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HUMAN RIGHTS IN NEGOTIATING PEACE AGREEMENTS: THE GOOD FRIDAY AGREEMENT

Fionnuala Ní Aoláin

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1. The Good Friday/Belfast Agreement (GFA) is a negotiated settlement between the multiple political actors to the conflict in Northern Ireland.¹ It is marked by the centrality of human rights norms to its substantive content, across multiple political and legal spheres. The deep embedding of human rights provisions in the Agreement should not surprise observers. This is because there has been general agreement that a defining and causal feature of the Northern Ireland conflict was the exclusion, disenfranchisement, and discrimination that accompanied the creation of Northern Ireland as a quasi-autonomous political entity in 1922.² The Agreement is a testament to a pattern of post Cold War conflict resolution through political settlement in which human rights norms and institutions figure in agreements to end protracted violence.³ It also illustrates the broader point that human rights protection is integral, rather than a hindrance to resolving conflict and engendering a sustainable peace.
2. This report explores the embedding of negotiated human rights provisions in the post conflict environment in Northern Ireland. It posits that human rights protections were not simply parachuted into the Agreement, but have consistently been offered as a partial means to unlock the conflict pattern itself. This is manifested through earlier political agreements upon which the GFA builds, notably the Sunningdale and Anglo-Irish Agreements.⁴ The limited expression of rights protections in these earlier political initiatives partly explains their failure. Moreover, consistent recourse by the United Kingdom government to measures of positive legal reform throughout the conflict in Northern Ireland is evidence of the state's acceptance of the link between human rights protection and conflict resolution. But the patchwork application of human rights norms in Northern Ireland has to be seen against a backdrop of continued state

¹ Agreement Reached in the Multi-Party Negotiations, April 10 1998. Both these terms are used to describe the Agreement reached between the political parties and endorsed by the Irish and British governments. I use the term GFA to describe the Agreement throughout the remainder of the text.

² See, Michael Farrell, *The Orange State* (London: Pluto Press, 2nd ed., 1980); Kevin Boyle, Tom Hadden & Paddy Hillyard, *Law and State: The Case of Northern Ireland* (London: Martin Robertson, 1975);

³ See generally, Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000).

⁴ See, Tom Hadden & Kevin Boyle, *The Anglo-Irish Agreement: Commentary, Text and Official Review* (1989).

violations of human rights. Thus, the uneasy relationship between the state's management of the conflict, its role as an actor in the conflict, and its attempts to "solve" the conflict through legal and political means, makes analyzing the relationship between human rights protections and conflict resolution a complex proposition. Part of that complexity emanates from the fact that the state is both complicit in human rights violations, and responsible for creating the means to facilitate accountability for violations.

3. I begin by examining the centrality of human rights protections to the Agreement and assess the significance of their inclusion in a negotiated end to internal conflict. I then engage in substantive analysis of the relationship between the Agreement's provisions for human rights protections and their translation into functional institutions and meaningful legal form in the post-Agreement period. Section I addresses the manner in which human rights norms were gradually brought into the center of the political process in Northern Ireland. Section II outlines the Agreement's provisions related to human rights. Section III addresses the difficulties in ensuring full enforcement of the post-Agreement phase, and the diminution of rights protections in the translation of the Agreement's principles into law. In other writings I have described this problem as one of 'under-enforcement'.⁵ There are many reasons for this under-enforcement, including the regrouping of political opposition to key reform elements of the political settlement, and the resistance to reform on the ground. Understanding this gap helps explain why human rights enforcement remains such contested territory in the post conflict context.

MAINSTREAMING HUMAN RIGHTS IN NORTHERN IRELAND

4. As Mageean and O'Brien have noted, the inclusion of human rights protection in the Good Friday Agreement tells a wider story about the movement of human rights from the margins to the mainstream in Northern Ireland.⁶ Human rights concerns historically had been articulated by nationalist political parties, and associated in recent times with the Irish government's views about the conflict. This reflected in large part the empirical reality that – as in many other parts of the world - human rights violations by the state were largely experienced by minority communities.⁷ Consequently, there was a clear political tendency on the part of some to conflate human rights advocacy with partisan political views. This in turn allowed human rights arguments to be denigrated as merely political rhetoric in a different guise and obliged human

⁵ See, Ní Aoláin & Beirne, *Rights After the Revolution: Progress or Backslide After the Good Friday Agreement* in Babbitt & Lutz (eds.) *Human Rights and Conflict Resolution in Context: Case Studies from Columbia, Sierra Leone and Northern Ireland* (forthcoming 2005)

⁶ See, Paul Mageean & Martin O' Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement* 22 *Fordham International Law Journal* 1499-1538 (1999). The appearance of social reform legislation with a strong human rights hue in the jurisdiction post 1972 offered partial state validation for these norms. In key areas such as voting, employment, housing, and equality, legislative enactments sought to eradicate the systematic elements of discrimination and exclusion which had defined the previous political regime. However, by and large the affirmation of human rights discourse on its own terms over the years was the product of hard work by the non-governmental sector, intersected with bilateral interventions such as the McBride Principles and with the establishment and legitimization of international and regional human rights courts and other oversight mechanisms. The McBride Principles were particularly significant. They were launched by the Irish National Caucus in 1984. The McBride Principles are a series of ethical investment principles which campaigners drew up to assist US companies to ensure that their employment policies in Northern Ireland would undermine rather than exacerbate the legacy of discrimination in the jurisdiction. They were modelled along the line of the earlier Sullivan Principles which applied to US investment in apartheid South Africa. Found in Robert J. Cormack & Robert D. Osborne, *Disadvantage and Discrimination in Northern Ireland* in *Discrimination in Public Policy in Northern Ireland* (Cormack & Osborne eds., 1991) at 15; See also US State Department Reports on Northern Ireland

⁷ See generally, Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press; 2000); Dermot Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (Cobden Trust; 1983).

rights advocates, non-governmental agencies and academics concerned with human rights issues to work doubly hard. Human rights proponents had to legitimize the independence of human rights norms by affirming their universality; but they also had to apply these universal norms to the local situation without becoming, or being seen to be, politically partisan.

5. It also is worth noting that previous attempts at a comprehensive political settlement tangled with the margins of human rights protections, both as a means to inculcate trust with the minority community and to assure the watching international world that any settlement was consistent with democratic and equality norms. For example, the Sunningdale Agreement of 1973 featured explicit reference to equality and non-discrimination norms.⁸ But, generally all the previous attempts at a negotiated settlement emphasized narrow political mechanisms to achieve the conflict's end. By contrast, the GFA offers a far more complex and indeterminate solution to the problems of Northern Ireland. It combines inclusive negotiation processes, constitutional solutions, consociational political arrangements, and far-reaching institutional and legislative reform. These are embedded around a selection of international formulae to deal with the sensitive areas of self-determination, territorial integrity, disarmament, and amnesty provisions. In these sensitive political arenas principles of public international law lay behind the formulae adopted as well as awareness of practical solutions with international resonance to help solve entrenched political differences. With respect to democratic policing and political power-sharing, the parties incorporated models from other conflict transition situations. Significantly, human rights values frame all parts of the Agreement. They are constantly referenced the governments and participants as being central to the entire agreement. They also provide the framework against which the negotiation process itself can be measured – for example the extent to which the process should be inclusive and respectful of all parties and participants. Arguably, it is the centrality of human rights in the Agreement that distinguishes this political negotiation from previous attempts to end the conflict. As Mary Robinson noted in a keynote address concerning the peace process in Northern Ireland:

... the experiences of decades, and indeed generations of conflict, the experience of poverty and discrimination, and the experience of division and marginalisation, have taken their toll. Yet, just as the Universal Declaration of Human Rights emerged from the horrors of World War II, I believe that the peace agreement negotiated in April 1998 bears within it the seeds of something very important in terms of human rights and equality protection.⁹

6. Moreover, a paradigm shift has occurred. Human rights protections have moved from the traditional 'zero sum game' of determining who are the 'winners' and 'losers'. Instead, placing human rights at the heart of a political process ensures that everyone is treated equally and fairly, and everyone benefits. Moreover, human rights can no longer be seen, or be portrayed, as being the exclusive domain of the minority nationalist Catholic political parties. Instead, the formulae they offer function as a conduit for the larger unionist Protestant community to ensure that, even if their majority status were to change in future constitutional arrangements, their long term political and cultural identities are protected through institutional and legal means. As Bell notes:

Thus.... in Northern Ireland human rights came to form a centrepiece of the deal, because, as the deal began to take shape, opposing parties came to see that individual right protections could address mutual concerns of domination.¹⁰

7. This provides an important lesson in seeing how human rights language can defuse political disputes by providing a means to externalise, validate and process them. As I will explore further below, it should not be assumed that this process is entirely failsafe, and that all political parties

⁸ See, Northern Ireland Constitution Act 1973, Part III Prevention of Religious and Political Discrimination section 17.

⁹ See, Mary Robinson, *Making Rights Relationships an Everyday Practice* (Public Lecture, Belfast 2002) at p9.

¹⁰ Bell *supra* note 3, at 193.

will feel equally at home in the terrain of human rights. Moreover, as section III explores below, in the post Agreement moment there is often retrenchment by opposing political groupings, which can operate to undermine the non-partisan role that human rights language may have played during the course of the political negotiations themselves. This facet is underlined by recent election results from local elections to the Assembly created by the Good Friday Agreement in which political parties opposed to the peace process have gained considerable support in the majority Protestant community.

HUMAN RIGHTS ASPECTS OF THE GOOD FRIDAY AGREEMENT

8. The GFA is notable for the pervasive entrenchment of human rights values throughout the document as well as explicit provision for human rights protections in its three strands. The ambit of human rights protections is generous, and reflects the indivisibility and equality of civil, cultural, economic, political and social rights.¹¹ The Declaration of Support, which opens the document states that

... we [participants in the multi-party negotiations] firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of **the human rights of all**.¹²

9. Notably, human rights protection for all is an integral component of the participants' commitment. The recognition of the multiple kinds of rights, in multiple spheres affirms that such a multiplicity is necessary to address the variety of rights issues that arose during the conflict and remain part of the transitional landscape. There is also no distinction concerning the subjects of rights entitlement: all spheres of rights protection belong equally to all those living in Northern Ireland.
10. The commitment in the Agreement to the centrality of human rights is apparent throughout the text and the institutions the Agreement establishes: this is no simple rhetorical device. It is worth exploring this issue in some detail to see how the Agreement institutionalises and validates the mainstreaming of human rights. Strand I of the document outlines the principles and practice that apply to the internal governance of Northern Ireland. Here in the section entitled Constitutional Issues paragraph 1(v) the parties, in settling upon the nature of governance in the jurisdiction, make explicit reference to the centrality of rights to this enterprise:

... 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 ... and shall be founded on the principles of full respect and equality of civil, political, social and cultural rights ...¹³

11. From a rights perspective is it significant that the principles both of self-determination and consent are embedded into a framework of rights protection. Following this, through in the provisions establishing democratic institutions in Northern Ireland, the local political Assembly is given the power to appoint a special committee to report on whether legislative measures are in conformity with equality requirements, including the European Convention on Human Rights or any future Northern Ireland Bill of Rights.¹⁴ This section is significant insofar as it envisages a mechanism for rights enforcement and protection which is not based on judicial intervention. The language is broad enough to give the Assembly committee both responsibility and an

¹¹ United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, reprinted in 32 ILM 1661 (1993), 14 HRLJ 352 (1993).

¹² The GFA, Declaration of Support, Section 1 (my emphasis).

¹³ The GFA Strand I, Constitutional Issues, Paragraph 1(v).

¹⁴ The GFA, Strand 1, Democratic Institutions in Northern Ireland, Paragraph 11.

oversight function not only in relation to specific equality matters, but as regards the effective enforcement of the rights contained in the European Convention or a future Bill of Rights.

12. Moreover, legislative enactments in Northern Ireland are subject to compatibility with the European Convention and/or a locally agreed upon Bill of Rights.¹⁵ Breach of these external standards would render the legislation null and void. This is a critical power in respect of the enforcement of human rights. The power goes further than the declaration of incompatibility found in the Human Rights Act (1998). It directly parallels the power of the United States courts to strike down statutes that are in breach of the US Constitution. It envisages that once the courts have found local primary legislation to be in breach of either the Convention/Human Rights Act and /or the Bill of Rights such legislation is automatically null and void. This means that a finding of breach requires the Assembly to start the legislative process again, and that it would not be in the legislature's interest to create legislation which fails to protect rights adequately. Thus, we find consistent evidence of the significance attached to micro aspects of rights enforcement during the multi-party negotiations, and the embedding of these measures in the Agreement itself.
13. Other aspects of the domestic legislative process illustrate how much significance was accorded to rights protections. For example, individuals elected to serve in the local political Executive body as Ministers are required to take a pledge of office stating that they will "serve all the people of Northern Ireland equally ... with the general obligation on government to promote equality and prevent discrimination."¹⁶ Notably, "equality and non-discrimination" are not simply disembodied phrases; rather they are rooted in a concrete apparatus of rights throughout the Agreement itself. Moreover, the code of conduct which Ministers must comply with refers to key principles such as impartiality, integrity, objectivity, accountability, transparency, and the importance of working to promote good community relations and equality of treatment for all.
14. Nor is the role of the Westminster Parliament overlooked in the realm of upholding rights. The Agreement states clearly that Westminster retains a duty "to legislate as necessary to ensure the United Kingdom's international obligations are met with respect to Northern Ireland."¹⁷ This means that the Northern Ireland legislature or executive is not authorised to undermine the commitments made by the UK government to various international human rights treaty bodies to uphold human rights.
15. Moving to Strand II of the Agreement, which regulates the bilateral relationships between Northern Ireland and the Republic of Ireland, a number of key human rights elements are articulated. In setting up a North-South Ministerial Council, the Agreement envisages that this body will facilitate human rights concerns by establishing "an independent consultative forum appointed by the two Administrations, representative of civil society with expertise in social, cultural, economic and other issues."¹⁸ In this context, it is worth reflecting on the especial emphasis placed on social and economic considerations in both the internal human rights protection context in Northern Ireland, and more broadly on the island as a whole.¹⁹

¹⁵ The GFA, Strand 1, Democratic Institutions in Northern Ireland Paragraph 26 (a).

¹⁶ The GFA, Democratic Institutions in Northern Ireland, Annex 1, Pledge of Office.

¹⁷ The GFA, Democratic Institutions in Northern Ireland, Strand 1, Paragraph 33(b).

¹⁸ The GFA, Areas for North/South Ministerial Co-operation, Strand II, Paragraph 19.

¹⁹ Note also the Annex to the North-South Ministerial Council, sections 2, (Education) 3, (Transport), 4, (Environment) 6 (Social Security/Social Welfare), 11 (Health) and 12 (Rural and Urban Development). I note that these areas specifically listed for North/South co-operation and implementation have a strong socio-economic rights enforcement dimension.. The emphasis on consultation, inter-agency (inter-state) responsibility, facilitating broader decision making in the economic and social sphere reflects many of the priorities advanced by a broadly constructed view of social and economic rights enforcement. See, *Report of the Working Party on Social and Economic Rights*, in Northern Ireland Human Rights Commission Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission (Belfast: NIHRC 2001).

16. Under Strand III, which addresses the East-West dimension to the Agreement, an institution called the British-Irish Council (BIC) is to be established. The Council is to “exchange information, discuss, consult and use best endeavours to reach agreement and co-operation on matters of mutual interest within the competence of the relevant administrations.” Potential issues for early discussion in the BIC include transport links, agriculture issues, environmental issues, cultural issues, health and education issues, and approaches to European Union issues.²⁰ Several of these matters relate to the effective realisation of economic and social rights. They arise in an institutional context of best practice through communication and broadened political process.
17. The most explicit and detailed human rights measures are found in subsequent chapter-heads of the Agreement. The most important provision for rights protection is made under the Rights, Safeguards and Equality of Opportunity section of Strand III. In paragraph 1, the parties confirmed their commitment to “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.” In this section the parties make human rights protection in the context of communal conflict a high priority. The British government committed to completing incorporation of the European Convention on Human Rights into Northern Ireland law, and the Irish government agreed that “the question of the incorporation of the ECHR will be further examined.”²¹
18. This section also creates a human rights institution for Northern Ireland with primary responsibility for overseeing the enforcement of human rights norms. Previously, Northern Ireland had a Standing Advisory Commission on Human Rights (established as early as 1973 as part of the NI Constitution Act), but its role was solely advisory and was thought to be insufficient for an era of even greater commitment to the centrality of human rights. The parties agreed that a new institution should have ‘an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission’.²² In this regard, Northern Ireland was following a trend found in many other places around the world. There has been a spiral in the creation of national human rights institutions, a number in post-conflict situations, and a corresponding attempt to regulate and set standards for such bodies.²³ While assessment of the success of the Northern Ireland Human Rights Commission (NIHRC) is beyond the scope of this report,²⁴ the willingness of the negotiating parties to create a ‘super’ enforcer for human rights attests to the importance they attached to the meaningful realisation of human rights protection.
19. The British government also committed itself, subject to public consultation, to create a new statutory Equality Commission which would *inter alia* oversee the introduction of a new statutory duty imposed on all public bodies 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.”

²⁰ The GFA, British/Irish Council, Strand III, paragraph 5.

²¹ The Irish Government introduced a bill to incorporate the European Convention on Human Rights into Irish law. Multiple concerns have been expressed about the mode of incorporation as well as the lack of public consultation. See, Submission of the Human Rights Commission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights on the European Convention on Human Rights Bill, 2001. <http://homepage.tinet.ie/~ihrc/documents.htm>

²² The GFA, Rights, Safeguards and Equality of Opportunity, Strand III, Paragraph 5.

²³ See Paris Principles found in Annex to GA RES 48/134 of December 20, 1993. See generally, Linda C. Reif *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection* 13 Harvard Human Rights Journal (2000).

²⁴ Stephen Livingstone & Rachael Murray, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* (2005).

20. A particularly important duty imposed on the new NIHRC was the invitation to consult and advise on a Bill of Rights for Northern Ireland.²⁵ Paragraph 4 mandates the Human Rights Commission to “[draw] as appropriate on international instruments and experience.”²⁶ The Irish government simultaneously committed to a series of important human right measures: the creation of an Irish Human Rights Commission, ratification of the Framework Convention on National Minorities, and the introduction of other equality legislation, specifically in the areas of employment equality and equal status. The Agreement also provides for much greater harmonisation of efforts in the two jurisdictions. The Irish government committed itself to bring forward measures which “would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.”²⁷ Both parties agreed that the two human rights commissions would create a joint committee that *inter alia* would be tasked with the “possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of fundamental rights of everyone living on the island of Ireland.”²⁸
21. In the subsequent section, reference is made to “rights, safeguards and equality of opportunity” in the realm of economic, social, and cultural issues. Explicit reference is made to the importance of social inclusion, community development, the advancement of women in public life, tackling the problems of division, strengthening anti-discrimination measures, more effective targeting of poverty, and the need to progressively reduce the unemployment differential between the two communities. Notably, as regards women’s rights there are a number of diverse references throughout the document, though a significant issue is the extent to which the inclusion of these commitments was reflective of a commitment to genuine gender mainstreaming or rather was seen as a means to unlock a historical sectarian division. The value of linguistic diversity, integrated education, and of creating new institutions in such a way as “to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division,” were all emphasised. Subsequent chapters dealt with decommissioning, security (and the ending of emergency powers in Northern Ireland), policing and justice, and prisoners, all issues of direct relevance to creating a future more respectful of rights.
22. It is worth noting that arrangements regarding the release of paramilitary prisoners were a key aspect of the Agreement. Though not formally described as an Amnesty, in practice they operated in this way, in that prisoners who had been convicted of scheduled offences (offences pursuant to the Anti-Terrorist and Emergency legislation) were released subject to a review process outside the normal realms of sentence review.
23. Finally in the Annex entitled “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland,” which sets out the nature of the relationship between the two guarantor states to the Agreement, human rights values are lauded and promoted.²⁹

Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions.

²⁵ The GFA, Rights, Safeguards, and Equality of Opportunity, Strand III, Paragraph 4.

²⁶ Notably, the Irish government did not escape the consequences of this rights activism. *See* The GFA, Rights, Safeguards and Equality of Opportunity, Strand III, Comparable Steps by the Irish Government. Paragraph 9 requires the Irish government to bring forward ‘measures ... which would ensure at least equivalent protection of human rights as will pertain in Northern Ireland’.

²⁷ The GFA, Rights, Safeguards, and Equality of Opportunity, Strand III, Paragraph 9.

²⁸ The GFA, Rights, Safeguards, and Equality of Opportunity, Strand III, Paragraph 10.

²⁹ The GFA, Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Preamble.

24. Both states affirm that the

... the power of the sovereign government ... shall be founded on the principles of **full respect for, and equality of, civil, political, social and cultural rights** and freedom from discrimination for all citizens ...³⁰

25. Both of these sections emphasise the indivisibility and interdependency of rights. They allow the obvious conclusion to be drawn that equal value must be given to all streams of rights protection, whether civil, political, social, or economic, as an integral aspect of achieving a resolution to conflict.

26. In sum, the Agreement sought to embed human rights protections firmly in all the new institutions, laws, and systems flowing from the peace accord. What is less clear, and what is becoming an increasing focus for public debate, is the extent to which the Agreement faltered in an important part of its mission by failing to seriously tackle the question of past human rights abuses. In an opening preamble, the parties noted:

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance and mutual trust, and to the protection and vindication of the human rights of all.³¹

27. There has been an increasingly active public debate in Northern Ireland concerning the need to address the experience of the conflict and human rights violations that took part during its course.³² This report does not revisit that ground, but notes that dealing with the human rights dimensions of a conflict invariably requires engagement with the past, no matter how uncomfortable that process. Whether included it in the substance of the Agreement or not, the post-conflict experience firmly demonstrates that it will come to the surface whether desired by the body politic or not. This is perhaps one of the most significant challenges lying ahead in the transitional context for Northern Ireland.

ENFORCEMENT AND UNDER-ENFORCEMENT

28. In addition to the quandaries posed by dealing with the past, another pressing challenge is posed by an assessment of the extent to which the Agreement's promise has been translated into practical effect. While there has been much progress since the GFA, it is clear that there has also been much backsliding. It can be argued that the backsliding is in no small part due to the lack of an agreed understanding at the time of the Agreement about the nature and extent of the problems to be addressed. The agenda for change was agreed, but the reason for that agenda was not always understood or shared. Accordingly, it is at the implementation stage that serious divergences of understanding and commitment come to the fore.

29. I use the concept of "under-enforcement" to articulate some aspects of the implementation problems experienced in transitional societies generally, and here in reference to Northern

³⁰ The GFA, Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Paragraph 1(v) (emphasis added).

³¹ The GFA, Declaration of Support, Paragraph 2.

³² See e.g. Christine Bell, Dealing with the Past in Northern Ireland 26 *Fordham International Law Journal* 1095-1147 (2003); Sir Kenneth Bloomfield, Report of the Northern Ireland Victims Commissioner (1998); Healing Through Remembering, *The Report of the Healing Through Remembering Project* (Belfast: Healing through Remembering Project 2002); Mike Morrissey & Marie Smyth, Northern Ireland After the Good Friday Agreement: Victims, Grievance and Blame (2002); Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition (1998) (Brandon Hamber ed.); Healing Through Remembering (2002).

Ireland. The term contains an expression of the idea that while certain principles and norms are broadly accepted as forming the basis of legal action and state responsibility, in practice their full effects or promise may not be translated into legal obligations and structures. I identify this as a particular feature of the post-conflict implementation processes. Resultantly, there exists an identifiable gap between principle and practice. From the state perspective there has been no formal negation of the values or principles in question. The state therefore is in a position to claim that legal implementation has followed the dictates of agreed principles, while in reality state practice may fall far short. This is not just an academic matter, because the principles themselves (particularly the human rights norms) are invested with both internal and external political significance, and that significance is often a key feature of the acceptability of the peace deal.

30. Another feature of under-enforcement is the extent to which the human rights principles as articulated in a political settlement facilitate a broader appropriation of human rights language in the transitional environment. While human rights activists generally welcome the broadened use of human rights norms in the GFA, there is increased recognition of the extent to which the language can be used to undermine fundamental human rights provisions in a manner which is subversive to overall goals of equality and protection in a post-conflict society.
31. Like many other transitional societies, the negotiated compromise that brought an end to the violent conflict in Northern Ireland did not contain a detailed blueprint for all aspects of institutional and legal reform. Many key issues were set out somewhat vaguely in the Agreement, and the interpretation and enforcement of specifics was left to Commissions of Inquiry, governmental officials, and newly established institutions.³³ This method of enforcement is not unusual but it creates a number of potential obstacles to full realisation of human rights protections in the post-negotiation context. It also can result in the backsliding of key reforms as institutions, elites, and political parties seize the opportunity to effectively re-negotiate critical aspects of the peace agreement in the post-conflict context.
32. This pattern has particular consequences for the integrity of the peace deal in Northern Ireland, but it also contains a strong warning to other post-conflict societies. A defining feature of many political settlements is that sensitive issues are “kicked to touch.” Thus, they make brief cameo general appearances in the settlement document, leaving the detail and hard choices left for the post-settlement. In Northern Ireland, these issues included policing, criminal justice reform, the reform of the judicial branch, dealing with human rights violations experienced during the conflict, and the Bill of Rights.
33. It is beyond the scope of this report to examine in detail the gap between the provisions and/or expectations created by the Good Friday Agreement and their realisation in the aftermath of its signing. Nor can I address all the backsliding tactics that were attempted and on occasion proved successful. Instead, a number of key examples have been selected to illustrate the point.

³³ This is not unusual, nor perhaps particularly surprising. It is arguable that a detailed peace agreement could only have been negotiated if everyone involved had had to develop an exact and shared understanding of every element of it. As Bell and Cavanaugh note the ‘constructive ambiguity’ of the Agreement was both the means to ensure that the parties could sign up to its provisions, and also provided the post-Agreement obstacle to enforcement in key areas. See Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-determination? Self-determination, Group Accommodation and the Belfast Agreement*, 22 Fordham International Law Journal 1345 (1999).

Policing

34. Policing in Northern Ireland has always been highly politically contentious, and it was considered a success that the political negotiators were able to develop a series of principles for future policing, and to agree upon the establishment of a mechanism by which these principles could be turned into a blueprint for action. The enormity and importance of policing change required rendered it impossible for the negotiators to go much further than this; indeed, it is arguable that had they tried to enter into more specific negotiations on this topic, the likelihood of securing any final Agreement would have been gravely compromised. Many other peace accords have run aground on such territory.
35. The Good Friday Agreement mandated a Commission to examine the contentious issue of policing, and laid down fairly explicit terms of reference for the Commission's work. The resulting report was hailed as a blueprint for policing reform, both in Northern Ireland and elsewhere.³⁴ Despite a very deliberate effort on the part of the Commission to depoliticise the debate around policing, and to focus on the needs of a professional police service going into the 21st century, its publication was locally received in partisan fashion by political parties and by government itself.
36. Major change in policing in Northern Ireland has resulted from the work carried out by Chris Patten and his fellow Commission members, but this seemed at times to be despite the efforts of the government, rather than because of them. Legislation was introduced to create important new policing arrangements: a reformed and re-named police service (the Police Service of Northern Ireland - PSNI), the creation of a completely independent police complaints system, and the establishment of a much more credible and powerful civic oversight body were all important gains.³⁵ However, a great deal of drafting, lobbying and public pressure on government in the course of the parliamentary process was needed to ensure that its draft legislation was in line with the various Patten Commission recommendations. Informed commentators still argue that important recommendations from the Patten Commission did not succeed in being translated into law, and the gap between policing legislation and the Patten Report resulted in an ongoing and unresolved debate about the extent to which meaningful reform of policing has in fact been carried through in the post-conflict environment.
37. The Royal Ulster Constabulary was involved in a major internal review of policing in advance of the creation of the Patten Commission.³⁶ The *Fundamental Review of Policing in Northern Ireland* initiative was focused on management, professionalism, and enhanced delivery of services.³⁷ All these are good things in their own right, but they would certainly have been considered insufficient by critics of past policing. Moreover, as O'Rawe notes, this kind of change may even obscure engagement with the reality of policing in a conflicted jurisdiction during a violent internal conflict. While the government's commitment to the modernisation and professionalisation of policing was evident in the course of the negotiations around new policing legislation, it appeared much less determined to secure fundamental institutional change of the type recommended by the Patten Commission.

³⁴ The Report of the Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (1999), frequently named after its chair, Chris Patten, former Governor of Hong Kong and currently EC Commissioner in Charge of External Relations.

³⁵ See, Police (Northern Ireland) Act 1998 Part VII and Schedule 3; and Police (Northern Ireland) Act 2000.

³⁶ See generally, Mary O'Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can't and Won't of the Change Dialectic* 26 *Fordham International Law Journal* 1015- 1073 (2003).

³⁷ This internal RUC review was completed in 1995-96.

38. An example of this was to be found in government's treatment of the "lustration" issue.³⁸ Patten refused to engage in any form of whole-scale investigation into past human rights abuses, but sought to address the issue indirectly by proposing that all officers – serving and new – take an oath to uphold human rights. The government determined that acceptance of this recommendation might imply, albeit only indirectly, that human rights abuses had previously taken place, and rejected this recommendation. Only new recruits are required to take such an oath. In this single move, the government highlighted that it was pursuing a totally different understanding of the change process than others had expected it to adopt, and that seemed to depart from its earlier commitments of principle.
39. Policing reform in Northern Ireland presents the clearest example of under – enforcement in practice, because there is an identifiable gap between the GFA blueprint principles, their interpretation by the Patten Commission, and the legislation proposed by government to implement both. Notably, the government insisted throughout its various legislative performances on policing that it was upholding the human rights norms considered essential to policing reform. Equally, constituencies considered traditionally hostile to policing reform, and the police themselves, vigorously asserted that the changes undertaken constituted the fullest consideration of human rights.

Criminal Justice

40. Criminal Justice reform was an arena for change clearly marked out by the Agreement.³⁹ However the state moved exceedingly slowly to implement review of the Criminal Justice system following the Agreement, and when it did so there were concerns that the process fell short of expectations, specifically with regard to the extent to which independent expertise, beyond those with a vested interest in the status quo, was drawn upon. Whereas for policing, an international independent body was created to develop a programme of change, no independent body was created to develop a programme of change, no similar approach was taken for the taken for the Criminal Justice Review established by the GFA which reported in March 2000. There have been criticisms that the Review which emphasised reform rather than transformation, did not go far enough. Moreover, it is not evident that the full panoply of human rights principles applicable to criminal justice as articulated in the GFA are reflected in the Review's recommendations. The government responded to the Review by publishing an Implementation Plan and the Justice (NI) Bill. There was evident dilution of the Review's proposals in both documents, particularly in the context of prosecutorial reform. Moreover, the Review failed entirely to deal with the issue of entrenched emergency powers. The Review itself recognised the limitations of this approach, which partly were dictated by its terms of reference, by stating, "... efforts to develop proposals for a fair, rights-based, and effective criminal justice system which inspired the confidence of the community as a whole could not be divorced from the outcome of those separate reviews."⁴⁰ .
41. The legislation which was proposed to implement the government's views has been the subject of heated debate from both political parties and the non-governmental sector. Matters have been pushed along by the recent publication of a revised plan by the government for the implementation of criminal justice reforms, in addition to the appointment of Lord Clyde as a

³⁸ There has been no selectivity in personnel carry-through from the Royal Ulster Constabulary (RUC) (though severance packages were offered across the board). The formulation adopted in s.1(1) of the Police (Northern Ireland) Act 2000 was that 'The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary).' S.1(2) provides that the 'body of constables referred to in subsection (1) shall be styled for operational purposes the 'Police Service of Northern Ireland'. The effect of this was to effect a complete carry through of personnel from the RUC to the PSNI

³⁹ See GFA, Policing and Justice, Strand III, Paragraph 9 and Annex B (Review of the Criminal Justice System).

⁴⁰ Review of the Criminal Justice System in Northern Ireland, para 1.22, 2000) (The Stationery Office, Belfast)

Justice Oversight Commissioner to provide independent scrutiny of the implementation process.⁴¹ His office has been hampered by the state's failure to place it on a statutory basis, and had initially operated without a fixed office or staff. The *ad hoc* nature of his appointment expresses the state's fundamental disquiet with over-activism in the criminal justice field. This also is apparent in the Report of the Diplock Review, published in December 2000, and the government's response to it. That Review was established in December 1999 by the Home Secretary, apparently in response to the commitments in the GFA to move towards normal security arrangements in Northern Ireland. The first conclusion of the Review group amply demonstrates an unwillingness to undertake substantial institutional reform.

...We are not persuaded that a return to jury trial at this stage would provide for the fair and effective administration of justice, that the safety of jurors could be guaranteed or that the community as a whole would have the necessary confidence in the system.⁴²

42. The Criminal Justice and Diplock Reviews demonstrate how the process of institutional reform can encounter deeply entrenched resistance to change from key institutions and actors. They clearly manifest the under-enforcement' gap which we have identified in the post-Agreement institutional reform process. Governmental resistance, as evidenced by the Criminal Justice legislation,⁴³ confirms that change to the Criminal Justice process in the local environs of Northern Ireland, remains politically contested and a source of long-term concern in the post-conflict environment.

Human Rights Institutions

43. A third arena of under-enforcement relates to the work of the Northern Ireland Human Rights Commission. As noted earlier, this Commission was established in the peace negotiations with the intention of having 'an extended and enhanced' role in comparison to its predecessor. Despite this, the government refused in the legislation pursuant to the Agreement to grant the Commission the powers and duties that are established for all national human rights institutions by the United Nations. It remained largely silent (and on occasion complicit) when the composition of the Commission became a matter of extensive and systematic public criticism in its first weeks and months of operation, weakening a key institution of the Agreement from the outset. The government failed for a long period of time to provide the Commission sufficient resources, thereby undermining its effectiveness in the early years. But, most importantly, the government disregarded many of the Commission's recommendations, failed to consult it on appropriate matters, and appeared in no way to be influenced by the Commission's watchdog functions. A report by the Commission two years into its operation is little more than a catalogue of failure,⁴⁴ and commentators wondered if the Commission's theoretically much weaker predecessor – the Standing Advisory Commission on Human Rights (SACHR) – had in fact been just as effective as its successor.
44. Many other examples of backsliding could be cited to illustrate the uneasy relationship that can exist between the state's management of the conflict, its role as an actor in the conflict, and its attempts to "solve" the conflict through legal and political means. All of these examples highlight the complexity of peace building in processes of political transition in which the state is

⁴¹ <http://www.nio.gov.uk/press/030618a.htm>

⁴² See, *No Surprise as Diplock Survives* 15 *Just News* (2000) at p2.

⁴³ Justice (Northern Ireland) Act 2002.

⁴⁴ See, Report on Effectiveness: Northern Ireland Human Rights Commission Report to the Secretary of State Required by Section 69 (2) of the Northern Ireland Act, 1998 (2001) <http://www.nihrc.org/>. See also, The Government's Response to the Northern Ireland Human Rights Commission Review of Powers Recommendations (2002) <http://www.nio.gov.uk/issues/rights.htm>

both responsible for or complicit in human rights violations and responsible for creating the means to facilitate accountability for all such violations.

45. These examples spotlight a wider problem experienced in many transitional societies: the under-enforcement of human rights norms in the post conflict environment.⁴⁵ The reasons why human rights norms and structures are particularly vulnerable are complex.⁴⁶ In some cases they may be perceived as less visible and less immediately significant to interested political groups than changes to key constitutional or political arrangements. In other contexts, the detail of legislation may serve to obscure the extent to which principles and norms are in fact being compromised, and allow the government to claim that no such damage is being inflicted. Finally, it has been documented elsewhere that the post-negotiation environment can change perceptions of the neutrality offered by human rights dialogue during the course of political negotiations and serve to reinvigorate partisan views. Other reasons for under-enforcement, include the regrouping of political opposition to key reform elements of the political settlement, and resistance to reform on the ground. Understanding this gap is crucial to pinpointing why human rights enforcement remains such contested territory in the post conflict context. Under-enforcement can manifest itself in many ways. It includes non-implementation, partial implementation, and implementation at odds with broader universal principles affirmed in the Peace Agreement. The reasons for under-enforcement are complex and multiple. Partial or non-implementation of human rights provisions can be correlated with what a state sees as necessary to achieve conflict resolution in the short term. Undoubtedly, some reform issues are difficult and their resolution has high political costs. Moreover, institutional transformation runs into the practical obstacles of governmental and official unwillingness to dismantle and revise key state institutions. Sometimes immediate reform can seem too daunting or too much for a society to bear as it comes to terms with a transforming society. However, I contend that this short-sighted view operates in opposition to the goal of preventing a return to conflict in the long run. This is particularly true of societies where human rights violations have formed the basis for the underlying experience of communal violence in the first place. In those societies, meaningful and sometimes hurtful transformation is a necessary pre-condition to a stable and long-lasting peace.
46. In conflicted societies, institutional reform is a complex matter, but the legitimacy of social and legal institutions in the post-conflict environment is of vital importance to societal transformation. That is why a lack of commitment to enforcement matters, and why close scrutiny is required to monitor, minimise, and amend such gaps.

⁴⁵ See, Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms* 91 Harvard Law Review 1212 (1978).

⁴⁶ See, Christine Bell & Johanna Keenan, *Human Rights Non-Governmental Organisations and the Problems of Transition* Human Rights Quarterly (forthcoming).