The ECHR and the Belfast (Good Friday) Agreement

Conor Casey, Richard Ekins KC (Hon), Sir Stephen Laws KCB, KC (Hon)

Forewords by Lord Alton of Liverpool, Rt Hon Sir Patrick Elias, Lord Faulks KC, Lord Stewart of Dirleton KC and Rt Hon Jack Straw

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Policy Exchange

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Contents

Forewords

Lord Alton of Liverpool, Chair of the Joint Committee on Human Rights

As I expected, Conor Casey, Richard Ekins and Sir Stephen Laws have produced a coherent, interesting, and well-argued paper on the relationship between the British-Irish Agreement and UK membership of the European Convention on Human Rights (ECHR).

There are many good reasons for the UK to remain in a reformed ECHR but those of us who advance that case should be wary of making it contingent on the duties set out under the British-Irish Agreement. Don Quixote's famous mistake of tilting at windmills, having mistaken them for giants, is instructive.

Membership of the ECHR isn't a condition of the British-Irish Agreement, although it is sometimes said that it is.

Perhaps this is to confuse the reference made in that Agreement to the "partnership" of membership of the European Union (too often, the entirely separate Council of Europe, which created the ECHR, is still frequently confused with the EU). Ditching the ECHR would, however, likely mean severing our membership of the Council of Europe which comprises 46 different nations.

The argument about the impact on the British-Irish Agreement is a separate one and deserves to be taken seriously.

For the avoidance of doubt, I was and remain a strong supporter of Northern Ireland's Good Friday Agreement – not least because it recognises the importance of the considerable unique human rights challenges which Northern Ireland has faced – including the deaths of over 3,500 people during "the Troubles" – and the hard-won step-by-step incremental progress which has subsequently been made there.

In providing "belt and braces" protections for citizens whose civil liberties were routinely previously disregarded, the ECHR has doubled down on the re-enforcement of those rights. Notwithstanding our own domestic legislation and the powers of the devolved Assembly, leaving the ECHR may well be seen by some as an attempted reversion and destabilise the carefully fostered but fragile relationships.

So, while I agree with the authors that it is a man of straw argument to say that leaving the ECHR would breach the British-Irish Agreement, I remain concerned that such a withdrawal would risk undermining the relationships on which the Agreement rests. It's hard to put a price on the undermining of relationships and on the cost of undermining trust but, as

a general rule, it is easier to destroy than it is to create.

Lord Sumption has said that he has changed his mind on the ECHR and is now in favour of leaving it because he believes that the Council of Europe is incapable of reforming it.

However, right across Europe – and from across the political spectrum - there is an increasing acceptance that there is scope for a reworking and rebalancing of the ECHR. I do not accept that this is an impossible task but we do need to separate the windmills from the giants.

This paper then, is timely in separating the arguments about what is, and what is not, contingent on ECHR membership.

We need a mature debate on what the ECHR contributes to the defence of human rights, to the common good and to the rule of law. I hope that a subsequent paper from these distinguished commentators might rise to that challenge.

Rt Hon Sir Patrick Elias, former Lord Justice of Appeal

There is a widely held belief that the UK could not leave the ECHR without infringing the Belfast Agreement. The authors of this paper, in a very detailed analysis, powerfully argue that this belief is erroneous. The paper is a major contribution to this important issue. Indeed, I suspect that it will be the focal point of future debate on this question.

Lord Faulks KC, former Minister of Justice and Chair of the Independent Review of Administrative Law

In 2012, the Commission on a Bill of Rights reported to the then Coalition government that the members of the Commission considered (by a majority) that the Human Rights Act 1998 should be repealed and replaced by a British Bill of Rights. In a separate opinion annexed to the report, two members of the Commission (Jonathan Fisher KC and me), expressed our regret that we were unable, by reason of our terms of reference, to consider the wider question of whether the United Kingdom should remain a member of the European Convention on Human Rights ("ECHR"). If permitted to express a view, I would have advocated leaving.

The question of whether we should leave the ECHR has now assumed centre stage in the light of the level of illegal migration. The Reform Party has made its position clear. If it gains power, we will leave the ECHR. The Labour Party has been equally clear: there are no circumstances in which

it will repeal the Human Rights Act or leave the ECHR. The Conservative Party has yet to clarify its position.

Whilst leaving the ECHR simply requires us to give notice, there are other significant complications involved in the process of leaving, not least the Belfast (Good Friday) Agreement and the Trade and Cooperation Agreement between the UK and the EU. This paper, for the first time, provides a scholarly and thorough analysis of those agreements, especially the Good Friday Agreement, showing clearly that they do not foreclose, or otherwise frustrate, the UK choosing to leave the ECHR.

Kemi Badenoch's response to the Reform Party's plans has been to say that leaving the ECHR "could affect the Good Friday agreement and needed to be done in a way that would not destabilise the country or the economy". Nigel Farage, when asked whether the Good Friday Agreement could be renegotiated to "get the ECHR out of it", suggested that the process would take longer than the period provided for simply giving notice to leave.

Both the Reform Party and the Conservative Party would be well advised to take note of the contents of this paper when considering whether and how to leave the ECHR.

The need to leave the ECHR is now accepted in much mainstream thinking as a necessary if not, of itself, sufficient part of preventing illegal migration. It would also follow that we should repeal the Human Rights Act 1998 which incorporates the Convention into our law.

My own view is that we do not need a British Bill of Rights to replace the 1998 Act. If we need to legislate to provide further protection for, by way of example, free speech, then this should be provided for by bespoke legislation. A British Bill of Rights, expressed in generalities, much like the Human Rights Act, would be a recipe for uncertainty and would mean that judges define the shape and extent of any "rights" included in the legislation.

It seems, in the current climate, that a political party that refuses to leave the ECHR or concludes that it is "too difficult" is unlikely to gain the support of the electorate at the next election. The authors of this paper have provided detailed analysis as to how the "difficulties" involved are, in fact, no impediment to a decision to leave.

Lord Stewart of Dirleton KC, Advocate General for Scotland 2020-2024

As the scope of the European Convention on Human Rights – and its place in the British legal and constitutional order – come increasingly to be questioned, it has become common to hear it asserted that the UK cannot alter its position without contravening the Belfast Agreement. Such a step, it has been said, might jeopardise civic peace in Northern Ireland. In this

important and lucidly argued paper, the authors demonstrate that this is not the case; that the Belfast Agreement cannot properly be interpreted as providing that the UK could not renounce the Convention without breaching the Belfast Agreement; and that the instruments forming the Belfast Agreement work through the political processes of consultation, negotiation, and, above all, mutual respect for and among all parts of society in Northern Ireland, and their legitimate aspirations. In so doing, the authors make a vital contribution to the debate on the topic. By close scrutiny of the texts, they show that political questions raised cannot simply be shut down by argument that the Belfast Agreement has been removed from democratic scrutiny into some separate legal sphere.

Rt Hon Jack Straw, Home Secretary 1997-2001, Foreign Secretary 2001-2006 and Lord Chancellor 2007-2010

I am not persuaded that the UK needs to withdraw from the ECHR the better to deal with the unacceptable number of unlawful and unfounded asylum seekers. Rather, I believe that we should de-couple our own human rights legislation from the Convention (as other European countries have done). But the debate about our future relationship with the ECHR, and its parent body, the Council of Europe, should be conducted on its merits.

This paper from distinguished jurists, Casey, Ekins, and Laws, helps to clear the ground for that debate. It argues, in thorough and forensic detail, that 'whatever the merits of UK withdrawal from the ECHR, nothing in the Belfast Agreement rules it out as a viable course of action'. It is essential reading for anyone who wishes seriously to contribute to this debate.

Executive Summary

Parliamentarians and other commentators routinely assert that UK withdrawal from the ECHR would somehow breach – or undermine – the Belfast (Good Friday) Agreement. This report shows that the Belfast Agreement does not require either the United Kingdom or the Republic of Ireland to remain a party to the ECHR. Each state has the same right under Article 58 of the ECHR to withdraw from the Convention, a right under international law that is not qualified in any way by the Belfast Agreement. UK withdrawal from the ECHR would *not* constitute a breach of the Belfast Agreement.

The Belfast Agreement is made up of two closely related agreements. The first is the British-Irish Agreement, which is a treaty between the UK and Ireland. The second is the Multi-Party Agreement, which is a political agreement between the British and Irish governments and several different political parties of Northern Ireland, an agreement that provides the foundation for the peace process. This political agreement turns in part on various commitments made by the British Government and the Irish Government. In signing the British-Irish Agreement, the UK and Ireland agreed "to support, and where appropriate implement, the Multi-Party Agreement", but it is only the former agreement that is binding in international law.

The British-Irish Agreement does not refer to the ECHR and none of its terms suggest in any way that either the UK or Ireland, or both of them, were undertaking to remain member states of the ECHR in perpetuity. The British-Irish Agreement does note that UK and Ireland are both "partners in the European Union", but no one is seriously suggesting that the UK's withdrawal from the EU is in breach of the terms of the Agreement. Disputes between Ireland and the UK about this Agreement are to be resolved by negotiation, including within the British-Irish Intergovernmental Conference, and cannot be the subject of binding dispute resolution.

The Multi-Party Agreement does include several references to the ECHR. The context of the Multi-Party Agreement, which includes the troubled history of Northern Ireland and fears about the risks of abuse of devolved power, makes it very clear that these references concern the importance of the law of Northern Ireland imposing limits on the new Assembly and on public bodies exercising devolved power. This report considers closely each reference to the ECHR in the Multi-Party Agreement and shows that, as one would expect in view of the context of the agreement, each reference concerns domestic law and has nothing whatsoever to do with the position

in international law. That is, the references to the ECHR in the Multi-Party Agreement have nothing to do with the individual right of petition to the Strasbourg Court, a right which the Belfast Agreement does not create or rely upon, or, more generally, with the UK or Ireland's acceptance of the Strasbourg Court's jurisdiction or its developing jurisprudence as a matter of international law. British or Irish withdrawal from the ECHR would in no way undercut, breach or cut across the Multi-Party Agreement.

The British Government's commitment, per the Multi-Party Agreement, is to incorporate the ECHR into the law of Northern Ireland as a limit on the Assembly and on public bodies, and is intended to form a safeguard against the abuse of devolved power. The enactment of the Northern Ireland Act 1998 and section 6 of the Human Rights Act 1998, insofar as it applied to Northern Ireland, implemented this commitment. The terms of the Multi-Party Agreement, read either as a political agreement that grounds a dynamic peace process or as a strict legal document, confirm that the commitment concerns the law of Northern Ireland in relation to public bodies exercising devolved power and not to the British Government itself and, certainly, not to the Westminster Parliament. If a future government withdraws the UK from the ECHR, the UK's duty to support the Multi-Party Agreement can continue to be met by maintaining in the law of Northern Ireland relevant limits – substantially the existing limits – on the power of the Assembly and public bodies. ECHR withdrawal will not diminish anyone's rights in Northern Ireland law.

The Multi-Party Agreement is a political agreement and the spirit of the agreement is very important. ECHR withdrawal is not incompatible with the spirit of the agreement. The different parties to the Multi-Party Agreement sought assurances that devolved power would not be abused and agreed that the constitutional status of Northern Ireland, as part of the United Kingdom, would not change without the consent of the people of Northern Ireland, freely given. If the UK is to withdraw from the ECHR, it will be important for the British Government, in line with the spirit of the Multi-Party Agreement, to engage closely with the different parties in Northern Ireland to reassure them that the UK's withdrawal from the ECHR will not unbalance relations between – the parity of esteem between – the different communities.

The British Government should make use of the institutional framework for which the Multi-Party Agreement makes provision to engage the parties in negotiations about how, or whether, the domestic law of Northern Ireland should change after the UK leaves the ECHR, but that would not give them a veto over withdrawal. The simplest course of action – the default option, but not necessarily the most satisfactory option – would be simply to maintain the existing limits in the Northern Ireland Act and section 6 of the Human Rights Act (in relation to Northern Ireland). But there would be an opportunity to revive discussions about a Bill of Rights for Northern Ireland or to consider enactment of more specific rights that address in detail the concerns that the parties may have. In maintaining the substance of the existing limits, or reworking them

after negotiations with the parties, the British Government would not be sundering Northern Ireland from the United Kingdom, for the spirit of the Multi-Party Agreement clearly embraces specific and separate provision for Northern Ireland about devolution and the legal limits on devolved power, as well as the acceptance of the case in principle for the enactment of a distinctively Northern Irish Bill of Rights.

The Windsor Framework (concerning Northern Ireland aspects of Brexit) does not provide any kind of legal limit on the power of a future government to exercise the UK's right under Article 58 of the ECHR. The UK-EU Trade and Cooperation Agreement entitles the UK or the EU to terminate parts of the Agreement if the UK or an EU member state were to leave the ECHR, but this right of termination (not automatic termination) has to be seen in the context of the more general right to terminate the Agreement. Far from somehow strengthening the case that ECHR withdrawal would undermine the Belfast Agreement, the Trade and Cooperation Agreement confirms that neither the UK nor the EU understood ECHR withdrawal to be incompatible with the Belfast Agreement. The Trade and Cooperation Agreement expressly envisages the UK (or Ireland, as an EU member state) withdrawing from the ECHR and makes provision, as the default state of affairs, for trade and other relations between the UK and EU to continue despite this change in international law.

The claim that UK withdrawal from the ECHR would breach the Belfast Agreement has become a commonplace in some corners of British (and Irish) public life. Yet when one considers the Belfast Agreement carefully, examining the terms of the British-Irish Agreement and the context, spirit and language of the Multi-Party Agreement, it is clear that this is an unsupportable conclusion. Whatever the merits of UK withdrawal from the ECHR, the Belfast Agreement should not be instrumentalised by either side of the debate on withdrawal from the ECHR. In choosing to exercise the UK's right to withdraw from the ECHR, a future government would neither be flouting the UK's international obligations under the Belfast Agreement nor failing to respect the political settlement that grounds the peace process.

Introduction

There is a strong principled case for ECHR withdrawal,[1] which every government should defend in forthright terms, even if only to facilitate the negotiation of reform. However, any government that is actively considering leading the UK out of the ECHR has a duty to anticipate and address the various objections that are likely to be made to withdrawal and thus to build political support, within Parliament but also across the country, for this course of action. Such a government should be able to answer questions about the compatibility of ECHR withdrawal with the UK's other international obligations and about any other difficulties to which withdrawal may give rise.

Perhaps the most important, and frequently invoked, objection that is raised to the prospect of ECHR withdrawal is the claim that it would place the UK in breach of the 1998 Belfast Multi-Party Agreement and British-Irish Agreement, better known, together, as the "Belfast (Good Friday) Agreement" (**Belfast Agreement**), and would thus put the Northern Ireland peace process in jeopardy. This claim has been made by a host of parliamentarians and commentators, but not by the Irish Government.

This report considers the objection and shows that it is without merit. UK withdrawal from the ECHR would not breach the Belfast Agreement, which does not require ECHR membership and does not impose on the UK (or on the Republic of Ireland) any duty to be – or to remain – a party to the ECHR. In leaving the ECHR, the UK would not breach the obligations that it undertook in signing the British-Irish Agreement, including its obligation (which mirrors the Republic of Ireland's obligation) "to support, and where appropriate implement, the provisions of the Multi-Party Agreement" (Article 2).

The Multi-Party Agreement is a dynamic political agreement that forms the foundation for the ongoing Northern Ireland peace process. Its provisions refer at various points to the ECHR, as do some of the subsequent agreements that build on it. However, as we show in detail, these references all concern the importance of limitations, in domestic law, on the powers of the Northern Ireland Assembly or other devolved public bodies. This reflects the history of Northern Ireland and the need to provide reassurance to the parties that devolved power would not be abused. None of the references to the ECHR in the Multi-Party Agreement in any way concern, or can reasonably be taken to concern, the position in international law, namely the UK's acceptance of the jurisdiction of the European Court of Human Rights and the right of individual petition to the Court. There are important questions to answer about how best

1. See further Jonathan Sumption, "Judgment call: the case for leaving the ECHR", Spectator, 30 September 2023, Richard Ekins, "The case for leaving the ECHR", UnHerd, 11 August 2023 and Richard Ekins, *The Limits of Judicial Power: A programme of constitutional reform* (Policy Exchange, October 2022), pp. 10-14.

the UK should support the Multi-Party Agreement and provide assurances to the people of Northern Ireland that government will be carried out impartially and fairly. But the need to answer these questions carefully and prudently does not support the claim, which has no foundation in law, that the Belfast Agreement rules out, or would somehow be undermined by, UK withdrawal from the ECHR.

This report begins, in Part I, by introducing the Belfast Agreement, explaining the terms of the British-Irish Agreement and their relationship with the Multi-Party Agreement. In Part II, we trace the various references to the ECHR in the text of the Multi-Party Agreement. Part III argues that ECHR withdrawal would be entirely compatible with the obligations that the British-Irish Agreement imposes. Part IV shows that ECHR withdrawal would not breach – or undermine – any part of the Multi-Party Agreement. In Part V, we consider the nature and extent of the British Government's commitment, which the Multi-Party Agreement records, to incorporate the ECHR into the law of Northern Ireland. Part VI reflects on how the British Government can and should support the Multi-Party Agreement in the event of ECHR withdrawal, outlining various options including legislating simply to maintain the existing limits on the competence of the Assembly and other public bodies in Northern Ireland. In Part VII, we consider and reject the argument that the Windsor Framework makes UK withdrawal from the ECHR unlawful. Finally, in Part VIII, we argue that far from supporting the claim that ECHR withdrawal would breach the Belfast Agreement, the EU-UK Trade and Cooperation Agreement confirms that neither the UK nor the EU (including Ireland) take ECHR withdrawal to be incompatible with the Belfast Agreement and peace in Northern Ireland.

This is a complex paper, which is unavoidable in view of the nature of the subject matter and its importance. However, these are the essential points:

- The British-Irish Agreement, which is the part of the Belfast Agreement that is a treaty and is binding on the UK in international law, does not refer to the ECHR at all and in no way implies or entails that the UK or Ireland in 1998 renounced their right to withdraw from the ECHR in future.
- The Multi-Party Agreement, which the UK has agreed to support, does refer to the ECHR, but these references all concern the domestic law of Northern Ireland and the need to provide assurances to the different parties that they will be secure from the abuse of devolved power.
- The British Government's obligation to support the Multi-Party Agreement does require the UK to maintain the substance of the ECHR as a limit on the Assembly and other public bodies in Northern Ireland, but this need not require incorporation of the ECHR in terms.
- The law of Northern Ireland could provide assurances against the

abuse of devolved power in a number of ways, which are a matter for negotiation between the parties, with the most straightforward option in the event of UK withdrawal from the ECHR being simply to maintain the Northern Ireland Act and the Human Rights Act in relation to Northern Ireland institutions.

- The spirit of the Multi-Party Agreement only requires the law of Northern Ireland to provide such reassurance about rights, safeguards and equality as will enable devolved government there to develop and be conducted in the context of domestic law mechanisms which build trust and parity of esteem between different communities. Those things will not be built by imposing on those communities, or indeed on the UK Government, pre-baked technical solutions involving supposed or inferred obligations to remain within the ECHR or to incorporate the ECHR in domestic law in some particular way – obligations that cannot be questioned despite the gravity of their impact on UK and Irish sovereignty.
- The Windsor Framework does not rule out, or forestall, UK withdrawal from the ECHR and the references to the ECHR in the UK-EU Trade and Cooperation Agreement confirm that the UK is free to withdraw from the ECHR without breaching the Belfast Agreement.

In short, in deliberating about whether the UK should leave the ECHR, parliamentarians and the public should not accept that the Belfast Agreement forecloses this course of action.

I. The Belfast (Good Friday) Agreement

The Belfast Agreement was signed on 10 April 1998 following three decades of conflict known as the Troubles, in which over three thousand and seven hundred people lost their lives. Countless thousands more suffered serious physical or mental harm.

The Belfast Agreement was a historic breakthrough that, for the most part, brought a cessation to political violence in the province and a commitment by all the major political parties in Northern Ireland to peaceful politics. The Belfast Agreement was built on years of tireless campaigning for peace, back-channel dialogue between the Irish and British governments, political parties, and paramilitary groups, and upon the frustrations of previous, unsuccessful inter-governmental agreements and declarations. The process culminating in the Belfast Agreement was also heavily supported by senior political figures in the United States.

The Belfast Agreement is composed of two interrelated agreements.[2]

The first agreement is the **Multi-Party Agreement,** whose terms were agreed by the British and Irish governments and several political parties in Northern Ireland, including the Ulster Unionist Party, Progressive Unionist Party,[3] Ulster Democratic Party,[4] Social Democratic and Labour Party, the Alliance Party, Sinn Fein,[5] and the Northern Ireland Women's Coalition.[6] The Multi-Party Agreement revolves around several commitments and undertakings by the parties. The most important undertakings include a "total and absolute commitment" to peaceful, democratic politics and the renouncement of political violence.[7] It also includes both a mutual recognition of the legitimacy of the different political aspirations of the parties, and a commitment to reconciliation and rapprochement within shared democratic frameworks. The parties also endorsed the commitments made by the Irish and British Governments in respect of the constitutional position and future of Northern Ireland, and the recognition that its position in the Union would continue unless and until a majority of the people on each part of the island of Ireland, North and South, freely and concurrently choose to bring about a united Ireland.[8]

The second agreement is **the British-Irish Agreement**, or the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland" to give it its full name, which supersedes the 1985 Anglo-Irish Treaty. In this Agreement, the British and Irish Governments recognise that the status of Northern Ireland should not be changed without the free consent of

2. Our citations to the Belfast Agreement are to the command paper "Cm 3883" laid before the House of Commons by the Secretary of State for Northern Ireland in April 1998. UK Government, "The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland" (Cm 3883, 1998),
3. Widely regard as the political wing of the Ulster Volunteer Force.
4. Widely seen as having close political ties to the Ulster Defence Association.
5. Widely regarded as the political branch of the Republican movement in which the Provisional Irish Republican Army was the paramilitary wing.
6. The Democratic Unionist Party, who would later overtake the UUP as the dominant unionist party, did not agree to the terms of the Belfast Agreement. However, after the St Andrew's Agreement in 2006 it began to take part in the democratic institutions that the Belfast Agreement created.
7. "The Belfast Agreement", p.1.
8. "The Belfast Agreement", p.2.

majority of the people of Northern Ireland. The Governments make a "solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement".[9]

There is very deep "interlinkage and synchronization" between the two Agreements, with the agreement reached in the multi-party talks, the Multi-Party Agreement, forming an annex to the British-Irish Agreement, and, conversely, the British-Irish Agreement being an annex to the Multi-Party Agreement.[10] Indeed, both Agreements are standardly referred to together as the Belfast Agreement. But strictly speaking it is the British-Irish Agreement that is a treaty between two sovereign states and is binding in international law. The Multi-Party Agreement is a political agreement that is intended to form the basis for an ongoing peace process and may be expected to develop over time.

The Belfast Agreement was approved by the people of Ireland, both North and South, in simultaneous referendums held on 22 May 1998. On a high turnout (81.1%), by a margin of 71% to 29%, the electorate in Northern Ireland indicated its support for the Multi-Party Agreement, in response to the referendum question: "Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?" On a lower turnout (56.3%), but by a margin of 95% to 5%, the electorate in the Republic of Ireland approved the Nineteenth Amendment to the Constitution of Ireland, which permits the state to be bound by the British–Irish Agreement.

The terms of the British-Irish Agreement

The British-Irish Agreement consists of four articles and two annexes. Annex 1 is the Multi-Party Agreement and Annex 2 is a joint declaration of the meaning of the term "the people of Northern Ireland".

In Article 1, the two Governments recognise that it is for the people of Northern Ireland freely to decide whether to continue to support the Union with Great Britain or to join a sovereign united Ireland and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people. The two Governments also undertake, if the people of the island of Ireland agree to bring about a united Ireland, to introduce and support legislation in their Parliaments to bring this about. The two Governments also:

> "affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities".

9. "The Belfast Agreement", p.28.
10. David Byrne, "An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics" (1999) 22 *Fordham Journal of International Law* 1206, 1212.

Finally, the two Governments accept the right of the people of Northern Ireland to hold both British and/or Irish citizenship, which would not be affected by any future change in the status of Northern Ireland.

Article 2 provides:

> The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:
>
> (i). a North/South Ministerial Council;
> (ii). the implementation bodies referred to in paragraph 9 (ii) of the section entitled "Strand Two" of the Multi-Party Agreement;
> (iii). a British-Irish Council;
> (iv). a British-Irish Intergovernmental Conference.

Article 3 provides that this Agreement replaces the Anglo-Irish Treaty of 1985.

Article 4 provides, in paragraph (1), that:

> It shall be a requirement for entry into force of this Agreement that:
>
> (a). British legislation shall have been enacted for the purpose of implementing the provisions of Annex A to the section entitled "Constitutional Issues" of the Multi-Party Agreement;
> (b). the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement shall have been approved by Referendum;
> (c). such legislation shall have been enacted as may be required to establish the institutions referred to in Article 2 of this Agreement.

Paragraph (2) provides that the Agreement enters into force after each Government has notified the other of the completion of these requirements. Paragraph (3) provides that immediately on entry into force of this Agreement, the Irish Government shall ensure that the relevant amendments to the Constitution of Ireland take effect.

There is no mention of the ECHR in any of the four articles of the British-Irish Agreement. There is, however, a reference in the third recital to that Agreement to both Ireland and the United Kingdom as "partners in the European Union". It is not seriously suggested either that the

British-Irish Agreement was breached when the United Kingdom left the European Union or that the Agreement acted as some form of impediment to the departure of the United Kingdom from the European Union.

Professor McCrudden notes that the Belfast Agreement created "no international legal methods of dispute settlement or enforcement... For the most part, the international legal obligations were therefore left legally unenforceable, perhaps trusting that these obligations would be operated in good faith by the two governments."[11] One might go further and say that without exception the international legal obligations that the British-Irish Agreement creates are not enforceable in any tribunal or forum,[12] save by negotiation between the states, negotiations that would of course be carried out in part by way of some of the institutions that the Multi-Party Agreement envisages.

An outline of the Multi-Party Agreement

The Multi-Party Agreement consists in eleven unnumbered chapters.

In the opening **Declaration of Support**, the participants note the background to the Agreement, affirm various principles that anchor it, and pledge their support for its adoption and implementation.

In the chapter entitled **Constitutional Issues**, the participants endorse the commitments made by the British and Irish Governments in Article 1 of the British-Irish Agreement, largely reproducing the text of Article 1. Annex A to this chapter sets out draft clauses/schedules for incorporation into British legislation; Annex B sets out draft Irish legislation to amend the Irish Constitution.

In **Strand One: Democratic Institutions in Northern Ireland**, the participants agreed the new institutional arrangements for the new devolved government of Northern Ireland. These institutions were built with a view to ensuring cross community participation. There would be a legislative assembly with devolved powers, the members of which would be elected on the basis of proportional representation. The allocation of committee positions would be based on the proportion of party representation. Each member of the Assembly would designate themselves nationalist, unionist, or other for the purposes of measuring cross community support in respect of several matters. Key decisions, including those on the election of the First and Deputy First Minister, standing orders, and budgetary decisions, were to be made on a cross-community basis requiring parallel consent between nationalist and unionist members or by a weighted majority.[13] Executive powers were vested in an Executive Committee chaired by a First and Deputy First Minister elected by the Assembly. The other members of the Executive Committee would consist of Ministers whose portfolios would be allocated in proportion to party support, allowing for the inclusion of all major groupings within government.[14]

In **Strand Two: North/South Ministerial Council** and in **Strand Three: British-Irish Council and British-Irish Intergovernmental Conference**, the Multi-Party Agreement established institutions to facilitate consultation and co-operation between North and South of the

11. Christopher McCrudden, "The origins of 'civil rights and religious liberties' in the Belfast-Good Friday Agreement" (2024) 75 *Northern Ireland Legal Quarterly* 29, 32.

12. The United Kingdom does not accept the jurisdiction of the International Court of Justice in relation to any dispute with a state that is a member or a former member of the Commonwealth, which includes the Republic of Ireland. For its part, the Republic of Ireland does not accept the jurisdiction of the International Court of Justice in relation to any dispute with the United Kingdom in relation to Northern Ireland.

13. "The Belfast Agreement", pp. 5-7.

14. "The Belfast Agreement", p.7.

Island, between all the administrations within the British Isles (including the devolved administrations in Northern Ireland, Wales, and Scotland), and between the Irish and British Governments. This was facilitated by the creation of the North/South Ministerial Council, the British-Irish Council, and the British-Irish Intergovernmental Conference, respectively.[15]

In the first part of the chapter entitled **Rights, Safeguards, and Equality of Opportunity**, the "parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community."[16] In paragraph 1, the parties "affirm in particular:"

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.[17]

Under the heading "United Kingdom legislation", paragraph 2 provides that:

> "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."[18]

Paragraph 3 provides:

> "Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation."[19]

Paragraph 4 provides:

> "The new Northern Irish Human Rights Commission (see paragraph 5 below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on

15. "The Belfast Agreement", pp.11-15.
16. "The Belfast Agreement", p.16.
17. Ibid.
18. Ibid.
19. Ibid.

> Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to "reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland."[20]

Under the heading "Comparable Steps by the Irish Government", paragraph 9 of this chapter notes that:

> "The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government… will bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland. In addition, the Irish Government will:
>
> - establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland;
> - proceed with arrangements as quickly as possible to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK);
> - implement enhanced employment equality legislation;
> - introduce equal status legislation; and
> - continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland."

In the second part of the **Rights, Safeguards, and Equality of Opportunity** chapter, the participants record the commitments by the British and Irish governments to take steps to address economic, social and cultural issues related to the conflict. There is a commitment by the British government to make progress with regional and economic development that would improve social cohesion, infrastructure, and rejuvenate major urban centres. There is also a commitment to introduce measures aimed at combatting unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.[21]

All participants committed themselves to respect linguistic diversity, including the Irish language, Ulster-Scots and the languages of the various ethnic communities in Northern Ireland. All participants agreed that symbols and emblems used for public purposes should be used in a manner which promotes mutual respect rather than division. There is a

20. "The Belfast Agreement", p.17.
21. "The Belfast Agreement", pp. 19-20.

commitment by the British government, in relation to the Irish language, where appropriate and where people so desire it, to take resolute action to promote the language.[22]

In the **Decommissioning** chapter, the participants affirmed a commitment to the "total disarmament of all paramilitary organisations" and to use "any influence they may have, to achieve the decommissioning of all paramilitary arms within two years" of the implementation of the Agreement.[23]

In the **Security** chapter, the participants affirmed a commitment to the "normalisation of security arrangements and practices", including "reduction of the numbers and role of the Armed Forces deployed in Northern Ireland", the "removal of security installations", and the "removal of emergency powers".[24]

In the **Policing and Justice** chapter, the participants committed to reforming the then Royal Ulster Constabulary with a view to developing a "police service representative in terms of the make-up of the community as a whole", which is "routinely unarmed", and whose work and arrangements conforms with "human rights norms". The parties agreed to support an independent commission to make recommendations for future policing arrangements.[25]

In the **Prisoners** chapter, the British and Irish Governments agreed to put in "place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences". The Multi-Party Agreement also provided that "prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire will not benefit from the arrangements."[26]

Finally, the **Validation, Implementation and Review** chapter notes that a new British-Irish Agreement is to be signed, that referendums are to be held, and makes provision, after implementation, for each institution, or the institutions jointly, to review any problems that may arise. Paragraph 7 notes that "If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction." Since the Multi-Party Agreement was agreed there have been a number of further agreements, which confirms that the political agreement is open to change over time.

22. Ibid.
23. "The Belfast Agreement", p.20.
24. "The Belfast Agreement", p.21
25. "The Belfast Agreement", pp.22-23.
26. "The Belfast Agreement", p.25.

II. The ECHR in the Belfast Agreement

There is no mention of the ECHR in the British-Irish Agreement.

However, the ECHR is mentioned at several points in the Multi-Party Agreement, as our summary above confirms. In **Strand One: Democratic Institutions in Northern Ireland**, under the heading "Safeguards", paragraph 5 makes several references to the ECHR.[27] These passages elaborate the limits of the competence of the devolved legislative Assembly.[28] The relevant passages provide:

> "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:
>
> (a) allocations of Committee Chairs, Minister and Committee membership in proportion to party strengths;
>
> (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
>
> (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland";
>
> (d) arrangements to ensure key decisions are taken on a cross-community basis…
>
> (e) an Equality Commission to monitor a statutory obligation to promote equality of opportunity in specified areas and parity of esteem between the two main communities, and to investigate individual complaints against public bodies."

Paragraph 11 provides that "The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for

27. "The Belfast Agreement", p.5.
28. Ibid.

legislation is in conformity with equality requirements, including the ECHR/Bill of Rights."

Paragraph 26 provides that "The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to… the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void".[29]

In the first part of the **Rights, Safeguards and Equality of Opportunity** chapter, under the heading "United Kingdom Legislation", paragraph 2 provides that:

> "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."[30]

Paragraph 9 of this chapter provides that the Irish Government will consider proposals to strengthen its system of human rights protection by drawing "on the European Convention on Human Rights and other international legal instruments in the field of human rights"[31] and further examine the "question of the incorporation of the ECHR".[32] This was to ensure that the Republic of Ireland would provide equivalent rights protection to Northern Ireland. Several years later the Oireachtas enacted the European Convention on Human Rights Act 2003, which put interpretative obligations on the Irish courts and obligations on all organs of the State to act compatibly with Convention rights which are similar to but different from those in the Human Rights Act 1998. The Irish Act also provided for similar remedies including allowing the Irish courts to issue a declaration of incompatibility.

A Bill of Rights for Northern Ireland?

The Belfast Agreement anticipates that incorporation of the ECHR may be supplemented by an additional Bill of Rights for Northern Ireland. In the chapter **Rights, Safeguards, and Equality of Opportunity**, under the heading "United Kingdom Legislation, paragraph 4 provides that the new Northern Ireland Human Rights Commission will be invited by the British Government:

> "to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland."[33]

29. "The Belfast Agreement", p.8.
30. "The Belfast Agreement", p.16.
31. "The Belfast Agreement", p.17.
32. Ibid.
33. Ibid.

The Multi-Party Agreement envisages that any such Bill of Rights would be judicially enforceable. Strand One provides that neither the Assembly nor other public bodies would have authority to infringe the "Bill of Rights for Northern Ireland", with "key decisions and legislation" proofed against such breach.[34] The Agreement also envisages courts having authority to render "null and void" Assembly legislation that is found to breach any future "Bill of Rights for Northern Ireland".[35]

Contrary to what is often said, there is no commitment in the Belfast Agreement to the enactment of any Bill of Rights for Northern Ireland. Attempts to secure agreement on a Bill of Rights for Northern Ireland have been unsuccessful.

References to the ECHR in subsequent agreements

The Belfast Agreement has been largely successful in helping to end large scale violence in Northern Ireland. The operation of the devolved institutions has, conversely, enjoyed a decidedly mixed record. The institutions have collapsed on several occasions, with the "key institutions of the Agreement operating on only 13 of its 25 annual anniversaries."[36] There have been several additional agreements between Northern Ireland's political parties and the British and Irish governments that have tried to iron out difficulties with the implementation of the Multi-Party Agreement, confirming that the Agreement is not an entrenched point set in stone but was rather, the first, very important step in a process which continues. Several of these subsequent agreements refer to the ECHR.

The 2006 St Andrews Agreement reaffirmed the importance of human rights protections and in an annex, which concerns the UK Government's obligations relating to "Human Rights, Equality, Victims and Other Issues", new powers were outlined for the Northern Ireland Human Rights Commission. These included the power to compel evidence, access places of detention and rely on the Human Rights Act when bringing judicial proceedings in its own name.[37] There is no express reference to the ECHR.

The 2014 Stormont House Agreement touched on a range of issues, including public sector reform, increased funding for Northern Ireland, additional fiscal devolution, parades, and legacy issues.[38] The Agreement notes, at paragraph 19, that legislation concerning parades and protests will have "proper regard for fundamental rights protected by the ECHR." In relation to legacy inquests, at paragraph 31, the Agreement notes that "the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements."

The 2020 New Decade, New Approach Agreement contained an acknowledgement of the "importance of promoting and protecting the rights and identity of individuals and are agreed that the Executive should seek to build a society that reflects the best international standards of human rights."[39] There was also an agreement to appoint an Ad-hoc Committee to revisit the idea of creation of a Bill of Rights that is "faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on

34. "The Belfast Agreement", p.5.

35. "The Belfast Agreement", p.8.

36. Chris O'Ralaigh, "From Constructive Ambiguities to Structural Contradictions: The Twilight of the Good Friday Agreement" (2023) 35 *Peace Review* 404, 405.

37. The St Andrew's Agreement (October 2006), https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006.

38. The Stormont House Agreement (December 2014), https://www.gov.uk/government/publications/the-stormont-house-agreement.

39. New Decade, New Approach Deal (January 2020), https://assets.publishing.service.gov.uk/media/5e178b56ed915d3b06f-2b795/2020-01-08_a_new_decade__a_new_approach.pdf.

Human Rights" and that "reflect the particular circumstances of Northern Ireland".[40] The Committee concluded its work in February 2022, with its final report indicating that there was no agreement within the Committee on what a Bill of Rights should look like.[41]

40. Ibid.

41. Northern Ireland Assembly, *156/17-22 Report of the Ad Hoc Committee on a Bill of Rights* (2022), https://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf,

III. ECHR withdrawal and the British-Irish Agreement

The Multi-Party Agreement is not itself a treaty. The British-Irish Agreement is a treaty and imposes obligations on the United Kingdom and the Republic of Ireland, including of course obligations in relation to the Multi-Party Agreement. The terms of the British-Irish Agreement quite clearly do not require the UK to be a member state of the ECHR, nor do they purport to restrain withdrawal.

Article 2 of the British-Irish Agreement imposes an obligation on the UK (and Ireland) "to support, and where appropriate implement, the Multi-Party Agreement". This is not language that implies that the British-Irish Agreement incorporates the terms of the Multi-Party Agreement, such that a failure to comply strictly with the terms of the Multi-Party Agreement (or, strictly speaking, with the commitments by the two states recorded in it) – read as if it were itself a treaty rather than a political agreement – would constitute a breach of the British-Irish Agreement.

Whether the British or Irish Government's actions in relation to the terms of the Multi-Party Agreement constitute a breach of the British-Irish Agreement, and thus breach international law, would turn on whether they amount to a failure to support the Multi-Party Agreement or a failure, where appropriate, to implement it. In the absence of a mechanism for binding dispute resolution, the question of whether any action or inaction constituted such a failure would fall to be determined by negotiation, including of course in the British-Irish Intergovernmental Conference. Established in accordance with Article 2 of the British Irish Agreement, the point of the Conference is set out in the Multi-Party Agreement**.** Paragraph 2 of **Strand Three: British-Irish Intergovernmental Conference** says that "The Conference will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments." Paragraph 5 says that in view "of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters". Paragraph 6 says that "The Conference also will address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration)".[42] Paragraph 4 provides that:

42. See Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 SI 2010/976 for the devolution of policing and justice functions following the St Andrew's Agreement.

> "All decisions will be by agreement between both Governments. The Governments will make determined efforts to resolve disagreements between them. There will be no derogation from the sovereignty of either Government."

It is also notable that having recorded the British and Irish Government's obligation to support, and where appropriate implement, the Multi-Party Agreement, Article 2 of the British-Irish Agreement goes on to say that various institutions for which the Multi-Party Agreement makes provision are to be established immediately (a North/South Ministerial Council, the implementation bodies referred to in paragraph 9(ii) of **Strand Two**, a British-Irish Council, and a British-Irish Intergovernmental Conference). Notably, Article 2 does not require the immediate establishment of the democratic institutions for which **Strand One** makes provision, including the Assembly and the Executive Committee. The British-Irish Agreement clearly does not envisage the British Government being in breach of the Multi-Party Agreement by reason of not immediately having enacted legislation establishing those democratic institutions. Likewise, although for different reasons, the British Government was not in breach of the British-Irish Agreement when – in 2000, twice in 2001, and between 2002 and 2007 – it suspended the operation of devolution and reinstated direct rule, because in suspending their operation the Government was not breaching its Article 2 obligation, which does not make the Multi-Party Agreement a binding treaty.

Article 4 of the British-Irish Agreement made ratification of the Agreement conditional on British legislation having been enacted to implement the provisions of Annex A to the **Constitutional Issues** chapter of the Multi-Party Agreement, on amendments to the Constitution of Ireland having been approved by referendum, and on British and Irish legislation having been enacted to establish the institutions mentioned in Article 2. All three conditions on ratification refer, unsurprisingly enough, to actions yet to be taken, to legislation that has to be enacted before the British-Irish Agreement can enter into force in international law and before the Multi-Party Agreement can be put into practice. Article 4 does not refer to any obligation to remain a member of the ECHR. Both Britain and Ireland were member states of the ECHR when the Belfast Agreement was signed. The focus of the British-Irish Agreement is on the obligations that Britain and Ireland will owe to one another in relation to supporting the Multi-Party Agreement, including enacting domestic legislation and making changes to the Constitution of Ireland.

The only possible way in which the UK (or Ireland) could be said to be in breach of the British-Irish Agreement by withdrawing from the ECHR is if the UK (or Ireland) could be said thereby to have failed to discharge its obligation to support, or where appropriate implement, the Multi-Party Agreement. It thus follows that one needs to consider closely the terms of that Agreement to see whether, or how, ECHR withdrawal would constitute a failure of support or appropriate implementation. In considering the terms of the Multi-Party Agreement, it is important to

recall that it was a political agreement, intended to form the foundation of an ongoing peace process, rather than itself a binding treaty. The Multi-Party Agreement was not drafted with the precision that one would expect of a statute or a treaty and it was envisaged that its requirements would be developed or elaborated by way of negotiation and agreement over time, not least by way of the various institutions for which it made provision.

We note that ten years ago, the Irish Government expressed the opinion that:

> "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 that undermines this, or is perceived to undermine this, could have serious consequences for the operation of the Good Friday/ Belfast Agreement."[43]

This statement was made in the context of news reports that the UK Government was considering reforming the Human Rights Act 1998, replacing it with a British Bill of Rights. The Irish Government's 2015 statement is very far from being an unequivocal claim that the UK's membership of the ECHR – and acceptance of the supervisory jurisdiction of the Strasbourg Court – is a legal obligation under the Belfast Agreement. It is more obviously a claim that UK withdrawal from the ECHR might risk antagonizing some of the parties to the Multi-Party Agreement, a risk which the Irish Government wanted the UK to bear in mind. The former claim would not be a plausible reading of the British-Irish Agreement, which clearly does not require the UK (or Ireland) to be, or to remain as, a member of the ECHR.

It is better to read the statement as a warning, pitched at a high level of generality, that UK withdrawal from the ECHR (or repeal and replacement of the Human Rights Act 1998) might have serious consequences for the operation of the Multi-Party Agreement. While it is obvious that the British Government should certainly take seriously the potential for such adverse consequences to arise from a proposed UK withdrawal from the ECHR – and should engage with the parties in Northern Ireland about how the risks of any such consequences can best be avoided or mitigated (something on which we say more in section VI below) – we note that the Irish Government did not claim that UK withdrawal from the ECHR would itself constitute a breach of the UK's obligation to support, and where appropriate implement, the Multi-Party Agreement.

Such a claim would not, in any case, have been plausible. When the British-Irish Agreement entered into force in accordance with Article 4, both Ireland and the United Kingdom were members of the European Union and had both agreed to be bound by the ECHR. If the United Kingdom were to invoke Article 58 of the ECHR, which as a party to the Convention it is entitled to do, it would be open to the British Government to argue that it would no longer be "appropriate" for the provisions of the Multi-Party Agreement requiring incorporation of the

43. Letter from Irish Minister for Justice Frances Fitzgerald TD to Lord Chancellor Michael Gove MP (3 February 2015), Minister-Frances-Fitzgerald-toSofSJus.pdf

ECHR into the law of Northern Ireland to be implemented precisely in the manner contemplated in 1998, with the then assumed state of affairs, viz. common British and Irish membership of the ECHR, having ceased to be. The British Government's obligation to support the Multi-Party Agreement would, we say, still require the UK to maintain the substance of the ECHR as a limit on the Assembly and other public bodies, but this need not require incorporation of the ECHR in terms. What constitutes the substance of the ECHR would turn on Convention rights in 1998 so far as they pertained to matters concerning Northern Ireland and the specific concerns that animated the Multi-Party Agreement. Ireland would remain obliged to "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland." If the British Government maintained the substance of the ECHR in the law of Northern Ireland, as a limit on the Assembly and other public bodies, this would not materially change Ireland's duty to maintain equivalence with Northern Ireland.

IV. ECHR withdrawal and the Multi-Party Agreement

Nothing in the Multi-Party Agreement can be construed as imposing any obligation on the UK (or on Ireland) to be, or to remain, party to the ECHR and subject to the jurisdiction of the European Court of Human Rights – indeed such a commitment would have been surprising given that Article 58 of the ECHR confers on all member states the right to denounce it. At a minimum any limitation on the UK's *express* right to withdraw under the ECHR, albeit operating vis-à-vis only one other State party to the ECHR (i.e. Ireland), would have had to have been provided for in clear, express and unambiguous terms in the British-Irish Agreement. With one exception, the references to the ECHR in the Multi-Party Agreement concern the domestic law of Northern Ireland and the powers of the new democratic institutions for which Strand One makes provision, especially the Assembly, and other public bodies, including police and prisons. The exception concerns the domestic law of the Republic of Ireland.

For all the parties to the Multi-Party Agreement, it was important to provide legally enforceable safeguards that would protect all communities within Northern Ireland, regardless of religious or political affiliations. In paragraph 1 of the **Rights, Safeguards and Equality of Opportunity: Human Rights** chapter, "the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation."

This list of rights helps confirm the concerns of the parties, as do the other provisions of the Agreement. But elsewhere, the Agreement refers to the ECHR as a limit on the competence of the devolved institutions and

other public authorities within Northern Ireland. The ECHR's importance in the Multi-Party Agreement is that the rights affirmed in the ECHR were intended to constitute legally enforceable safeguards that would bind the newly created Assembly and Executive Committee, as well as other public bodies operating in Northern Ireland exercising responsibility over devolved matters. The contemporary context was, of course, that, while the Republic of Ireland already had relevant protections in its Constitution, there were no comparable protections for Northern Ireland, although the United Kingdom government had very recently accepted the principle and viability of incorporating ECHR rights into domestic law, with its Bill for what was to become the Human Rights Act 1998 then before Parliament.

The ECHR is mentioned in **Strand One: Democratic Institutions in Northern Ireland**, under the heading "Safeguards", with paragraph 5 referring to "safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected". Specifically, the ECHR (and any Bill of Rights for Northern Ireland) will be a safeguard that "neither the Assembly nor public bodies can infringe" and there will be "arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland". Paragraph 11, under the heading "Operation of the Assembly", provides that the Assembly may set up a special committee to consider whether proposed legislation is compatible with equality requirements, including the ECHR. Paragraph 26, under the heading "Legislation" provides that "The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to… the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void". The focus of these references is on limiting the power of the Assembly (and, in paragraph 5 "public bodies") to breach Convention rights.

These references to the ECHR as a limit on the powers of the Assembly (and other "public bodies") correspond with paragraph 2 of the first part of the **Rights, Safeguards and Equality of Opportunity** chapter, under the heading "United Kingdom Legislation", which provides that:

> "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."[44]

That the point of referring to the ECHR in the Belfast Agreement framework was to provide a salient limitation on the power of public authorities within Northern Ireland, is clearly reflected in the precise nature of the obligations imposed on the British Government. The British Government committed itself to completing "incorporation into Northern Ireland law"[45] of the ECHR in a manner that features "direct access to the

44. "The Belfast Agreement", p.16.
45. "The Belfast Agreement", p.16.

courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."[46]

The reference to "including" the power to overrule Assembly legislation certainly suggests that incorporation was intended to encompass additional domestic judicial remedies in respect of non-legislative acts of public authorities in Northern Ireland that infringe Convention rights, such as executive or administrative decisions. This reading is supported by the Multi-Party Agreement's reference to the importance of having safeguards to prevent "public bodies"[47] from infringing the ECHR. Since public bodies exercise statutory authority rather than promulgate legislation, the courts could not "ensure"[48] that other public bodies did not infringe ECHR rights if their role was limited to overruling Assembly legislation on the grounds of inconsistency with the ECHR.

The commitment on the part of the UK to incorporate the ECHR complete with "direct access to courts", in the context of the incorporation of rights into Northern Ireland law, clearly refers to access to domestic courts and not to the European Court of Human Rights in Strasbourg. Only domestic courts could provide remedies in domestic law, such as overruling "Assembly legislation on grounds of inconsistency"[49] or quashing executive and administrative decisions that infringe Convention rights. The Strasbourg Court *cannot* overrule Assembly legislation, executive action, or administrative decisions on grounds of inconsistency; only a domestic court can do that.

In addition, it would make no sense to read a duty on the British Government to incorporate the ECHR into the law of Northern Ireland, with direct access to the courts, as entailing a further and quite different duty to remain a party to the ECHR. Or to put the point in a different way, the duty to incorporate the ECHR into Northern Irish law is not a duty to maintain the position in international law by virtue of which persons within Northern Ireland retain a right of individual petition to the European Court of Human Rights. The right of individual petition to the Strasbourg Court already existed both in the UK and in Ireland and the Belfast Agreement says nothing about it except in so far as any modification to it – whether by reason of ECHR treaty change or British or Irish denunciation of the ECHR – would, of course, constitute a matter that it might be necessary to discuss in the British-Irish Intergovernmental Conference. When the Agreement says "direct access to the courts", this must in context mean the courts of Northern Ireland and cannot possibly be understood, or have been intended to be understood, as meaning the Strasbourg Court.

It follows that the only commitment that the Multi-Party Agreement imposes on the British Government in relation to the ECHR is to incorporate Convention rights into Northern Irish law and thus to impose legally enforceable restrictions on the powers of the Assembly, Executive, and other public bodies, complete with remedies, including the power to nullify any legislative infringement of the rights.[50] References to the ECHR in the Belfast Agreement are references to Convention rights, rather than to

46. Ibid. Emphasis added.
47. "The Belfast Agreement", p.5.
48. Ibid.
49. "The Belfast Agreement", p.16.
50. Where the legislation in question is enacted by the Assembly.

the Convention as a treaty-based system of international adjudication. It is hard otherwise to read the obligation to *incorporate* the ECHR into domestic law and to limit the competence of the Assembly.

The point of the references to the ECHR in this context is to provide a ready means for limiting the power of the Assembly, the Executive Committee and other public bodies and thus providing reassurance to the people of Northern Ireland.

It is also worth remembering that one feature of the political dynamic of the Multi-Party Agreement was to facilitate the acceptance of the appropriateness of resort to domestic courts on human rights issues – and the consequential inhibition on any immediate resort to international remedies[51] – by those who had been historically reluctant, in the light of the territorial claim that Ireland was agreeing to abandon, to accept the legitimacy and jurisdiction of UK institutions in Northern Ireland. The provisions of the Multi-Party about "incorporation" need to be understood in the light of that dynamic.

All the references to the ECHR form part of a wider series of specific commitments to political and civil rights, to impartial devolved government, and to political and religious equality and non-discrimination. It is striking that while the British-Irish Agreement makes no reference to the ECHR, in agreeing Article 1, the British and Irish Governments jointly:

> "affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities".

The more specific references to the ECHR in the Multi-Party Agreement itself limit the devolved institutions, rather than the British Government or the Westminster Parliament (the unlimited lawmaking authority of which is expressly affirmed in paragraph 33 of Strand One), but the British Government, and thus the UK as a state, is obliged to act with rigorous impartiality on behalf of all the people of Northern Ireland, respecting equal civil, political, social and cultural rights and eschewing discrimination. (If a united Ireland is ever formed, the Irish Government will be subject to the same obligation in relation to its exercise of jurisdiction over Northern Ireland.)

In understanding the British Government's commitments in the Multi-Party Agreement, it is highly relevant to keep in mind paragraph 9, under the heading "Comparable Steps by the Irish Government", which notes that:

51. Article 35 of the ECHR provides that "The Court may only deal with the matter after all domestic remedies have been exhausted". While we maintain that the Multi-Party Agreement does not address the position in international law at all (viz. the right of individual petition to the Strasbourg Court), one predictable consequence of making provision for incorporation of the ECHR into the law of Northern Ireland was that it would result in legislation being enacted (first and foremost the Northern Ireland Act 1998) that would have the obvious effect that persons in Northern Ireland would not have "direct access" to the Strasbourg Court, insofar as they would have had to exhaust their domestic remedies before they were able to make an application to the Court that the Court would be free, as a matter of international law, to consider.

> "The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government… will bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland."

The point of this paragraph was to ensure that the Republic of Ireland would provide equivalent rights protection to Northern Ireland. Some years later, the Oireachtas did decide to enact the European Convention on Human Rights Act 2003, which imposed interpretative obligations on the Irish courts and obligations on all organs of the State to act compatibly with Convention rights which are similar to, but different from, those in the Human Rights Act 1998. The Irish Act also provided for similar remedies including allowing the Irish courts to issue a declaration of incompatibility. Nothing in paragraph 9, or elsewhere in the Multi-Party Agreement, involves any commitment by Ireland to be, or to remain, a state party to the ECHR. The Irish Government's commitment is to "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland", but again the focus is entirely on domestic law (the law of Ireland) and the means to be adopted are for Ireland itself to decide. The ECHR is only one of the models that the Irish Government was committed to considering and it was specifically under no obligation to incorporate the ECHR at all into Irish law, let alone to incorporate it in any particular way.

The British Government is not committed to ensuring an equivalent level of protection of human rights to that in the Republic of Ireland. And it is striking that the Irish Government's commitments under this part of the Multi-Party Agreement, which are framed as comparable to the British Government's commitments, also pertain only to domestic law, do not include membership of the ECHR (and consequent acceptance of the jurisdiction of the European Court of Human Rights), and, as mentioned, do not even require equivalence to be achieved by way of incorporation of the ECHR into Irish domestic law.

V. The scope of the commitment to incorporate the ECHR into the law of Northern Ireland

The Belfast Agreement does not specify any particular statute or piece of legislation for implementing incorporation of the ECHR into Northern Irish law. Indeed, by April 1998, the Bill that would become the Human Rights Act was still before Parliament and its passage and contents when passed were still (in theory at least) uncertain. The Bill that was to become the Northern Ireland Act 1998 (and implement other provisions of the Multi-Party Agreement including the limitation on the legislative competence of the Assembly) had not of course been introduced into Parliament.[52] Accordingly, the Belfast Agreement does not specify either the Human Rights Act or the Northern Ireland Act as the vehicle by which incorporation of the ECHR into Northern Ireland law was to be achieved. The Belfast Agreement left it to the UK to decide on the form of incorporation.

It follows that it is the "substance of the connection established between Northern Ireland's domestic law and the ECHR, not the legislative form" that "remains the key to fulfilling the Belfast Agreement's requirement."[53] This means that the restrictions on lawmaking, executive, and administrative competences within Northern Ireland must be based on the "rights protections of the ECHR itself" and the Belfast Agreement's textual emphasis on providing for access to courts and remedies for breaches.[54] The British Government discharged these commitments by enacting several statutory provisions that incorporate the ECHR into the domestic law of Northern Ireland. They did so in a manner that provide a suite of restrictions on public bodies, several proofing devices in the legislative process, and a range of powerful remedies for breaches.

Section 6 of the Northern Ireland Act 1998[55] provides that a provision of an Act of the Assembly is "not law if it is outside the legislative competence of the Assembly" and that a provision is "outside that competence if" inter alia "it is incompatible with any of the Convention rights".[56] The NIA 1998 also provides, as contemplated in the Belfast Agreement, for several devices to assist members of the Assembly to proof legislation for ECHR compliance. Section 11 provides that the Attorney General for Northern Ireland may refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly – which as noted above is limited by section 6 to include compatibility with ECHR rights - to the

52. The long title of the Northern Ireland Act 1998 says that it is "An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883."

53. Colin Murray, Aoife O'Donoghue & Ben TC Warwick, "The Implications of the Good Friday Agreement for UK Human Rights Reform" (2016-2017) 11 Irish Year Book of International Law 92.

54. Ibid.

55. Mirroring provision enacted at the same time for Scottish devolution in section 29 of the Scotland Act 1998 and subsequently for Wales (see now section 108A of the Government of Wales Act 2006).

56. Section 90 provides that the phrase "the Convention rights" has the same meaning as in the Human Rights Act 1998, which in turn incorporates into domestic UK law the provisions of the ECHR contained in its Schedule 1.

Supreme Court for decision.

Section 13(4) of the Northern Ireland Act 1998 provides that the Assembly's Standing Orders shall include provision:

> (a) requiring the Presiding Officer to send a copy of each Bill, as soon as reasonably practicable after introduction, to the Northern Ireland Human Rights Commission; and
> (b) enabling the Assembly to ask the Commission, where the Assembly thinks fit, to advise whether a Bill is compatible with human rights (including the Convention rights).

Section 24 of the Northern Ireland Act 1998 provides for analogous restrictions on the competences of the Executive committee. Section 24(1) provides that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act...is incompatible with any of the Convention rights".

The Northern Ireland Act, as its long title confirms, is the primary legislative vehicle by which the British Government's commitments in the Multi-Party Agreement are given effect, limiting the capacity of the new devolved institutions to act incompatibly with Convention rights. However, the Multi-Party Agreement refers to "public bodies" as well as the Assembly and the Human Rights Act 1998, which came into force in October 2000, also contributes to the implementation of the Agreement.

Section 6 of the Human Rights Act 1998 provides that it is unlawful for any court, tribunal, or any person certain of whose functions are of a public nature, from acting "in a way which is incompatible with a Convention right". Section 8 provides that courts may, in relation to "any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." These provisions apply equally to the whole of the United Kingdom, including Northern Ireland.

Taken together, the effect of these provisions is to incorporate the ECHR into Northern Ireland law and thus to implement the Multi-Party Agreement's requirement that "neither the Assembly nor public bodies can infringe... the European Convention on Human Rights"[57] and that legislative, executive, and administrative decisions are "proofed" against the possibility of infringement.[58] These sections permit domestic courts – the Northern Ireland High Court, Northern Ireland Court of Appeal and UK Supreme Court – to invalidate any legislation enacted by the Assembly by which the domestic courts found the ECHR "to be breached".[59] They also permit the courts to grant remedies in respect of delegated legislation in Northern Ireland as well as non-legislative decision-making by public authorities that is incompatible with Convention rights.

Section 6 of the Human Rights Act 1998 applies to public authorities in

57. "The Belfast Agreement", p.5.
58. Ibid.
59. "The Belfast Agreement", p.8.

Northern Ireland in addition to the Assembly and Executive departments, for example the police service and public hospitals, but as a UK-wide provision, it also applies to public authorities anywhere in the United Kingdom, including any making decisions in non-devolved areas that affect Northern Ireland as part of the United Kingdom.

A proposal for UK withdrawal from the ECHR would give rise to a question whether any ECHR-related provisions retained for Northern Ireland to accommodate the commitments referred to in the Multi-Party Agreement would need to reproduce the whole existing effect of section 6 of the Human Rights Act in Northern Ireland, or only so much of it as applies to public bodies operating in Northern Ireland in devolved areas or to decisions that are confined in their effect to Northern Ireland.

Ultimately that question would fall to be determined as a practical question of what, in the context of UK withdrawal from the ECHR, is necessary to preserve the reassurance currently provided in Northern Ireland by the operation of section 6. It would not be a question that would fall to be resolved by a close textual analysis of the Multi-Party Agreement. However, discussion about what is necessary to provide reassurance would need to be framed in part by a context in which the Multi-Party Agreement is, at the very least, unclear about whether it was intended to extend to the exercise of non-devolved powers or to the exercise of powers of non-devolved bodies, and in which the provisions about the British-Irish Intergovernmental Conference clearly recognise UK sovereignty in relation to non-devolved matters, subject to discussion in that conference. That is a discussion that should also be informed by recalling that the British Government did not think it appropriate to bring section 6 of the Human Rights Act into force in Northern Ireland (to give effect to any respects in which it supplements the Northern Ireland Act 1998) until it was brought into force for the rest of the UK, on 2 October 2000: well after the entry into force of the Belfast Agreement on 2 December 1999.

The most persuasive reading of the Multi-Party Agreement's references to "public bodies" is that they were never intended to extend to public authorities exercising non-devolved powers that impact Northern Ireland. In particular, the Multi-Party Agreement's references to public bodies does not encompass His Majesty's Government or its departments or, of course, the Westminster Parliament (which is not even a "public authority" for the purposes of section 6 of the Human Rights Act 1998); rather, it is intended to refer to public authorities exercising devolved powers. As set out above, the structure of the Multi-Party Agreement deals with non-devolved powers in Strand 3 where they are treated as a subject for discussion between the British and Irish governments in the British-Irish Intergovernmental Conference – the agreement providing expressly that, while "determined efforts" must be made to resolve differences between the two governments, "there will be no derogation from the sovereignty of either Government".[60]

The whole history and context of the Multi-Party Agreement suggests

60. "The Belfast Agreement", p.15.

that the rights protection it is seeking to guarantee is specifically protection against the abuse of the devolved institutions of Northern Ireland to reinforce inequalities or otherwise to exploit the historically divided communities of the Province. The Belfast Agreement, particularly the detailed provisions of the Multi-Party Agreement, must be read in this light.

For the sake of completeness, we note that close textual analysis of the Multi-Party Agreement strongly bears out this understanding. If one reads the Agreement strictly, construing it as if it were a formal legal document whose only relevant context was contained within its wording (which, for the reasons given elsewhere in this report, we do not), then one reaches a similar conclusion about the scope of "public bodies".

There are two references to "public bodies" in paragraph 5 of Strand One of the Multi-Party Agreement, under the heading "Safeguards". The relevant passages provide (emphasis added):

> "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:
>
> …
>
> (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
>
> …
>
> (e) an Equality Commission to monitor a statutory obligation to promote equality of opportunity in specified areas and parity of esteem between the two main communities, and to investigate individual complaints against public bodies."[61]

The reference to "these institutions" in paragraph 5 is a reference to a preceding paragraph – paragraph 3 – and its references to the Northern Ireland Assembly, which the Multi-Party Agreement provides will "exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement."[62]

These textual references to "public bodies", when taken in this context, suggests that the term is restricted in scope to those public bodies involved in the operation of devolved governance in Northern Ireland. The incorporation of the ECHR into Northern Ireland law was intended to help ensure the successful operation of devolved government by, inter alia, protecting all sides of the community from public authorities in Northern

61. "The Belfast Agreement", p.5.
62. Ibid.

Ireland exercising their authority over devolved matters, should they do so in a manner infringing ECHR rights.

The term public bodies could not extend – without ignoring the context (namely, ensuring that safeguards apply to matters administered separately in Northern Ireland following devolution) – to UK-wide institutions or other public bodies, except in so far as their functions include functions exercisable separately in relation to matters that are devolved in Northern Ireland or that are otherwise specific to the circumstances of Northern Ireland.

Sub-paragraph (e) bolsters the conclusion that the term "public bodies" is limited to those involved in the exercise of devolved responsibilities. This paragraph envisages a newly established Equality Commission investigating individual complaints against public bodies as part of its statutory mission to "promote equality of opportunity... and parity of esteem between the two main communities".[63] This, in turn, is in aid of ensuring that "all sections of the community can participate and work together successfully in the operation of" the Assembly institutions and "that all sections of the community are protected".[64] The role of the Equality Commission is thus envisaged to be to investigate public bodies whose functions are within the competence and jurisdiction of the Assembly. The soundest reading of this paragraph is that the public bodies the Equality Commission is charged with investigating to help ensure "parity of esteem between the two main communities" only encompasses those public bodies whose functions do include functions exercisable separately in relation to matters that are devolved in Northern Ireland or that are otherwise specific to the circumstances of Northern Ireland.

There are two additional references to public bodies in the Rights, Safeguards, and Equality of Opportunity chapter. Under the heading "United Kingdom Legislation", paragraph 3 provides that (emphasis added):

> Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.[65]

Section 75(2) of the Northern Ireland Act 1998 implemented this provision by placing a legal duty on designated public authorities – designated in advance by the Secretary of State – to have regard to the

63. "The Belfast Agreement", pp.5-6.
64. Ibid.
65. "The Belfast Agreement", p.17.

desirability of promoting good relations between persons of different religious belief, political opinion or racial group when carrying out its functions relating to Northern Ireland. The most recent list of designated public authorities contains only public bodies whose functions consist of or include functions exercisable separately in relation to matters that are devolved in Northern Ireland or that are otherwise specific to the circumstances of Northern Ireland.[66]

This is because the text of the Multi-Party Agreement, when read in context, suggests the intended meaning of the term "public bodies" relates to those that are "in Northern Ireland" exercising devolved powers. Moreover, paragraph 3 explicitly mentions the "British Government" before it refers to "public bodies", which strongly suggests that Government *itself* was not included amongst the public bodies that would be subject to the statutory obligation that the Government, as paragraph 3 of the Multi-Party Agreement records, said that it intended to create.

The final reference to "public bodies" is in the next paragraph of the Multi-Party Agreement, paragraph 4, which relates to the future responsibilities of the Northern Ireland Human Rights Commission that the British Government is charged with establishing. It provides that the Commission will be "invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland".[67] Paragraph 4 additionally provides that:

> "…Among the issues for consideration by the Commission will be:
>
> - the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland…"[68]

The text and context here, which concerns additional safeguards that will supplement the incorporation of the ECHR into Northern Ireland, again suggest that the term "government and public bodies" refers to the devolved government, that is, the Assembly and Executive Committee and not His Majesty's Government in right of the United Kingdom or the Westminster Parliament. The same context suggests the reference to public bodies means those public authorities working in Northern Ireland that assist the devolved government institutions in exercising their devolved powers, but not to UK wide public bodies exercising powers in relation to non-devolved matters in relation to the UK as a whole, or even, it seems, specifically in relation to Northern Ireland.

66. Equality Commission for Northern Ireland, "List of Public Authorities designated for the purposes of section 75 of the Northern Ireland Act 1998" (February 2025), https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Monitoring%20and%20review/List_of_Bodies_DesignatedS75.pdf
67. "The Belfast Agreement", p.17.
68. Ibid.

VI. ECHR withdrawal and support for the Multi-Party Agreement

Having regard to the text, structure, and context of the Multi-Party Agreement and its references to the ECHR, it is abundantly clear that it would not be a breach of the Agreement for the UK to leave the ECHR. The Belfast Agreement does not require ongoing ECHR membership by the UK (or Ireland) or give the parties or Ireland a veto on UK withdrawal.

However, it is also clear that if the UK Government is considering leaving the ECHR it would need to engage, both with the parties and communities in Northern Ireland and with the Irish Government, about how it would be best, in the event of UK departure from the ECHR system, to amend the law of Northern Ireland to maintain the reassurance given by the Belfast Agreement and the current legislation for implementing its requirements on rights, safeguards and equality of opportunity.

It is certainly open to the UK to denounce the Convention pursuant to Article 58 of the ECHR while maintaining for Northern Ireland the substance of the statutory restrictions imposed on the devolved institutions by the Northern Ireland Act 1998 and the Human Rights Act 1998, so far as they are necessary to meet the UK's obligations under the British Irish Agreement.

If the UK ceases to be a member state of the ECHR and is no longer subject to the jurisdiction of the European Court of Human Rights, these provisions (or others like them or to a similar effect) would continue to permit domestic courts to invalidate devolved legislation and to grant remedies in respect of other infringements of Convention rights. They would continue to play the legally enforceable safeguarding and power-limiting functions that the Multi-Party Agreement envisages; nonetheless, it would be important to work with those in Northern Ireland to see whether and how those provisions could be adapted or amended to retain the reassurance they currently provide.

It would also arguably be open to the UK, while retaining the substance of the existing provisions, to amend the law of Northern Ireland, removing references to Convention rights, but replacing them with specific civil, political and social rights, including prohibitions on discrimination, which would continue to apply to the Assembly and other public bodies in Northern Ireland.

Existing domestic law would need little if any amendment to enable it to

continue to operate once the UK had left the jurisdiction of the Strasbourg Court. The UK Government would of course still be bound by the terms of the British-Irish Agreement. There is no logical reason why that should not provide just as much reassurance as the status quo. But if it did not, there would be plenty of other political options that would not involve the continued acceptance by the UK, as a whole, of the international legal obligations imposed by the ECHR, qua treaty.[69]

The existing legal restrictions on the devolved institutions and public bodies in Northern Ireland could quite easily continue to fall to be administered by the domestic courts, even if the UK had repudiated the Convention and left the jurisdiction of the Strasbourg Court. It would remain open to Parliament, if the people of Northern Ireland so wished, to clarify that domestic courts may, or must in specified circumstances, still consider the case law of the Strasbourg Court, even if there were no longer any right in international law for individuals to petition that court, or any duty for the UK to have to treat its judgments against the UK as authoritative in international law.

The only plausible reading of the ordinary and natural meaning of the text of the Multi-Party Agreement, as well as any reading soundly based on the broad context of its "constructive ambiguities",[70] establishes that that Agreement was never intended to require – and does not require – the British Government to ensure that incorporation of the ECHR into the domestic law of the UK must take place and remain in force on a UK-wide basis. Nor does it, either in intention or effect, override or supersede the UK's entitlement under Article 58 of the ECHR to denounce that Convention. The Belfast Agreement was never intended to bind the UK, or Ireland for that matter, to the jurisdiction of the Strasbourg Court in perpetuity – and does not do so even as an unintended side-effect or tenuous implication of the spirit of the Agreement.

All that the spirit of the Multi-Party Agreement requires is that the law of Northern Ireland provide such reassurance about rights, safeguards and equality as will enable devolved government there to develop and be conducted in the context of domestic law mechanisms which build trust and equality of esteem between different communities. Those things will not be built by imposing on those communities, or indeed on the UK government, pre-baked technical solutions involving supposed or inferred obligations that cannot be questioned despite the gravity of their impact on UK sovereignty.

Indeed, it is difficult to think of any approach to the interpretation of the Multi- Party Agreement that is more at odds with its spirit than one that assumes that its ambiguities and silences can be resolved by the delegation of a search for what it means – but does not say – to the process of interpretation, rather than to the process of peaceful negotiation in the spirit of mutual respect which the Agreement itself is supposed to represent. The notion that the Multi-Party Agreement can be read as imposing obligations that it does not set out – but that can be inferred by textual exegesis – so as to make winners of those who favour them

69. These might, for example, include a new, independent, and different dispute resolution procedure as between the Republic of Ireland and the United Kingdom to accommodate the loss of the Republic's ability to petition the Strasbourg Court in respect of perceived breaches of the UK's ECHR related obligations, so far as their incorporation is required by the Multi-Party Agreement (or any loss of the reciprocal ability of the UK in respect of Ireland's equivalence provisions) – even though no such ability for either state is currently guaranteed by anything in either the Multi-Party Agreement or the British-Irish Agreement.

70. For discussion of the way in which the political nature of the Multi-Party Agreement is built on and characterised by "constructive ambiguities" and the implications of that for construing it, see for example: Noel Anderson, "The 'Art of the Fudge': Merits of Constructive Ambiguity in the Good Friday Agreement" (2009) *Attaché Journal of International Affairs* 57-72 and L. C. Whitten, "The Belfast 'Good Friday' Agreement and Unconstructive Ambiguity", U.K. Const. L. Blog 16th Sept. 2020.

and losers of those who do not is wholly incompatible with everything the Multi-Party Agreement and the British-Irish Agreement do make clear about how disagreements between the parties to those agreements are to be handled.

A comparable approach may also be warranted even to the express references in the Multi-Party Agreement to the ECHR and thus to Convention rights. It is plausible to assume that, in the context of the rest of the Agreement, the references to those rights should be understood as identifying the Convention rights only so far as they articulate or exemplify the rights more specifically referred to and treated as important by that Agreement – rights that are identified as necessary for the achievement and maintenance of peace and harmony as between different communities in Northern Ireland. It is implausible, for example, that that Agreement was intended to identify commitments by the UK as to the treatment of illegal migrants arriving on the south coast of England or, on the other hand, to give the UK a special *locus standi* to insist, via the equivalence provision, on particular approaches to the various issues that, in 1998 at least, created tensions between Convention rights and the provisions of the Irish Constitution. The idea that the ECHR and total adherence to the jurisprudence of the Strasbourg Court is an indivisible package which, in perpetuity but subject (in the case of the jurisprudence) to its own dynamism, is a pre-condition for peace in Northern Ireland makes no sense, either politically or practically. It is noteworthy perhaps that the domestic law of neither country requires strict adherence to Strasbourg jurisprudence or gives it binding effect.

In short, it is open to the UK to leave the ECHR consistently with its obligations under the British-Irish Agreement and the Multi-Party Agreement and to continue to support the Multi-Party Agreement by maintaining limits in the domestic law of Northern Ireland on the Assembly and on public bodies exercising devolved powers. Such a course of action would be fully compatible with the spirit and effect of the Belfast Agreement. The proposed form of the retained limits would be open to being considered by way of the procedures in the Multi-Party Agreement for dealing with issues involving non-devolved matters and would in any case need to be discussed with the participants in that Agreement in the spirit it promotes. Such a process, and the adoption of an appropriate replacement regime, would be wholly consistent with maintaining both the integrity of the United Kingdom and the continuation, as intended by that Agreement, of a separate system of devolved government in Northern Ireland, as one of its component parts.[71]

The answer to the question of whether UK withdrawal from the ECHR is a breach of the Belfast Agreement is not dependent on whether Parliament enacts a Bill of Rights either for the UK or for Northern Ireland in particular. However, we note that the retention of ECHR-derived statutory restrictions on the devolved institutions and public bodies in Northern Ireland could happen concurrently with Parliament revisiting the enactment of a special Bill of Rights for Northern Ireland that would

71. It is worth noting too that separate but similar decisions about replacement provisions would also be needed – in the event of UK withdrawal from the ECHR – in the case of the existing ECHR constraints on devolved power in the other parts of the United Kingdom with devolved legislatures: Scotland and Wales. On the one hand, it would perhaps be desirable to have a consistent approach in all three devolved jurisdictions. On the other, it should be recognised that the integrity of the United Kingdom is not put in doubt by virtue of the existence of three separate and different devolution settlements, including one that already makes specific and separate provision for Northern Ireland.

supplement the Convention rights incorporated via the Northern Ireland Act and Human Rights Act or would restate, in a consolidated form, both the Convention rights and any additional rights created in accordance with the Belfast Agreement. UK withdrawal from the ECHR might provide a useful boost to that, as yet unfulfilled, ambition implicit in the Multi-Party Agreement.

VII. The Windsor Framework and the lawfulness of ECHR withdrawal

It is likely that if or when the Government proposes UK withdrawal from the ECHR, claimants will apply to the Northern Ireland Courts arguing that ECHR withdrawal would breach Article 2 of the Windsor Framework and is thus unlawful as a matter of domestic law. This argument would purport to build on the Belfast Agreement, but for the following reasons is groundless and should be rejected.

The EU-UK Withdrawal Agreement contained a dedicated Protocol concerning the treatment of Northern Ireland.[72] This Protocol was later amended to become the Windsor Framework.[73] Article 2(1) of the Windsor Framework provides as follows:

> "The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms."

Article 2 of the Windsor Framework commits the UK to ensuring alignment between Northern Ireland law and EU law regarding the six equality directives listed in Annex 1 of the Windsor Framework. It also places a more open-ended obligation on the UK. With respect to those aspects of EU law that protect the rights and equality arrangements of the Rights, Equality, Safeguarding, Opportunity part of the Belfast Agreement, Article 2 additionally provides that there will be no diminution of such protections as a result of Brexit.

As McCrudden notes, Article 2 requires that the "*substance* of the rights in existence before withdrawal and underpinned by EU law must be retained in Northern Ireland, there is no obligation to retain *specific EU measures* themselves, but article 2 obliges the UK to achieve the functionally equivalent result".[74]

Article 4(1) of the Withdrawal Agreement provides that the provisions of the Agreement (which include the Windsor Framework) and the provisions of Union law made applicable by this Agreement:

72. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/ Northern Ireland.

73. Decision no 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

74. Christopher McCrudden, "The origins of 'civil rights and religious liberties' in the Belfast–Good Friday Agreement" (2024) 74 *Northern Ireland Legal Quarterly* 29, 33. Emphasis in original.

> "shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."

In Article 4(2) of the Withdrawal Agreement the UK explicitly agreed to provide "the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions". Section 7A of the European Union (Withdrawal) Act 2018 as inserted by the European Union (Withdrawal Agreement) Act 2020, is the statutory mechanism by which the UK has undertaken to implement provisions like Article 2 and Article 4. It provides, in subsection (1), that:

> "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and… all such remedies and procedures from time to time provided for by or under the withdrawal agreement… are without further enactment to be given legal effect or used in the United Kingdom."

And, in subsection (2), that:

> "The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a). recognised and available in domestic law, and
> (b). enforced, allowed and followed accordingly."

As understood by the Northern Ireland High Court in *Dillon*, the dramatic effect of these provisions is that any provisions of domestic law, including primary legislation, that is "in breach of the Windsor Framework should be disapplied."[75] In a series of cases, including *Dillon* and *Re SPUC* [2023] NICA 35, the Northern Irish courts have held that the non-diminution of rights obligation in Article 2 of the Windsor Framework has direct effect in UK law. This means that, pursuant to the Withdrawal Act 2018 (as amended), any legislation or executive action inconsistent with Article 2 is liable to be disapplied by the courts.

The Northern Ireland Court of Appeal in *Re SPUC* [2023] NICA 35[76] held that to establish a breach of Article 2 of the Windsor Framework, several factors must be satisfied:

> "(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;
>
> (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;

75. *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11.
76. [2023] NICA 35, para 54.

> (iii) That Northern Ireland law was underpinned by EU law;
>
> (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;
>
> (v) This has resulted in a diminution in enjoyment of this right; and
>
> (vi) This diminution would not have occurred had the UK remained in the EU."

Factor (vi) requires asking "whether *but for* the UK's exit that diminution would have been able to occur, legally. If the answer is negative, then Article 2's non-diminution obligation applies."[77] Therefore, whether UK withdrawal would breach Article 2 will turn on whether we can say that the UK's membership of the ECHR was legally obligatory while the UK was a member of the EU. On this point, McCrudden is correct in stating that ECHR withdrawal would not breach Article 2 as "we cannot say that the UK's membership in the Convention is underpinned by EU law".

Rather, the UK's membership of the ECHR has always been underpinned "only by a political commitment"[78] and was never a legal obligation imposed by EU membership. While the EU and the ECHR are intertwined in practice (every EU member state is a signatory to the ECHR, and the EU has a treaty obligation to join the ECHR, which the Court of Justice has deeply complicated in Opinion 2/13 by rejecting accession to the ECHR because it does not want to be subject to the Strasbourg Court), the EU treaties never made an ongoing commitment to ECHR membership legally obligatory.

While their views are of course not legally authoritative, it is telling that the furthest the European Commission itself has ever gone in linking ongoing membership of the EU with membership of the ECHR is to say that (emphasis added):

> "Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures **could, in certain circumstances, raise concern** as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union."[79]

In other words, the view of the 'guardian of the treaties' is that, whether it is problematic for a member state to withdraw from the ECHR will turn on the substantive consequences of withdrawal for the protection of rights, not on the act of ECHR withdrawal per se.

This means there would be no basis for the courts to rely on Article 2 Windsor Framework to disapply legislation that sought to (i) authorise

77. Christopher McCrudden, "Human Rights and Equality", in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022) 148.
78. Ibid.
79. Parliamentary question | Answer to Question No E-5000/06 | E-5000/2006(ASW) | European Parliament

the government to denounce the ECHR, or (ii) to repeal the whole or any part of the HRA 1998.[80] In any event, it remains open to Parliament to prevent use of the Withdrawal Act 2018 (as amended) and the Windsor Framework to legally challenge a decision to denounce the ECHR. It is open to a future government to invite Parliament to pass legislation authorizing denunciation that expressly disapplies the Withdrawal Act and records Parliament's conclusion that ECHR membership was never underpinned by EU law.

80. Our argument that the Windsor Framework cannot act as an obstacle to the UK leaving the ECHR and repealing the Human Rights Act would, of course, apply with even greater force should the Supreme Court find in the *Dillon* appeal that the lower courts have misinterpreted Article 2 of the Windsor Framework as having direct effect in the UK.

VIII. The significance of the EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation agreement is an international treaty agreed between the EU and the UK which sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation, and participation in Union programmes.

Articles 763 and 771 provide that the parties "shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties." These commitments are described as "essential elements of the partnership established by this Agreement". However, Article 772 provides that "for a situation to constitute a serious and substantial failure to fulfil any of the obligations described as essential elements... its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions".

Part Three of the Trade and Cooperation Agreement concerns criminal law enforcement co-operation. It provides for close co-operation on a range of issues:

- exchanges of DNA, fingerprints and vehicles registration data (Title II & ANNEX 39)
- transfer and processing of passenger name record data (Title III & ANNEX 40)
- cooperation on operational information (Title IV)
- cooperation with Europol (Title V & ANNEX 41)
- cooperation with Eurojust (Title VI & ANNEX 42)
- surrender (Title VII & ANNEX 43)
- mutual assistance (Title VIII)
- exchange of criminal record information (Title IX & ANNEX 44)

Article 524 of the Trade and Cooperation Agreement states that co-operation on these matters is "based on" the Parties' and Member States'

"long standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically."

Each party "may at any moment terminate" these co-operation measures by written notification for breach of these protections. Unlike the general rules on mutual respect for rights, there is "no requirement that the breach be of the exceptional sort required for a breach of the general human rights obligations".[81]

Article 692 provides that "if this Part is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification." This seems to expressly anticipate that denunciation of the ECHR would be the equivalent of a breach of the basis of co-operation justifying termination of Part Three of the Trade and Cooperation Agreement.

However, it can be inferred from the fact that separate provision may be made for the consequences of this eventuality that it is not something that is otherwise or inevitably a breach of the agreement and that the provision is made to spell out the legal consequences of a course of action that is, at least under some circumstances, available to the parties to the agreement.

This means that UK withdrawal from the ECHR would justify the European Union terminating this part of the Trade and Cooperation Agreement and its provision for co-operation on criminal justice matters. (Likewise, if France or Ireland were to withdraw from the ECHR, this would entitle the UK to terminate this part of the Agreement.)

This right to terminate on the grounds of ECHR withdrawal must be seen relative to the general right of either party to collapse all or part of the agreement for any reason whatsoever. (In this context, one should never forget that the EU itself is *not* a party to the ECHR and that the Court of Justice in Opinion 2/13 rejected EU accession to the ECHR on the grounds that it would have an "adverse effect on the autonomy of EU law".) Thus, the risk of termination of Part Three is not an insoluble problem, even if it might well require negotiation with the EU to maintain the relevant treaty provisions. Such negotiation might require the UK to give particular assurances about specific future legal arrangements, as opposed to any general commitment to membership of the ECHR, a commitment which again the EU itself has not undertaken.

The legal and political difficulties that terminating co-operation under Part Three of the Trade and Cooperation Agreement might cause are, however, entirely distinct from the question this report is considering, which is whether leaving the ECHR would be inconsistent with the Belfast Agreement.

81. Christopher McCrudden, "Human Rights and Equality", in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022) 157.

Our legal analysis of the Trade and Cooperation Agreement does not contradict our legal assessment of this question. On the contrary, Article 692 of the UK-EU Trade and Cooperation Agreement envisages that the UK or an EU member state may denounce the ECHR, which is a ground for terminating the application of Part Three of the Agreement. This agreement postdates the Withdrawal Agreement and the Northern Ireland Protocol, which expressly aim to protect the Belfast Agreement in all its parts. Thus, Article 692 implies that neither the UK nor the EU (including Ireland) consider UK withdrawal from the ECHR to constitute a breach of the Belfast Agreement.

Conclusion

It has become an article of faith in some quarters that UK withdrawal from the ECHR would breach or undermine the Belfast Agreement. But neither repetition nor intensity of feeling makes it so. When one considers the Belfast Agreement carefully, noting the relationship between the British-Irish Agreement (the treaty) and the Multi-Party Agreement (the political agreement), it is clear that the Belfast Agreement does not forbid the UK (or Ireland) from exercising its right in international law to withdraw from the ECHR.

The British-Irish Agreement does not refer to the ECHR at all and none of its terms suggest in any way that the UK or Ireland were undertaking to remain member states of the ECHR in perpetuity. In signing the British-Irish Agreement, the UK and Ireland agreed "to support, and where appropriate implement, the Multi-Party Agreement". This obligation does not simply make the terms of the Multi-Party Agreement binding on the UK and Ireland in international law, but instead requires the British Government and the Irish Government to do their best, as they see it, to make the political agreement work over time.

The troubled history of Northern Ireland forms the context of the Multi-Party Agreement, with the parties concerned to address the risks of abuse of devolved power. The references to the ECHR in the agreement are clearly concerned with domestic law rather than international law – with ensuring that the law of Northern Ireland imposes limits on the Assembly and on public bodies exercising devolved power. The references to the ECHR have nothing to do with the individual right of petition to the Strasbourg Court or, more generally, with the UK and Ireland's subjection to the Strasbourg Court's jurisdiction. British or Irish withdrawal from the ECHR would in no way undercut, breach or cut across the Multi-Party Agreement.

The enactment of the Northern Ireland Act 1998 and section 6 of the Human Rights Act 1998, insofar as it applied to Northern Ireland, discharged the British Government's commitment to incorporate the ECHR into the law of Northern Ireland as a safeguard against the abuse of devolved power. The commitment concerns public bodies exercising devolved power and not the British Government itself and, certainly, not the Westminster Parliament. If a future government withdraws the UK from the ECHR, the UK's duty to support the Multi-Party Agreement can continue to be met by maintaining in the law of Northern Ireland limits of the existing kind on the devolved institutions and public bodies exercising devolved power.

The simplest way to achieve this end might be in effect to maintain the law of Northern Ireland as it stands, but what matters is the substance of restraint and reassurance, rather than particular legal form. The spirit of the Multi-Party Agreement does not forbid ECHR withdrawal, but rather requires the British Government to engage the different parties in discussion about how, or whether, to amend the law of Northern Ireland after the UK leaves the Convention, engagement that should provide reassurance that there will be no diminution of the rights that the Agreement was concerned to protect and that there will be no change in the constitutional status of Northern Ireland within the United Kingdom.

In maintaining the substance of the existing limits, or reworking them after negotiations with the parties, the British Government would not be sundering Northern Ireland from the United Kingdom, for the spirit of the Multi-Party Agreement clearly embraces specific and separate provision for Northern Ireland about devolution and the legal limits on devolved power, as well as the acceptance of the case in principle for the enactment of a distinctively Northern Irish Bill of Rights.

Nothing in our argument is qualified or undermined by the adoption of the Windsor Framework, and its incorporation into domestic law, or by the terms of the UK-EU Trade and Cooperation Agreement. On the contrary, the Trade and Cooperation Agreement anticipates that the UK or another member state, such as Ireland, may leave the ECHR and makes provision for trade and cooperation to continue nonetheless, subject to a right of termination. In entering into this agreement, the UK and Ireland (as an EU member state) have jointly accepted that ECHR withdrawal would not undermine their existing obligations under the British-Irish Agreement, including in relation to the Multi-Party Agreement.

Whatever the merits of UK withdrawal from the ECHR, nothing in the Belfast Agreement rules it out as a viable course of action. In choosing to exercise the UK's right to withdraw from the ECHR, a future government would neither be flouting the UK's international obligations under the Belfast Agreement nor failing to respect the political settlement that grounds the peace process.

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