

Human Rights of Ulster-Scots

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Content	Page
Historical Dimension	1
Context of ‘the Talks’, 1997 - 1998	1
Concept of a Minority	3
UK and Irish Governments’ position	3
Framework Convention for the Protection of National Minorities (FCNM)	6
The Ulster Scot Context	7
Suggested Rights	8
<u>Other Relevant Aspects</u>	
International Law (Territorial Integrity of the State)	10
Northern Ireland Protocol	12
Delayed Bill of Rights	15
<u>Concluding Comments</u>	17

by
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Historical Dimension

1. The Council of Europe (A leading international human rights body and home of the 'European Convention on Human Rights' and the 'European Court of Human Rights'), during a meeting of member States (are present 46 members) in Vienna in October 1993 *"agreed that the national minorities which the upheavals of history have established in Europe had to be protected and respected as a contribution to peace and stability."*¹ Why was this agreed and why in 1993?
2. The challenge of the 1990's requires looking back in time. In 1919 the Austro-Hungarian Empire was broken up at the end of the First World War (Treaty of Versailles), with the formation of new States such as Austria and Czechoslovakia (now divided into two States in 1992: Czech Republic and Slovak Republic). This resulted in, for example: Hungarians in Romania; Croatians in Yugoslavia, and - importantly - Germans in Poland and Czechoslovakia. Emeritus Professor of Irish Studies, Brian Walker wrote: *"In the early 1920s other states were established, such as Czechoslovakia and Romania. They also contained majorities in favour of these arrangements and minorities opposed to them. They resembled Northern Ireland."*²
3. Go forward to 1989. There was the break-up of the Soviet Union, officially known as the 'Union of Soviet Socialist Republics' (USSR). This caused potentially the creation of further minority problems, such as Russians in Estonia and Slovaks in Hungary. Thus, the Council of Europe - mindful of European history - decided it had to act to assist in the provision of stability and peace in Europe. A decision was taken in 1993 that led to the Council of Europe's 'Framework Convention for the Protection of National Minorities' (FCNM). It was open for signature by member States on 1 February 1995 and it subsequently entered into force on 1 February 1998. It could not enter into force until a minimum of 12 member States had formally ratified the Convention. Following pressure in 1997, during the negotiations (the 'Talks') that led to 'The Agreement' ³ on 10 April 1998, the United Kingdom Government ratified the FCNM on 15 January 1998, with it entering into force in the United Kingdom (UK) on 1 May 1998.

Context of 'the Talks', 1997-1998

4. I participated in the Talks that led to The Belfast Agreement and was the Ulster Unionist Party's (UUP) spokesperson on 'Equality and Human Rights'. In addition to the three main strands in the Talks there was another strand entitled 'Cross-Strands Issues'. As agreed by the Procedural Motion on 24 September 1997, issues to be considered in this other strand included 'rights and safeguards'. I was the lead person for the UUP on this issue. In this context, the UK Government indicated that: *"the protection of rights will be of central significance for the achievement of a lasting settlement."*⁴

¹ FCNM: 'Explanatory Report', Background, par. 5, page 2, 1 November 1995.

² Brian Walker: 'Partition and the establishment of Northern Ireland in 1920-1925', Belfast Telegraph, 12 September 2020.

³ The document agreed on 10 April 1998 was called 'The Agreement'. Some call it 'The Good Friday Agreement', while in the related 'Northern Ireland Act 1998' it is referred to as 'The Belfast Agreement'.

⁴ UK Government: 'Rights and Safeguards', paper submitted to multi-party talks on 6 February 1998, par. 1.

5. In an endeavour to be objective, I noted, studied and agreed overall with a series of 'Consultancy Studies', sponsored by the Irish Government, relating to the political situation in Northern Ireland (NI) and published in 1996 by the 'Forum for Peace and Reconciliation'. I was clear this required compromise from all sections of the community and also that these principles were a reflection of a wider international consensus. I articulated these views consistently, both publicly and also within the Talks, and remain of the same opinion today. One early example:

Were all participants in the Talks process to abide by the international consensus as to how to solve our problem of a divided society, progress would be made. Indeed it will only be by such a commitment on the part of all participants that progress will be made - and it could be made quickly. [Concluding] It will never be possible to find a widely acceptable solution to the problems of our divided society without a basis of agreed principles. These principles will have to be derived from international human rights law, which balances majority rights and secure borders with minority rights and democratic inclusion. Until these principles are publicly debated and widely agreed it is naïve to expect much progress from the political talks.⁵

6. This Forum published several documents in view of their "*relevance to the peace process and the all-party negotiations*."⁶ This was against the background of elections in NI in June 1996 to the 'Northern Ireland Forum for Political Dialogue' from whose membership came party negotiation teams to the Talks. The following refers to aspects of these publications.

Professors Boyle, Campbell and Hadden, commented:

The substance of fundamental human rights is now determined by international agreement and there is an obligation on all States to protect them. To this extent the identification of the human rights to be protected is not a matter for bargaining between the parties to the peace process.⁷

Asbjorn Eide, a leading United Nations (UN) human rights expert, commented:

In November 1994 the Council of Europe adopted the Framework Convention on Minorities. The Convention is significant for two reasons. It is the first multilateral 'hard law' instrument devoted in its entirety to the protection of minorities, and it contains much more detailed provisions on such protection than any other international instrument...building as it does on the United Nations Minority Declaration and on the Copenhagen Document of the CSCE (now OSCE).⁸

7. Professors Boyle, Campbell and Hadden also stated that in a divided society requiring the effective recognition of communal rights, the best approach may be to "*incorporate the*

⁵ Dermot Nesbitt: 'Solutions lie with basic rights'; Belfast Telegraph, 19 September 1996.

⁶ Opening commentary to the Dublin Forum's documents referred to in this lecture.

⁷ Kevin Boyle, Colm Campbell and Tom Hadden: 'The Protection of Human Rights in the context of Peace and Reconciliation in Ireland'; Number Two, Forum for Peace and Reconciliation, May 1996, page 2.

⁸ Asbjorn Eide; 'A Review and Analysis of Constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies'; Forum for Peace and Reconciliation, July 1996; page 69.

major provisions of the FCNM into any new bill of rights leaving the detailed provisions to be worked out in ordinary legislation.”⁹

Concept of a Minority

8. The word minority, often used in reference to NI, is one that in some quarters is disliked because it implies a lesser degree of importance. The Council of Europe has referred to a national minority as a group of people within a state *“who display distinctive ethnic, cultural, religious or linguistic characteristics”* and are *“motivated by a concern to preserve together that which constitutes their common identity.”¹⁰*
9. It also stated that such a national minority is to be *“sufficiently representative, although smaller in number than the rest of the population of that State or a region of that State.”* This reflects more truly the concept of a minority and accords with the usage of the terms two / both communities in The Belfast Agreement.
10. No grouping should consider itself a minority within NI in the sense of being less important. The Celtic Romansh in Switzerland consider themselves not to be a minority, with all its connotations, but rather the fourth and smallest language group in Switzerland and equal in status to the French, German and Italian speakers.
11. Dr. Michael Breisky, the then Austrian ambassador in Dublin, stressed in a speech ¹¹ at Queen’s University Belfast the equal importance of protecting minorities by the norms of international rules and the breaking down of psychological barriers. The sense of superiority and inferiority must be eliminated and confidence and trust must be built.

UK and Irish Governments’ position

12. By way of background to the Talks, the UK and Irish Governments published in 1995 the ‘The Framework Documents’, comprising two sections: ‘A New Framework for Agreement’ and ‘A Framework for Accountable Government in Northern Ireland’. They referred to:

Guiding principles [Including] that any new political arrangements must be based on full respect for, and protection and expression of, the rights and identities of both traditions in Ireland and even-handedly afford both communities in Northern Ireland parity of esteem and treatment, including equality of opportunity. ¹²

13. But it was also demonstrated in their documentation that neither Government seemed to wish to fully acknowledge their international obligations. For example:

They will discuss and seek agreement with the relevant political parties in Northern Ireland as to what rights should be so specified and how they might

⁹ Kevin Boyle, Colm Campbell and Tom Hadden: op. cit., May 1996, page 6.

¹⁰ Human Rights Law Journal Vol. 16 No. 1-3, page 114.

¹¹ Michael Breisky: ‘Dealing with Minorities: A Challenge for Europe’; The Institute of European Studies, The Queen’s University of Belfast, October 1998.

¹² UK/Irish Governments: ‘A New Framework for Agreement’; 22 February 1995, par. 10.

best be further protected, having regard to each Government's overall responsibilities including its international obligations.¹³

14. And the UK Government was challenged, publicly and within the Talks, both to ratify the Council of Europe's FCNM and to consider developing a Bill of Rights for Northern Ireland. My position was initially summarised as follows:

Firstly, the new Labour government has the key responsibility. It already has made proposals to incorporate into UK law the 'European Convention on Human Rights', which it views as a valuable step in protecting basic human rights. It needs to go further for Northern Ireland by ratifying and implementing the 1995 'Convention for the Protection of Minorities'. This could best be done by incorporation into a Bill of Rights for Northern Ireland. Both conventions, developed by the Council of Europe, conform to the 'European model' for solving the problems of a divided society. Since introduction in 1995, countries such as Estonia, Hungary, Romania and Slovakia have already ratified the convention: the question to London is; why are you delaying?¹⁴

15. Eventually in mid-January 1998, the UK Government ratified the FCNM and subsequently would be held to account for its implementation by way of regular monitoring procedures by the Council of Europe. At the time of ratification I commented:

Though largely unnoticed, this represents potentially the most significant development to help resolve our present difficulties. [Concluding] The new UK government has taken a first step towards following the true European model of reconciliation between different groups within a state. For the first time a UK government has seemingly recognised what is appropriate. All should accept these principles.¹⁵

16. While the UK Government indicated, as previously stated (par. 4), that "*the protection of rights will be of central significance for the achievement of a lasting settlement*", it was surprising that, in considering the matter of the protection of rights and knowing by this time that it was a party to the FCNM, stated that:

There may be some existing models for rights protection whose contents could be adapted for use in the Northern Ireland context [And that] the provisions of certain international instruments on human rights might contain elements which could be applied in a specific Northern Ireland context.¹⁶

17. At all times the UUP's response was clear and simple. As submitted to the Talks: "*We wish for the same rights and the same level of stability based on the same principles as are applied elsewhere in Europe.*"¹⁷

¹³ UK/Irish Governments: Ibid, par. 50.

¹⁴ Dermot Nesbitt: 'Responsibilities and challenges facing positive unionism'; News Letter, 5 June 1997.

¹⁵ Dermot Nesbitt: 'Minority protection pact will help us'; News Letter, 20 January 1998.

¹⁶ UK Government: op. cit., 6 February 1998, par. 8.

¹⁷ UUP: 'Rights: Principles of Government', paper submitted to the Talks, 2 March 1998.

18. Eventually, as part of The Belfast Agreement, the UK Government agreed *“to legislate as necessary to ensure the United Kingdom’s international obligations are met in respect of Northern Ireland.”*¹⁸ This latter quotation represented a subtle change by the UK Government from merely *“having regard”* (par. 13) to international obligations. The Government should be held to account in its fulfilment of its international obligations. And, importantly, fulfilment of these obligations by all - in the context of good relations - would benefit everyone in NI.
19. Overall, both the UK and Irish Governments seem clearly to have had, and unfortunately continue to have, an unacceptable ‘blind spot’ regarding relevant international norms. This ‘blind spot’ was based initially on a belief that they faced a unique problem. A former UK Prime Minister described Northern Ireland as *“unique”*.¹⁹ Additionally, the UK Government stated: *“A key feature for discussion in the talks is the extent which there is a need to develop specific additional rights protections to deal with the unique problems of the divided community in Northern Ireland.”*²⁰
20. Viewing the problem as unique blocks the mind from considering all aspects of the FCNM. This has the potential to cause continued instability, interspersed with periods of apparent stability.
21. Yet the assertion that the central problem is unique is not based on fact. The Council of Europe’s rationale for the FCNM is clear: *“Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent”*²¹, combined with its monitoring process, is testimony to that fact. And, the FCNM’s related ‘Facts Sheet’ states: *“Virtually all European states have some population belonging to national minorities.”*²² Also, Asbjorn Eide commented: *“Experience shows that there are almost no ethnically homogeneous States.”*²³
22. All of the 39 European countries²⁴ subject to the FCNM are likely to have their own particular characteristics but all are subject to the same FCNM template. Most NI residents will likely not have heard of the FCNM, but one might suppose their general attitude is likely to be a reflection of its overall values. The UK Government, with direct responsibility for the application of human rights in NI, has not reflected the full extent of these values, having viewed NI - completely erroneously - as unique.
23. And, in The Belfast Agreement there is minimum reference to the FCNM. Work still requires to be done in convincing both Governments and others of its importance in helping to provide a stable community at ease with its inherent diversity.

¹⁸ The Belfast Agreement: ‘Strand One; Democratic Institutions in Northern Ireland’, par. 33 (b).

¹⁹ John Major: ‘A Framework for Accountable Government in Northern Ireland’, Foreword, February 1995.

²⁰ UK Government: op. cit., 6 February 1998, par. 4.

²¹ FCNM: page 1.

²² <https://www.coe.int/en/web/minorities/fcnm-factsheet>

²³ Asbjorn Eide: op.cit., July 1996.

²⁴ <https://www.coe.int/en/web/minorities/country-specific-monitoring>

Framework Convention for the Protection of National Minorities (FCNM)

24. Consider this aspect initially in the context of a Bill of Rights. The overall latest guiding principle was clear, as referenced in the UK and Irish Governments' publication: 'New Decade, New Approach' (January 2020). It states: "*The Ad-Hoc Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement...*" (Page 37, par. 5.26). It is worth repeating this intention as articulated at paragraph 4 (pages 16 and 17) of The Belfast Agreement.

The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

25. The Council of Europe describes the FCNM as:

One of the most comprehensive treaties designed to protect the rights of persons belonging to national minorities. Parties to the Convention undertake to promote the full and effective equality of persons belonging to minorities in all areas of economic, social, political and cultural life together with the conditions that will allow them to express, preserve and develop their culture and identity.²⁵

26. However, the FCNM does not contain a definition of 'national minority' as there is no general agreement among the Council of Europe's member states. Each member state is left to decide which groups are to be covered by the FCNM. Also, individuals are free to decide whether or not they wish to be treated as belonging to a national minority. The UK Government has used the following definition, based on the Race Relations Act (1976), "*a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins.*"²⁶ It recognises Cornish, Irish, Scots, Welsh and now Ulster Scots²⁷ as a national minority. Gypsies, Roma and Travellers are also recognised.

27. At the outset, the FCNM states that signatories to the Convention are:

²⁵ <https://www.coe.int/en/web/minorities/fcnm-leaflet>

²⁶ UK Government: 'Report submitted by the UK to the Council of Europe pursuant to Article 25'; 26 July 1999, part 1, par. 2.

²⁷ Recognised by UK Government on 22 May 2022 as a national minority under the FCNM.

Resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states.²⁸

28. The FCNM specifies the legal principles which States undertake to respect. However, because each State may have different issues to be resolved, a measure of discretion in the implementation is left to each State. According to the FCNM's 'Explanatory Report', this enables States: *"to take particular circumstances into account."*²⁹ Thus, the word 'Framework' is in the Convention's title. This last quotation reflects The Belfast Agreement and is not, as some have implied, taken to mean unique circumstances applicable only to NI.
29. The FCNM describes the central elements of one's 'Identity', namely; culture, language, education and religion.³⁰ And, including the wording in The Belfast Agreement; 'Ethos' can be described as the characteristics of a community and manifested by its attitudes and aspirations, and 'Parity of Esteem' refers to equal respect for the identity, ethos and aspirations of both communities. Overall, the meaning of the language describing the 'particular circumstances' is clear.

The Ulster Scot Context

30. However, The Belfast Agreement may be viewed by some as ambiguous, regarding Ulster Scots and language. In this context some view it as a 'dialect' (a particular form of a language which is peculiar to a specific region or social group). It states:

All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.³¹

31. But then, Brandon Lewis, the then Secretary of State for Northern Ireland, stated on 25 May 2022 that the Government now recognises officially Ulster Scots as a national minority under the FCNM. He further stated that: *"Ulster Scots have a proud history and a distinct language, heritage and culture, and this recognition will afford them the same status as other minorities in the UK."*³² He also granted £4m for the Irish language Investment Fund, adding they were two commitments in the 'New Decade, New Approach' agreement and the Government is proud of this delivery.
32. Yet, Ulster Scots were already recognised within the dialogue between the UK Government and the Council of Europe's Advisory Committee, the latter having responsibility for overseeing implementation of the FCNM. For example: in 2007 the

²⁸ FCNM: page 1.

²⁹ FCNM: 'Explanatory Report', Approaches and fundamental Concepts, par. 11, page 3.

³⁰ FCNM: Articles 5 and 6.

³¹ The Belfast Agreement: 'Rights, Safeguards and Equality of Opportunity', par. 3, page 19.

³² Brandon Lewis: Press Statement, 25 May 2022.

Council of Europe's Second Opinion welcomed *"the Government's commitment...to introduce an Irish language Act, and to develop strategies for enhancing and protecting the Ulster Scots language, heritage and culture."*³³ This demonstrates that a minority seemingly does not require to be formally recognised by the relevant government and Council of Europe in order to be considered within the terms of the FCNM.

33. However, consider the latest Council of Europe's 'Fifth Opinion on the United Kingdom' (25 May 2023). Paragraph 11 states:

It is welcome that the proposals relating to the Irish language and Ulster Scots have now been passed by the UK parliament - however these proposals further contribute to the sectarianism surrounding cultural questions: the naming of a Commissioner for Ulster Scots as for the Ulster Scots and Ulster British Tradition unnecessarily conflates this minority identity with a distinct political one, for example.

34. This Fifth Opinion added at paragraphs 28 and 159 that the authorities should also: *"consider revising the Bill in consultation with the Ulster Scots minority representatives to address the conflation of Ulster Scots and Ulster British identities"*. However, invoking the UK and Irish Governments' publication 'New Decade New Approach' by quoting it within paragraph 152 of the Fifth Opinion, it stated:

They provide for an Irish Language Commissioner, another Commissioner for "the Ulster Scots and Ulster British Tradition", the naming of which, according to the authorities, is intended to reflect the separation of these two identities and the Government's recognition of the Ulster Scots as a national minority under the Framework Convention.

35. Overall, it's a question of balance and a demonstrable equitable treatment between the two national minorities. I recognise Ulster Scots representatives referred to lack of support for their language (Fifth Opinion, paragraph 155).

36. A further and final point is perhaps worth noting and in a wider context, though I add no comment. The News Letter editorial on 8 July 2023 stated:

While it is understandable that unionists talked up Ulster Scots to try to combat the proliferation of forced Gaelic, it was a mistake even so. The extreme goals for Irish can seem balanced because the experts want three new Ulster-Scots bodies. Most people who consider themselves British or Northern Irish have no interest in Ulster-Scots, so there is no need for a "language institution". It will divert the gaze from forced Gaelic.

Suggested Rights

37. This section focuses entirely on the 'particular circumstances', as described in The Belfast Agreement and, importantly, also what is contained in the FCNM. The Articles referenced in brackets relate to the FCNM. The implementation of these rights would be the responsibility of public authorities (including the NI Assembly and local councils).

³³ Council of Europe: Second Opinion on the United Kingdom', par. 21, page 6, Strasbourg, 26 October 2007.

(i) Rights Regarding Culture

- a. Public authorities shall promote, where necessary, in all areas of cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority - including freedom of peaceful assembly, association and expression - and shall refrain from policies or practices aimed at assimilation of a community against its will and shall protect the community from any action aimed at such assimilation. (Arts. 4, 5 & 7)
- b. Public authorities shall ensure that persons from a national minority are not discriminated against in their access to the media and shall adopt adequate measures in order to facilitate access to the media. This does not preclude authorities from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises. These measures are in order to promote tolerance and permit cultural pluralism. (Art.9)
- c. Also, in the legal framework of sound radio and television broadcasting, public authorities shall ensure, as far as possible, that persons belonging to a national minority are granted the possibility of creating / using their own media. (Art. 9)
- d. Public authorities shall not hinder the creation and the use of printed media by persons belonging to a national minority. (Art.9)
- e. Public authorities undertake not to interfere with the right of persons belonging to a national minority: to establish and maintain free and peaceful contacts across the border, in particular with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage; and to participate in the activities of non-governmental organisations, both within Northern Ireland and across the island of Ireland. (Art. 17)
- f. As part of general all-island co-operation, public authorities shall endeavour to conclude, where necessary, bilateral agreements with Ireland in order to ensure the protection of persons belonging to the national minority concerned. (Art. 18)

(ii) Rights Regarding Usage of the Minority Language

- a. Freedom of expression and to receive and impart information and ideas regardless of frontiers (Art.9); freedom of use in private and in public, orally and in writing (Art. 10); and freedom to use as his / her surname and first names and also official recognition of them. (Art. 11)
- b. Where requested and a real need, public authorities shall ensure as far as possible its use in relations with the administrative authorities. (Art. 10)
- c. Freedom to display signs, inscriptions and other information of a private nature visible to the public (Art. 11). In areas traditionally inhabited by substantial numbers of a national minority, public authorities shall endeavour to display traditional local names, street names and other topographical indications intended for the public also in the minority language. (Art. 11)

- d. Recognition that every person belonging to a national minority has the right to learn the minority language (Art. 14). In areas where there is substantial numbers / sufficient demand, public authorities shall endeavour to ensure, as far as possible and within the framework of their education systems, that minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language. (Art. 14)

(iii) Rights Regarding Education

- a. Public authorities undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities (Art. 12) and including 'd.' immediately above.
- b. Public authorities, where appropriate and in the fields of education and research, shall take measures to foster knowledge of the culture, history, language and religion of both national minorities and of the majority (Art. 12). In this context, public authorities shall, among other aspects, provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. (Art 12)
- c. Within the framework of the education system, public authorities recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments. Exercise of this right shall not entail any financial obligation for the public authorities. (Art. 13)

(iv) Rights Regarding Religion

- a. Public authorities undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations. (Art. 8)

Other Relevant Aspects

International Law (Territorial Integrity of the State)

38. Respect for the territorial integrity (whole and undivided) of a State is a consistent principle in international law related to the consideration of the rights of a minority within a State. The following are some relevant examples.

(a) In 1979 a UN publication stated:

It must be stressed, however, that co-operation with regard to the rights of members of minority groups should be based on mutual respect for the principles of the sovereignty and territorial integrity of states concerned and non-interference in their internal affairs.³⁴

³⁴ Francesco Capotorti: 'Study on the rights of persons belonging to ethnic, religious and linguistic minorities', page 103, United Nations, New York 1979.

(b) In 1992 the Council of Europe's 'European Charter for Regional or Minority Languages' stated, Article 5:

Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

(c) On 11 December 1992 a United Nations General Assembly resolution adopted the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities'. Article 8 / 4 stated: *"Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."*

(d) In February 1995 the FCNM was open for signature (par. 3). Art. 21 states:

Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

39. Interestingly, the Ministers for Foreign Affairs and Representatives of States and International Organisations met in Paris on 20 and 21 March 1995, in response to the European Union's call, to adopt the 'Pact on Stability in Europe'. This Stability Pact was subsequent to the demise of the USSR in 1989 when several States, formally within the USSR, wished to join the European Union (EU). The EU was conscious of the imperative nature of respecting territorial integrity, being mindful of international agreements and also conscious of particular minority rights, especially if they share a land border with a neighbouring State where they have an associated identity. The Stability Pact listed international agreements, from which certain principles were derived, as follows:

It must be based on effective implementation of the existing principles [my underlining] and commitments established within the framework of the UN, the OSCE and the Council of Europe, notably all of the principles contained in the 1975 Helsinki Final Act, the 1990 Charter of Paris for a new Europe, the 1990 Copenhagen Document, the 1992 Helsinki Document, the 1994 Budapest Documents, as well as the Vienna Declaration of the Council of Europe summit of 1993 and, for the States that are party to them, the relevant treaties and conventions of the Council of Europe, including the 1994 Framework-Convention for the protection of national minorities.³⁵

40. The Stability Pact then stated also in paragraph 7 that: *"These principles [my underlining] refer to sovereign equality, respect of the rights inherent in sovereignty, refraining from the threat or use of force, inviolability of frontiers, territorial integrity of States and respect for internationally recognised frontiers..."*

³⁵ The Pact on Stability in Europe, par. 7, Paris, 20-21 March 1995.

41. The then Secretary of State for Foreign and Commonwealth Affairs (Mr. Douglas Hogg) was asked to make a statement on the outcome of the above meeting in Paris. The States he listed in the following quotation have all since joined the EU. He stated:

The Pact's aim has been to help nine prospective members of the EU - Czech Republic, Slovakia, Poland, Hungary, Romania, Bulgaria, Estonia, Latvia and Lithuania - resolve problems, especially concerning frontiers and minorities, before enlargement, by promoting good neighbourliness on the basis of OSCE principles.³⁶

42. In the above context, consider a relevant section of The Belfast Agreement. Regarding constitutional issues, it recognises the legitimacy of the territorial integrity of the United Kingdom, by stating at page 2:

The participants...recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland [and] acknowledge that...the present wish of the majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish...

43. Also, the Belfast Agreement makes clear that there is "*the right to pursue democratically national and political aspirations*", and "*to seek constitutional change by peaceful and legitimate means.*"³⁷ Importantly, Nationalism and Unionism have equally legitimate rights regarding the 'aspiration' dimension, but Unionism's aspiration also reflects NI's legal status and accepted by international law. From that accepted legal status, flow certain responsibilities enshrined in international law.

44. Any action by all the key players (i.e. political parties, Governments and the EU) should be in accordance with the above clearly stated principles, namely the rights and associated responsibilities reflecting these internationally agreed norms.

45. By way of a footnote to this section and a clear demonstration that the territorial integrity of the UK has been breached, a House of Lords committee stated:

EU law as set out in the annexes to the protocol applies to Northern Ireland on a dynamic basis, subject neither to UK government participation in the EU institutions, nor to consent from parliamentarians either at Westminster or Stormont.³⁸

Northern Ireland Protocol

46. While the Windsor Framework (February 2023) is an adjustment to the Northern Ireland Protocol, it does not alter the legal position in the quotation immediately above. This aspect of the Protocol derives mainly from the minority dimension within NI. For example

³⁶ UK Parliament: House of Commons, Hansard for 28 March 1995, (Volume 257), Written Answers.

³⁷ The Belfast Agreement: 'Human Rights', par. 1, page 16.

³⁸ House of Lords, European Affairs Committee; Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Chapter 1: Introduction, par. 2, page 5, 22 March 2022.

Leo Varadkar, then Ireland's Taoiseach (Prime Minister) in 2017 and again from 2022, wrote:

To the nationalist people in Northern Ireland, I want to assure you that we have protected your interests throughout these negotiations. Your birth right as Irish citizens, and therefore as EU citizens, will be protected. There will be no hard border on our island. You will never again be left behind by an Irish Government. These rights will, of course, be available to everyone in Northern Ireland who chooses to exercise his or her right to be an Irish citizen, regardless of their political persuasion or religious beliefs.³⁹

47. Among key participants during final days of 'the Talks' leading to The Belfast Agreement were Sir Tony Blair, the UK Prime Minister from 1997 to 2007 and Jonathan Powell, Sir Tony Blair's Chief of Staff, also from 1997 to 2007. Both could be viewed as influential and expressed clear views on the issues surrounding the impact of 'Brexit'. For example:

Sir Tony Blair

In addition, at the core of the agreement was the following deal: Northern Ireland would remain part of the UK for as long as a majority in the north wanted it, but in return the nationalist aspirations and identity of those who wanted a united Ireland would be recognised and given effect. The open border between north and south was key. Had that been in doubt, there would never have been a peace agreement. Simple as that.⁴⁰

Jonathan Powell

Brexit was always going to trample on someone's rights. If the United Kingdom was going to leave the Customs Union and the Single Market then there had to be a hard border somewhere. At first Boris Johnson proposed it should be between Northern Ireland and the Republic, which would have injured the identity of nationalists.⁴¹

48. In reference to the above Lord Jonathan Caine, a former Advisor in the Northern Ireland Office - a Westminster Government Department - and at present the Parliamentary Under Secretary of State in the Northern Ireland Office, addressed the issue while speaking in the House of Lords on 13 September 2021. This related to a debate on the Lords European Affairs Committee's report on the Northern Ireland Protocol. He referenced this debate in a print-media article. Also in this article, regarding the draft joint UK-EU report that he saw for the first time on 4 December 2017, he stated:

³⁹ Leo Varadkar TD, 8 December 2017. Quoted in an open letter comprising 1,000 signatories from a broad cross-section of civic nationalism urging the then Taoiseach to adhere to his commitment and for his government to ensure their rights as Irish citizens are protected; Irish News, 5 November 2018.

⁴⁰ Tony Blair: 'The EU was crucial to securing peace in Ireland. This plan puts it in peril', The Guardian, 5 October 2019.

⁴¹ Jonathan Powell: 'Backing the People's Vote is party's best chance of preventing a united Ireland', Belfast Telegraph, 21 October 2019.

At a meeting the following day in the Cabinet Room, I stated that the document had every hallmark of having been drafted in Dublin, at which point one very, very senior official replied, "That's because it largely was".⁴²

49. This draft UK-EU Report was signed on 8 December 2017. Lord Caine stated: "*In classic EU negotiating fashion, we were unable to remove any of the agreed text...*" He added:

Early on the Friday morning, Mrs May did indeed fly to Brussels and sign the joint report. Regrettably, the die had been cast and whatever way we tried to present the situation, the principle that Northern Ireland would be treated separately from the rest of the United Kingdom had been conceded.

50. Subsequently the Northern Ireland Protocol was agreed between the UK and the EU in December 2020. Article 1 (Objectives) / 3 of the Northern Ireland Protocol states:

This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

51. Consider each of the four elements in the above quotation that were considered necessary in order to reach an agreement.

(a) Address the unique circumstances on the island of Ireland: on the basis of this lecture, NI is not unique. Yes, it has its' own particular circumstances. Also, maybe the appearance of uniqueness is because NI is separated by water from the rest of the UK and has a land border with the EU. Yet, for example: Hawaii, in the middle of the Pacific Ocean, is an integral part of the USA and consider Alaska's location; Sicily is part of Italy; Tasmania is part of Australia; and the island of Borneo is divided among three countries - Brunei, Indonesia and Malaysia. Other EU countries have a border with a non-member of the EU. NI's geo-political situation is not unique and, while there are particular circumstances that need to be addressed, it should not be considered as needing a unique solution.

(b) Maintain the necessary conditions for continued North-South cooperation: Niall Cody (Ireland's Chairman of the Board of Revenue Commissioners), gave evidence to the Irish Parliament on 27 May 2017 regarding border issues. In summary: less than 2% of goods were physically checked; the vast majority of these checks were carried out in approved warehouses; customs systems being managed entirely on the basis of electronic processing; and "*we are not looking for sites for customs posts.*" This evidence was ignored by the Irish Government.

(c) Avoid a hard border: cultural identity was not affected at all by the partition of Ireland in 1921. Consider the content of a published article that stated: "*Here, sport reflects wider society, where most organisations governed on an all-Ireland basis before partition, remained so afterwards, highlighting that the political partition of Ireland was not matched by a social and cultural one on the island, by and large.*"⁴³

⁴² Lord Jonathan Caine: 'The UK too readily accepted the EU-Irish view of what was needed to prevent a hard land border between Northern Ireland and the Republic', News Letter, 16 September 2021.

⁴³ Cormac Moore: 'Why did Ireland's sporting bodies not split in 1921?', Belfast Telegraph, 23 July 2021.

Also: there is an agreed 'Common Travel Area' (CTA).⁴⁴ Arrangements were reaffirmed regarding the *"associated reciprocal rights and privileges enjoyed by British and Irish citizens in each other's state."* (par. 2, b)

"The CTA is a long-standing arrangement... that facilitates the ability of our citizens to move freely within the CTA. In addition, associated reciprocal rights and privileges have been enjoyed by British citizens in Ireland and Irish citizens in the UK since Ireland's independence." (par. 3)

"The CTA...existed long before either the UK or Ireland were members of the EU...and therefore not dependent on EU citizenship or EU membership." (par. 5)

These reciprocal rights involve the right to: reside, work, health care, social security rights, social housing, education and voting.

(d) Protect the 1998 Agreement in all its dimensions: The FCNM provides the necessary protection of The Belfast Agreement. Also, Strands 1 to 3 could still function (NI Assembly; North/South Ministerial Council; British-Irish Council; and the British-Irish Intergovernmental Conference). All necessary and relevant dimensions are protected, notwithstanding the UK leaving the EU.

52. Overall, what has threatened to make NI's political situation worse is thinking that NI is uniquely complicated to the extent that it can only be addressed by pursuing untried, innovative and complex measures without precedent elsewhere, and which could likely result in continued instability. Given the UK's initial position and subsequent pressure during the Talks for the UK to ratify the FCNM, I expressed the following view: *"What is unique about Northern Ireland is not the problem but the solution advocated by government."*⁴⁵ The same situation applies today.

Delayed Bill of Rights

53. The concept of a Bill of Rights has been mentioned on several occasions in this lecture, but specifically it is referenced in paragraph 24. The Belfast Agreement was endorsed by the peoples of the island of Ireland on 22 May 1998, which included reference to the creation of a Bill of Rights. Yet, 22 years later in January 2020 'New Decade, New Approach' stated: *"The Ad-Hoc Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement..."* (Page 37, par. 5.26). Why the delay? Briefly consider some aspects.
54. The newly-established Northern Ireland Human Rights Commission (NIHRC) considered the contents of a Bill of Rights. It stated in 2001:

It has chosen not to confine itself to advising on 'the scope for defining' the requisite rights but to advise on the rights themselves. [And] In so far as a narrow interpretation of paragraph 4 [the 1998 Agreement, page 16] might be thought to rule out the recommendation of certain rights, the Commission

⁴⁴ Memorandum of Understanding between the Governments of the UK and Ireland, concerning the Common Travel Area and associated reciprocal rights and privileges. Signed by both Governments, 8 May 2019.

⁴⁵ Dermot Nesbitt: 'Solutions must be based on reality', News Letter, 8 January 1998.

is satisfied that it can properly rely on its general power under section 69(3)(b) of the Northern Ireland Act 1998 to make recommendations for the better protection of human rights in Northern Ireland.⁴⁶

55. Section 69(3)(b) states: *“The Commission shall advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights on such other occasions as the Commission thinks appropriate.”*

56. However, Professor Tom Hadden (referenced previously in pars. 6 and 7) was a member of the initial NIHRC from 1999 to 2005. He subsequently expressed in 2010 his views as to the lack of progress towards a Bill of Rights:

But the Human Rights Commission and the human rights community at large seriously misunderstood what was intended and agreed by the parties and the two governments in 1998. Instead of working on what was needed to guarantee the concerns of unionists, nationalists and the unaligned they convinced themselves that their job was to incorporate an up to date list of human rights for all.⁴⁷

57. Yet, and by comparison, Professor Monica McWilliams, then Chief Commissioner of the NIHRC, expressed in 2010 her view on a Bill of Rights: *“The Commission advised government that there should be a Bill of Rights, not as some kind of tick box exercise for the expediency of the Belfast (Good Friday) or St Andrews Agreements, but because we recognise it as an essential part of the peace process.”*⁴⁸

58. Regarding the above quotation by Professor McWilliams, I believe it is most disrespectful of the outcome contained in The Belfast Agreement that was in turn agreed by a large majority, via two referenda of the peoples of the island of Ireland on 22 May 1998. It is a matter of complying with the wishes expressed by referenda and not viewing the implementation of the people’s clearly expressed wish as a mere “tick box” exercise.

59. Professor Hadden also commented to the NI Assembly’s Ad Hoc Committee on a Bill of Rights:

In my view the proper role of a bill of individual and communal rights in a divided society like that of Northern Ireland is to facilitate peaceful and consensual change as the population balance changes over time, not to set an example to the wider world by the adoption of an exemplary range of internationally recognised human rights. The failure of the Human Rights Commission to focus on this particular circumstance of the people(s) of Northern Ireland has been, in my view, the most significant missed opportunity that was provided under the Good Friday/Belfast Agreement. It could still be remedied if the two governments could step in and persuade the political parties and the Human Rights Commission to go back to the original conception outlined in the Good Friday/Belfast Agreement or failing that to develop the terms of their own Agreement given that the political

⁴⁶ NIHRC: ‘Making a Bill of Rights for Northern Ireland’, September 2001, page 14.

⁴⁷ Tom Hadden: ‘How the Bill was lost’; ‘Fortnight’, September 2010, complete text on pages 10 and 11.

⁴⁸ Monica McWilliams: Platform Article; Belfast Telegraph, 16 September 2010.

parties and the Human Rights Commission have so far proved to be unable to do the job.⁴⁹

60. My views are clear. I have no desire to define cultural identity / rights in a restrictive manner. Simply, I wish to base decisions on the law, including international law that follow practices in wider Europe. The meaning of the language describing the 'particular circumstances' of Northern Ireland is clear: mutual respect for; Identity (culture, language, education & religion), Ethos (characteristics of a community as manifested in its attitudes and aspirations), and Parity of Esteem (equal respect for the identity, ethos and aspirations of both communities).
61. I regret very much the delay in agreeing a proposed Bill of Rights. Some may wish for an expansive Bill of Rights and I can understand their perspective. But that provides no rationale to ignore the law's demands. The law must be applied and it is clear. However, with a Bill of Rights agreed, according to The Belfast Agreement, nothing precludes the possibility of adding further rights at a future date.

Concluding Comments

62. The Northern Ireland 'problem' is not insoluble and the Ulster Scot dimension has a valid contribution to make. Progress is possible in achieving lasting stability if all follow agreed international norms. Since the end of the Second World War an array of international agreements and conventions have been drawn up at both European and global level in order to establish guidelines and regulations on the rights and responsibilities of residents within States and on the responsibilities of States towards them.
63. It is indisputable that the overwhelming consensus that has emerged from these agreements is that the best deal for all, and the best hope for stability, is to be found in respect for the territorial integrity of existing States while offering maximum guarantees - internationally defined - to all. This does not preclude the right of persons to seek separation from the UK, as contained in The Belfast Agreement.
64. The approach, including by the UK and Irish governments and the EU, should not be a willingness to accommodate ideological 'hard line' demands. Rather, it must be to follow the principles of international human rights law that are endorsed elsewhere in Europe and wider afield.
65. Interestingly in the context of the perception of a broad swath of Unionism towards the Northern Ireland Protocol - and also historically - a briefing note by Eamonn Gallaher to the then Taoiseach (Ireland's Prime Minister), prior to a meeting in Chequers in September 1971, stated:

So far as the question of Irish unity goes the Taoiseach is bound to raise it as a future eventuality. It is consistent with his general policy however to get there step by step. All that he needs from Chequers 11 therefore, is a single step. Perhaps this could be encompassed through the creation of an

⁴⁹ Tom Hadden: 'What the bill of Rights was intended to achieve for Northern Ireland'; Ad Hoc Committee on Bill of Rights, written briefings received by the Committee, last par., August 2020.

Economic and Social Council of Ireland designed to harmonise the economic and social conditions of the country North and South.⁵⁰

66. Unfortunately but accurately, the former Moderator of the Presbyterian Church, Rev. Dr. Norman Hamilton, was quoted in the Belfast Telegraph regarding his perception of where we are regarding The Belfast Agreement:

It has singularly failed to bring reconciliation to this land and to our people. Tensions and animosities are everywhere...It means that every time a political leader speaks of reconciliation, there is no clarity as to what he or she is actually describing or advocating. Maybe the subject is too toxic, complex or costly - or they simply don't know what is entailed. This policy silence simply isn't good enough.⁵¹

67. Personally, I have had an acute frustration with our present political situation that has lacked a clear, positive, balanced and pragmatic approach regarding the implementation of human rights. I have challenged publicly both local and national politicians and the media as to why international standards on human rights are not being implemented. All political parties, in particular the dominant two Northern Ireland parties from each tradition, have a clear responsibility. Further, the UK Government has disregarded its obligations to the Council of Europe by failing to recognise the breadth of respect required in order to make progress on human rights.

68. Evidence demonstrates, when dealing with Northern Ireland, the UK and Irish Governments and the EU act in breach of a fundamental principle of international law regarding territorial integrity. Solutions are available that both respect international law in all its parts and also address the present concerns in NI. This would provide a real, balanced, honourable and acceptable accommodation. For example: in order to address North / South trading arrangements, there could have been a separate Act, such as 'The Northern Ireland (European Harmonisation) Act'. Locally based companies wishing to trade freely into Europe through Ireland would have had to adhere to such an Act.

69. I believe that the majority wish to see a real, balanced and honourable accommodation between our two communities. The principles determined by international agreement are aimed at solving the problems of a community deeply divided along communal lines. These International principles, regarding identity and respect, form the basis required to build bridges within our divided society. I wrote in September 1996 (par. 5) that: *"Until these principles are publicly debated and widely agreed it is naïve to expect much progress from the political talks."* Subsequently, we have had The Belfast Agreement and the absence of war, but remain to have a society at ease with itself, on the basis of community reconciliation. We have still some distance to travel.

⁵⁰ Noel Dorr: 'The Search for peace in Northern Ireland, Sunningdale', Royal Irish Academy, Dublin 2017, page 98.

⁵¹ Suzanne Breen: 'Good Friday Agreement has failed to bring reconciliation to this land, says former Presbyterian moderator Dr. Norman Hamilton', Belfast Telegraph, 14 October 2022.