

# **The Implications of the Good Friday Agreement for UK Human-Rights Reform**

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## **Keywords**

Good Friday/Belfast Agreement – European Convention on Human Rights – Human Rights Act Reform – Sewel Convention – Law of Treaties

## **Abstract**

Speculation is rife as to the impact of the Good Friday/Belfast Agreement upon the Conservative Government's plans to repeal the Human Rights Act 1998. In the face of this speculation, the UK's Conservative Government has provided little detail as to how UK human-rights reform will address the requirement for incorporation of the European Convention on Human Rights in the Northern Ireland settlement. We therefore analyse the Agreement as both an international treaty and peace agreement and evaluate its interrelationship with the Human Rights Act and the Northern Ireland Act. Once the hyperbole surrounding the Agreement and its attendant domestic legislation is stripped away, the effects of the 1998 settlement are in some regards more extensive than has to date been recognised, but in other respects are less far-reaching than some of the Human Rights Act's supporters claim. The picture that emerges from our analysis is of an intricately woven constitution dependent on devolution arrangements, peace agreements, and international relationships.

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## Introduction

Shortfalls in human rights protection within Northern Ireland exacerbated and sustained the conflict in Northern Ireland between the 1960s and 1990s, and although human rights and equality are concepts ‘central’<sup>1</sup> to the Good Friday/Belfast Agreement (GFA),<sup>2</sup> their place within Northern Ireland’s legal order remains politically contentious. This is a volatile context for the UK Government’s proposals to replace the Human Rights Act 1998 (HRA), the statute which gave effect to some of its most important GFA commitments. In the Northern Ireland Assembly Sinn Féin has condemned the policy as ‘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>3</sup> The Democratic Unionist Party (DUP), by contrast, has been supportive of HRA repeal, and has questioned the connection between the HRA and the GFA. In the words of one of its MLAs, claims that the HRA ‘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>4</sup>

The UK’s international human rights commitments were often prominent and controversial during the conflict in Northern Ireland.<sup>5</sup> High-profile judgments enforced the European Convention on Human Rights (ECHR)<sup>6</sup> in the teeth of UK security policy.<sup>7</sup>

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<sup>1</sup> M. Simpson, ‘The Agreement and Devolved Social Security: A Missed Opportunity for Socio-Economic Rights in Northern Ireland?’ (2015) 66 NILQ 105, 106.

<sup>2</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473. For overview and contextualisation of the GFA’s human rights provisions see B. Dickson, ‘The Protection of Human Rights – Lessons from Northern Ireland’ [2000] EHRLR 213, C. Harvey, ‘Bringing Humanity Home: A Transformational Human Rights Culture for Northern Ireland?’ in A.-M. McAlinden and C. Dwyer, *Criminal Justice in Transition: The Northern Ireland Context* (Hart, 2015) p.47, M. Lamb, ‘Loyalty and Human Rights: Liminality and Social Action in a Divided Society’ (2010) 14 IJHR 994 and B. O’Leary, ‘The Nature of the Agreement’ (1999) 22 Fordham ILJ 1628.

<sup>3</sup> C. Ruane, MLA, NIA Deb., vol. 105, no. 2, p.41 (1 Jun 2015).

<sup>4</sup> P. Weir, MLA, NIA Deb., vol. 105, no. 2, p.48 (1 Jun 2015).

<sup>5</sup> See J. Winter, ‘Abuses and Activism: The Role of Human Rights in the Northern Ireland Conflict and Peace Process’ (2013) EHRLR 1.

<sup>6</sup> European Convention on Human Rights and Fundamental Freedoms (1953) 213 UNTS 222.

<sup>7</sup> See *Ireland v United Kingdom* (1978) 2 EHRR 25, relating to inhuman and degrading treatment of republican internees, *Brogan v United Kingdom* (1989) 11 EHRR 117, relating to police pre-charge detention powers in Northern Ireland found to breach the right to liberty and *McCann v United Kingdom* (1996) 21 EHRR 97, relating to breach of the right to life as a result of inadequate planning in an SAS operation in which three Provisional IRA members were shot dead. For an overarching analysis of the significance of the ECHR to the conflict in Northern Ireland, see B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP, 2010).

Whereas Nationalists of all stripes regarded the ECHR as a counterweight to UK Government policy, many Unionists maintained that the Strasbourg system prioritised individual rights at the expense of security considerations and that human rights organisations addressed state violations of rights but not those perpetrated by paramilitary groups.<sup>8</sup> These concerns reinforced doctrinaire Unionist scepticism towards rights discourse as being impossible to reconcile with parliamentary sovereignty's place within the UK's constitutional arrangements.<sup>9</sup> Against this backdrop the Ulster Unionist Party's (UUP) acceptance in the GFA that human rights protections had a place within the Northern Ireland peace process was all the more significant. Unionists might not exactly 'picked up the human rights ball and [run] with it',<sup>10</sup> but the UUP at least acknowledged that rights-based commitments would play a prominent role in the post-GFA legislative settlement. The DUP, then estranged from the peace process, made no such commitment. Although it eventually became reconciled to the process in the St Andrews Agreement<sup>11</sup> it has ever since sought to dilute human rights components of the 1998 settlement. In response to its political rival the UUP has resisted any strengthening of those human rights protections.<sup>12</sup>

The GFA's human rights provisions were operationalised in domestic law by a combination of the HRA and the Northern Ireland Act 1998 (NIA), with the latter providing 'in effect a constitution' for Northern Ireland.<sup>13</sup> Proposals for overhaul or repeal of the HRA, however, put these protections at risk and threaten the GFA's delicate inter-institutional balance. The proposals have also generated opposition from the devolved legislatures of Scotland and Wales, but the prominence of devolution and human rights

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<sup>8</sup> See P. Munce, 'Unionism and the Northern Ireland Human Rights Commission 1999–2005: Hostility, Hubris and Hesitancy' (2014) 29 *Irish Political Studies* 194, 205-206.

<sup>9</sup> See A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (Belfast Press, 2000) 358-359 and C. Turner, 'Political representations of law in Northern Ireland' [2010] *PL* 451, 454-456.

<sup>10</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.

<sup>11</sup> Agreement at St Andrews (13 Oct 2006). Available at: <https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006>. Accessed 25 Jan 2017.

<sup>12</sup> See UUP, 'Ulster Unionist Party Position on a Bill of Rights' (2011). Available at: <http://uup.org/assets/images/featured/Ulster%20Unionist%20Party%20Position%20on%20a%20Bill%20of%20Rights.pdf>. Accessed 25 Jan 2017.

<sup>13</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390, [11] (Lord Bingham).

within the GFA raise Northern-Ireland-specific issues.<sup>14</sup> The confluence of the UK's GFA obligations, disagreements between the Northern Ireland parties over the role of human rights within Northern Ireland's governance and the complexity of relations between Westminster and the Assembly produces an 'obscure yet systemic constitutional conundrum'.<sup>15</sup> In this article we unpack the GFA's complex status as an international legal agreement, a peace settlement and a de facto constitutional instrument, to enable us to explain the impact of the "Northern Ireland conundrum" on UK-wide human rights reform. We first explain how the UK's obligations under the GFA have shaped human rights protections in Northern Ireland. Second, we outline the pressure upon the HRA and how its detractors have neglected its relationship with the GFA. Third, we assess whether substantive reform of the HRA's operation in Northern Ireland's law can be reconciled with the terms of the 1998 settlement, and whether the UK Government needs, as a matter of constitutional convention, to obtain the Northern Ireland Assembly's consent to reform or repeal the HRA. Fourth, if the UK Government acts in contravention of these obligations, we consider the remedies which exist under international law. We conclude that a proactive redrawing of the 1998 settlement's human rights and devolution elements with the involvement of the Northern Ireland parties offers the only GFA-compliant route forward. If the UK Government seeks to pay lip service to these commitments, Ireland's role as the GFA's co-guarantor under international law assumes particular significance.

### **Pressure for the HRA's Repeal**

The HRA formed part of a wider package of constitutional reform that was brought forward during the first term of Tony Blair's Labour Government. Labour's consultation process

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<sup>14</sup> This is demonstrated by the public concerns of the First Ministers of Scotland and Wales for the impact of the proposals on the GFA's arrangements; Scottish Government, 'News - First Ministers of Scotland and Wales Meet' (3 Jun 2015). Available at: <http://news.scotland.gov.uk/News/First-Ministers-of-Scotland-and-Wales-meet-1988.aspx>. Accessed 25 Jan 2017.

<sup>15</sup> P. England and A. Barnett, 'Why does the UK need a Constitutional Convention? An interview with Anthony King' *Our Kingdom* (29 Jul 2015). Available at: <https://www.opendemocracy.net/ourkingdom/anthony-barnett/why-does-uk-need-constitutional-convention-interview-with-anthony-barnett>. Accessed 25 Jan 2017.

on the Human Rights Bill was framed as “bringing rights home”,<sup>16</sup> and, as such, the subsequent legislation addressed Labour’s desire to align the UK’s domestic rights protections with its international legal obligations under the ECHR.<sup>17</sup> Prior to the HRA the dualist nature of the UK’s constitutional order meant that, as an unincorporated treaty, the ECHR (and with it the European Court of Human Rights’ (ECtHR) jurisprudence) played a minimal role in domestic civil liberties cases.<sup>18</sup> As a result of the inability of domestic courts to resolve some rights claims, the pre-HRA system contributed to a series of embarrassing adverse ECtHR judgments. As the ECHR’s renown grew, an increasing number of applications from the UK were lodged with the Strasbourg institutions.<sup>19</sup> This traffic emphasised the inefficiency of the UK’s pre-HRA arrangements as a system of rights protections.

The HRA increased the human-rights role of the UK’s domestic courts. Section 6 imposes a duty upon public authorities to act in a manner compatible with a range of incorporated ECHR rights (unless they are otherwise bound by primary legislation) which can be enforced by the domestic courts. When a literal interpretation of primary legislation permits an abuse of human rights, section 3 obliges judges to reading the legislation in a human-rights-compliant manner if it is possible to do so. This provision gives Parliament’s blessing to judicial reinterpretation of statute, in theory shielding judges from accusations of unwarranted judicial activism.<sup>20</sup> And if such a reinterpretation is not possible, as it would go against the grain of the legislation,<sup>21</sup> section 4 allows senior judges to issue a declaration of incompatibility, warning Parliament that the legislative provision in question is at serious risk of an adverse ruling by Strasbourg. Only 20 such declarations have been made since the HRA’s introduction,<sup>22</sup> and they can be ignored by the Government and UK Parliament. For example, successive Governments have ignored a Declaration of

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<sup>16</sup> J. Straw and P. Boateng, ‘Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights into UK Law’ [1997] EHRLR 71.

<sup>17</sup> J. Straw, MP, *Rights Brought Home: The Human Rights Bill* (HMSO, 1997) para.1.11. 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). Accessed 25 Jan 2017.

<sup>18</sup> See Lord Donaldson, HL Deb, vol. 560, col. 1154 (25 Jan 1995).

<sup>19</sup> See Straw (above n.17), para.1.14.

<sup>20</sup> See *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264, [24] (Lord Bingham).

<sup>21</sup> See *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, [33] (Lord Nicholls).

<sup>22</sup> Joint Committee on Human Rights, *Seventh Report: Human Rights Judgments* (2015) HL Paper 130/HC 1088, para.4.1.

Incompatibility concerning the disenfranchisement of prisoners issued in 2007.<sup>23</sup> Notwithstanding such contentious issues these powers have enabled many clear-cut cases of rights abuses to be dealt with within the UK's domestic legal orders. The years since the HRA entered force have consequently seen a decline in the number of adverse Strasbourg judgments against the UK, despite a higher number of claims being instituted.<sup>24</sup>

Many Conservative politicians and large sections of the press have nonetheless consistently condemned 'Labour's Human Rights Act'.<sup>25</sup> The Conservatives have presented the Act as 'a charter for miscreants to pursue their individualistic interests through the courts',<sup>26</sup> even though its use by unpopular or disadvantaged groups within society is in keeping with it being a counter-majoritarian constitutional device. They have furthermore insisted that section 2's requirement that the domestic courts take into account Strasbourg's case law in their decisions 'means problematic Strasbourg jurisprudence is often being applied in UK law'<sup>27</sup> and challenged domestic courts' ability to reinterpret legislation in a rights-compliant manner as a threat to parliamentary sovereignty.<sup>28</sup> Following the 2010 general election disagreement within the Conservative-Liberal Democrat Coalition Government over the HRA's future led to the establishment of a Commission on a Bill of Rights in 2011.<sup>29</sup> The Commissioners agreed that large sections of the public had an 'ownership issue' when it came to human rights,<sup>30</sup> sustained by misgivings over the role and influence of the ECtHR within the UK's legal systems.<sup>31</sup> Some

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<sup>23</sup> Ibid., para 4.13.

<sup>24</sup> See A. Donald, 'The Implementation of Judgments of the European Court of Human Rights against the UK: Unravelling the Paradox' in L. Hodson, L. Wicks and K. Ziegler (eds), *The UK and European Human Rights – A Strained Relationship?* (Hart, 2015) p.135.

<sup>25</sup> D. Cameron, MP, HC Deb, vol. 598, col. 311 (8 Jul 2015).

<sup>26</sup> A. Donald and E. Mottershaw, *Identifying Human Rights Stories: A Scoping Study* (2014) p.3. Available at: [http://www.mdx.ac.uk/\\_\\_data/assets/pdf\\_file/0021/135318/Identifying-human-rights-stories-July-2014.pdf](http://www.mdx.ac.uk/__data/assets/pdf_file/0021/135318/Identifying-human-rights-stories-July-2014.pdf). Accessed 25 Jan 2017.

<sup>27</sup> Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014) p.6. Available at: [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf). Accessed 25 Jan 2017.

<sup>28</sup> Ibid., p.4.

<sup>29</sup> The Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Dec 2012). Available at: <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>. Accessed 25 Jan 2017.

<sup>30</sup> Ibid., vol. 1, pp.28-29.

<sup>31</sup> Ibid., vol. 1, p.183 (Lord Faulks QC and Jonathan Fisher QC).

of the Commissioners, however, maintained that the HRA had been subjected to a campaign of misinformation<sup>32</sup> which had also exaggerated how often the ECtHR finds that the UK has breached its ECHR commitments.<sup>33</sup>

## **The GFA, Human Rights and International Law**

The GFA involved both a settlement between the parties in Northern Ireland and a bilateral international treaty between Ireland and the UK. 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>34</sup> This shift therefore reflects broader changes within international law, but the legal status of such a peace agreement remains both under-defined and under-explored.<sup>35</sup>

### *The GFA as a Bilateral International Treaty*

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. This section of our analysis examines the operation of this Bilateral Treaty under customary international law and the Vienna Convention on the Law of Treaties (VCLT).<sup>36</sup> Within this framework the legal position of Northern Ireland’s political parties is complex. Christine Bell notes that the 1998 Agreement is in fact composed of two agreements; one between all of the

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<sup>32</sup> Ibid., vol. 1, p.232 (Lord Lester of Herne Hill QC).

<sup>33</sup> See Joint Committee on Human Rights, *Seventh Report: Human Rights Judgments* (2015) HL Paper 130/HC 1088, para.2.1-2.2.

<sup>34</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). Accessed 25 Jan 2017.

<sup>35</sup> C. Bell, ‘Peace agreements: Their nature and legal status’ (2006) 100 AJIL 373, 374.

<sup>36</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 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) pp.5-10 and A. Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> Ed, CUP, 2013) pp.10-11.

negotiating and consenting parties at the preceding talks (the multi-party agreement), and another between the UK and Ireland (the inter-state agreement).<sup>37</sup> Even though the GFA expressly recognises the interests of the negotiating parties<sup>38</sup> and Northern Ireland's inhabitants in the fulfilment of its terms, under international law the UK's obligations are owed to Ireland.<sup>39</sup>

The annexed provisions referred to in the GFA's full 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 otherwise, which is not the case with the GFA.<sup>40</sup> Within the Treaty's annexed provisions is a section on 'Rights, Safeguards and Equality of Opportunity', which opens with the parties affirming a partial catalogue of 'the civil rights and the liberties of everyone in the community'. Although this account of fundamental rights 'is purely aspirational as between the political parties',<sup>41</sup> it sets the tone for the subsequent provisions which deal with the two governments' 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>42</sup> ...

The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction.<sup>43</sup>

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<sup>37</sup> C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP, 2008) p.146.

<sup>38</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>39</sup> For full details of the complexities of peace agreement construction, see Bell (above n.37), p.144.

<sup>40</sup> GFA, Article 4.

<sup>41</sup> Morgan, *The Belfast Agreement* (above n.9), p.376.

<sup>42</sup> GFA, Section 6, para.2.

<sup>43</sup> *Ibid.*, Section 6, para.9.

The conformity of Ireland and the UK's legislative arrangements with the requirements of the GFA can therefore be evaluated, within international law, by reference to the terms of the Bilateral Treaty and its Annexes.

The VCLT provides a method of scrutinising the latitude available under the Bilateral Treaty.<sup>44</sup> Under the doctrine of *pacta sunt servanda*, parties are bound to act in good faith throughout negotiation and implementation of a treaty,<sup>45</sup> which provides the basis for assessing parties' conformity with their treaty obligations.<sup>46</sup> Once a treaty is in force the state parties, in this case Ireland and the UK, must act in good faith with regard to all elements of the Bilateral Treaty. In this context "good faith" depends upon the ordinary meaning of a treaty's terms, considered in light of its object and purpose.<sup>47</sup> To ascertain the object and purpose, parties can use both the wording of a treaty and also the preamble and annexes.<sup>48</sup> Other relevant materials include instruments made by one or more of the parties in the course of concluding a treaty (and which are accepted by other parties as related to it). A bad-faith breach of international obligations includes the non-performance of specific treaty terms. This would cover a failure by the UK to introduce legislation incorporating the ECHR into Northern Ireland law or the subsequent abrogation of those rights. States cannot invoke changes in the political complexion of the executive or legislative branches of Government, or reforms required by domestic law, to negate their obligation to act in good faith.<sup>49</sup>

### *The GFA as a Peace Agreement*

State parties to international peace agreements do not merely owe obligations to each other, but also to individuals within their jurisdiction.<sup>50</sup> Accordingly, action by the UK

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<sup>44</sup> See A. Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> Ed, CUP, 2013) and E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011).

<sup>45</sup> J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996) p.39. See also O. Schachter, *International Law in Theory and Practice* (M. Nijhoff Publishers, 1991).

<sup>46</sup> VCLT, Article 26.

<sup>47</sup> *Ibid.*, Article 31.

<sup>48</sup> See 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.

<sup>49</sup> VCLT, Article 27.

<sup>50</sup> On these obligations in the context of peace agreements and human rights see respectively Crnic-Grotic (above n.48), 145 and H. Steiner, 'International Protection of Human Rights' in M. Evans (ed), *International Law* (3<sup>rd</sup> edn, OUP, 2010) 784, pp.800-801.

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 more diffuse ways than would be the case with the commitments to other countries, but in the context of the GFA there are a number of local, national and international monitoring bodies and organisations that could flag up potential breaches. With regard to the proposed repeal of the HRA the Northern Ireland Human Rights Commission (NIHRC) and the Irish Human Rights and Equality Commission (IHREC) have expressed their concerns in a joint statement to the Joint Oireachtas Committee on the Implementation of the GFA.<sup>51</sup> Civil society organisations have also issued statements,<sup>52</sup> putting on notice international bodies such as the Council of Europe and the United Nations' Human Rights Committee.<sup>53</sup> As reform proposals develop the Joint Committee of the NIHRC and the IHREC, a cross-border initiative established by the GFA,<sup>54</sup> could play a pivotal role.<sup>55</sup>

The GFA does not require *ECHR-equivalent* protections defined by and adjudicated within the UK. Instead, reflecting the widespread mistrust of loose talk of "British values" in Northern Ireland,<sup>56</sup> it explicitly mandates that the ECHR arrangements apply generally within Northern Ireland's legal system. Moreover, in a second lock, the GFA envisaged that the Northern Ireland Assembly would be bound to legislate in compliance with the ECHR.<sup>57</sup> The HRA and the NIA together implement these requirements. Under the NIA, the Northern Ireland Assembly can legislate to enhance rights protections available within

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<sup>51</sup> Joint Statement of IHREC and NIHRC (25 June 2015). Available at: <http://www.nihrc.org/news/detail/joint-statement-of-irish-human-rights-and-equality-commission-and-northern>. Accessed 25 Jan 2017. See also, the earlier reaction by, NIHRC, '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>. Accessed 25 Jan 2017.

<sup>52</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>. Accessed 25 Jan 2017; 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>. Accessed 25 Jan 2017.

<sup>53</sup> Northern Ireland Human Rights Commission, 'UK Commissions Alert United Nations Committee on Human Rights Act' (18 Jun 2015). Available at: <http://www.nihrc.org/news/detail/uk-commissions-alert-united-nations-on-human-rights-act>. Accessed 25 Jan 2017.

<sup>54</sup> GFA, Section 6, para.10.

<sup>55</sup> See Bell (above n.37), p.175.

<sup>56</sup> See C. Harvey, 'Taking the Next Step? Achieving another Bill of Rights' [2011] EHRLR 24, 28-29.

<sup>57</sup> GFA, Strand 1, para.26.

Northern Ireland’s law, but is obliged to respect the ECHR standards.<sup>58</sup> If Assembly legislation conflicts with the incorporated ECHR rights, ‘the courts are supreme and are required to strike down all and any “unconstitutional” acts of the devolved legislature’.<sup>59</sup> This process can be contrasted with the treatment of Westminster’s enactments, which continue to shape many areas of law in Northern Ireland. In this context the HRA incorporates the same range of ECHR rights, but its rights-protection mechanisms, including declarations of incompatibility and the re-interpretation clause, have produced ‘a dance of deference between the judiciary and legislature but one where ultimately Parliament has the last word’.<sup>60</sup>

The resultant human rights protections are not always entirely coherent. The Northern Ireland Assembly has the power to alter existing Westminster statutes within its areas of competence, at which point the Assembly legislation can be struck down by the courts if it is not ECHR compatible. Until the Assembly legislates on one of these devolved matters, however, the courts only possess the limited HRA powers with regard to Westminster statutes. When the courts identify an inadequate protection in an existing statute it is for the Northern Ireland Assembly to take legislative steps to rectify such provisions. In *NIHRC’s Application*,<sup>61</sup> for example, the Northern Ireland High Court declared that the criminal offences relating to abortion operative in Northern Ireland Law, as set out under the Offences Against the Person Act 1861,<sup>62</sup> is incompatible with Articles 8 ECHR.<sup>63</sup> The High Court could not strike down these provisions, as they are contained within an Act of Parliament, but the Assembly (and not Westminster) has the primary responsibility for whether and how to amend the legislation.

This messiness showcases the half-finished nature of Northern Ireland’s peace process.<sup>64</sup> The Bilateral Treaty and its Annex envisaged an “ECHR-plus” arrangement for

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<sup>58</sup> NIA, s.6(2)(c).

<sup>59</sup> A. O’Neill, ‘Stands Scotland Where it Did?’ (2006) 57 NILQ 102, 106.

<sup>60</sup> *Ibid.*, 106.

<sup>61</sup> *Northern Ireland Human Rights Commission’s Application* [2015] NIQB 96 and [2015] NIQB 102.

<sup>62</sup> Offences Against the Person Act 1861, s.58 and 59. See also the Criminal Justice Act (Northern Ireland), s.25.

<sup>63</sup> *NIHRC’s Application* [2015] NIQB 102, [5] (Horner J).

<sup>64</sup> See C. McCrudden, ‘Consociationalism, Equality, Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities’ in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights* (OUP, 2007) p.315.

Northern Ireland, whereby the transitional HRA/NIA arrangements would ultimately be superseded by the NIHRC's drafting of a Bill of Rights for Northern Ireland.<sup>65</sup> When the Commission's proposals were debated in 2011, however, the Assembly divided 46-42 against their adoption, with the Unionist parties combining to block any extension to rights protections in Northern Ireland's law.<sup>66</sup> Having received no responses from the Northern Ireland parties to subsequent queries on the proposals, in 2012 the Northern Ireland Office minister Hugo Swire informed his predecessor Paul Murphy that the transitional arrangements put in place after the GFA had ossified:

The House will want to acknowledge the right hon. Gentleman's part in the Good Friday agreement in trying to pursue the Bill of Rights. Frankly, however, that was when he should have pursued it, instead of squandering the good will that he and his Government had generated at that time.<sup>67</sup>

The Stormont House Agreement identifies the stalemate on this issue, noting that 'there is not at present consensus on a Bill of Rights'.<sup>68</sup>

In the face of this mixture of apathy and antipathy towards building upon the existing human rights arrangements amongst the Northern Ireland parties the UK and Irish Governments have reasserted the GFA's obligations in subsequent negotiations. The 2006 St Andrews Agreement reaffirmed the importance of the GFA's human rights provisions<sup>69</sup> and in an annex which outlines the UK Government's obligations relating to 'Human Rights, Equality, Victims and Other Issues', new powers were outlined for the NIHRC.<sup>70</sup> The unagreed final draft produced by the 2013 Haass talks placed significant emphasis on

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<sup>65</sup> GFA, Section 6, para.4 and NIA, s.69(7). For an overview of the Northern Ireland Bill of Rights debate, see C. Harvey, 'Designing a Bill of Rights for Northern Ireland' (2009) 60 NILQ 181 and A. Kavanagh, 'The Role of a Bill of Rights in Reconstructing Northern Ireland' (2004) 26 HRQ 964.

<sup>66</sup> See H. Swire, MP, HC Deb., vol. 541, col. 832 (7 Mar 2012).

<sup>67</sup> Ibid., col.831.

<sup>68</sup> Stormont House Agreement (23 Dec 2014) para.69. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf). Accessed 25 Jan 2017.

<sup>69</sup> St Andrews Agreement (above n.11), sections 3 and 8 and Annex E.

<sup>70</sup> Ibid., Annex B.

the ECHR with regard to parades.<sup>71</sup> The 2014 Stormont House Agreement also indicates the ECHR's continued centrality in the peace process. With regard to parades<sup>72</sup> and the Historical Investigations Unit,<sup>73</sup> compliance with the ECHR is explicitly required. Elsewhere, the 2014 Agreement affirmed the need for mechanisms for dealing with the past to be 'human rights compliant',<sup>74</sup> and noted the negotiating parties' obligation to promote human rights in lieu of an agreed Bill of Rights for Northern Ireland.<sup>75</sup> These subsequent agreements prevent the DUP from presenting itself as consistently opposed to the operation of the ECHR within Northern Ireland's law.

The ECHR and its institutions therefore remain a consistent base line within the ongoing peace process, providing an international system for rights protection which the parties involved in the peace process can accept.<sup>76</sup> The "foreignness" of the ECHR to the UK's legal traditions, which the Conservative leadership finds so suspect, underpinned its place within the GFA. The ECHR could not, in 1998 or since, be claimed as particular to the narrative of one community within Northern Ireland.<sup>77</sup> Repealing the HRA risks unpicking this settlement,<sup>78</sup> and the UK Bill of Rights Commission unsurprisingly recognised considerable reticence within Northern Ireland about the need for HRA reform.<sup>79</sup> Two Commissioners went so far as to conclude that in Northern Ireland 'the existing arrangements ... are not merely tolerated but strongly supported'.<sup>80</sup> When many of the complaints regarding the HRA voiced in other parts of the UK concern the rights of

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<sup>71</sup> R. Haass, 'Proposed Agreement 31 Dec 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' (31 Dec 2013) p.4.

<sup>72</sup> Stormont House Agreement (above n.68), para.19.

<sup>73</sup> Ibid, para.31.

<sup>74</sup> Ibid, para.21.

<sup>75</sup> Ibid, para.69.

<sup>76</sup> See M. Lamb, 'Ethno-nationalist Conflict, Participation and Human Rights-based Solidarity in Northern Ireland' (2013) 17 *IJHR* 723, 729.

<sup>77</sup> See G. Hogan, 'Incorporation of the ECHR: Some Issues of Methodology and Process' in U. Kilkelly (ed), *ECHR and Irish Law* (Jordans, 2004) 13, p.16. The ECHR's cultural neutrality has not prevented the GFA's human rights provisions and institutions being perceived as a threat by unionists, see Turner (above n.9), 457-459.

<sup>78</sup> See 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) p.86. Available at: <http://www.equalityhumanrights.com/legal-and-policy/legislation/bill-rights/case-human-rights-act>. Accessed 25 Jan 2017.

<sup>79</sup> See Commission on a Bill of Rights (above n.29), vol. 1, p.165.

<sup>80</sup> Ibid., vol.1, p.32 (Helena Kennedy QC and Philippe Sands QC).

prisoners and terrorist suspects it can come as little surprise that such issues play very differently in the Northern Ireland context.

### *The GFA's relationship with the HRA*

The relationship between the GFA and the HRA is indirect. The GFA required that the UK incorporate the ECHR into Northern Ireland law, with the substance of this obligation being more important than the legislative instrument used to achieve it. At the time of the GFA, the parties seem to have considered the HRA's UK-wide rights protections as an interim measure within the peace settlement, to operate while a Northern Ireland Bill of Rights was being drafted. These factors do not, however, negate the GFA's applicability to efforts to repeal or reform the HRA. Although the HRA is not explicitly mentioned within the GFA, the broader context of a treaty's operation may be considered in assessing the obligations it generates, including pre-existing and subsequent practice relevant to the treaty's application. In April 1998 the negotiating parties were on notice of the substantial progress already made towards the HRA's enactment. The White Paper which preceded the Bill explained some key aspects of its effect upon on any devolved institutions which might be subsequently be agreed by the Northern Ireland parties.<sup>81</sup> Moreover, although the HRA does not in fact incorporate the ECHR in its entirety,<sup>82</sup> the Irish Government was satisfied that it fulfilled the GFA's requirements; '[i]n the area of Human Rights, the British Government undertook to complete incorporation of the European Convention on Human Rights. This was achieved through the Human Rights Act, 1998'.<sup>83</sup> Joint Irish-UK Government statements which acknowledge the HRA's significance for the GFA are also important. The Joint Declaration issued in April 2003, for example, commended the HRA's operation and discussed the further extension of human rights protections.<sup>84</sup>

The ECHR-incorporation provision must also be assessed in light of other elements of the Bilateral Treaty, including and the UK Government's broader commitments to

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<sup>81</sup> Straw, *Rights Brought Home* (above n.17) para.2.23.

<sup>82</sup> See HRA, Sch.1 and NIA, s.71(5). The right to an effective remedy (ECHR, Article 13) is not incorporated into UK law and the UK has not signed up to some of the rights contained within the ECHR's additional protocols (such as Article 2, Protocol 4, on freedom of movement).

<sup>83</sup> B. Cowen, TD, Dáil Éireann Debates, vol. 539, WA 19135/01 (27 Jun 2001).

<sup>84</sup> 'Joint Declaration by the British and Irish Governments' (April 2003), Annex 3 para 2.

ensure fair functioning of the criminal justice system<sup>85</sup> and the requirement upon the Irish Government to examine ‘the question of incorporation of the ECHR’ and to ‘ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland’.<sup>86</sup> Under international law the doctrine of reciprocity envisages that a state’s obligations under a treaty are balanced against consequent advantages, an outcome that is mirrored by the obligations upon, and advantages secured by, other state parties. Reciprocity does not necessarily require that state parties mirror each other’s actions in responding to treaty obligations, but rather depends upon whether divergent approaches are proportionate in light of a treaty’s aims.<sup>87</sup> The Bilateral Treaty envisages different arrangements for implementation of the ECHR into law in Northern Ireland and in Ireland. The GFA does not, for example, explicitly call for the ECHR’s incorporation into Irish law, meaning that the existence of some distinctions in the approaches to rights protection within these jurisdictions do not suggest a breakdown in reciprocity. In light of the obligation upon the UK to make the ECHR rights justiciable within Northern Ireland’s legal system it nonetheless proved difficult for the Irish Government to develop an alternate means by which Ireland could satisfy the equivalent-protection requirement.<sup>88</sup> Indeed, once the GFA entered into effect, the Irish Government explicitly based its plans for the incorporation of the ECHR on the HRA model.<sup>89</sup> This included the replication of much of the HRA’s architecture in the European Convention on Human Rights Act (ECHR Act) 2003.<sup>90</sup> The Joint Committee’s advice – mandated by the GFA<sup>91</sup> – relating to a *Charter of Rights for the Island of Ireland* is also notable for its efforts to map, and demonstrate the

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<sup>85</sup> GFA, Section 6, para.8.

<sup>86</sup> Ibid., Section 6, para.9.

<sup>87</sup> D. Greig, ‘Reciprocity, Proportionality, and the Law of Treaties’ (1994) 34 Virginia JIL 295, 298.

<sup>88</sup> Morgan, *The Belfast Agreement* (above n.9), pp.395-396.

<sup>89</sup> J. O’Donoghue, TD, Dáil Éireann Debates, vol. 523, WA 20184/00 (5 Oct 2000). See F. de Londras, ‘Neither herald nor fanfare: The limited impact of the ECHR Act 2003 on rights infrastructure in Ireland’, in S. Egan, L. Thornton and J. Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014) 37, pp.52-54.

<sup>90</sup> Basing the ECHR Act 2003 on the HRA arguably demonstrated Ireland’s substantive commitment to the GFA, but its record as a self-standing human rights instrument is more dubious. See F. de Londras, ‘Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant?’ (2014) 35 Statute Law Rev 50 and F. de Londras and C. Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall/Thomson Reuters, 2010).

<sup>91</sup> GFA, Section 6, para.10.

complementarities of, human rights protections available across the two jurisdictions.<sup>92</sup> Reciprocity is therefore central to Ireland's objections to any weakening of human rights protections through HRA reform.<sup>93</sup>

### **Options for GFA-compliant HRA Reform**

The 2015 Conservative Party Manifesto pledged to 'scrap the Human Rights Act, and introduce a British Bill of Rights'.<sup>94</sup> In response to questions on the implications of the GFA for the Conservative Government's plans, the then Justice Minister Dominic Raab limply asserted that '[w]e will consider the implications of a Bill of Rights on devolution as we develop our proposals'.<sup>95</sup> His counterpart in the House of Lords maintained that the Government 'will fully engage with the devolved Administrations and the Republic of Ireland in view of the relevant provisions of the ... Good Friday ... Agreement'.<sup>96</sup> These holding statements indicate that even if HRA reform could satisfy the GFA's human-rights provisions, its devolution arrangements provide further challenges for the Conservative Government's agenda. The GFA provided the platform by which power could be devolved to Northern Ireland institutions alongside similar transfers to Wales and Scotland. Westminster "loaned" law-making powers within certain areas of competence to the Northern Ireland Assembly, but maintained its power to legislate in respect of devolved matters.<sup>97</sup> The UK Parliament's sovereignty has, nonetheless, been tempered as a matter of practice when it seeks to legislate in devolved areas by the operation of constitutional conventions. HRA reform is therefore a complex proposition for a Conservative Government with a slender Commons majority. The repeated delays in the publication of a draft Bill of Rights point to ministers wrestling with the difficulties posed by unpicking

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<sup>92</sup> Northern Ireland Human Rights Commission and Irish Human Rights Commission, 'The Advice of the Joint Committee on a Charter of Rights for the Island of Ireland' (2011) Available at: <http://www.nihrc.org/uploads/publications/charter-of-rights-advice-june-2011-final.pdf>. Accessed 25 Jan 2017.

<sup>93</sup> See C. Flanagan, TD, 'Commencement Matters: International Agreements' (Seanad, 14 May 2015).

<sup>94</sup> Conservative Party, 'The Conservative Party Manifesto 2015' p.60. Available at <https://www.conservatives.com/manifesto>. Accessed 25 Jan 2017.

<sup>95</sup> D. Raab, MP, HC Deb., WA 5209 (6 Jul 2015).

<sup>96</sup> Lord Faulks, HL Deb., vol. 762, col. 2209 (2 Jul 2015).

<sup>97</sup> NIA, s.5(6).

one element from the 1998 constitutional reforms. In this section we examine the problems facing different versions of HRA reform in turn.

### *Cosmetic Change to the HRA*

The Conservative Government could give effect to its headline proposal to scrap the HRA by simply rebadging the legislation and maintaining comparable levels of rights protection within UK law. Under this approach the HRA would be replaced with a “British Bill of Rights” which retains the ECHR rights incorporated into the UK’s legal orders, the duty of domestic courts to have regard to Strasbourg jurisprudence and the right of individual petition to Strasbourg. Even though such a measure would ‘not appear to depart significantly from the Human Rights Act’,<sup>98</sup> some question whether it would satisfy the GFA’s human-rights obligations. The GFA has been said to the continuation of the HRA in its present form,<sup>99</sup> on the basis that the parties were aware that the UK Parliament was working on this legislation at the time of the negotiations.<sup>100</sup> Indeed, the Irish Government has maintained that the UK’s obligations were ‘given [effect] in the 1998 UK Human Rights Act’.<sup>101</sup> The HRA explicitly extends to Northern Ireland, whereas Wales and Scotland are not mentioned in the text (being covered by implication).<sup>102</sup> The GFA’s terms, however, merely mandate that the UK Government must ‘complete incorporation into Northern Ireland law of the European Convention on Human Rights’.<sup>103</sup> It does not specify the HRA as the vehicle by which this incorporation is achieved. Moreover, given the NIHRC’s remit under the GFA to draft a Bill of Rights for Northern Ireland,<sup>104</sup> the negotiating parties must have intended that the HRA, if enacted, would be a placeholder measure, which would assume at most a background role when a Northern Ireland-specific Bill of Rights came into effect.

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<sup>98</sup> European Union Committee, *The UK, the EU and a British Bill of Rights* (2016) HL 139, para.46.

<sup>99</sup> See, for example, S. Agnew, MLA, NIA Deb., vol. 105, no. 2, p.47 (1 Jun 2015).

<sup>100</sup> See Commission on a Bill of Rights (above n.29), vol. 1, p.252 (A. Speaight QC).

<sup>101</sup> C. Flanagan, TD, ‘Commencement Matters: International Agreements’ (Seanad, 14 May 2015).

<sup>102</sup> HRA, s.22(6).

<sup>103</sup> GFA, Section 6, para.2.

<sup>104</sup> GFA, Section 6, para.4 and NIA 1998, s.69(7).

Compliance with the GFA thus depends upon the degree to which the ECHR is embedded within Northern Ireland's law, not the legislative tool used to fulfil this task. Nonetheless, labelling any replacement for the HRA a "British" Bill of Rights would be loaded with unwelcome symbolism in the Northern-Ireland context. Throughout the GFA, 'British' and 'Irish' are used to distinguish the different traditions within Northern Ireland.<sup>105</sup> Independent of the substance of such legislation, a "British" Bill of Rights would inevitably be perceived as partisan in its operation. Describing the new legislation as a "United Kingdom Bill of Rights" avoids this specific incongruence with the GFA's language, but any national appellation is likely to generate tension. Although an entirely cosmetic change to the title of the legislation would thus not fall foul of the GFA, even such a minimal reform could produce a destabilising effect within Northern Ireland.

The conformity of any more substantive HRA reforms with the GFA depends upon the impact of specific reforms on the degree of ECHR incorporation within Northern Ireland's law. The Conservatives' most prominent proposal has been to 'curtail the role of the European Court of Human Rights'<sup>106</sup> within the UK's domestic legal systems by revisiting the HRA's requirement that domestic courts should take into account interpretations of human rights adopted by Strasbourg.<sup>107</sup> This could involve reworking this HRA provision to make it explicit that the Strasbourg's human rights jurisprudence is purely 'advisory' in character.<sup>108</sup> As scope already exists under the HRA for the UK's courts to adopt interpretations of rights which diverge from the position taken by Strasbourg, such a reform could therefore be seen to be cosmetic in character, and might not undermine the UK's GFA commitments.<sup>109</sup> The Conservatives have, however, also suggested weakening the courts' power under the HRA to reinterpret legislation so far as possible to conform with human rights,<sup>110</sup> on the basis that this power allows judges to

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<sup>105</sup> See for example British-Irish Council, *British/Irish Agreement, British-Irish Intergovernmental Conference*; GFA, Strand 3.

<sup>106</sup> Conservative Party (above n.94), p.60.

<sup>107</sup> HRA, s.2(1).

<sup>108</sup> Conservative Party (above n.27), p.5.

<sup>109</sup> HRA jurisprudence confirms that section 2 does not require UK courts to 'slavishly' follow or 'mirror' the ECtHR's approach to rights; 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* (OUP, 2013) p.111.

<sup>110</sup> HRA, s.3(1).

adopt unnatural readings of a statute which were not intended by Parliament.<sup>111</sup> They also propose introducing a seriousness threshold for instituting human-rights claims, which ‘could undermine the commitment of the UK to facilitate direct access to the courts and to remedies for breaches of the Convention’.<sup>112</sup> In light of the fact that the powers Northern Ireland’s courts possess to address statutory human rights breaches under the HRA are already weak, any further diminution would, in many cases, render human-rights protections nugatory.

Reforms which adjust, but maintain, the relationship between Strasbourg jurisprudence and Northern Ireland’s law, can be subjected to a three-step touchstone test for GFA compatibility. HRA-reform proposals must maintain the level of ECHR ‘incorporation’, ‘direct access to the courts’ and the ‘power for the courts to overrule Assembly legislation on grounds of inconsistency’ with the ECHR.<sup>113</sup> These criteria, subject to broader devolution and political considerations, might therefore permit some weakening of the link to Strasbourg jurisprudence. Legislative limitations curtailing particular ECHR rights or restricting their application to certain groups would be contrary to the Agreement. This would include, for instance, the exclusion of prisoners or the armed forces from the ambit of domestic human rights protections or the restriction of the domestic operation of Article 8 ECHR. Even cosmetic changes to the current HRA scheme would thus be subject to GFA restrictions. Beyond such limited changes, proposals which explicitly prevent the UK courts from relying upon Strasbourg’s jurisprudence would have a substantial impact on human rights in Northern Ireland, and therefore warrant separate consideration.

### *Breaking the Link with the ECHR Institutions*

A mere rebadging exercise, tweaking particular aspects of how the ECHR is applied within UK law, hardly corresponds to the venom of Conservative criticisms of the HRA. If that is all that is in the legislative pipeline, some have questioned whether a British Bill of Rights

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<sup>111</sup> Conservative Party (above n.27), p.6.

<sup>112</sup> M. Murphy, ‘Repealing the Human Rights Act: Implications for the Belfast Agreement’ (2015) 26 KLJ 335, 342.

<sup>113</sup> GFA, Section 6, para.2.

is necessary at all.<sup>114</sup> Throughout David Cameron's premiership the Conservatives therefore toyed with more extensive proposals, in particular sweeping away the HRA's requirement that UK courts take ECtHR jurisprudence into account as a means of freeing them from their supposed subservience to Strasbourg.<sup>115</sup> Of particular concern for the Conservatives has been the Court's 'living instrument' doctrine,<sup>116</sup> by which some ECHR rights have been given more extensive interpretations than were envisaged when the ECHR was drafted. By 'break[ing] the formal link between the British Courts and the European Court of Human Rights'<sup>117</sup> the Conservatives would prevent Strasbourg's extensions from being applied directly by UK courts. Moreover, David Cameron's team believed that once this step was taken the ECtHR would be obliged to grant the UK a more substantial 'margin of appreciation'<sup>118</sup> when subsequent legislation explicitly sought to restrict the operation of the ECHR's qualified rights.

The most direct way to achieve this aim would be for a British Bill of Rights to maintain in UK domestic law enumerated rights which are comparable to, or even mirror, those listed in the 1950 Convention, but to explicitly curtail the application of Strasbourg's subsequent interpretations of these rights by the UK courts. Any such reform, however, threatens the UK's compliance with the GFA. The GFA expressly stipulates that '[t]here will be safeguards to ensure [that] ... neither the Assembly nor public bodies can infringe [the ECHR]'.<sup>119</sup> In this context the ECHR's provisions cannot be divorced from their interpretations by Strasbourg. The UK is obliged to respond to ECtHR judgments which apply to the UK,<sup>120</sup> and many significant ECtHR judgments develop the interpretation of particular rights and therefore matter for UK law even if the UK is not a party.<sup>121</sup> The Court

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<sup>114</sup> See EU Committee (above n.98), para.46.

<sup>115</sup> See, for example, J. Forsyth, 'Chris Grayling: I want to see our Supreme Court supreme again' *The Spectator* (28 Sep 2013).

<sup>116</sup> See *Tyrer v United Kingdom* (1978) 2 EHRR 1, para.31.

<sup>117</sup> Conservative Party (above n.94), p.60.

<sup>118</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>119</sup> GFA, Strand 1, para.5.

<sup>120</sup> ECHR, Article 46(1).

<sup>121</sup> See D. Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 1231, pp.1244-1245.

has confirmed that it will consider whether national authorities have taken into account its body of jurisprudence when determining whether they have taken requisite measures in response to a ruling.<sup>122</sup>

For all the packaging of this proposal as a sweeping change, when confronted with concerns based upon the GFA Conservative ministers solemnly intoned that ‘the protection of human rights is a key part of the Belfast agreement, and our Bill of Rights will continue to protect the rights set out in the European Convention on Human Rights’.<sup>123</sup> The aim would seem to be to present these proposals as maintaining sufficient incorporation for GFA compliance. Despite such efforts to allay concerns, restrictions upon the Northern Ireland courts’ ability to take account of Strasbourg case law would create a three-fold problem for GFA compliance. First, by removing their ability to consider the jurisprudence, such reforms would limit the extent to which the ECHR is incorporated. Second, such a measure would curtail the Northern Ireland courts’ ability to assess whether actions by public bodies and Assembly legislation are ECHR-compliant. Third, such a restriction would invariably disconnect between the interpretations of ECHR rights adopted by Strasbourg and Northern Ireland’s courts. Such differences would likely spur an increase in complaints against the UK at the ECtHR. Such reforms would therefore substantially weaken human rights protections within the law of Northern Ireland, to the point where it could no longer be said to involve a meaningful incorporation of the ECHR rights.

### *Post-Brexit: More Radical Potential Departures from the 1998 Settlement*

The proposed reforms to the UK’s domestic human rights arrangements evaluated above both involve enacting a British Bill of Rights which provides for a broadly equivalent statement of rights to those contained within the HRA. And under David Cameron’s leadership the Conservatives did indeed appear committed to replacing the HRA with a rights instrument ‘rooted in our values’<sup>124</sup> and which placed the original ECHR’s text ‘at

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<sup>122</sup> *Opuz v Turkey*, App no 33401/02 (9 June 2009) para.163.

<sup>123</sup> Lord Bridges, HL Deb., vol. 773, col. 376 (24 May 2016). See also Lord Faulks, HL Deb, vol. 773, col. 282 (24 May 2016).

<sup>124</sup> D. 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/>. Accessed 25 Jan 2017.

the heart of our plan'.<sup>125</sup> For as long as the UK remains part of the European Union (EU) the UK is effectively tied into the ECHR as a baseline requirement for EU membership.<sup>126</sup> For all that David Cameron saw electoral advantage in refusing to rule out the UK's withdrawal from the Council of Europe during the 2015 UK General Election campaign,<sup>127</sup> after the election reverted to a position of seeking 'to pass a British Bill of Rights, which we believe is compatible with our membership of the Council of Europe'.<sup>128</sup> David Cameron thus seemed to tacitly accept that, for all his critique of contemporary pan-European human rights protections, such proposals marked the limit of achievable human rights reforms. With Brexit, however, this major obstacle to more far-reaching reforms is removed. His successor, Theresa May, can therefore contemplate acting on her confirmed animus against an ECHR system which 'can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals, and does nothing to change the attitudes of governments like Russia's when it comes to human rights'.<sup>129</sup> Such action could ultimately include repeal of the HRA without replacement and even the UK's withdrawal from the Council of Europe.<sup>130</sup>

Any attempt to return to civil liberties along pre-HRA lines, by which individuals were supposedly free to act in any way which does not contravene the law,<sup>131</sup> would undoubtedly conflict with the GFA and would run into the same devolution challenges that would hamper major changes to the HRA's core provisions. The 2014 Conservative Party Policy Paper on Human Rights spun a line that 'over the centuries through our Common Law tradition, the UK's protection of human rights has always been grounded in real

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<sup>125</sup> Conservative Party (above n.27), p.5.

<sup>126</sup> It has long been the case that all EU member states are also members of the Council of Europe; see H. Schermers, 'The European Communities Bound by Fundamental Human Rights' (1990) 27 CMLRev 249, 251-252. Under Article 6(3) Treaty of the European Union the ECHR rights 'constitute general principles of the Union's law'.

<sup>127</sup> For an example of the mooted of this option see; M. Dathan, 'David Cameron Refuses to Rule out Quitting the European Convention on Human Rights' *The Independent* (6 Mar 2015).

<sup>128</sup> D. Cameron, MP, HC Deb., vol. 598, col. 311 (8 Jul 2015). See also Justice Committee, 'Oral Evidence: The Work of the Secretary of State for Justice' (17 Jul 2015) HC 335, Q54 (Michael Gove).

<sup>129</sup> A. Asthana and R. Mason, 'UK must leave European convention on human rights, says Theresa May' *The Guardian* (25 Apr 2016).

<sup>130</sup> This could be the ultimate goal of Conservative policy under May, even if interim steps are pursued towards more limited HRA reform; M. Wilkinson, 'Human Rights Act will be scrapped in favour of British Bill of Rights, Liz Truss pledges' *The Telegraph* (22 Aug 2016).

<sup>131</sup> See D. Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 3-33.

circumstance'.<sup>132</sup> Post-Brexit, Parliamentarians concerned about the threat to human rights protections in Northern Ireland have been fobbed off with condescending *bon mots* about the UK's glorious tradition of liberties stretching back to Magna Carta.<sup>133</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 conflict in Northern Ireland.<sup>134</sup> The common law may well have moved on since 1998, with an increasing number of appellate judgments emphasising fundamental rights inherent within the common law,<sup>135</sup> but this does not substitute for the ECHR's catalogue of enumerated rights.

The ECHR system has also moved on since 1998. Conterminous with the enactment of the HRA, Strasbourg's jurisdiction to hear individual claims became compulsory.<sup>136</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. These temporary grants were often used by states to exert leverage over the Court, allowing governments to threaten a state's withdrawal of individual access to the Court if its judgments became too uncomfortable.<sup>137</sup> But even if individual petition, and by extension the oversight of the Strasbourg Court, are now fixed features of the ECHR system, this does not satisfy the GFA's requirement for incorporated ECHR rights which can be employed before the Northern Ireland courts.

Rather than attempting to turn back the clock to before 1998, the Conservative Government could contemplate withdrawing from the ECHR, an outcome supported by many prominent supporters of Brexit.<sup>138</sup> In her campaign to become Conservative leader Theresa May recognised that she could not at present gain parliamentary support for UK

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<sup>132</sup> Conservative Party (above n.27), p.2.

<sup>133</sup> See O. Heald, MP, HC Deb., vol. 614, col. 205 (6 Sep 2016) and O. Heald, MP, HC Deb., WA906073 (6 Sep 2016).

<sup>134</sup> See, by way of overview, B. Dickson, 'Counter-Insurgency and Human Rights in Northern Ireland' (2009) 32 *Journal of Strategic Studies* 475.

<sup>135</sup> See, for example, *AXA General Insurance Limited v Lord Advocate* [2011] UKSC 46; [2011] UKSC 46 and *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115. See, for discussion, R. Masterman and S. Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] *EHRLR* 57.

<sup>136</sup> ECHR, Protocol 11.

<sup>137</sup> See C. Warbrick, "'Federal" Aspects of the European Convention on Human Rights' (1989) 10 *Michigan JIL* 698, 709-710.

<sup>138</sup> See R. Dearlove, 'Brexit would not damage UK Security' *Prospect* (23 Mar 2016). Available at: <http://www.prospectmagazine.co.uk/opinions/brexit-would-not-damage-uk-security>. Accessed 25 Jan 2017.

withdrawal from the ECHR, and made it clear that she would not pursue such a policy in the remainder of the current Parliament.<sup>139</sup> Moreover, Brexit will undoubtedly place a considerable strain on the UK's administrative resources, potentially marginalising other major reform projects. This does not, however, preclude a more a much more aggressive push against the UK's membership of the Council of Europe being part of the next Conservative manifesto. Theresa May has already flagged up withdrawal from the ECHR as a priority once the legislative heavy-lifting of disentangling the UK from EU law is at least under way.<sup>140</sup> Such a platform would be intuitively attractive to many Conservatives, even at the price of further destabilising politics in Northern Ireland. Withdrawal could not, however, be reconciled with the GFA. The Irish Government has insisted that ending the ECHR's incorporation within Northern Ireland law would contravene the Bilateral Treaty. Frances Fitzgerald, the Minister for Justice and Equality, pointedly informed the UK Government that 'while a domestic Bill of Rights could complement incorporation, it could not replace it'.<sup>141</sup> The GFA does not directly protect the HRA, but UK cannot simply abandon its ECHR commitments and claim to remain GFA compliant.

### *A Northern Ireland-Specific Solution*

The foregoing analysis indicates that if the UK Government is to comply with the GFA's prominent ECHR-incorporation provisions its options for HRA reform are limited. But because the GFA's obligations apply specifically to Northern Ireland's law, one option could be for Westminster to produce a Northern Ireland Bill of Rights and then proceed with human-rights reform without concern for the GFA's requirements. We must therefore evaluate whether GFA compliance could be achieved by establishing a separate regime covering Northern Ireland's 'particular ... situation',<sup>142</sup> and the difficulties inherent in

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<sup>139</sup> See J. Parkinson, 'The Human Rights Act helps us hold power to account. We must defend it' *The Guardian* (26 Jul 2016).

<sup>140</sup> See W. Worley, 'Theresa May "will campaign to leave the European Convention on Human Rights in 2020 election"' *The Independent* (29 Dec 2016).

<sup>141</sup> F. Fitzgerald, TD, to M. Gove, MP (3 Feb 2016). Available at: <http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/RepealofHRAeffectonEULaw/Minister-Frances-Fitzgerald-toSofSJus.pdf>. Accessed 25 Jan 2017.

<sup>142</sup> M. Ritchie, MP, HC Deb, vol. 577, col. 370 (12 Mar 2014).

establishing such distinct arrangements. Early Conservative Party thinking on human-rights reform proceeded on the basis that developing unique provisions for Northern Ireland would address the GFA's requirements. As Dominic Grieve 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>143</sup> Up until 2012 the Conservatives remained breezily confident that some Northern Ireland provisions could be 'tagged on' to UK-wide reform.<sup>144</sup> Since then, however, increasing use of the ill-considered "British Bill of Rights" epithet has been accompanied by equivocation over special arrangements for Northern Ireland.<sup>145</sup>

In legal terms a separate regime for Northern Ireland provides the most direct means of tackling GFA concerns. Although Christine Bell has argued that the GFA's reciprocity requirements oblige the maintenance of ECHR incorporation on a UK-wide basis, and not simply in Northern Ireland,<sup>146</sup> the Bilateral Treaty explicitly compares standards of rights protection between Northern Ireland and Ireland. Adjustments in the standard of human rights protections in other parts of the UK cannot, of themselves, be taken to breach the requirements of reciprocity under international law.<sup>147</sup> For its part, the Irish Government has been keen to kick start progress towards a Northern Ireland Bill of Rights, lamenting the absence of a renewed commitment within the Stormont House Agreement.<sup>148</sup> If it was to be GFA-compliant, however, a Northern Ireland Bill of Rights could not restrict the ECHR's incorporation within Northern Ireland's law. The sections of the GFA which discuss a Northern Ireland Bill of Rights maintain that no matter what 'supplementary' protections might result, the baseline of the relationship between the law of Northern

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<sup>143</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>. Accessed 25 Jan 2017.

<sup>144</sup> H. Swire, MP, HC Deb, vol. 541, col. 832 (7 Mar 2012).

<sup>145</sup> See D. Raab, MP, HC Deb., WA 1446 (15 Jun 2015).

<sup>146</sup> See C. Bell, 'Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland' (13 May 2015). Available at: <http://rightsni.org/2015/05/human-rights-act-repeal-and-devolution-quick-points-and-further-resources-on-scotland-and-northern-ireland/>. Accessed 25 Jan 2017.

<sup>147</sup> Memories of the Birmingham Six and Guilford Four miscarriages of justice might nonetheless lead Nationalist parties to insist that their commitment to the GFA was predicated upon UK-wide human rights protections. See A. Smith, M. McWilliams and P. Yarnell, *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* (TJI, 2014) pp.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). Accessed 25 Jan 2017.

<sup>148</sup> See C. Flanagan, TD, (Minister for Foreign Affairs) Seanad Debates (14 May 2015).

Ireland and the ECHR must be maintained.<sup>149</sup> As a result, even setting aside the political difficulties with instituting a Northern Ireland Bill of Rights, this solution would actually foreclose certain options for human rights reform. So as not to reduce current human rights protections the Northern Ireland courts would have to retain their ability to take account of Strasbourg jurisprudence, to reinterpret provisions in a rights-compliant manner and to issue declarations of incompatibility with regard to UK Acts of Parliament which apply within Northern Ireland law. Adopting an approach which tied Northern Ireland into the ECHR would also stymie any effort by the UK Government to withdraw from the Strasbourg system.

### **The Northern Ireland Assembly's Consent to HRA Reform**

Unless the Northern Ireland Assembly consents to any of the above range of human rights reforms their imposition from Westminster would also undermine the institutional arrangements established on the basis of the GFA. Lord Sewel, a minister responsible for piloting the 1998 devolution legislation through the House of Lords, explained that once devolution was operational a constitutional convention would operate to ensure that 'Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'.<sup>150</sup> The same convention also covers Wales and Northern Ireland.<sup>151</sup> If we confine "normally" in the above statement to permitting Westminster to legislate without consent in response to an emergency, when the UK Government proposes legislation which touches on devolved matters then the Sewel Convention requires that such a change be assented to by the Assembly by means of a Legislative Consent Motion.<sup>152</sup> Under the Assembly's standing orders Westminster legislation which covers a "devolution matter" includes any measure which touches upon an area of competence transferred to Northern Ireland's institutions or which attempts to

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<sup>149</sup> GFA, Section 6, para.4.

<sup>150</sup> Lord Sewel, HL Deb, vol. 592, col. 791 (21 Jul 1998).

<sup>151</sup> The Convention was adopted within the Memorandum of Understanding on relations between the UK's devolved and central institutions; Office of the Deputy Prime Minister, *Memorandum of Understanding and Supplementary Agreements between the UK Government and the Devolved Administrations* (December 2001) Cm 5240, para.13. See Murphy (above n.112), 336-337.

<sup>152</sup> See Commission on a Bill of Rights (above n.29), vol. 1, p.251 (A. Speaight QC).

change the Assembly's legislative competence.<sup>153</sup> The Assembly's competence is bounded by human rights considerations, as stipulated by the GFA.<sup>154</sup> The NIA denies the Assembly competence to make laws which are incompatible with incorporated ECHR rights.<sup>155</sup> Its interpretation clause moreover specifies that the concept of incorporated ECHR rights 'has the same meaning as in the Human Rights Act 1998', tying together the statutes.<sup>156</sup>

Assuming that the Assembly is functioning,<sup>157</sup> this convention could be interpreted as meaning that any amendment to the HRA which would alter the competences of the Assembly and therefore trigger the need for a Legislative Consent Motion.<sup>158</sup> This requirement would appear to pose severe difficulties for a UK Government intent on achieving HRA reform in a manner which respects this constitutional commitment. Even if the Unionist parties combined to provide a majority in the Assembly in support of a Legislative Consent Motion, the NIA also contains consociationalism provisions intended to prevent measures passed with the backing of parties representing one community from having a disproportionate impact upon the other community's interests.<sup>159</sup> The Nationalist parties could use these provisions to trigger a Petition of Concern,<sup>160</sup> requiring that any Legislative Consent Motion authorising HRA reform receive cross-community support. By this route they could refuse Assembly consent for any reform which they considered a threat to the GFA's human-rights obligations. The UK Government has hitherto accepted that unilateral action on an issue so bound up in the GFA would challenge the very nature

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<sup>153</sup> Northern Ireland Assembly, Standing Order 42A, para.10. On this issue, see *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [140].

<sup>154</sup> GFA, Strand 1, para.5 and para.26.

<sup>155</sup> NIA, s.6(2)(c).

<sup>156</sup> *Ibid.*, s.98(1).

<sup>157</sup> The Assembly was suspended for prolonged periods between 2000 and 2007 as a result of the inability of some of the major parties to agree to cooperate in the Northern Ireland Executive. In light of the collapse of the Executive in January 2017 amid acrimonious fall out from the Renewable Heating Initiative scandal there is the possibility of further a suspension if an Executive cannot be formed after the March 2017 Assembly elections. In these circumstances there could be no requirement for the Assembly to issue a Legislative Consent Motion with regard to HRA reform for as long as it is suspended. The UK Government has, however, pledged to keep the main Northern Ireland parties informed with regard to Brexit negotiations, and a similar *ad hoc* process could well be instituted regarding HRA reform. See Online Editors, 'Brexit Supreme Court dismissal of Northern Ireland undermines Assembly's democratic mandate, warns SDLP' *Belfast Telegraph* (24 Jan 2017).

<sup>158</sup> See A. Smith, M. McWilliams and P. Yarnell, 'Does every cloud have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) 40 *Fordham ILJ* 79, 120.

<sup>159</sup> On the importance of these elements of the GFA settlement, see *Robinson* (above n.13), [25] (Lord Hoffmann).

<sup>160</sup> NIA, s.42(1).

of the 1998 settlement; ‘We take our responsibilities under the Belfast agreement very seriously; we will not do anything to undermine it and we will work with parties to that end’.<sup>161</sup> Moreover, successive Northern Ireland Secretaries have insisted that any progress on a Northern Ireland Bill of Rights requires the Assembly’s consent:

[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>162</sup>

This self-imposed commitment to consensus<sup>163</sup> would appear to stymie the use of a Northern Ireland Bill of Rights as a way out of any impasse on HRA reform. It may well be that the Conservatives come to regret their studied disinterest in the NIHRC’s proposals.

These bulwarks against imposed reform, however, appear to rest upon legislative consent as a constitutional convention as opposed to constitutional law.<sup>164</sup> In the *Miller* case<sup>165</sup> the UK Supreme Court recently ruled on the question of whether the Northern Ireland Assembly would, as a matter of law, have to issue a Legislative Consent Motion to allow the UK Parliament to legislate to begin the process of Brexit. As the Assembly’s legislative competence is bounded by EU law’s requirements in similar fashion to the provisions relating to the ECHR, the Court’s ruling is relevant to whether the HRA could be repealed without the Assembly’s consent.<sup>166</sup> In *Miller* all eleven Supreme Court Justices agreed that the courts could not enforce the convention that Westminster would gain a Legislative Consent Motion from the devolved legislatures before legislating to authorise

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<sup>161</sup> Lord Bridges, HL Deb, vol. 773, col. 376 (24 May 2016).

<sup>162</sup> Owen Paterson, reported in: M. Hennessy “‘Stormont agreement’ needed for rights Bill’ *Irish Times* (23 Nov 2010). See also T. Villiers, MP, Westminster Hall, col. 197WH (16 Jul 2013).

<sup>163</sup> This requirement is not in the GFA, and has been characterised as ‘invented’; See Smith, McWilliams and Yarnell (above n.158), 126.

<sup>164</sup> Within the UK’s system of government constitutional conventions are rules which encompass ‘core elements in the United Kingdom’s parliamentary democracy’, but which ‘are not enforced by courts’; *Evans v Information Commissioner* [2012] UKUT 313, [66]-[67] (Walker J). See C. Munro, *Studies in Constitutional Law* (2<sup>nd</sup> Ed, Butterworths, 1999) pp.55-88.

<sup>165</sup> *Miller* (above n.153).

<sup>166</sup> NIA, s.6(2)(d).

the commencement of Brexit negotiations.<sup>167</sup> In the words of the majority judgment, conventions can ‘play a fundamental role in the operation of our constitution’ but the policing of their scope and operation ‘does not lie within the constitutional remit of the judiciary’.<sup>168</sup> Put another way, acting without Assembly consent could be unconstitutional, but it would not be illegal.<sup>169</sup>

We nonetheless maintain that a direct analogy between the Assembly’s ability to consent to EU law and ECHR law is, in important respects, inappropriate. *Miller* emphasised that although the GFA assumed the UK’s continuing membership of the EU, it did not require it.<sup>170</sup> The ECHR, however, has a much stronger basis in the GFA and might be said to cross the line from ‘assumed’ to ‘required’. The Supreme Court further asserted that the Assembly does not have a parallel legislative competence in relation to Brexit on the basis that ‘the EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations’.<sup>171</sup> The basis for the ECHR constraints upon the Assembly could not be characterised in the same way; they were imposed to reflect specific GFA commitments.<sup>172</sup> If the GFA, and not parliamentary sovereignty, is accepted as the ‘ultimate political fact’<sup>173</sup> underpinning Northern Ireland’s system of governance then even after *Miller* it remains arguable that as a matter of constitutional law there are some measures that Parliament cannot enact without the Assembly’s consent. Thus the Supreme Court’s judgment does not foreclose the possibility of litigation to uphold the need for the Assembly’s consent should Parliament attempt to redraw central features of the GFA settlement, such as its human rights arrangements. It does, however, suggest that if the UK Government is intent on forcing through human-rights reform in spite of constitutionally significant (but arguably purely political) requirements for Assembly consent, then Ireland’s ability to challenge any breach of the GFA as a breach of international law will take centre stage.

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<sup>167</sup> See *Miller* (above n.153), [145].

<sup>168</sup> *Miller* (above n.153), [150]. See A. Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> Ed., Liberty Fund, 1982) p.292.

<sup>169</sup> See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723 (Lord Reid).

<sup>170</sup> *Miller* (above n.153), [129].

<sup>171</sup> *Miller* (above n.153), [130].

<sup>172</sup> ECHR incorporation is explicitly part of the GFA’s “safeguards” section; GFA, Section 6.

<sup>173</sup> H. Wade, ‘The Legal Basis of Sovereignty’ [1955] CLJ 172, 188.

## International Law's Impact upon HRA Reform

### Modifying the GFA

An alternate way to circumvent the GFA's restrictions would be for the UK Government to seek to renegotiate of the settlement's human rights provisions. 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 legal route, however, does not take account of the political context of Northern Ireland's peace process.

The first issue which arises concerns the relationship between successor and predecessor treaties.<sup>174</sup> Although the Irish Government was present at the negotiation of the 2006 St Andrews Agreement, the ultimate Agreement was concluded between the UK Government and the Northern Ireland parties. 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 HRA, but does not mention the ECHR,<sup>175</sup> exemplifying the degree to which the HRA 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 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. The St Andrews Agreement can be understood as subsequent practice by the UK and Irish Governments in implementing the Bilateral Treaty. As such, it seems to reinforce the ECHR's within Northern Ireland's system of governance, rather than undermining it.

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<sup>174</sup> It is notable that the 1985 Anglo Irish Agreement was explicitly replaced under the terms of the Bilateral Treaty and cannot therefore be used to interpret the terms of the subsequent treaties. See GFA, Section 2, para.1

<sup>175</sup> St Andrews Agreement (above n.11), Annex B.

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>176</sup> The VCLT also allows for successive treaties, an option which is particularly straightforward with regard to bilateral treaties and a route which the Irish and UK Governments have employed since the establishment of the Free State in 1921.<sup>177</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 Northern Ireland's 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 pacificatoria*).<sup>178</sup> This presupposes 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, regards the human rights provisions of the GFA as clear and unchanged:

[A] strong human rights framework, including external supervision by the European Court of Human Rights, has been an essential part of the peace process and anything

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<sup>176</sup> VCLT, Article 59.

<sup>177</sup> VCLT, 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 GFA as a treaty, see Morgan (above n.9), pp.64-66.

<sup>178</sup> See Bell (above n.37) and C. Stahn, J. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP, 2014).

that undermines this, or is perceived to undermine this, could have serious consequences for the operation of the Good Friday/Belfast Agreement.<sup>179</sup>

As a guarantor of the GFA, the Irish Government has affirmed its responsibility to safeguard its institutions and principles.<sup>180</sup> In clearly voicing its intention to carry out this responsibility the Irish Government is positioning itself as an essential component in any discussion on reform or repeal of the current arrangements.

### *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 substantive human-rights reform, it will have to engage in a proactive 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>181</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>182</sup>

Although simple in legal terms, negotiating a new British-Irish Human Rights Protocol would undoubtedly face serious challenges in light of the fact that the 1998 Agreement is not a simple bi-lateral treaty. Both Governments would operate under the pressure of perceptions from various constituencies, notably the Northern Ireland parties.<sup>183</sup> The Irish Government's actions in renegotiations would attract pressure from

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<sup>179</sup> F. Fitzgerald (above n.141).

<sup>180</sup> C. Flanagan, TD, 'Commencement Matters: International Agreements' (Seanad, 14 May 2015).

<sup>181</sup> Constitution of Ireland, *Bunreacht na hEireann*, Nineteenth Amendment.

<sup>182</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>. Accessed 25 Jan 2017.

<sup>183</sup> See Murphy (above n.112), 343.

the public in both the Republic and Northern Ireland. A key element of the GFA settlement has been the inclusion of Northern Ireland's politicians in British-Irish negotiations which affect the region. In 2004, however, a 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, the SDLP's Mark Durkan warned 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>184</sup> To this warning can be added concerns over the Interpretive Declaration's significance in international law, for it suggests that the Northern Ireland parties can be excluded from any subsequent renegotiation process between the two governments. Negotiations on a new British-Irish Human Rights Protocol, however, would be unlikely to follow this pattern. On an issue as central to the GFA as general human rights commitments, side-lining Northern Ireland's democratically-elected representatives could not be countenanced by the Irish Government. This brings us back to the stalemate between Northern Ireland's parties on issues of human rights, best illustrated by the lack of progress towards a Northern Ireland Bill of Rights in the Stormont House Agreement.<sup>185</sup> There seems no obvious route towards cross-party agreement. As such, although renegotiating the GFA's human-rights elements is a necessary precursor to altering the UK's obligations, the place of Northern Ireland's parties in such negotiations generates near insurmountable political difficulties.

### *Challenging Unilateral Action by the UK*

While it is possible to pass a subsequent treaty, or to amend or sever the existing Bilateral Treaty's provisions, it is not possible for the UK to do so unilaterally. Any modifications by the UK 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 international law and

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<sup>184</sup> See W. Graham, 'Nationalists Concerned Over Referendum' *Irish News* (8 Jun 2004).

<sup>185</sup> See Stormont House Agreement (above n.68), para.69.

the VLCT.<sup>186</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. Although 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 (ICJ), 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. 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'.<sup>187</sup> Whether the UK's exclusion would include Ireland is, however, 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>188</sup> Ireland had passed the Republic of Ireland Act 1948 which came into effect 10 days before the London Declaration, and 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 in respect of the GFA. This position is made more difficult by the

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<sup>186</sup> VCLT, Article 60.

<sup>187</sup> Both states' declarations are available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>. Accessed 25 Jan 2017.

<sup>188</sup> London Declaration (26 Apr 1949) lists the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon (Sri Lanka) as members. Available at: <http://thecommonwealth.org/sites/default/files/history-items/documents/London%20Declaration%20of%201949.pdf>. Accessed 25 Jan 2017.

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. Though the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts have not been adopted as a treaty, they are widely regarded as reflecting binding customary international law.<sup>189</sup> An internationally wrongful act can be an act or omission which is attributable to a state and which constitutes a breach of its international obligation. The internal conditions or domestic law of a country are irrelevant to a determination of a breach.<sup>190</sup> The Bilateral Treaty imposes international obligations upon the UK, and any of the options for human-rights reform which were indicated above as breaching these GFA 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>191</sup> If a state refuses to acknowledge its breach or provide reparations the injured state can ultimately invoke proportionate 'countermeasures'.<sup>192</sup> Therefore, although it is difficult to imagine such a collapse in relations between the UK and Ireland, if the UK did unilaterally abrogate its GFA commitments international law provides Ireland with options for recourse.<sup>193</sup>

## Conclusion

Some unalloyed vision of national sovereignty underpins both Brexit and the Conservative Party's aversion to the ECHR. Its proposals have given little consideration to Northern Ireland, seemingly proceeding on Anthony King's ill-judged dictum that '[w]hat happens in Northern Ireland scarcely affects British constitutional development; constitutional

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<sup>189</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries (2001), GA Resolution A/56/10. Accessed 25 Jan 2017. See also J. Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874.

<sup>190</sup> *Ibid.*, Articles 1, 2 and 3.

<sup>191</sup> *Ibid.*, Articles 31 and 34.

<sup>192</sup> *Ibid.*, Articles 49 and 51.

<sup>193</sup> If Ireland consented to the UK breaching the Bilateral Treaty this would vitiate any claim to a wrongful act; *Ibid.*, Article 20.

development in Britain scarcely affects what happens in Northern Ireland'.<sup>194</sup> Our account has challenged the wishful thinking inherent in the notion that the arrangements covering Northern Ireland can be conceptually detached from the remainder of the UK constitution; there can be no "British" Bill of Rights without consideration of its application to Northern Ireland. The GFA, moreover, was not a simple Bilateral Treaty between the UK and Ireland. As the primary instrument enabling Northern Ireland's peace settlement it became part of the 'metaconstitutional discourse' between the two countries.<sup>195</sup> As such, the GFA was rooted in the ECHR and EU as legal orders which bind both the UK and Ireland.<sup>196</sup> Of the two, however, the ECHR's roots are by far the deeper, and are all but impossible to unearth if the UK Government remains 'committed to honouring the Belfast Agreement' and to ensuring that 'our proposals for a Bill of Rights are compatible with it.'<sup>197</sup> Any meaningful attempt at UK-wide human-rights reform will undoubtedly collide with the UK's obligations under the GFA. As a consequence, the Conservative Government will have to compromise the vision of a British Bill of Rights which it has sold to its supporters, or be prepared to flout the Agreement's terms.

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<sup>194</sup> A. King, *The British Constitution* (OUP, 2007) p.ix.

<sup>195</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, p.20.

<sup>196</sup> The supranational nature of the GFA's arrangements is also manifested in the reliance it places on shared connections through the EU. See, for example, GFA, Strand 2, para.17. In this regard, Brexit has already weakened some of the foundations of the settlement.

<sup>197</sup> O. Heald, MP, HC Deb., WA 59693 (23 Jan 2017).