc A/HRC/24/52/Add1 2013).

<sup>172</sup> Committee on the Rights of Child, *Concluding Observations of the Committee on the Rights of Child: United Kingdom* (UN Doc CRC/C/GBR/CO/4 2008).

<sup>173</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom* (UN Doc CCPR/C/GBR/CO/6 2008).

<sup>174</sup> Working Group on the Universal Periodic Review, 'United Kingdom of Great Britain and Northern Ireland' (UN Doc A/HRC/21/9 2012).

feeling on a country's rights protections.<sup>175</sup> The Good Friday Agreement, in addition to the primary obligation of ECHR incorporation, also includes a focus on these broader rights issues.<sup>176</sup>

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<sup>175</sup> Although for a critique of the way that this body operates in terms of 'politicisation' of human rights, see; Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013).

<sup>176</sup> See, for example; Good Friday Agreement (n.2), Annex 1, preamble and art 1(v).



## 10. An Inter-State Complaint before Strasbourg

Many human rights treaties contain within them a procedure allowing states to bring complaints against one another.<sup>177</sup> Depending on the human rights treaty, this procedure is rarely, if ever, used.<sup>178</sup> However the European Convention system has heard some such cases. An interesting and relevant example is the *Ireland v UK* case<sup>179</sup> (the ‘Hooded Men’ case) brought by the Irish Government in relation to claims of torture and cruel, inhuman and degrading treatment in Northern Ireland. Ireland’s ongoing commitment to maintaining human rights standards throughout the island of Ireland was reaffirmed when it requested that the ‘Hooded Men’ case be re-opened following the discovery of new evidence.<sup>180</sup> The re-opening of cases is rare,<sup>181</sup> and this example is especially exceptional in light of the now close relationship between the UK and Ireland.<sup>182</sup> Nonetheless, the Irish Minister for Foreign Affairs, Charles Flanagan TD, justified this action on the basis that the ‘suffering of the individual men and of their families, ... the significance of this case, and ... the weight of these allegations’, noting that these factors outweigh any potential damage to the relationship shared between the UK and Ireland.<sup>183</sup>

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<sup>177</sup> See, for example; *European Convention on Human Rights* (1950) article 33; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013); *Optional Protocol to the International Covenant on Civil and Political Rights* (adopted 16 December 1966, entry into force 23 March 1976). ECHR art 33, OP ICESCR, OP ICCPR.

<sup>178</sup> Jane Connors and Markus Schmidt, ‘United Nations’ in Daniel Moeckli and others (eds), *International Human Rights Law* (Oxford University Press 2013) 381; Council of Europe, ‘Inter-States Applications’. Available at: [http://www.echr.coe.int/Documents/InterStates\\_applications\\_ENG.pdf](http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf).

<sup>179</sup> *Ireland v United Kingdom* [1978] 2 EHRR 25.

<sup>180</sup> See; Fiona de Londras, ‘Revisiting the Five Techniques in the European Court of Human Rights’. Available at: <http://www.ejiltalk.org/revisiting-the-five-techniques-in-the-european-court-of-human-rights/>.

<sup>181</sup> Philip Leach, ‘Ireland v. UK: Revisiting the Treatment of the “Hooded Men”’. Available at: <http://jurist.org/forum/2014/12/philip-leach-hooded-men.php>.

<sup>182</sup> Department for Foreign Affairs and Trade, ‘Statement by Minister Flanagan on the “Hooded Men” Case’ (12 February 2014). Available at: <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/december/hooded-men-case-northern-ireland/#>.

<sup>183</sup> *ibid.*

Ireland's willingness to push this case to the point of a renewed inter-state action is indicative of the attitude that would likely prevail regarding any unilateral effort by the UK Government to resile from its GFA obligations. The request to re-open *Ireland v UK* can be read two ways. It might signal the *continued* commitment of the Government to the use of the inter-state process to ensure accountability for (the most egregious) human rights violations. On a more conservative reading, the Government's request to re-open the case can be viewed as no more than a desire to ensure individual justice in individual (legacy) cases, in light of public pressure.

The possibility of Ireland initiating a similar inter-state action regarding the scrapping of the Human Rights act therefore requires attention. An inter-state complaint related to the proposed human rights reforms could happen in two possible ways. The first, and more analogous to the *Ireland v UK* case, would be a case centred on a particular alleged violation. To provoke such a response from the Irish Government, it is likely that such a case would need to be demonstrably serious with some element of systematic abuse and/or connection to the conflict. The political justification for such a case within Ireland would be relatively simple; a grave case of alleged abuse, combined with a severely limited or no option for affected individuals to enforce their Convention rights, would be taken as requiring the intervention of the Irish state. This is the archetypal case of an inter-state complaint, with such cases generally 'being instigated where the applicant state represents, or is closely connected with, the victims'.<sup>184</sup> Even if the UK signalled its intention to withdraw from the ECHR, its obligations would continue to cover any human rights abuses until that withdrawal was effective.<sup>185</sup>

There is also precedent for different type of case to be brought against the UK. In the context of the 1967 military coup in Greece, three countries (Norway, Sweden and the

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<sup>184</sup> Philip Leach, 'Ukraine, Russia and Crimea in the European Court of Human Rights'. Available at: <http://www.ejiltalk.org/ukraine-russia-and-crimea-in-the-european-court-of-human-rights/>.

<sup>185</sup> ECHR, Article 58(2).

Netherlands) brought an application under the European Convention.<sup>186</sup> This case involved allegations of both specific violations, and of violations of the ECHR due to general legislative changes and 'administrative measures'.<sup>187</sup> This case demonstrates the capacity of inter-state complaints to invoke generalised or abstract complaints about the effect of national laws on aspects of a state's ECHR obligations. Thus, whether an inter-state application is brought is contingent upon the strength of feeling within Irish Government circles regarding the changes to the Human Rights Act. It remains a crucial bargaining chip which the Irish Government can seek to use to influence the eventual form of human rights protection in Northern Ireland.

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<sup>186</sup> *The Greek Case* (Applications No.3321/67, No.3322/67, No. 3323/67, No.3344/67, European Commission of Human Rights) 1969.

<sup>187</sup> See for example; *ibid*, 9.

## 11. The European Union Dimension

A recent and controversial<sup>188</sup> opinion of the Court of Justice of the European Union<sup>189</sup> considered whether it was legally possible for the EU to become a party to the ECHR. The desire for the EU to sign up to the articles of the European Convention,<sup>190</sup> followed extensive negotiations and an increasing emphasis on human rights in the EU.<sup>191</sup> With the UK's continued membership of the EU soon to be the subject of a referendum,<sup>192</sup> there is an important and complex overlap between the Conservative Government's human rights plans and EU questions. The UK and Ireland's relationship as 'as partners in the European Union' was as much a feature of the GFA arrangements as the ECHR.<sup>193</sup> As Mark Durkan has recognised in Parliament:

[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.<sup>194</sup>

If the UK were to remain in the EU, and if the EU were to successfully become a party to the ECHR, indirect human rights obligations would flow. These ECHR obligations would

<sup>188</sup> 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/>.

<sup>189</sup> Opinion 2/13 (Court of Justice of the European Union, 18 December 2014).

<sup>190</sup> 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-eus-accession-to-the-echr-to-be-finalized-without-delay#\\_ftn3](http://blogg.uio.no/jus/smr/multirights/content/negotiations-on-the-eus-accession-to-the-echr-to-be-finalized-without-delay#_ftn3).

<sup>191</sup> See generally; Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP, 2014).

<sup>192</sup> Prior to the Westminster summer recess, the European Union Referendum Bill had already completed committee stage in the House of Commons.

<sup>193</sup> 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).

<sup>194</sup> Mark Durkan, HC Debs, vol.596, col.1104 (9 Jun 2015)

be a consequence of the UK's EU membership<sup>195</sup> and not a consequence of the Human Rights Act or any replacement legislation. Whilst it is beyond the scope of this paper, the UK should seek a Bilateral Interpretive Agreement with Ireland in advance of any EU Referendum (as Ireland did with the 2004 citizenship referendum) to consider how UK withdrawal from the EU would impact upon the GFA arrangements.

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<sup>195</sup> Although the obligations might also be a limited version of ECHR rights; Wheatle (n 93).

## 12. Conclusions

The Good Friday Agreement was not merely a Bilateral Treaty between the UK and Ireland. In providing the vehicle for a peace settlement it became part of the ‘metaconstitutional discourse’ between the two countries.<sup>196</sup> As such, it is unsurprising how the peace settlement anchored itself in the EU and ECHR as established examples of supranational arrangements overarching the relations between the UK and Ireland. A desire for an unalloyed version of national sovereignty underpins the aversion to the EU and ECHR fuels the current pressure for a “British” Bill of Rights and an EU Referendum. The GFA, however, presents no less of an affront to this vision of national sovereignty. Being of the same matter as these pan-European arrangements and weaving them into its terms, it should come as little surprise that human rights reform in the UK will engage the GFA and careful action will be required by the UK Government to abide by its terms.

In the discussion above, Section One highlighted the centrality of human rights to the peace process in Northern Ireland, and how that centrality has co-existed with some disagreement between Northern Irish parties about the appropriate extent of human rights protections. A different set of diverging views were seen in respect of the reasons for the Human Rights Act’s repeal. The views of some who see the Human Rights Act as having an ‘ownership’ issue and the hostility towards the Act by some sections of the media and the Conservative party, were set alongside the misconceptions about human rights that have been promoted. The additional layer of difficulty added by the UK’s devolution settlements was also discussed. We argued that the differing views in the different regions and the Sewel convention requiring the consent of devolved administrations, would both add significant legal and political complexity. The very the

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<sup>196</sup> N. Walker, ‘Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’ in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, 2000) 9, 20.

authority of the Northern Ireland Assembly to legislate is also bound up with its compliance with the ECHR.

