

**European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland  
House of Lords Northern Ireland Protocol consultation  
Call for evidence  
Inquiry: Northern Ireland Protocol Bill  
Submission by Rights and Security International**

**(1) How would you summarise the impact (both positive and negative) of the Protocol as it currently operates on Northern Ireland?**

Positive

Media reports indicate that the majority of voters, political parties and businesses surveyed in Northern Ireland (NI) support the current operation of the Protocol.<sup>1</sup> The Protocol (as its provisions stand presently) preserves the principles of the Belfast/Good Friday Agreement (B/GFA) in the aftermath of Brexit.

Crucially, Article 2 of the Protocol provides for non-diminution of human rights standards, which is an important safeguard for human rights in NI. By contrast, the UK government has indicated its intention to remove or amend the existing human rights framework in NI. For instance, legal analysts and human rights groups have argued that the recently withdrawn Bill of Rights Bill, if enacted, would have led to a diminution in human rights standards in NI as well as elsewhere in the UK; concerns remain that the current administration in Westminster will re-introduce this Bill.<sup>2</sup> Therefore, the continued jurisdiction of the Court of Justice of the EU (CJEU) to scrutinise the application of human rights standards in NI is now particularly important.

Negative

The attempt by the UK government to unilaterally amend the Protocol with the NI Protocol Bill, rather than the actual operation of the Protocol, has created uncertainty in NI society.<sup>3</sup> The Protocol Bill's passage through Westminster as unilateral legislation, as well as local politics in NI following the elections in May 2022, have prevented the effective operation of the Protocol and contributed to the failure to progress human rights though

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<sup>1</sup> Brian Hutton, 'Majority of voters in North want Stormont restored' (*Irish Times*, 27 October 2022) <<https://www.irishtimes.com/ireland/social-affairs/2022/10/27/majority-of-voters-in-north-want-stormont-restored/>> accessed 2 November 2022

<sup>2</sup> E.g. A O'Donoghue and C Murray, 'The Bill of Rights Bill: Playing Fast and Loose with the Belfast/Good Friday Agreement (Again)' (*Oxford Human Rights Hub*, 24 June 2022) <<https://ohrh.law.ox.ac.uk/the-bill-of-rights-bill-playing-fast-and-loose-with-the-belfast-good-friday-agreement-again/>> accessed 2 November 2022

<sup>3</sup> Leader, 'Britain's bill to rip up the Northern Ireland protocol is a terrible idea' (*The Economist*, 14 June 2022) <<https://www.economist.com/leaders/2022/06/14/britains-bill-to-rip-up-the-northern-ireland-protocol-is-a-terrible-idea>> accessed 2 November 2022

the NI Assembly.<sup>4</sup> For instance, there have been delays to, and (from the perspective of the desirability of local democratic accountability) less accountable decision-making concerning, the Identity and Language (Northern Ireland) Bill<sup>5</sup> and the commissioning of abortion services in NI.<sup>6</sup>

**(2) What is your overall assessment of the UK Government’s approach to the Protocol, including bringing forward the Northern Ireland Protocol Bill? To what extent will it alleviate the issues with the Protocol that it seeks to address?**

We are concerned that the UK government has shown that it is content to breach international law in relation to its treaty commitments regarding the Protocol, by acting unilaterally to legislate with the Protocol Bill. The UK government has contributed to instability in NI, which can harm people’s rights, and its previous attempts (in the UK Internal Market Bill) to breach the Protocol do not suggest that it is acting in good faith with this Bill.<sup>7</sup>

**(3) What is your assessment of the Government’s argument that the Bill, and the measures contained within it, are necessary to safeguard the Belfast/Good Friday Agreement?**

Human rights and equality issues are central to the B/GFA. However, the Agreement only provided for a baseline of human rights protection, with the understanding that law- and policy-makers would develop this legal framework – in terms of substantive rights and remedies – to offer unique, and likely greater, protections in NI law.<sup>8</sup> As a result, the B/GFA recognises a set of human rights and equality rights in a part of the Agreement entitled ‘Rights, Safeguards and Equality of Opportunity.’ Indeed, a group of academics with expertise in NI law and politics consider that: “*The Ireland Protocol’s provision on rights, safeguards and equality of opportunity are directly related to the GFA and reaffirm the GFA’s baseline requirement that the [European Convention on Human Rights] is part of Northern Ireland’s law. This will mean that the UK will*

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<sup>4</sup> Northern Ireland Human Rights Commission, 'NIHRC and ECNI Briefing on the Protocol Bill' (*Northern Ireland Human Rights Commission*, 7 October 2022) <<https://nihrc.org/publication/detail/nihrc-and-ecni-briefing-on-the-protocol-bill>> accessed 2 November 2022

<sup>5</sup> Identity and Language (Northern Ireland) Bill [HL]

<sup>6</sup> <https://www.gov.uk/government/news/uk-government-to-commission-abortion-services-in-northern-ireland>

<sup>7</sup> A Stennett, E Regan and E Dellow Perry, 'Internal Market Act 2020 and the Protocol on Ireland/ Northern Ireland' (*Northern Ireland Assembly*, 16 April 2021) <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2021/finance/2821.pdf>> accessed 2 November 2022

<sup>8</sup> Belfast/Good Friday Agreement (1998), ‘Rights, Safeguards and Equality of Opportunity,’ Clauses 2, 4.

*have to keep the Human Rights Act for Northern Ireland unless a Northern Ireland Bill of Rights can be passed that does the same job.”<sup>9</sup>*

We are concerned that the Protocol Bill may weaken these existing (dynamic) human rights and equality mechanisms in NI rather than, as the government argues, safeguarding them as part of its declared intention to safeguard the B/GFA. The section of the B/GFA entitled ‘Rights, Safeguards and Equality of Opportunity’ protects the ‘civil rights and religious liberties of everyone in the community’. The B/GFA then specifies particular rights that are included as illustrations of what is included in this broad protection:

- 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
- The right of women to full and equal political participation

The protection accorded by Article 2(1) of the Protocol applies to those ‘rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity’. Therefore, elements of the B/GFA in practice have the status of higher law in UK law via the Protocol, rather than indirectly via the Northern Ireland Act 1998. This interpretation of the B/GFA will also require that such bodies as the NI Assembly and Executive must be prohibited from legislating or acting contrary to Article 2(1) of the Protocol.<sup>10</sup>

Under domestic law, the UK Parliament may expressly repeal even constitutional statutes, such as is proposed through the Protocol Bill.<sup>11</sup> However, under international law, this would be a breach of the UK’s obligations

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<sup>9</sup> de Mars, S., Murray, C., O’Donoghue, A., & Warwick, B. (2018). *Bordering Two Unions*. Bristol, UK: Policy Press. Retrieved Nov 1, 2022.

<sup>10</sup> This provides for an international legal guarantee for Section 26(1), Northern Ireland Act 1998, which provides that ‘If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken.’

<sup>11</sup> Catherine Barnard, ‘The Northern Ireland Protocol Bill and its Constitutional Implications’ (*UK in a Changing Europe*, 21 June 2022) <<https://ukandeu.ac.uk/the-northern-ireland-protocol-bill-and-its-constitutional-implications/>> accessed 2 November 2022

under the Withdrawal Agreement, unless it were done with the express consent of the EU. Therefore, if the Protocol Bill were to proceed, the rights secured under the B/GFA are more likely to be undermined (or at least to be more precarious) than safeguarded, given that people in NI are facing likely reforms to the HRA 1998, which would effectively reduce human rights protections throughout the UK, rather than strengthen them.

Although the government has a duty to protect the B/GFA, the Irish government also has such a duty as a co-signatory. The Irish government has maintained that this Bill is not the way to protect it. Micheál Martin said that “*Unilateral action to set aside a solemn agreement would be deeply damaging. It would mark a historic low-point signalling a disregard for essential principles of laws which are the foundation of international relations.*”<sup>12</sup>

The EU and the United States are co-guarantors of the B/GFA and, like the Irish government, they do not see the Protocol Bill as a way to protect it. The other signatories to the B/GFA are the political parties of NI, and a majority of them are opposed to the Bill.<sup>13</sup> The Sub-Committee on the Protocol on Ireland/Northern Ireland is a sub-committee specifically responsible for examining proposals by the North-South Ministerial Council and its implementing bodies, as well as any issues raised by the human rights and equality bodies established by the B/GFA. This Sub-Committee must submit recommendations to the central committee for a binding decision on any issues arising by the Protocol. In its report published on 29 July 2021, the Sub-Committee highlighted the importance of Article 2 of the Protocol and the complex interaction between the Protocol and the B/GFA.<sup>14</sup> We believe the fact of proposing the Protocol Bill, as well as its actual provisions, has made this interaction even more complex and that the human rights and equality rights of the B/GFA would be better safeguarded through continued operation of the Protocol. In summary, the Bill, and the measures contained within it, are not necessary to protect the B/GFA.

**(10) What are the practical and legal implications of removing the jurisdiction of the European Court of Justice in the UK to oversee the implementation of the Protocol and stating that UK courts are not bound by decisions of the CJEU on matters related to the Protocol?**

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<sup>12</sup> Micheál Martin, 'The Northern Ireland Protocol Bill and its Constitutional Implications' (*Department of the Taoiseach*, 8 June 2022) <<https://www.gov.ie/en/speech/b2559-speech-by-the-taoiseach-micheal-martin-at-plenary-of-the-european-parliament/#peace-in-ireland>> accessed 2 November 2022

<sup>13</sup> Garrett Hargan, 'Pro-protocol parties in Northern Ireland voice opposition to ‘reckless new legislation’ in letter to Boris Johnson' (*Belfast Telegraph*, 13 June 2022) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/pro-protocol-parties-in-northern-ireland-voice-opposition-to-reckless-new-legislation-in-letter-to-boris-johnson-41748025.html>> accessed 2 November 2022

<sup>14</sup> House of Lords, 'Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Introductory report' (*UK Parliament*, 21 July 2021) <<https://committees.parliament.uk/publications/7001/documents/72888/default/>> accessed 2 November 2022



Article 2 of the Protocol, headed “Rights of individuals”, deals with the UK’s undertakings to ensure “*no diminution of rights, safeguards and equality of opportunity*”, as set out in Section 6 of the B/GFA, including with respect to six EU Directives which are listed in Annex 1 to the Protocol.<sup>15</sup> The B/GFA committed the UK government to

implement the European Convention on Human Rights (ECHR) into UK law, which was incorporated into UK law via the Human Rights Act (HRA) 1998.<sup>16</sup> Schedule 3 of the EU-UK Withdrawal Agreement<sup>17</sup> confers new functions on the Northern Ireland Human Rights Commission and the Equality Commission to enable each to act as part of the ‘dedicated mechanism’, to monitor, advise, report on, and enforce the UK’s adherence to its commitment that there will be no diminution of rights, safeguards, or equality of opportunity in NI as a result of the UK’s exit from the EU.

The HRA 1998 authorises the NI Assembly to strike down legislation incompatible with the ECHR. Equality law and anti-discrimination law in the UK has subsequently been enhanced through the application of EU law, the UK government’s transposition of EU Regulations and Directives, and dynamic interpretation by the CJEU. This development is reflected in the reference in Article 1 of the Protocol to anti-discrimination law in NI “*as enshrined in the provisions of Union law*”. However, there is a danger of potential ‘mission creep’ through the Brexit Freedoms Bill and HRA 1998 reform, which could have a negative impact upon human rights standards in NI. Therefore, the removal of EU law from the UK’s statute books may have unintended consequences in NI in terms of the effective enjoyment of human rights.<sup>18</sup>

Furthermore, the EU Charter of Fundamental Rights (the Charter) was adopted in 2000, after the B/GFA was agreed. It initially had only persuasive effect but became binding in 2010.<sup>19</sup> The commitment to no diminution of rights under Article 2 of the Protocol should therefore be interpreted as referring to the Charter.<sup>20</sup> The Charter includes many rights similar to those set out in the ECHR, but its scope is wider and includes additional specific rights, such as rights relating to children, social security, and data protection. It operates according to the EU law principle of ‘direct effect’, meaning that legislation of Member States (within spheres of EU

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<sup>15</sup> Foreign, Commonwealth & Development office, 'Protocol on Ireland/Northern Ireland' (*UK Parliament*, 24 January 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf)> accessed 2 November 2022

<sup>16</sup> Human Rights Act 1998

<sup>17</sup> The EU-UK Withdrawal Agreement

<sup>18</sup> Prime Minister's Office, 10 Downing Street, 'Prime Minister pledges Brexit Freedoms Bill to cut EU red tape' (*UK Government*, 31 January 2022) <<https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape>> accessed 2 November 2022

<sup>19</sup> EU Charter of Fundamental Rights

<sup>20</sup> Sylvia de Mars, Aoife O’Donoghue, Colin Murray, Ben Warwick, Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement: A ‘Constitutional Conundrums: Northern Ireland, the EU and Human Rights’ Project Report, available at: <http://niconstitution.org/> accessed 2 November 2022

competence) that is incompatible with the Charter is necessarily unlawful as a matter of EU law and must be removed or disapplied.

Therefore, we are concerned that the provisions of Article 2 of the Protocol will be undermined by removing the jurisdiction of the CJEU in the UK to oversee the implementation of the Protocol. We see it as essential to the protection of human rights in NI that the jurisdiction of the CJEU remains to oversee the implementation of the Protocol, especially Article 2, at a time when the UK government has expressed an intention to reduce or remove human rights protections – and even suggested the possibility of withdrawing from the ECHR.<sup>21</sup>

In addition to protecting civil rights and religious liberties stemming from the B/GFA, the Protocol ensures that there will be no diminishment of equality and non-discrimination provisions derived from EU law. These provisions can be found in Annex 1 of the Protocol, which references six specific EU provisions on equal treatment that the Protocol commits to protect from diminishment post-Brexit:

- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;
- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;
- Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity; and
- Directive 79/7/EEC of on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

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<sup>21</sup> Paul Brand, 'Rwanda deportation flight thrown into doubt after last-ditch ECHR intervention' (*ITV*, 14 June 2022) <<https://www.itv.com/news/2022-06-14/immoral-rwanda-flight-set-to-take-off-after-legal-challenge-fails>> accessed 2 November 2022

The Protocol Explainer further mentions three EU Directives which have been incorporated into UK domestic legislation as EU retained law under the Withdrawal Agreement and which are relevant to the safeguarding of equality and non-discrimination.<sup>22</sup> These Directives can be added to those in Annex 1:

- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime;
- Directive 2010/18/EU implementing the revised Framework Agreement on parental leave; and
- Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

The rights, safeguards and equality provisions of Article 2 are addressed to the United Kingdom, which accepts the obligations in Article 2 as part of the package of rights, obligations, and duties that arise under the Withdrawal Agreement as a whole. Article 2 is not less important legally than any other provision of the Withdrawal Agreement and places the United Kingdom under a legally binding obligation in international law; it is not a mere statement of good intentions, or a political declaration. As indicated above, the rule of law would also be undermined by the failure of the UK government to adhere to its obligations under international law if it unilaterally attempted to remove the jurisdiction of the CJEU as a result of enacting the Bill.

### **The way forward**

#### **(14) What, in your view, is the best way forward to resolve the current impasse?**

The best way forward for human rights in NI is the preservation of the existing terms of the Protocol with the Protocol Bill withdrawn or, alternatively, a negotiated settlement with the EU. Under no circumstances should Article 2 of the Protocol be unilaterally amended or undermined by the UK government, including in relation to the jurisdiction of the CJEU.

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<sup>22</sup> UK Government, 'Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland' (UK Government, August 2022) <<https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2>> accessed 2 November 2022