ADDITIONAL INFORMATION TO THE COMMENTS AND QUESTIONS TO CERD UK RAPPORTEUR

1. My oral statement regarding the future reporting information is **"We urge the Committee as the matters of urgency to ask the 4 nations of the UK government in the future report to provide information on all areas of devolved policy and good practice within their jurisdiction in order to compile with the Reporting mechanism of the Convention."**

   WE are not asked for the UK Government to produce a 4 country report. In order to the realization of rights under the Convention, our government should provide comparable data across the 4 nations of United Kingdom in all the key policy areas such as education, housing, employment, health care services, benefits, criminal justice and immigration, etc. The issue at stake is the ethnic monitoring data collection which is not available on majority of the policy area as well as collected data without disaggregated, particularly the White category under the ethnic monitoring, in which could not benchmark the progress of the Convention implementation within United Kingdom.

   We suggest that the UK Government should start a scoping exercise within 12 months of the Conclusion Observation: Firstly, identify what are the current key policy areas across the 4 nations of United Kingdom in addressing racial inequality? Secondly, do we have any data collection on all these key policy areas? If we have which types of data collection? Could these data assist to benchmark the outcomes and impacts of the policy? Any ethnic monitoring data in all these key policy areas? Thirdly, are any current key policy areas targeting and enhancing racial equality? If yes, what are these policy areas? Fourthly, what types of data collection is available for the purpose of enhance racial equality within the ambit of the Convention, including special measures under Article 1 (see Positive Action Provision under Section 158 and 159 of the Equality Act 2010).

2. Legislative jurisdiction within United Kingdom
   Currently Northern Ireland Assembly is the only devolved administration has power to make law on equality area. The issue is whether the current state of law under the Race Relations (NI) Order 1997 and subsequent amendment is compatible to the definition of racial discrimination under Article 1 of the Convention. If our devolved government is in breach, what action the UK Government could be taken in relations to the breach of the international obligations.

   The Northern Ireland Act 1998 is our mini constitution resulting from the Belfast Agreement (commonly known as the Good Friday Agreement). The nature of the Belfast Agreement will be discussed more in details regarding the impacts of Brexit below.

   International obligations is within the "except matter" of Section 2 and Schedule 2 of the 1998 Act, including international human rights obligations. Under Part II Legislative Power of the 1998 Act, Section 26 International Obligations has specific provision regarding the incompatibility of international obligations by Northern Ireland Executive. Section 26(2) provides the following:

> "If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken."

More relevant is under Section 27 Quotas for purposes of international obligations. Section 27 (1) provides that:

> "A Minister of the Crown may make an order containing provision such as is specified in subsection (2) where— (a) an international obligation or an obligation under Community law is an obligation to achieve a result defined by reference to a quantity (whether expressed as an amount, proportion or ratio or otherwise); and (b) the quantity relates to the United Kingdom (or to an area including the United Kingdom or to an area consisting of a part of the United Kingdom which is or includes the whole or part of Northern Ireland)."

The board definition of "quotas" under Section 27 implied "international human rights achievement" within the category of "otherwise".

Therefore, if the Northern Ireland Executive Government is in breach of the Convention, the Secretary of the State for Northern Ireland could make an order for the compliance of the Convention. Subsection 3 provides the time scale to achieve a result and subsection 5 further provides that no order shall be made unless the Secretary of State for Northern Ireland has consulted the Minister or department concerned.

3. Three priority areas as result of Brexit:
   1. **Brexit will destablise the constitutional settlement in Northern Ireland resulting from the repeal of the Human Rights Act and the border issue**

1.1 The Belfast Agreement is the political settlement of the legacy of conflict in Northern Ireland in which modelling the protection of rights in the devolution settlement. The protection of human rights in Northern Ireland under the ECHR differs from that of Wales and Scotland. Professor Gordon Anthony and Professor Christopher McCrudden in their recent submission to the House of Lord European Union Committee on "The UK, EU and a British Bill of Rights"[1] highlighted further that in the three critical respects, namely functional, procedural and status of international law.

1.2 The functional, procedural and status of international law of human rights protection create the complex constitutional settlement in Northern Ireland. Therefore, any diminishing of human rights and in particular the repeal of the human rights act will destablise the constitutional settlement in Northern Ireland. Details of the constitutional arrangement could be referred to the recent

[1] **12th Report of Session 2015-16 - published 9 May 2016 - HL Paper 139**
http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/13902.htm

submission of Professor Gordon Anthony and Professor Christopher McCrudden, two renowned Constitutional and Human Rights experts. [2]

1.3 For the border issue it will go through a process talk between the British and the Irish government as well as through the North-South Ministerial Council. The real issue is to entrench the further sectarian divide which will result upsurge of sectarian attacks and potential riots as well as other security issues.

2. **The rise and legitimisation of anti-migrant racism.**
   There is anecdotal evidence of more hate crimes against migrants or people who are deemed to be "foreign" in England and Wales but not upsurge in Northern Ireland as we were approaching the annual matching season. Ethnic minority community is not the target yet, but the political process of the border issue it will entrench both sectarian and racism attacks as predicted most of the perpetrators are from the Protestant, Unionist and Loyalist areas in which most of the migrants are living, particularly concern is the loyalist paramilitary involvement in these well organised attacks in the past.

3. **Increase the racial profiling within the UK-Ireland Common Travel Area**
   NICEM has serious concern following the UK decision to leave the EU in which Northern Ireland voted for remains there will be upsurge of immigration checks on the land border between Northern Ireland and the Republic of Ireland and on internal journeys between Northern Ireland and Great Britain which will target perceived non-British and Irish citizens on the basis of racial profiling. This also forms part of the border issue.

4. There is no consultation process in Northern Ireland with NGOs on the draft Report. NICEM received a copy from the Department of the Community when we communicated with the Department regarding the forthcoming CERD hearing.

Prepared by Patrick Yu, Executive Director of NICEM on 4 August

[2] The Written Submission of Professor Gordon Anthony and Professor Christopher McCrudden is annex in this additional information.

ANNEX

Professor Gordon Anthony and Professor Christopher McCrudden, Queen's University Belfast—Written evidence (HRA0003)

Memorandum to the Select Committee on the European Union, Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing the Human Rights Act

A. Protection of human rights in Northern Ireland, in general

1. The legal arrangements for the protection of human rights in Northern Ireland, as in the rest of the United Kingdom, are multi-layered in form and include Common Law, ordinary statute (enacted by the UK Parliament and by local legislatures), and what might be considered 'constitutional' enactments, including in particular the Human Rights Act 1998 and the Northern Ireland Act 1998.

2. In the Northern Ireland constitutional context, 'human rights' is neither an excepted nor a reserved matter (with certain exceptions we shall mention subsequently). Neither Schedule 2 of the Northern Ireland Act 1998 (on what constitutes an excepted matter) nor Schedule 3 (on what constitutes a reserved matter, mention 'human rights', save where mention is made of the European Convention on Human Rights ('ECHR').[1] The principle of the Northern Ireland Act is clearly set out in section 4(2), that a '"transferred matter" means any matter which is not an excepted or reserved matter.' As a result, , it might be said that the Northern Ireland Assembly has power to legislate in respect of 'human rights' as a 'transferred', i.e. a devolved, issue.

3. This interpretation is supported section 69 of the Northern Ireland Act 1998 and related provisions in the Assembly's Standing Orders, which require that the Northern Ireland Human Rights Commission should be consulted on whether Assembly legislation complies with 'human rights'. In addition, although Schedule 2 of the Northern Ireland Act (on excepted matters) includes (in para 3(c)) 'international relations' as one of the excepted matters, this is stated *not* to include 'observing and implementing international obligations, obligations under the Human Rights Convention[2] and obligations under [EU] law'. Observing and implementing these obligations are therefore also devolved responsibilities.

4. Although 'human rights' are devolved, and the Assembly is empowered (and obliged[3]) to act to observe and implement the ECHR, the Assembly and Northern Ireland Ministers are disabled from amending the Human Rights Act 1998. This is because section 7(1) of the Northern Ireland Act 1998 provides that the Human Rights Act constitutes an entrenched provision, meaning that it cannot 'be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.'

5. Whilst this Memorandum considers the 'constitutional' enactments in more detail, it is noteworthy that 'ordinary' statutes have played a significant role in establishing human rights protections, perhaps particularly in the area of equality and non-discrimination, including such legislation as the Fair Employment and Treatment Order 1998, which differs from the Equality Act 2010 that applies in the rest of the UK. In addition, sections 75 and 76 of the Northern Ireland Act 1998, together with Schedule 9,[4] provide for additional equality obligations on public authorities that differ from those in the rest of the UK.

6. In addition to these arrangements, there is one further provision in the Northern Ireland Act 1998 that is of relevance to considering the protection of human rights. The Northern Ireland Act (as amended by legislation to give effect to the St Andrews Agreement[5]) provides, in section 28A, that there shall be a Ministerial Code and that Ministers shall act in accordance with that Code. The Northern Ireland courts have held these provisions to be legally binding.[6] The Ministerial Code includes a requirement on Ministers to 'uphold the rule of law'. It is unclear whether the 'rule of law' includes the 'rule of international law', but arguably it does, and therefore there is an obligation on Ministers in the Executive to uphold international human rights obligations.

7. It would also appear that, where a Minister states that he or she has taken international law into account when making a decision, his or her decision can subsequently be challenged as contrary to the international standard in question.[7] Subsequent case law has, however, made clear that a challenge of this kind will fail where the international standard in question permits of more than one interpretation.[8] We would also note that such cases fasten upon a *power* to consider unincorporated international law, rather than an enforceable *duty* to do so. Constitutional dualism in this way retains influence even if it is no longer quite as dominant as it once was..[9]

B. The protection of human rights under the ECHR and EU Law in Northern Ireland

8. The Human Rights Act 1998 applies to Northern Ireland, but in several other critical respects, the protection of human rights in Northern Ireland under the ECHR and EU Charter is different from that in Scotland and Wales.

9. Before turning to those differences, we would note that there are many similarities between Northern Ireland and Scotland and Wales. Under each of the devolution schemes, legislative measures and executive acts must conform to the ECHR and EU law, and remedies may be granted where they fail to do so.[10] While the genesis of the Northern Ireland Act 1998 is different in that it lies in the Belfast-Good Friday Agreement 1998, much of the modelling for the protection of rights under the wider devolution settlement is similar. In this sense, Northern Ireland has much to learn from Scotland and Wales and the "rights-centred" devolution case law that has arisen in those settings.[11]

10. The protection of human rights in Northern Ireland under the ECHR differs from that of Wales and Scotland in three other critical respects: the first is functional; the second is procedural; and the third is in terms of its status in international law.

11. As regards the functional differences, it is important to note that the ECHR has played a critical role in the most recent Troubles in Northern Ireland, from the early days in the late 1960s when it was used as a method of challenging religious and political discrimination, following the descent into violence when it was used as a way of limiting actions by the security forces, and following the Good Friday-Belfast Agreement ('the Agreement') in 1998 when it has proven an important mechanism in the context of dealing with the past.[12]

12. The procedural differences concern the operation of the ECHR in Northern Ireland, where aspects of the Human Rights Act 1998 are modified. Section 13(4) of the Northern Ireland Act 1998 provides that Standing Orders of the Northern Ireland Assembly '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 71, in addition, provides that the Northern Ireland Human Rights Commission has standing to litigate ECHR issues in the domestic courts, without itself having to satisfy the 'victim' test under section 7 of the Human Rights Act 1998/Article 34 of the ECHR. It is this procedural difference that recently enabled the Commission successfully to challenge Northern Ireland's abortion laws as contrary to Article 8 ECHR.[13]

13. The international law difference concerns the status of the ECHR as a part of the Belfast-Good Friday Agreement, where the protection of rights has dimensions that are internal and external to Northern Ireland (and, by extension, the UK). The important point here is that the Belfast-Good Friday Agreement not only constitutes a peace agreement between the contending communities in Northern Ireland, it also comprises an international agreement between the Republic of Ireland and the United Kingdom.

14. The Agreement provides, in Strand One (which details new institutional arrangements in Northern Ireland):

> 'There will be safeguards … 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; [and] (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'[14]

15. In Section 6 of the Agreement (dealing with 'Rights, Safeguards, and Equality of Opportunity'):

> '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.'[15]

16. The human rights provisions included in the devolution arrangements in Northern Ireland are, therefore, unlike those in the rest of the United Kingdom, underpinned by an international agreement between the Republic of Ireland and the United Kingdom. How far the obligations protect the different provisions of the whole of the existing Human Rights Act 1998 is a matter of debate, but it would appear to require, at least, that if Westminster did repeal the HRA it could continue to meet the UK's obligations under the Belfast-Good Friday Agreement only by providing, at the very least, that Convention rights would continue to be justiciable in Northern Ireland courts.

C. Role of the EU Charter of Fundamental Rights in Northern Ireland

17. The approach taken to implementing the ECHR, through the Human Rights Act 1998 and the Northern Ireland Act 1998, means that all Westminster legislation and decisions taken by UK Ministers, as well as all Northern Ireland Assembly legislation and decisions taken by Northern Ireland Ministers and other public authorities, are subject to human rights scrutiny.

18. On the other hand, the application of the EU Charter in Northern Ireland means that, as in the rest of the EU, the Charter applies to public authorities only when they are implementing EU law. While it is not entirely clear how 'implementing' is to be understood, it would appear that domestic courts and the Court of Justice of the European Union are reading the term broadly.[16] This would suggest that the Charter's reach is an expansive one, albeit that, in UK law, it is not as far-reaching as the Human Rights Act 1998.

19. The Northern Irish courts are already faced with arguments using the EU Charter in the human rights context. McCloskey J, of the Northern Ireland High Court has referred to the Charter as 'a dynamic, revolutionary and directly effective measure of EU law'.[17]

20. The Northern Ireland courts have been faced with a steady stream of arguments drawn from the Charter. There are several recent examples.[18] Most recently, in a case in which the Northern Ireland Department of Health's life-time ban on males who have sex with other males from donating blood was struck down, counsel for the applicant relied on the EU Charter's non-discrimination provisions.[19] This case is currently before the Northern Ireland Court of Appeal.

21. In another case, a mother sought to prevent the registration in Northern Ireland of an order of a Polish court which had awarded parental powers to her husband, the father of their two children.[20] At the time that the order was made the mother and the children resided in Northern Ireland and the father resided in Poland. The father sought to enforce the order of the Polish court so that the children would come tolive with him in Poland. The mother argued that the children do not wish to return to Poland and that their views should be taken into consideration on matters which concern them in accordance with their age and maturity, referring to Article 24(1) of the Charter. This argument was accepted by Stephens J.

22. In our view, there would be likely to be increased reliance on the EU Charter in Northern Ireland courts were the Human Rights Act were to be repealed, at least in those areas in which it could be plausibly argued that there was an element of implementation of EU law involved, and that this issue would, in itself, lead to increased references to the Court of Justice of the European Union. We would note, parenthetically, that there is a very significant overlap between the Charter and the Convention and that any rulings of the Court of Justice of the European Union may well give the Convention a continuing, if indirect, role in UK law.

23. To what extent could the EU Charter substitute for the repeal of the Human Rights Act? Although the Northern Ireland courts have been willing to take a flexible approach to the operation and scope of the Charter, the fact that Charter applies to such bodies only when they are implementing EU law means that the EU Charter may have a limited impact on Northern Ireland-specific matters. The point is notably true of many of the areas in which human rights issues have arisen during the Troubles and during the transition – the investigation of controversial deaths under Article 2 ECHR would be one obvious example.

24. We cannot say, therefore, that the EU Charter would (or could) provide an adequate functional substitute for the repeal of the Human Rights Act, given the limitations on its applicability. To the extent that, as we believe, the availability of human rights remedies provided in the Human Rights Act has eased that transition, repeal of the HRA could, therefore, have a destabilizing effect on the Peace Process, broadly conceived, and that the EU Charter would be unlikely to be able to fill that vacuum.

D. Operation of the Sewel Convention, the Legislative Consent Motion, and the Petition of Concern procedure

25. Would the Northern Ireland Assembly need to consent to repeal the Human Rights Act under the Sewel Convention? This is a difficult question for several reasons. The first reason is that the Convention might be thought to have a broader as well as a narrower ambit.

26. The broader understanding is that all matters that significantly impact on devolved matters in Northern Ireland are subject to the Convention, such that if the UK Parliament wishes to legislate in these areas, the agreement of the Assembly should be obtained. This broader reading is based, in part, on the Memorandum of Understanding between the devolved administrations of 2001. This states, at paragraph 13:

> '… the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.'[21]

This would suggest, for example, that a broad range of matters over which Westminster and Stormont share responsibilities, such as 'human rights' are subject to the Convention, as well as Westminster legislation that significantly affects the operation of devolved powers.

27. The narrower interpretation of the Convention is that such agreement need only be obtained where it is intended directly to legislate in areas 'specifically' devolved to Northern Ireland Ministers and the Assembly. This narrower reading is based on the UK Government's Devolution Guidance Note 10 which provides that: 'Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the [Northern Irish] Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.' Provisions which are 'specifically for devolved purposes' would include legislation directly altering the powers of the Assembly and of Northern Ireland Ministers.

28. In order to consider the potentially different effect of these two (somewhat different) understandings of the Convention, it is worth distinguishing between repealing the Human Rights Act 1998, and enacting an alternative domestic Bill of Rights that falls short of the ECHR and the ECtHR's jurisprudence. It seems clear to us that whether a broad or a narrow interpretation of the Sewel Convention is adopted, enacting a new domestic Bill of Rights that applied to the Northern Ireland Assembly and to Northern Ireland Ministers, would involve amending the existing Northern Ireland Act's allocation of powers to Ministers and the Assembly and would therefore require Assembly approval. We would suggest that this is certainly true as a matter of politics if not also a matter of law. We would also note that this directly involves the UK Parliament acting in the area of 'human rights', which we have seen to be a devolved matter.

29. There is, however, greater uncertainty regarding the repeal of the HRA only. If the broader reading of the Sewel Convention is adopted, then repeal of the HRA as it applies to Northern Ireland, would seem torequire Assembly approval. While the position is not clear, the following points suggest a need for approval: the HRA touches on areas that indirectly affect devolved areas, since currently the HRA is regularly used in the Northern Ireland courts to challenge the actions of Northern Ireland Ministers operating under devolved powers; and the HRA is specifically included in the definition of 'human rights', which is a devolved matter.

30. If the narrower reading is adopted, however, then the repeal of the HRA would seem not to trigger the Sewel Convention, for two reasons. First, it could be said that Sewel would not be engaged because thatrepeal would not entail the UK Parliament legislating 'with regard to' areas that are specifically devolved. This is because section 7(1) of the Northern Ireland Act 1998 provides that the Human Rights Act constitutes an entrenched provision, meaning that it cannot 'be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.' Since, therefore, the Assembly and Northern Ireland Ministers are disabled from legislating to modify the HRA, the Sewel Convention does not arise if Westminster elects to do so. Some support for this argument is derived from previous practice: when the UK Parliament amended the HRA in 2008,[22] it did so

for Northern Ireland as well,[23] and we understand that no legislative consent motion was sought from the Assembly at that time.

31. Secondly, the Convention may not apply under the narrower understanding of the Sewek Convention because, it could be argued, the relevant references in the Northern Ireland Act to the limits on the powers of the Assembly and of Ministers refer to 'Convention rights', not the HRA. On this reading, repeal of the HRA would not directly affect the operation of 'Convention rights' under the Northern Ireland Act, which would remain in operation and therefore repeal would not engage the Sewel Convention.

32. However, a peculiarity in the drafting of the various devolution Acts, including the Northern Ireland Act 1998, means that this second argument in the previous paragraph may not be correct. Section 98 of the Northern Ireland Act provides that the term 'Convention rights' (which as has been seen above is the term used in that Act regarding the competence of the Assembly and Northern Ireland Ministers), is to be interpreted as having 'the same meaning as in the Human Rights Act 1998'. This seems to link 'Convention rights' in the Northern Ireland Act 1998 directly to the HRA in a way which might be interpreted as meaning that, in the absence of the HRA, 'Convention rights' in the Northern Ireland Act 1998 would have no internal definition and would thereby be inoperable. This would mean that the requirement on Ministers and the Assembly to conform to 'Convention rights' would fall away once the HRA was repealed, and that repeal would therefore have modified the powers of Ministers and the Assembly in a manner that would have required Assembly approval as *per* Sewel.

33. A separate question arises, however, even assuming that the UK Government considered that the Sewel Convention operated. Even if the Northern Ireland Assembly were asked to consent to repeal of the HRA and/or the enactment of a domestic Bill of Rights, would the Assembly be able to consent, in the sense of being able to muster sufficient votes to pass the legislative consent motion?

34. The answer is likely to be 'no', at least as things stand politically. This is because any significant issue before the Assembly may be made the subject of a Petition of Concern, triggered by a group of Members of the Assembly. The effect of such a Petition of Concern is that both the major parties (Sinn Fein and the Democratic Unionist Party) have effective vetoes over any issue before the Assembly, because a super-majority is required where such a Petition has been triggered. It seems highly unlikely that either Sinn Fein or the Social Democratic and Labour Party (to say nothing of the other political parties represented in the Assembly) would be willing to vote in favour of a legislative consent motion of this type, and highly likely that they would (separately or together) initiate a Petition of Concern.

35. We turn now to consider whether the Northern Ireland Assembly would have competence to legislate for any gaps in human rights protection caused by repealing the Human Rights Act, and not covered by a Bill of Rights or the EU Charter.

36. For the reasons stated previously, we consider that the Northern Ireland Assembly would have power to legislate for some of the gaps in the protection of international and ECHR human rights provisions that would remain post repeal of HRA. In particular, as we point out in paragraph 3 above, the Assembly is free to implement the UK's international obligations within its sphere of competence. This means that if the HRA were to be repealed contrary to the Assembly's wishes, it could itself pass an Act to replace it.

37. There are two major possible limits to the power of the Assembly in this regard. The first is whether the Assembly could enact a HRA-alternative which would apply to the Assembly and the Executive, effectively reproducing the current terms of section 6 and section 24 of the Northern Ireland Act.

38. A second issue arises regarding the scope of public authorities affected. A significant gap that could exist is the issue of what constitutes a 'public authority' for the purposes of human rights protections. At the moment, as we have seen, all public authorities operating in Northern Ireland are included within the human rights coverage of the Human Rights Act, the Northern Ireland Act, or both. If, following repeal of the HRA, UK-based public authorities operating in Northern Ireland in subject areas that were reserved or excepted (such as the Ministry of Defence) were not covered by any UK Parliament generated human rights obligations, or were subject to reduced human rights obligations, then the Northern Ireland Assembly would *only* be able to fill this gap if the consent of the Secretary of State for Northern Ireland wasobtained. Some years ago the Assembly brought some UK public authorities under the umbrella of the equality duties deriving from section 75 of the Northern Ireland Act,[24] with the consent of the Secretary of State, so there is an existing precedent for such a move..

39. There is another significant difficulty, however, which is more practical and political than legal and constitutional. At the moment, there is some dispute in Northern Ireland about the role and relevance of human rights standards, with the DUP appearing to be less inclined towards enforceable human rights standards than Sinn Fein appears to be. This controversy has contributed to the impossibility, so far at least, of obtaining sufficient agreement between the parties on a Northern Ireland Bill of Rights that would have gone beyond the HRA in terms of rights and remedies. Given this, it would seem likely that there would be very real difficulties, following any repeal of the HRA, in securing any agreement between the parties as to what would replace the HRA in Northern Ireland.

40. Given the significant legal and political issues that would arise from repealing the HRA and providing for a Bill of Rights, there is a strong likelihood that litigation would result, and in the remaining paragraphs we consider various possible routes that might be used, beginning with domestic litigation and then moving on to consider possible European and international litigation.

E. Possibility of domestic litigation

41. Would it be possible to challenge UK Parliamentary legislation that repealed the Human Rights Act? Certainly, if such legislation were to be enacted under the Parliament Acts, there may be the possibility of challenging the legislation as unconstitutional on the ground that it contravened the 'rule of law'. This is the territory of the *Jackson* case[25] in which a number of the Law Lords indicated, *obiter*, that the House of Lords (now the Supreme Court) could constrain Parliament at some point in the future.[26] However, we would accept that it is highly unlikely that any such challenge would succeed, given that it would be seen as a major root-and-branch challenge to Parliamentary sovereignty.

42. Would it be possible to challenge a Northern Ireland Minister's decision to bring forward a legislative consent motion in the Northern Ireland Assembly? Were a Northern Ireland Minister to attempt to bring forward a legislative consent motion to the Northern Ireland Assembly, there is the possibility of challenging that decision under the Ministerial Code (see above), on the grounds that it involves asking the Assembly to consent to a breach of the 'rule of law' (because it would breach the Agreement between Ireland and the United Kingdom), and under section 75 of the Northern Ireland Act 1998, on the ground that, in reducing the opportunity to contest discrimination, it involves a breach of the Ministerial obligation not to have 'due regard to the need to promote equality of opportunity.' Using the Ministerial Code in this way would open up the meaning of the 'rule of law' in this context and, as we have seen, there is uncertainty as to whether the 'rule of law' includes the rule of international law. Whether the challengeunder section 75 would succeed is, perhaps, doubtful given the approach taken to the meaning of 'due regard' in the Northern Ireland courts.[27]

43. Would it be possible to challenge non-compliance with the Sewel Convention? We have suggested above that it is more probable than not that, given the unlikelihood that the Northern Ireland Assembly would pass a legislative consent motion, the United Kingdom Government would need to act in breach of the Sewel Convention, if it wanted to repeal the Human Rights Act, in so far as it applied to Northern Ireland. The received wisdom is that breaches of the Sewel Convention can only be challenged politically, not legally, because they concern breaches of a Constitutional Convention, which UK courts have, historically, been unwilling to remedy. However, it can be argued that there may be legal avenues now available for such a challenge, particularly on the basis that non-compliance with such a clear Convention is a breach of a legitimate expectation. This is very much unchartered territory, however, and the result of a judicial review on this basis is also unpredictable.

F. International law ramifications of repeal of the Human Rights Act protection in Northern Ireland

44. What are the implications under ECHR? We suggest the starting point here would be whether the UK legislated to replace HRA with a clearly deficient instrument, i.e. one that, on its face, would provide for inadequate coverage or remedies in domestic law for breaches of the ECHR. Article 13 of the ECHR obliges Member States to the Convention to provide effective remedies in domestic law. In the event that there were no such remedies in place, there would be the potential for either an Inter-State application (by

the Republic of Ireland, for example) or an individual petition (by a 'victim') by which the UK's failure to provide an effective remedy could be challenged in Strasbourg.

45. What are the implications under EU law? The situation under EU law is more complicated. There is the possibility, were the repeal of the HRA to give rise to difficulties in implementing EU law, for a case to be referred to the CJEU. Apart from this, however, the question is whether the repeal of the HRA and its replacement with something clearly inadequate gives rise to issues under Article 6 and 7 of the Treaty on European Union, under which a procedure may be initiated alleging that a Member State's actions are such as to call into serious question the Member State's commitment to human rights and the rule of law.While we might expect the UK government to argue that UK law was simply returning to a position that had previously been deemed suitable for membership, the EU has since developed and given human rights a much more central role in its constitutional architecture. A return to the UK's past may therefore be inconsistent with EU law's current and future expectations.

46. What are the implications under public international law more broadly? This, too, is a complex matter, and we have been unable to identify any general forum under which the argument could be made that the United Kingdom would be in breach of its international agreement with the Republic of Ireland. Ireland would have the right, in theory, to regard the UK's breach of the Agreement as constituting a fundamental breach of the Agreement, giving Ireland the right to withdraw from its obligations under the Agreement, and this possibility could act as a further stimulus to get diplomatic negotiations going.

47. Even should it wish to, Ireland does not appear to have the right to seek to mobilize the International Court of Justice. Although both the United Kingdom and Ireland have agreed to the compulsory jurisdiction of the Court, in so far as the other State has agreed to the compulsory jurisdiction also, Ireland has specified that the compulsory jurisdiction of the Court does not apply in relation to disputes between the UK and Ireland regarding Northern Ireland. That would appear to exclude the ICJ's jurisdiction. In any event, even if that were not the case, it appears that the ICJ could not adjudicate the dispute. We understandthat the Agreement was not formally registered at the United Nations, and that unregistered Agreements will not be recognized by the Court in disputes between the parties to the Agreement.

Professor Christopher McCrudden FBA[28]
School of Law, Queen's University Belfast; University of Michigan Law School

Professor Gordon Anthony
School of Law, Queen's University Belfast

19 January 2016

[1] Northern Ireland Act 1998, Schedule 2, paragraph 2.

[2] In this paragraph "the Human Rights Convention" means the following as they have effect for the time being in relation to the United Kingdom— (a) the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950; and (b) any Protocols to that Convention which have been ratified by the United Kingdom.'

[3] Northern Ireland Act, section 6 and Human Rights Act, section 6.

[4] On the legal effects of which, see Re Neill's Application [2006] NI 278, and JR1's Application [2011] NIQB 5.

[5] Northern Ireland (St Andrews Agreement) Acts of 2006 and 2007.

[6] Re Solinas' Application [2009] NIQB 43.

[7] Re McCallion's Application [2007] NIQB 76.

[8] Re McCallion's Application [2009] NIQB 45 & [2009] NICA 55.

[9] Re T's Application [2000] NI 516. For the limits of dualism in the human rights context see Lord Kerr's comments in R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16

[10] See Northern Ireland Act 1998, ss 6, 24, 81, 83; Scotland Act 1998, ss 29, 57, 101, 102; Government of Wales Act 2006, ss 80, 81, 108, 153, 154.

[11] E.g., Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3.

[12] The definitive study is Brice Dickson, The European Convention on Human Rights and the Conflict in Northern Ireland (OUP, 2012).

[13] Re Northern Ireland Human Rights Commission's Application [2015] NIQB 96 & 102.

[14] Strand One, at paragraph 5.

[15] Rights, Safeguards, and Equality of Opportunity, at paragraph 2

[16] Eg, Rugby Football Union v Viagogo Ltd [2012 UKSC 55 and Case C-617/10, Aklagaren v Fransson [2013] 2 CMLR 46.

[17] See AB & Ors v Facebook Ireland Ltd [2013] NIQB 14, at [14].

[18] See also Re ALJ et al's Application [2013] NIQB 88.

[19] *Re JR65's Application for Judicial Review* [2013] NIQB 101,

[20] *Re Jakub and Dawid (Brussels II revised: recognition and enforcement of foreign order)* [2009] NIFam 23,

[21] Devolution: Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, December 2001 CM 5240.

[22] Health and Social Care Act 2008, section 145.

[23] Health and Social Care Act 2008, section 169(2)(e).

[24] See the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001.

[25] Jackson v Attorney General [2005] UKHL 56.

[26] See also, e.g., *Re Moohan* [2014] UKSC 67, para 35, Lord Hodge.

[27] Re Neill's Application [2006] NI 278; JR1's Application [2011] NIQB 5.

[28] We are grateful to our colleague, Professor Brice Dickson, for helpful comments on an earlier draft.