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Our ref. Your ref.

19 October 1995

The Secretariat,
Forum for Peace and Reconciliation,
Dublin Castle,
Dublin 2.

Dear Wally and Adrian,

I am enclosing as promised an agreed final draft of our paper which will form the basis of our presentation to the Forum on November 3rd. As you know already we have felt it better in all the circumstances not to include any discussion of what we have previously referred to as the 'transitional issues', mainly because we feel that to do so would inevitably involve a discussion of highly controversial matters which might result in less attention being paid to the principal focus of our study, namely the future protection of human rights under any of the possible constitutional settlement which may emerge from the peace process. This does not rule out a further separate paper which would deal with those transitional issues if the parties to the Forum wish for that to be submitted, though it would inevitably take some months to complete given the need for further detailed discussion between us on how best to present the material.

As you will see, we have not as yet inserted the notes and references which will include some more detailed examples of formulations which have been adopted on the various issues in other jurisdictions. If all goes well we should be able to complete an annotated version for presentation on November 3rd. But as before we would welcome any comments which you or any of the individual parties may wish to make on the style or content of this draft either in advance of or following the formal oral presentation. As we have explained, we are also making this version available for comment and discussion with other parties to the peace process not directly involved in the Forum.

I am sorry that it has taken so long to get to this stage, but hope that what we have produced will be of assistance.

Yours sincerely,

THE PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF PEACE AND RECONCILIATION IN IRELAND

1. SOME BASIC PRINCIPLES FOR THE PROTECTION OF HUMAN RIGHTS

1.1 All parties are agreed that fundamental human rights must be protected under any settlement which emerges out of the current peace process in Northern Ireland. But there is less clarity on precisely what that will involve. This study is an attempt to explain some principles which in our view should be recognised and implemented as an essential foundation for any stable and lasting settlement in Ireland, whatever the future relationships between the two parts of Ireland and the United Kingdom. These principles will be set out in general terms by way of introduction. They will then be discussed in greater detail in the main body of our report along with some suggestions as to how they might be implemented.

1.2 The principles may be divided into two groups, those of general application and those of particular relevance to peace and reconciliation in Ireland. They may be summarised as follows:

General principles

1. The human rights to be protected, embracing civil, political, social, economic and cultural rights, are defined by established conventions drawn up by international agreement within the United Nations and must not be thought of as subject to bargaining between the parties.

2. Some of these rights are defined in the international conventions in precise terms which leave little scope for variation in their implementation; others are enunciated as general principles, leaving it to individual states to decide on the precise means of implementation.

3. Though human rights have traditionally been formulated as individual rights some may equally be formulated as communal or group rights and cannot properly be treated in a different way or considered as any less binding on that account.

4. The recognition of communal rights in a divided society must not be allowed to interfere with the right of individuals to reject any communal allocation, to assert their commitment to integration and pluralism and to have equal facilities for doing so in education, housing, employment and other spheres.

5. The most widespread and almost certainly the best means of protecting these rights in national law is to incorporate the relevant international provisions into national law so that international guarantees can be enforced in national courts.

6. The establishment of democratic structures and the rule of law is essential to the effective delivery of human rights.

7. The protection of human rights is not merely a matter of formal enactment and enforcement but must be built into the formal and informal structures of government at every level and sustained by the active involvement of non-governmental organisations of all kinds in such a way as to create a general human rights culture.

Principles of special relevance to peace and reconcilation in Ireland

8. The full range of human rights must be protected with equal commitment and effect under any of the various possible political settlements which may emerge from the current peace process.

9. If any settlement envisages the possibility of future change in the constitutional status of Northern Ireland or Ireland as a whole, the same human rights must be protected with equal commitment and effect before and after the change.

10. Given the general perception that human rights and international humanitarian standards have been systematically abused during the conflict in Northern Ireland special attention should be given to the prevention of abuses during any future state of emergency.

11. Given the particular circumstances of the conflict in Northern Ireland and the nature of the current peace process the effective protection of human rights is likely to involve joint British and Irish action and guarantees.

12. Given the fact that both the United Kingdom and Ireland are members of the European Union, have ratified the main human rights conventions within the Council of Europe, and are participant states in the Organisation for Security and

Cooperation in Europe the effective protection of human rights is also likely to involve important European dimensions.

13. Any new structures for the protection of human rights should be developed in harmony with existing constitutional and common law protections.

14. Experience in other jurisdictions suggests that the effective protection of human rights will require the creation of one or more independent human rights commissions with sufficient powers and resources to monitor and where necessary to assist in enforcing human rights.

15. Any such commission should also be granted sufficient powers and resources to develop a general human rights culture through education and other forms of promotion.

2. NATIONAL AND INTERNATIONAL PROTECTION OF FUNDAMENTAL RIGHTS

2.1 In the early stages of the development of the concept of fundamental human rights it was usual for a list of fundamental rights to be included in state constitutions, often after the overthrow of an authoritarian or colonial regime. The best known examples were the United States Declaration of Independence and the ensuing Bill of Rights incorporated in the United States Constitution as the first twelve amendments and the French Declaration of the Rights of Man. The list of rights to be guaranteed in these early examples were typically limited to matters of concern in the late eighteenth century. The Irish Constitution of 1937 is an example both of a more developed list of individual rights and also of the recognition of more general social and familial rights based on a particular, though unexpressed, theory of natural law. But there is no formal requirement in international law or otherwise that any fundamental rights should be identified or guaranteed in a state's constitution. Neither the unwritten British constitution nor the written Northern Ireland constitution contain any express or implied provisions as to fundamental rights. As will be seen, however, the United Kingdom is out of line with practice in most other European states in this respect.

2.2 Since the adoption of the Universal Declaration of Human Rights by the United Nations in 1948 and the subsequent opening for signature of the European Convention on Human Rights and Fundamental Freedoms in 1954 and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights in 1966 the situation has changed radically. Decisions on what should constitute fundamental human rights can no longer be regarded as a matter for people in individual states to decide as best they can. The substance of fundamental human rights is now determined by international consensus and in so far as the Universal Declaration is regarded as having attained the status of customary international law there is an obligation on all states to protect those rights. In Europe this obligation has been formally accepted by most states through their ratification of the European Convention on Human Rights. Similar obligations have been accepted by most states in North and South America under the American Convention on Human Rights and in Africa under the African Charter on Human and Peoples Rights. And by the end of 1994 128 states throughout the world had formally ratified the International Covenant on Civil and Political Rights. Though

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there are some minor differences in the precise formulation of some of the rights covered in these various international covenants, there is a remarkable degree of convergence on the essential list of fundamental human rights.

2.3 The rights which states may currently be regarded as under an obligation to respect may be listed in a number of categories: first the individual civil and political rights principally defined and protected under both the International Covenant on Civil and Political Rights and the European Convention of Human Rights; secondly the individual social and economic rights principally defined and protected under the European Social Charter and the International Covenant on Economic, Social and Cultural Rights; and thirdly a number of collective or group rights defined and protected under these same and some other covenants. As will be seen, these rights differ in a number of significant respects, not least in the precision with which they are defined and the way in which they may be enforced. And there are important differences in the priorities which are accorded to them by people with different political perspectives. But it is important to stress that these different categorisations must not be allowed to detract from the fact that states are required under the main international human rights instruments to respect and protect them all.

Civil and political rights

2.4 The main civil and political rights which states are required to guarantee to all individuals within their jurisdiction and the conventions under which they are protected may be summarised as follows:

The right to life	ECHR art 2; ICCPR art 6
The right not to be tortured or subjected to inhuman or degrading treatment	ECHR art 3; ICCPR art 7; UN Convention against Torture; European Convention for the Prevention of Torture
The right to protection from slavery or forced work	ECHR art 4; ICCPR art 8
The right not to be unlawfully arrested or detained	ECHR art 5; ICCPR art 9

The right to fair trial	ECHR art 6; ICCPR art 14
The right to freedom of belief and expression	ECHR arts 9-10; ICCPR arts 9-10
The right to free association	ECHR art 11; ICCPR art 22
The right to privacy and and family life	ECHR art 8; ICCPR art 17
The right not to be discriminated against	ECHR art 14; ICCPR art 26
The right to a remedy for breaches of human rights	ECHR art 13; ICCPR art 2

2.5 Though this list is by now well established, the precise content of each of the rights varies both within and between the major conventions. The right to life, for example, is formulated with much greater precision under the European Convention than the International Convenant: the European Convention specifies a number of circumstances in which the state may legitimately deprive an individual of life, for example in the control of rioting or the protection of others from unlawful violence, provided no more force is used than is absolutely necessary, while the International Covenant merely prohibits the arbitrary deprivation of life. Similarly the elements of a fair trial are specified in great detail under both the European Convention and the International Covenant, while the right to respect for family life and privacy is formulated in very general terms which leave a great deal of discretion to those charged with interpreting or enforcing the right. Under the European Convention, for example, the right to respect for family life and privacy has been interpreted to require the Republic of Ireland to provide legal aid and permit access to contraception and to information on abortion and to require both the United Kingdom and Ireland to remove the criminal ban on homosexual activities in private. There is accordingly a good deal of scope for debate on which of the international models should be adopted and on whether a more or less precise formulation should be adopted in the protection of each of the main rights.

2.6 The precise formulation of the right not to be discriminated against is also of considerable significance. Under the European

Convention, for example, the provision in article 14 covers only discrimination in respect of the rights protected in the Convention. There is no protection from discrimination on the ground of age or from discrimination in non-state employment. Nor is there any express provision of the kind that is included in some other anti-discrimination covenants in respect of positive or affirmative action to remedy the effects of past discrimination or to enable effective equality to be achieved. If affirmative action of this kind is not expressly authorised, it may be held to be unlawful on a strict construction of a general equality or non-discrimination provision.

Economic, social and cultural rights

2.7 The Universal Declaration of Human Rights of 1948 made no distinction between civil and political and economic and social rights. But social and economic rights are now protected under a number of separate conventions under which the formulation of each right and the procedures for monitoring are clearly distinguished from those for civil and political rights. The most important are the European Social Charter, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child. Though the list and classification of rights covered in these conventions is not as well settled as in respect of civil and political rights, some of the most important may be listed as follows:

The right to food, clothing and shelter	ICESCR art 11
The right to health	ESC art 11; ICESCR art 12; CRC art 24
The right to education	ECHR Protocol 1; ICESCR arts 13-14; CRC arts 28-29
The right to work	ESC art 1; ICESCR art 6
The right to safe and fair conditions for work	ESC arts 2-3; ICESCR art 7
The right to social security	ESC arts 12-14; IESCR art 9
The right to cultural expression	ICESCR art 15

2.8 The most significant distinction in the formulation of these social and economic rights compared with civil and political rights is that states are required only to use their best efforts within the resources available to them to achieve their realisation. In addition the procedures for monitoring state performance are exclusively based on the submission and discussion of periodic state reports to the relevant supervisory committee of experts. There is no provision for individual complaints or for formal adjudication on alleged violations. These features have led some commentators - and some states - to treat the obligations imposed under these conventions as less serious and less binding than those in respect of civil and political rights. Other commentators and states, however, argue that the effective delivery of basic social and economic rights is a precondition for the delivery of most civil and political rights and that they should therefore be given greater priority. One possible response to this difference in the treatment of the two sets of rights which has been adopted in a number of states, following the lead set in the Irish Constitution, is to provide that social and economic rights should be recognised as 'directive principles of social policy' to govern the interpretation of relevant legislation rather than as rights which may be enforced by individual action in the courts.

Collective rights

2.9 The final category of rights are those which are best described as pertaining not to individuals as such but to groups or communities. The best established of these are granted under the International Covenants. But the range of minority rights recognised by the international community has recently been expanded, notably under the United Nations Declaration on the Rights of Persons belong to National or Ethnic, Religious or Linguistic Minorities adopted in 1993. Similarly at a European level, though none are included in the European Convention on Human Rights, a wide range of such rights has recently been recognised under the European Charter for Regional or Minority Languages of 1992 and under the new European Framework Convention on the Protection of National Minorities, which was finally agreed in 1994. Though neither of these has as yet been ratified by either the United Kingdom or the Republic of Ireland, both have signed the Framework Convention. There are also a number of rights of special relevance to communities in divided societies

which are not so readily classifiable as peoples or minority rights but which may be equally important to peace and stability.

2.10 The most important of these collective rights may be listed as follows:

The right of peoples to self-determination	ICCPR art 1; ICESCR art 1
The rights of [members of] minorities:	
to practise their religion, use their language and enjoy their culture	ICCPR art 27; EFCPNM art 5
to be taught or educated in their distinctive language	EFCPNM art 14
to participate effectively in government, especially on matters affecting them	EFCPNM art 16
The rights of [members of] communities in divided societies:	
to parity of esteem	EFCPNM art 4(2)
to freedom from incitement to hatred	ICCPR art 20
to education in mutual tolerance	CPDE art 5; EFCPNM art 6
not to be treated as members of a distinct community against their will	EFCPNM art 3

2.11 There is some dispute among human rights lawyers as to whether these rights should be treated as the collective rights of groups or communities as such or as the individual rights of persons belonging to them. But this distinction is not of much practical significance, except in so far as it illustrates the difficulties both in theory and in practice of attempting to draw a strict line between individual and communal rights. The more important issues are how a people with the right of

right to shared or integrated schooling for those parents or children who wish it.

2.19 There is a delicate balance between the rights of individuals to resist the segregative pressures inherent in divided societies and the rights of communities or minorities to preserve their identity and culture. Committed members of distinctive communities often demand the right to maintain structures which will enable them to preserve their culture and their identity and which may make it correspondingly difficult for persons born into their community to pursue less exclusive values. But the rights of those who seek to break down communal barriers and to develop a pluralist culture must deserve special attention in the search for peace and reconciliation in Ireland. An appropriate balance between these competing interests must be carefully preserved in the formulation of any bill of rights for Northern Ireland or Ireland as a whole.

self-determination is to be identified and distinguished from a minority and how the collective rights of either are to be dealt with in the context of the recognition of other human rights. Some of the possible approaches to the delivery of these rights in divided societies have been discussed in the study by Dr Eide. But given the obvious importance of collective rights in the context of Northern Ireland an understanding of their relationship to other human rights and how they may be handled in any formal bill of rights is essential.

The right of self-determination

2.12 The right of peoples to self-determination is given pride of place in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Soical and Cultural Rights. In practice, however, the difficulty of identifying a people for this purpose and the political implications of doing so has led to a marked reluctance on the part of international bodies to lay down any firm rules on the issue. The United Nations Human Rights Committee, for example, has recently held that the right of self-determination under the International Covenant on Civil and Political Rights is effectively non-justiciable in that the Human Rights Committee will not rule on a complaint about any alleged violation. It is generally accepted, however, that to qualify as a people with a right to establish a separate state or to merge with another state the population in question must at least have the following characteristics:

1. a distinctive language, religion or culture;

2. a shared history and experience;

3. a commitment to preserving its separate identity;

4. an association with a specific territory.

The difficulty is that the accepted criteria for the identification of a minority, which does not have a right of self-determination, are broadly the same with the possible exception of a specific territorial association.

2.13 The application of these principles within the two parts of Ireland is obviously of central concern to the peace process. Any agreed resolution will need to address not only the question

of outcomes, but also the precise basis on which the right of self-determination might be exercised. Thus while the Irish people within the Republic have clearly established their right of self-determination, it is less clear whether either or both communities in Northern Ireland should be treated as a people or as a minority. It may be argued, for example, that if the unionist community is to be entitled to retain the existing constitutional association with the United Kingdom, the nationalist community should be granted a reciprocal right to equivalent constitutional or institutional links with the Republic of Ireland. But the only support in international law or practice for this approach is in respect of the right of members of minority communties to develop and maintain cross-border relationships and institutions. It may be noted in this context that both the British and Irish governments have formally recognised the importance of this issue and have made express reference in the Anglo-Irish Agreement and the Downing Street Declaration, and by reference in the Framework Documents, both to the existence of a right of self-determination for the people of Ireland, North and South, which might be exercised by joint referendums on any proposed settlement, and also to the right of the people of Northern Ireland as a whole to vote either to remain part of the United Kingdom or to join the Republic of Ireland, but not to opt for independence. It must also be noted, however, that the formulations adopted in these documents have not been accepted by all parties to the peace process. Given the absence of any clear rules of international law on how the right of self-determination is to be exercised and the essentially political nature of decisions on the issue, any resolution must remain a matter for political negotiation between the two states directly involved and other parties to the peace process.

Minority or Communal Rights

2.14 There is an initial difficulty over the terminology to be used in discussing other collective rights. The use of the word minority has implications which may not be either accurate or acceptable in societies where there are two or more communities which demand equality of treatment. Whether they are described as minority or communal rights, however, their substance is defined in the relevant international covenants in general terms which leave a good deal of discretion to states to decide how they may best be implemented. There are many ways, as will be clear from Dr Eide's study, in which different communities may be facilitated in maintaining their separate identity and culture or

in which their right of effective participation in government on matters which affect them may be guaranteed. Whatever legislation or means of provision is adopted to ensure the rights of a particular community, however, it is important that communal rights in all the respects covered in the international conventions should be guaranteed and entrenched in the same way as individual rights. In a divided society the effective recognition of communal rights and the development of a concept of parity of esteem may be as important to the maintenance of peace and stability as the recognition of individual rights in more homogeneous societies. It follows that any entrenched bill of rights for Northern Ireland or other parts of the United Kingdom or for Ireland as a whole should include provisions to ensure that communal rights are effectively guaranteed.

2.15 The best approach in this sphere may be to incorporate the major provisons of the most recent international covenants, notably the European Framework Convention on the Protection of National Minorities, into any new bill of rights leaving the detailed provisions to be worked out in ordinary legislation. A good example of this approach in respect of the Irish language, as an alternative to extending the status of Irish as a state language to the whole of Ireland, would be a combination of a general entrenched right for individuals to use Irish as a minority language and its implementation by specific legislation along the lines of the Welsh Language Acts prescribing the circumstances in which Irish could be used for official and educational purposes as of right.

2.16 The idea of a right to parity of esteem for the two traditions in Northern Ireland or in Ireland as a whole raises more difficult issues. Some lawyers take the view that any general provision of that kind in a bill of rights would be meaningless or at least of no greater effect that a provision outlawing discrimination on the grounds of religion, political opinion or communal membership. But there are numerous examples in divided societies, as Dr Eide's study illustrates, of provisions recognising the existence or the parity of two or more communities within a given state. And there may be some advantages, as has been argued by the Standing Advisory Commission on Human Rights for Northern Ireland, in a general entrenched provision guaranteeing parity of treatment and esteem for two or more communities both in symbolic terms and as a means of ensuring that all governmental programmes can be effectively

challenged as either directly or indirectly discriminatory in their purpose or effect.

Rights of individuals and communities in divided societies

2.17 There is a well recognised danger that undue emphasis on communal rights in divided societies may lead to increased segregation and intercommunal conflict. Though this is as yet an undeveloped area in human rights law there are a number of conventions which expressly recognise the positive values of pluralism and integration and the right of individuals or groups to resist such pressures. The International Covenant on Civil and Political Rights includes the right to freedom from incitement to racial hatred and the United Nations Declaration on Religious Tolerance lays the foundation for a right of mutual toleration between religious communities. The UNESCO Covenant on Freedom from Discrimination in Education and the European Framework Convention on the Protection of National Minorities likewise include a right to education in mutual tolerance. The right of individuals not to be treated as members of a defined community against their will is less clearly expressed in the major conventions. But it is expressly included in the European Framework Convention on the Protection of Minorities. This and other individual rights, referred to by Dr Eide as rights in the common domain, must not be allowed to be overridden by claims to mutually exclusive rights in the communal domain.

2.18 The individual right not to be classified or treated as a member of a distinct or separate community is particularly important in respect of education, in that separatist attitudes and pressures often stem from separate educational systems. The right of individual parents to have their children educated in shared or integrated schools has been granted some recognition in recent legislation both in Northern Ireland and in the Republic of Ireland. But in neither case does it grant an effective right for all parents to have their children educated in shared or integrated schools. Though it is arguable that the provision in the First Protocol to the European Convention on Human Rights which grants to parents a right to have their children educated in accordance with their religious and philosophical convictions could be interpreted in this way, the decisions of the European Court on the issue fall far short of that. There is therefore a strong argument that the interests of peace and reconcilation would be furthered by providing a more specific and enforceable

3. CURRENT HUMAN RIGHTS PROTECTIONS IN IRELAND AND THE UNITED KINGDOM

3.1 The peoples of the United Kingdom and the Republic of Ireland are committed to democratic values, to individual freedom and to the rule of law. Both as democratic states have accepted common commitments to international human rights standards. Both have ratified the European Convention and the International Covenants and a number of other human rights conventions, as set out in Appendix A. And both have accepted not only the binding force of judgments by the European Court of Human Rights in Strasbourg but also the right of their individual citizens to initiate proceedings aganst them through the European Commission and Court of Human Rights. In addition as members of the European Union both have accepted binding obligations in respect of certain individual rights under the Treaty of Rome and the Maastricht Treaty of Union. But neither has incorporated the provisions of the major human rights conventions into national law, a matter which has drawn adverse comment from the United Nations Human Rights Committee in its response to the most recent British and the Irish reports under the International Convention. Both states have nonetheless claimed that human rights are already adequately protected under their domestic legislation or by common law. Before discussing the various ways in which internationally accepted human rights might best be protected under any of the regimes which might emerge from the current peace process the validity of these claims must be assessed.

The position in the Republic of Ireland

3.2 An extensive list of fundamental rights is entrenched in the Irish Constitution (Bunreacht na hEireann). And Irish judges have repeatedly shown that they are prepared to uphold these fundamental constitutional rights by overruling both legislation and established common law rules where that is necessary to give effect to them. They have also sought to take some account of the social and economic principles enumerated in the Constitution in their interpretation of relevant legislation. The Irish courts have adopted a dynamic approach to the interpretation of the Constitution. But the list of rights and the way in which they are formulated differ in some important respects from those in the international covenants. This is due largely to the fact that the Irish Constitution was drafted in the 1930s and reflects the attitudes and concerns of the time. It also reflects a

Westminster Parliament also has unrestricted power to suspend the Northern Ireland constitution or to introduce emergency powers. Wide-ranging provisions restricting the rights protected under ordinary legislation or the common law have been enacted under the Prevention of Terrorism (Temporary Provisons) Acts and the Northern Ireland (Emergency Provisions) Acts. Legislation has also been enacted which provides greater protection for some fundamental rights in Northern Ireland, such as the provisions on discrimination in employment under the Fair Employment (Northern Ireland) Acts, than is available in other parts of the United Kingdom. And Northern Ireland is the only part of the United Kingdom with a permanent official commission, the Standing Advisory Commission on Human Rights, with formal responsibility for monitoring the effectiveness of human rights protections.

3.7 It would be impossible to sustain a claim that in practice fundamental human rights have been effectively protected in Northern Ireland under this regime. Throughout its existence as a distinct unit of government both the Stormont and the Westminster Parliaments have been able to maintain and to use emergency powers of arrest and search, detention for interrogation, internment without trial, censorship and wide ancillary powers to control movement and requisition property regardless of the level of paramilitary violence and without effective judicial control. In the period since 1969 there have been numerous well-attested allegations both of the abuse of these powers and of wholly unlawful activity, notably the physical abuse of those under interrogation and the unjustifiable use of lethal force, on the part of the security forces. But only in a handful of cases have those responsible for proven abuses been brought to justice. And almost all the many recommedations of the Standing Advisory Commission on Human Rights for the improvement of safeguards against abuse have been rejected by successive governments. The international procedures have not always been much more successful. A number of interstate and individual complaints under the European Convention on Human Rights have resulted in findings of ill-treatment by state forces and set some limits to the use of some of these emergency powers. And recent reports by the United Nations Committee on Torture and the European Committee on the Prevention of Torture have expressed concern about recent interrogation practices. But in many cases the actions of the government and the security forces have been held by the European Commission or Court in Strasbourg to have been a justifiable response to paramilitary or terrorist activity. In the context

of the current peace process issues may also arise over some continuing provisions of Northern Ireland law on such matters as the use of the Irish language and the oath of allegiance required of certain office holders.

The position in Europe

3.8 As members of the European Union both the Republic of Ireland and the United Kingdom are subject to a wide range of additional obligations in respect of the fundamental rights of individuals. Though these were initially formulated primarily as economic rights, the rights to equal treatment, to freedom of movement and to freedom of access to services have had significant implications in both states. For exmaple, European law has been held by the Irish Supreme Court to prevail over the Irish Constitution in respect of access to abortion services in other states. And the decisions of British courts in respect of a number of issues involving the rights of women to equal treatment in respect of work and pension rights have been overruled by the European Court of Justice. The position in respect of these rights differs significantly from those protected under the European Convention on Human Rights in that under European law these rights have direct effect in all member states and have thus been automatically incorporated into Irish and British law.

Conclusion

3.9 It will be clear from this brief assessment that there is scope for the better protection of human rights in all three jurisdictions. In the Republic of Ireland there is a need for the fundamental rights listed under the Irish Constitution to be brought into line with those in the major international covenants. In the United Kingdom as a whole there is a need for more comprehensive protections in national law for the full range of accepted human rights obligations. In Northern Ireland under whatever regime emerges from the peace process there is a need for new legal structures through which accepted human rights obligations can be more effectively entrenched and enforced both under settled conditions and in the event of any renewal of paramilitary or terrorist activity. And constitutional provisions in all three jurisdictions will need to reflect any agreement which may emerge from the peace process on the exercise of the right of self-determination in accordance with current political realities.

4. TECHNIQUES FOR THE BETTER PROTECTION OF HUMAN RIGHTS

4.1 The primary defect in the current regime for the protection of human rights in all three jurisdictions is the fact that international human rights norms are not enforceable in national law. The straightforward remedy for this, as indicated in the general principles outlined at the start of this study, is to incorporate the substance of those norms into national law as has been done in most other European jurisdictions. But there are a number of different legal techniques through which this objective might be achieved under each of the various possible future regimes which might emerge from the peace process. It may help to clarify the more detailed discussion of the practical means of protecting human rights under these various regimes to summarise the advantages and disadvantages of these legal techniques. The main options, though they are not mutually exclusive, are:

1. a formal declaration of commitment to human right as proposed in the Framework Documents

2. direct incorporation of the European Convention or other international covenants into national law;

3. entrenched constitutional protection of fundamental human rights;

4. comprehensive legislative protection of fundamental human rights;

5. protection under bilateral or multinational treaty.

The significant features of each will be discussed in turn.

Declaratory protection

4.2 The idea of a joint declaration by the British and Irish Governments of their commitment to the protection of human rights throughout Ireland was initially raised in 1986 and has recently been reiterated in the Joint Framework Document of February 1995 in the following terms:

> 50. ... both Governments envisage that the arrangements set out in this Framework Document will be complemented and underpinned by an explicit undertaking in the Agreement on

the part of each Government, equally, to ensure in its jurisdiction in the island of Ireland, in accordance with its constitutional arrangements, the systematic and effective protection of common specified civil, political, social and cultural rights. ...

51. In addition, both Governments would encourage democratic representatives from both jurisdictions in Ireland to adopt a Charter or Covenant, which might reflect and endorse agreed measures for the protection of fundamental rights of everyone living in Ireland. ...

4.3 Though the reference in paragraph 51 to a declaratory charter or covenant must be read in the light of the commitment by the two governments in paragraph 50 to other techniques of binding legal protection under national law and by bilateral treaty, the practical value of any such declaration must be questioned. There are numerous precedents for the adoption of non-binding declarations on human rights within the United Nations, for example the 1981 Declaration on the Elimination of Intolerance and of Discrimination based on Religion or Belief. But this is usually regarded as the first step towards the adoption of a formally binding convention. Similarly, in the context of the peace process in Northern Ireland the adoption of a non-binding declaration on human rights, whether by the two Governments or by the parties involved in discussions on future regimes, could form a useful interim step, for example in respect of a commitment that the same human rights would be protected in the event of future constitutional change. But this should not in our view be regarded as a viable long term option since it would have no legal effect and could not be relied on in the courts in the event of future disputes on its meaning. As will be seen there are many ways in which commitments on the protection of human rights, whether for the the present or for the future, can be made binding and enforceable. The opposition to any form of enforceable bill of rights which is prevalent in some quarters in Britain should not be alowed to determine the form of human rights protection in either part of Ireland. This approach will not therefore be further discussed in the analysis which follows.

Incorporation

4.4 The most straightforward means of ensuring that internationally agreed human rights are enforceable in national

law is to incorporate the express terms of the relevant conventions into national law. There are a number of techniques by which this can be achieved: by a general provision making all state commitments under international law an integral part of domestic law, as in Germany; or by a specific constitutional or legislative provision incorporating the terms of a particular convention into domestic law; or by the transformation of national law to include the relevant international principles. One or other of these techniques has been adopted in most European jurisdictions in respect of the European Convention of Human Rights. Following the recent decision by Denmark to incorporate the United Kingdom and Ireland are now the only major states in western Europe in which the terms of the Convention are not directly enforceable in national courts. And though the European Union has not formally incorporated the terms of the Convention into European law, the European Court of Justice has held that the norms of the Convention must be regarded as part of the common law of Europe in the sense that the Convention is accepted as a source for the general principles of European law.

4.5 There are two major advantages in direct incorporation: first that there can be no conflict between the provisions of international human rights law and national law; and second that any relevant issues can be argued and decided in national courts, though the final decision in the highest national court remains subject to an appeal to the European Commission or Court at Strasbourg. One of the principal arguments for incorporation in the United Kingdom has been that many of the large number of adverse decisions against the British Government in the European Court could have been avoided if British courts had been able to take account of the Convention in reaching their own decisions. The only significant difficulty is that for incorporation to achieve this effect the terms of the Convention must be given superior force to those of national legislation. As will be seen this has been raised as an objection to incorporation in the United Kingdom by those who believe in the absolute sovereignty of the Westminster Parliament. But it should not cause any difficulty in states, like the Republic of Ireland, in which it is accepted that national legislation can be held to be invalid if it infringes any fundamental constitutional principles. Nor should it prevent the subordination to the European Convention of legislation adopted by any future subordinate legislature in Northern Ireland.

Entrenched constitutional protection

4.6 The objective of making the terms of international human rights conventions enforceable in national law may equally be achieved by the adoption of an entrenched bill of rights which includes all relevant international provisions. This will usually be entrenched as part of the state constitution, as for the fundamental rights under the Irish Constitution, though that is not essential. The main advantage of this technique is that it permits a more specific formulation of those rights which are expressed in very general terms in the European Convention, such as the right to life or the right to privacy and respect for family life, to take account of prevailing national attitudes on such matters as abortion and contraception or divorce. The freedom of states to maintain their own interpretations of such general rights has been accepted by the European Court of Human Rights and other international bodies on the ground that states must be granted a good deal of discretion - 'a wide margin of appreciation'- in the implementation of international norms in areas of individual and social morality. This technique also permits states to include in an entrenched bill of rights specific provisions in respect of minority or communal rights which are not covered in detail or at all in the European Convention.

4.7 The main drawback to this technique is the potential for conflict between the terms of a national bill of rights and those of relevant international conventions. It is not permissible for any member state of the Council of Europe to maintain a provision in its constitution or bill of rights which has been held to be inconsistent with the corresponding provisions of the European Convention. The best approach may therefore be to incorporate the precise wording of relevant international conventions into any national bill of rights and to limit additional provisions to those matters which are not covered in the international covenants with sufficient precision.

Protection by ordinary legislation

4.8 There is no requirement in any of the international conventions that human rights should be protected under national law by an entrenched bill of rights. It is equally acceptable for protection to be provided by ordinary legislation, by common law rules or even by administrative practice. In some areas in which the international norms are expressed in general terms

detailed legislation may be the most appropriate means of implementation. The use of ordinary legislation in this contect is formally recognised under the European Convention in the general provision that any limitations on relevant rights in the interests of such matters as public order, public health or national security must be 'provided by law', which has been interpreted by the European Court of Human Rights as including not only formal legislation but also established common law rules provided they are sufficiently clear and precise.

4.9 This means of implementation is clearly of particular relevance in the United Kingdom for those who claim that the principle of parliamentary sovereignty makes it constitutionally impossible for any entrenched bill of rights to be adopted which is proof against future repeal or amendment. But it is equally clearly open to the objection that to secure the enjoyment of fundamental rights by laws which can be repealed or amended at will by a simple parliamentary majority fails to provide the level of confidence in the protection of those rights which is arguably necessary to secure the consent of all sections of the population in a divided society.

Protection by international treaty

4.10 None of these forms of protection for human rights under national law is proof against subsequent amendment or repeal. A decision to incorporate the European Convention may be reversed and constitutional provisions may be amended, whether by a weighted majority in a parliamentary vote or by a simple majority in a popular referendum. Ordinary legislation may be repealed at any time. And the procedures for challenging alleged breaches of the terms even of the European Convention are notoriously long drawn out and the enforcement mechanisms notoriously weak. They may be strengthened, however, by means of bilateral or multilateral treaties with other states mutually guaranteeing the maintenance of agreed internal structures for the protection of human rights under national law. This approach has been formally endorsed in respect of minority rights under the European Framework Convention for the Protection of National Minorities, which requires the parties to 'endeavour to conclude, where necessary, bilateral and multilateral agreements with other states, in particular neighbouring states, in order to ensure the protection of persons belonging to the national minorities concerned' (art. 18(1)). The Anglo-Irish Agreement of 1985 is a good example of an attempt to initiate this approach in respect

of the nationalist minority in Northern Ireland. But there is clearly scope for further development of more precise commitments in respect of the full range of human rights throughout the British-Irish Isles.

4.11 The advantages of this strategy are that the commitments under a bilateral treaty can help to entrench agreed measures for the protection of human rights by increasing the political and diplomatic costs of a decision to abandon them on a unilateral basis. They can also provide further support in international law for particular measures which go beyond the general obligations under the major international covenants. But they do not provide protection against agreement by future governments of the states involved to make substantial changes. Given the natural tendency of minorities to fear that their interests may be sacrificed to other state or governmental concerns, the involvement of external guarantors in any bilateral agreement may give added confidence to all those involved.

4.12 There may be a role in this context for the Council of Europe, the European Union, or the Organisation for Security and Cooperation in Europe or for individual European states or the United States as guarantors of a new British-Irish treaty. The Council of Europe as the sponsoring body for most European human rights conventions is the most obvious candidate. Though it has not as yet sponsored any bilateral treaties or acted in any way as a guarantor, the members of its Council of Ministers approved the proposal under the abortive Vance-Owen plan that judges from the European Commission or Court of Human Rights might share in adjudications on any minority rights which might have been agreed by the states of the former Yugoslavia. This might be used as a precedent for a similar involvement in the protection of human rights under any new British-Irish Agreement. The assistance of the European Union might also be sought in giving further multilateral support to such an agreement. Though there may be objections to any direct involvement by the European Union or Commission in the internal affairs of any member state on a unilateral basis, it would not be impossible for an agreement between the United Kingdom and Ireland to be entered as a protocol to the Treaty of Rome, the Maastricht Treaty of Union or any future inter-governmental agreement of a similar kind and thus to involve all other member states in the acceptance of its terms and at least in theory of any future amendment. There are already a number of precedents for this in the form of very specific and limited protocols under the Maastricht Treaty in

respect of Danish and French dependent territories. Provided the initiative came from the British and Irish governments there should not be any formal difficulty in accepting a similar protocol in respect of Northern Ireland. There may also be a role for the Organisation for Security and Cooperation in Europe in providing diplomatic support for the adoption of a new British-Irish Agreement based on the principles of democracy and human rights which have been developed in successive OSCE Documents. But since the OSCE has not as yet become involved in promoting formal conventions, its major contribution is likely to be in monitoring future performance under any such agreement, as discussed below. Finally the United States or individual European states with an interest in promoting a settlement over Northern Ireland might agree to become external guarantors of a new British-Irish Agreement and to offer their good offices in the resolution of any disputes which might arise over its interpretation.

5. MONITORING AND ENFORCEMENT

5.1 The effective protection of human rights requires more than the acceptance of international standards and their incorporation into national law. The experience in many jurisdictions is that the formal acceptance of a bill of rights or constitutional guarantees of human rights may have little immediate impact, whether as a result of a lack of experience in the legal profession or the judiciary or a lack of commitment to change by governmental agencies. In Ireland it took several decades for the full impact of the fundamental guarantees in the 1937 Constitution to become accepted. In Northern Ireland and Britain, as has often been pointed out, there is an even stronger tradition of respect for the doctrine of parliamentary sovereignty and of judicial deference to governmental decisions, especially where issues of national security or public order are involved. Consequently there is little direct judicial and legal experience in the implementation of fundamental rights in national law, despite the increasing incidence of litigation under the European Convention. The success of the European Convention, however limited, is in large part due to the effectiveness of the procedures for the investigation and adjudication of complaints by the European Commission of Human Rights and the European Court of Human Rights.

5.2 The creation of effective structures for monitoring and enforcement of any new fundamental rights which may be established as part of the peace process may therefore be as important as the enactment of the rights themselves. This is likely to involve three distinct elements:

1. one or more human rights commissions to monitor and assist in the enforcement of the full range of fundamental rights in the relevant jurisdictions;

2. judicial institutions and procedures for the selection of judges which will command public confidence in each relevant jurisdiction;

3. the development through education and training of a general human rights culture in all governmental agencies and in society as a whole.

Whether these systems should be developed on a North/South basis, on an all-Ireland basis or in some other way will clearly depend

on what is agreed in broader constitutional terms. But there are some general issues and principles which should be reflected under any of the major constitutional options.

Human Rights Commissions

5.3 The idea that a state-funded human rights commission should be established to monitor and assist in the promotion and protection of human rights is well established in most common law jurisdictions. But there is considerable variation in the ambit and powers of such agencies.

5.4 In Britain the practice has been to establish single purpose agencies to monitor and assist in enforcing the law on discrimination: currently these are the Commission for Racial Equality in respect of racial discrimination and the Equal Opportunities Commission in respect of sex discrimination. In Northern Ireland similar agencies have been established in respect of religious and political discrimination, currently the Fair Employment Commission, and sex discrimination, the Equal Opportunities Commission for Northern Ireland. There is also a specific agency, the Community Relations Council, with the broader task of promoting mutual tolerance in all spheres thoughout Northern Ireland. Finally there is a general purpose agency, the Standing Advisory Commission on Human Rights established in 1973 under the Northern Ireland Constitution Act, though it differs from the standard British model in being purely advisory without power to make findings or pursue legal action in respect of individual cases. In the Republic of Ireland a similar approach has been followed only in respect of sex discrimination by the establishment of the Employment Equality Agency and the Commission on the Status of Women. In Canada and Australia the tendency has been to establish general purpose human rights commissions, both at a federal and state or provincial level, with similar powers and duties in respect of the full range of human rights and discrimination.

5.5 There has also been some variation in the precise powers granted to these human rights and discrimination agencies. Initially, both in Britain and elsewhere, it was usual to give powers to the agencies to investigate complaints and make findings of discrimination or breaches of rights. But this gave rise to some conflict over their proper role. In so far as they were established to promote human rights or to prevent discrimination they were expected to encourage individual

complainants to come forward, to give them assistance in pursuing their claims and to carry out research on patterns of violation or discrimination. But this often made it difficult for the agency to act as an impartial adjudication body since it was likely to be perceived, especially by defendants, as being inherently biased in favour of the complainant. The tendency in recent years has been to remove powers of adjudication from the agencies to independent tribunals or courts, thus leaving the agency free to pursue a positive policy in promoting the interests of victims of human rights violations or discrimination both in general terms and also in assisting individual complainants to pursue actions for compensation or redress in the courts. This is the current position in respect of all the discrimination agencies in Britain, Northern Ireland and the Republic of Ireland. The exception is the Standing Advisory Commission on Human Rights in Northern Ireland, which has no powers either to investigate individual complaints or to take action on behalf of complainants or even to assist them in doing so, though it has been permitted to make submissions as amicus curiae in respect of certain cases before the European Court of Human Rights.

5.6 The idea that all states should create official human rights commissions with powers to act independently of government has been given further support by the Principles relating to the status of national institutions discussed within the United Nations in the context of the Vienna Conference on Human Rights in 1994. These principles leave a good deal of discretion to states on the precise competence and powers of human rights commissions, but emphasise that they should have as broad a mandate as possible 'to promote and protect human rights', including the power to make recommendations to government, and to investigate and report on both general and specific violations. They also emphasise that any such commission should be completely independent of government, should be pluralist and representative of society as a whole, and should have adequate funding so as not to be subject to any governmental or financial control which might affect its independence. It may be noted that while the Standing Advisory Commission on Human Rights for Northern Ireland does have a broad mandate to promote and protect human rights it fails to meet a number of these principles, notably in that it has no power to investigate specific cases, in that its secretary is a civil servant within its sponsoring department, the Northern Ireland Office, and in that it requires governmental approval for all major items of expenditure.

5.7 Any new human rights commission or commissions which may be established as part of the current peace process should clearly comply both with these general internationally agreed principles and also build on the experience of anti-discrimination agencies in both parts of Ireland and in Britain. The essential requirements for any such human rights commission may be summarised as follows:

1. It must be independent of government and its members must be broadly representative of the society within which it works.

2. It must have power to investigate and report on both general and individual violations of human rights.

3. It must have power to scrutinise and report on the human rights implications of proposed legislation.

4. It must have power both to initiate legal proceedings either in its own right or on behalf of individuals or groups and to assist individuals and groups to initiate proceeedings.

5. It must have power to engage in general promotional and educational activities.

6. It must have sufficient resources free from detailed governmental control to carry out its functions effectively.

5.8 The extent of the mandate of any such commission or commissions is a difficult issue on which there are strong vested interests. As has been indicated, the practice in Britain and Northern Ireland has been to respond to political pressures as they have emerged by creating a separate commission or agency to deal with each distinct form of discrimination. There was strong opposition from most of those involved in Northern Ireland to a governmental suggestion that the various discrimination agencies and perhaps also the Standing Advisory Commission on Human Rights should be combined in a single Human Rights Commission on the ground that the issues involved in sex and religious and other forms of discrimination were different and that separate single purpose agencies were required to deal effectively with each of them. On the other hand there is no theoretical reason to oppose and some practical and financial arguments to support the creation of a single human rights commission with responsibility for all aspects of human rights, which might then establish

specialised units to deal with each major area of activity. There are certainly examples of effective all-purpose human rights agencies in Canada and Australia. Ultimately this is a matter that can be resolved only though the political process rather than by technical legal arguments.

5.9 The precise jurisdiction of any human rights commission or commissions can similarly be resolved only in conjunction with decisions on the broad constitutional structures which may emerge from the peace process. The most straightforward approach would clearly be to establish a human rights commission to monitor and assist in the enforcement of the rights guaranteed under a bill of rights in any distinct jurisdiction, whether in Northern Ireland, the Republic of Ireland and Great Britain as separate units or on an all-Ireland or British-Irish Isles basis. But it would not be impossible, if it were politically acceptable, to create a single or joint human rights commission with jurisdiction over two or more separate jurisdictional units.

Human Rights and Constitutional Courts

5.10 Some form of independent judicial adjudication on alleged human rights violations is essential for the effective protection of the rights guaranteed under any bill or charter of rights. Without it the expectations raised by the adoption of the bill or charter can become a source of further division and conflict. This is particularly so in a divided society in which activists on all sides can assert the denial of fundamental rights on their own interpretation of the relevant provisions as a ground for continuing rejection of any political accommodation. It follows that the adjudicating body must be constituted and operate in such a way that its decisions will be generally accepted on all sides and that they will actually be implemented. The authority of the European Court of Human Rights to make final decisions on the compatibility of national laws or practices with the European Convention, for example, lies in the fact that its judges are drawn from all member states of the Council of Europe. The fact that it has no power to invalidate national legislation or national governmental decisions, though it can order that compensation be paid to individual victims, is less important since article 13 of the Convention imposes a binding obligation on states to provide an effective remedy for breaches of its terms. In a national context compliance with this requirement means that a constitutional or human rights court must have the

same powers as other courts to invalidate legislation and overrule governmental decisions as well as to award compensation.

5.11 The effective protection of fundamental rights in both parts of Ireland under any constitutional settlement is therefore likely to require the establishment of one or more human rights or constitutional courts which meet the following criteria:

1. independence from government;

2. general acceptance of the legitimacy of its decisions by all sections of the population;

3. authority to make binding rulings;

4. appropriate provision for the implementation of its decisions and the compensation of victims.

Some ways in which these criteria might be met under various possible structures will be discussed in turn.

5.12 The minimum requirement in respect of independence is that members of a human rights or constitutional court should have the same independence from government as ordinary judges. In both Ireland and Britain this has traditionally been guaranteed by providing that judges once appointed cannot be removed before retirement otherwise than in Ireland by a vote of both houses of the Oireachtas and in Britain by a vote of both Houses of Parliament. But this provides no protection against governmental bias in the initial selection of judges. In the United States some further protection is provided by the practice of holding Senate and Congressional hearings on all Presidential nominations for the Supreme Court. These hearings, however, have not prevented the tendency on the part of most Presidents to make nominations on the basis of the known political preferences of candidates with a view to influencing the balance of power on the Supreme Court. In Ireland and Britain, where governmental control of parliamentary proceedings is considerably greater than in the United States, some further safeguards in respect of the balance of appointments may be desirable to ensure effective as well as formal independence.

5.13 General public acceptance of the legitimacy of decisions by a human rights or constitutional court is affected as much by the perceived balance of representation on the court as by its

perceived independence. Even in relatively homogeneous societies concern is often expressed about the privileged background and conservative attitudes of most senior judges and the absence of representation from women and minority communities. In divided societies the balance of representation from each major community is likely to have an even greater effect on public perceptions of the legitimacy of particular decisions. On international human rights courts this problem can be avoided by the selection of judges from a wide range of different jurisdictions. The European Commission and Court of Human Rights, for example, are composed of representatives from each member country and significant decisions are made by panels of as many as 20 to 30 judges. On national human rights or constitutional courts other means must be sought to ensure appropriate balance and thus to enhance the authority and legitimacy of their decisions. In homogeneous states the usual approach is to provide for larger panels of judges. But this may not be sufficient in divided societies. In some cases balanced representation may be achieved by informal conventions in the selection of panels for sensitive cases. But more formal provisions may be preferred. In South Africa, for example, the new Constitution of 1993 provides for nominations for appointment to the new constitutional court to be made by a Judicial Service Commission having regard 'to the need to constitute a court which is independent and competent and representative in respect of race and gender'; it also permits the appointment of competent persons other than judges to two of the eleven positions.

5.14 In making any proposals in this context in respect of Northern Ireland it must be recognised that many nationalists are distrustful of the commitment to human rights of both Northern Ireland and British judges and also that many unionists have a corresponding distrust of some Irish judges. The legitimacy and general public acceptability of decisions by a constitutional or human rights court would be greatly enhanced if some way could be found of ensuring that its decisons had the support of judges who would command the confidence of both communities. This may involve the estabishment of a new human rights and constitutional court and new procedures for the selection of judges. One possibility within Northern Ireland would be to ensure, whether by a formal provision or an informal convention, that any judgement of a human rights court should require the assent of at least one judge from each main communal tradition. This could be achieved by requiring a clear majority of judges from a court composed of equal numbers of judges from each major community.

But there is considerable and understandable opposition among most members of the Northern Ireland judiciary to any kind of communal allocation. An alternative and perhaps better approach may be to involve judges from other jurisdictions. A human rights or constitutional court for Northern Ireland might be composed of judges drawn from Britain, the Republic and perhaps also a nominee from the Council of Europe as well as Northern Ireland judges. The implication of this would be that no further appeal would lie to the House of Lords. A human rights or constitutional court for Ireland as a whole, if that were agreed, might be similarly constituted while Northern Ireland remains part of the United Kingdom. And in the event of some form of Irish unification the continuing participation of British or European judges might still be considered an appropriate means of giving greater confidence to members of both traditions that issues involving their fundamental rights would be impartially decided. It may be noted in this context that there is an established precedent in the United Kingdom for the selection of judges from more than one jurisdiction to sit on the Judicial Committee of the Privy Council.

5.15 Under any of these arrangements it would also be desirable for the procedures for the selection of judges to be clarified and formalised. Reference has already been made to the idea that the appointment of judges should be entrusted to an independent judicial services commission of the kind that has been established under the new South Arican Constitution. This would help to isolate the issue of judicial appointments from the political pressures which have from time to time been observed in both parts of Ireland. It would also make it possible to lay down broad guidelines for the constitution of panels of judges.

5.16 The most usual and effective sanction for a constitutional or human rights court at national level is to invalidate the legislation or governmental action which has been challenged. In addition provision may be made for the payment of compensation to those who have suffered directly as a result of the violation of their fundamental rights. Both these sanctions are well established in Irish law. In British and Northern Ireland law, however, the courts have traditionally been less ready to declare legislation, as opposed to administrative action, invalid or to award compensation other than under the established heads of civil liability. Though British courts have more recently accepted their obligation to overrule any legislative provision which is contrary to European Union law, some more specific

formal provision, of the kind discussed in paragraphs 7.3-7.13, may be required to subordinate ordinary legislation to a new Northern Ireland or British constitution or bill of rights and to provide for compensation for breach of constitutional or fundamental rights.

5.17 The effectiveness of a constitutional or human rights court depends ultimately on the way in which its judges approach their task. In recent years Irish judges have shown their ability to adopt positive and flexible interpretations of the fundamental rights in the Irish Constitution. British and Northern Irish judges have little experience in dealing with rights of this kind and have shown little appetite for moving beyond the essentially procedural principles of judicial review. There must therefore be some concern over their capacity to adopt similarly positive and flexible interpretations of the provisions of any new bill of rights or constitution for Northern Ireland or Ireland as a whole. This in itself may be an additional ground for broadening the range of those eligible for appointment to such a court, whether by extending the range of those eligible for appointment to legal academics and others with expertise in human rights law and practice or by providing for some external judicial representation from the Council of Europe. But it may also be possible to assist and encourage existing judges in both jurisdictions in their new task by a programme of seminars and discussions with judges in other jurisdictions, such as Canada and the United States as well as the European Court of Human Rights.

International monitoring

5.18 International institutions, both governmental and non-governmantal, have played an important part both in developing standards and in monitoring British and Irish performance in the delivery of human rights. A number of decisions by the European Commission and Court of Human Rights set significant limits to action by British security forces in Northern Ireland during the conflict and a series of critical reports by human rights NGOs increased the pressures both on state security forces and more recently on paramilitary bodies to avoid more serious and blatant violations of human rights and humanitarian law. The Irish Government has also had to introduce significant reforms in its legislation to meet European standards in the treatment of those who do not share the prevailing Catholic ethos in the Republic. It is equally important to

consider what future role these various bodies - the Council of Europe, the Organisation for Security and Cooperation in Europe, the United Nations human rights agencies and international NGOs may play in helping to implement and guarantee a lasting political settlement.

The Council of Europe

5.19 The primary role of the Council of Europe in this context will be to maintain its structures for adjudication on the provisions of the European Convention on Human Rights, which will remain the essential foundation of any new human rights regime in Northern Ireland or Ireland as a whole, and for monitoring state security practice under the European Convention on Torture. It would also be desirable for these or similar structures to be extended to cover the provisions of other significant conventions such as the European Framework Convention on the Protection of National Minorities, though that will be dependent on general agreement among other member states. There are some additional ways, however, in which the Council of Europe might assist in implementing and guaranteeing the human rights aspects of a political settlement over Northern Ireland. One possibility, as suggested above, would be for the Council of Europe to nominate one or more judges from the European Court or Commission to assist in adjudication on cases arising under a specific bill of rights for Northern Ireland or Ireland as a whole. A similar proposal for the nomination of a European judge to assist in adjudication on minority rights under the abortive Vance-Owen plan for Bosnia was agreed in princple by those concerned in the Council of Europe in 1992. It might also be possible, though there is no precedent, to seek agreement for the European Commission and Court themselves to adjudicate on complaints under a bill of minority or communal rights which incorporated the terms of the European Framework Convention.

5.20 It should be noted in this context that there appears to be tacit agreement that formal adjudication on human rights and related matters in Europe should be regarded as the province of the Council of Europe and the Commission and Court of Human Rights at Strasbourg rather than the European Union or the European Court of Justice in Luxembourg. It seems unlikely that the European Union will seek to develop its own specific human rights provisions as opposed to incorporating or becoming a party in its own right to the European Convention on Human Rights, leaving ultimate adjudication to the institutions of the Council

of Europe. The most positive role for the European Union is likely to be in providing political and economic support for a settlement and perhaps in acting as guarantors for a new British-Irish Treaty. It would be technically feasible, for example, for the relevant terms of any such treaty, such as those relating to self-determination and cross-border institutions, to be entered as a protocol to the Treaty of Rome or the Maastricht Treaty of Union. This would have the effect of incorporating them in European law and giving the European Court of Justice jurisdiction to make binding judgements on their interpretation and implementation. There are numerous precedents for the agreement of protocols of this kind in respect of special arrangements for dependent territories such as the Faroe Islands. the Azores and certain overseas French territories.

The Organisation for Security and Cooperation in Europe

5.21 The Organisation (formerly Conference) for Security and Cooperation in Europe differs from the Council of Europe and the European Union in that its procedures are essentially diplomatic rather than legal. But it has played a significant role since the initial Helsinki Conference of 1975 in developing standards for democratic institutions and for the protection of minorities and in creating formal diplomatic mechanisms to monitor progress in their implementation. The most directly relevant standards for a settlement in Northern Ireland or Ireland as a whole are the formulations of minority rights in the Copenhagen Document of 1990. Though these have subsequently been incorporated in more formal though less demanding terms in the UN Declaration and in the European Framework Convention, the absence of any enforcement provisions in these later instruments gives added significance to the OSCE mechanisms for monitoring the implementation of OSCE standards. The most important is the office of the High Commissioner for Minorities, currently held by Max van der Stohl the former Netherlands foreign minister. He has jurisdiction to visit any member state in which there is a minority, except those in which minority claims are accompanied by terrorist violence, to communicate with members of the minority and to draw up a report and recommendations. An explicit commitment by both the British and Irish governments to seek a visit and report by the High Commissioner on the terms or implementation of any proposed settlement and/or on appropriate measures in the absence of agreement would give added confidence to all those involved that their rights would be effectively protected. If serious human rights problems of any kind persist other interested member

states might also with the consent of the British and/or Irish governments, and in certain circumstances even without their consent, make use of the so called Moscow mechanism for the appointment of a mission of experts to visit and report on the implementation of any relevant OSCE standards. It should be noted, however, that within the international governmental community the performance of the British and Irish governments in working together towards a resolution of their differences over Northern Ireland is regarded more as a model for other countries faced with ethnic or communal conflict rather than as a cause for external intervention.

The United Nations

5.22 The United Nations Human Rights Commission and related agencies have developed a much wider range of human rights conventions, declarations and monitoring systems. Though the impartiality and objectivity of some UN monitoring systems is affected by political manoeuvering and most lack any effective sanctions, they have already proved their value in some spheres, notably in respect of the complaints made to the UN Committee Against Torture in 1991 over ill-treatment during police interrogation in Northern Ireland. In the context of the current search for a lasting settlement over Northern Ireland a number of these procedures are likely to be of continuing importance.

5.23 The first is the work of the Human Rights Committee and other similar bodies in dealing with state reports under the various international conventions. Both the British and Irish Governments must now make periodic reports to the Human Rights Committee on their progress in implementing their commitments under the International Convention on Civil and Political Rights (ICCPR). The initial Irish report was made in 1993 and the most recent British report was made in 1995. In both cases, however, the governmental reports were widely criticised as being complacent and defensive rather than open and self-critical on sensitive issues and it was left to national and international NGOs to inform the Committee of the many issues of concern in both jurisdictions. A similar pattern has been noticeable in the British reports under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. A commitment by both governments to a more open approach to reporting and discussing contentious issues would make the reporting process more valuable to all concerned.

5.24 The second is the related work of the Human Rights Committee in dealing with individual complaints under the Optional Protocol of the ICCPR. The Irish government ratified this Protocol when it belatedly ratified the ICCPR in 1989, but the British Government has so far failed to do so though it ratified the ICCPR in 1976. The procedures for dealing with individual complaints under the Protocol are less satisfactory than those under the European Convention on Human Rights (ECHR) and there is a formal bar on taking complaints on issues which have already been decided under that Convention. However, there are some rights which are protected under the ICCPR which are not covered under the ECHR, notably in respect of persons belong to minorities and some aspects of criminal procedure. It would clearly be helpful if the British government now ratified the Optional Protocol, as most other European states have done despite their prior commitment to the ECHR, and thus made available the procedures for individual complaint on rights protected only under the ICCPR.

5.25 The third is the work of special rapporteurs appointed within the United Nations structures to investigate and report on on specific issues of concern. Though there would be no case for the appointment of a special rapporteur in relation to Northern Ireland if the current politial negotiations make satisfactory progress, the continuing work of 'thematic' special rapporteurs appointed to look into particular classes of human rights violations, such as torture, summary and arbitrary executions and fair trial, may remain relevant and might usefuly be recognised by both governments.

6. THE CREATION OF A HUMAN RIGHTS CULTURE

6.1 Respect for human rights is an attitude of mind. The enactment of a bill of rights and the provision of enforcement procedures will not in themselves ensure that ordinary people's rights are actually respected. Impressive bills of rights and legal enforcement systems are often to be found in countries with the most oppressive regimes or where intercommunal conflict is rampant. If those in control of state power or the police or soldiers who act on their behalf are unconcerned about the violation of the fundamental rights of those who challenge or threaten them in any way there is often little that lawyers or courts can do to protect them. Legal challenges in national or international courts, even if they are successful, will achieve little unless there is some basic commitment to human rights values at all levels of government and throughout the community. This is likely to be particularly important in Ireland where many people - whether they are actively involved in the security forces or in paramilitary bodies or merely express their support for the activities of others on their behalf - have had scant regard for the fundamental rights of others if that stood in the way of the pursuit of their own communal interests. If human rights are to be effectively protected in both parts of Ireland positive action will be needed to create a culture of human rights which pervades all the institutions of government and of civil society.

6.2 The training of governmental officials in the obligations imposed on them by human rights conventions is an essential part of this task. There is a temptation for some government officials, particular those in the security forces and the police, to regard those who allege that any of their activities are in breach of human rights as natural enemies. That is a misconception. All international human rights conventions have been drawn up by or on behalf of governments which are naturally interested in the maintenance of stability. Consequently there is nothing in international human rights standards which poses any threat to resolute action by state officials acting on behalf of a legitimate government for the prevention and control of criminal activity or the suppression of paramilitary or politically motivated violence. And there are strong arguments for the position that law enforcement carried out in compliance with international standards is likely to be more effective than methods which involve breaches of human rights. But there is clearly a substantial job to be done to persuade many of those

involved, not least members of security forces involved in dealing with paramilitary violence, that this is so and to train them effectively in the use of legitimate techniques. The effective implementation of human rights must therefore include an active programme for training all government officials in the importance of human rights values and in the particular standards for each area of government activity which have been drawn up by relevant international agencies.

6.3 In Northern Ireland the value of this approach has already been established in the field of discrimination in employment: little progress was made by exclusively legal means for almost a decade from the enactment of the initial Fair Employment Act in 1976; it was not until a commitment was made at a senior level in government to subject its own recruitment structures and all official programmes to 'equality proofing' that some progress began to be made in changing long established patterns of communal differentials in employment and unemployment. A similar governmental commitment to training its officials at all levels and to programmes for implementation is needed in respect of other human rights priorities.

6.4 There is an equally pressing need to promote underlying human rights values throughout the community. This is not simply a matter of ensuring that the list of basic human rights is widely understood at all levels of society. An equally essential element is an understanding of the relationship between asserting individual and communal rights and respecting the corresponding rights of others. An obvious starting point is in education. The government in Northern Ireland has made 'education in mutual understanding' (EMU) a compulsory element in the Northern Ireland Curriculum. But the main emphasis is in learning about 'the two traditions' rather than the human rights obligatons of mutual tolerance. There is clearly scope for greater emphasis on all aspects of human rights in this and other parts of the school curriculum in both parts of Ireland and for a positive programme for the development of suitable educational materials and training progammes for teachers.

6.5 Experience in other jurisdictions has demonstrated that respect for the human rights of all and tolerance for different identities cannot be achieved merely by changing attitudes at the level of governmental agencies, however crucial that may be. The whole population and both communities must be engaged through a wide range of organisations and networks. This applies as much

to the Republic of Ireland as to Northern Ireland. But Northern Ireland is particularly rich in voluntary organisations which have flourished rather than diminished in both communities throughout the long period of conflict. Many of these, including women's and anti-poverty groups as well as the churches, professional bodies and human rights pressure groups, have done and continue to do vital voluntary work within and between the two main communities. All should be encouraged to contribute to the shaping and delivery of any human rights progamme and adequate resources should be provided to enable them to do so. Statutory agencies could play a major role in this process by encouraging voluntary bodies to become involved in the promotion of human rights and tolerance. One possibility would be to provide for nominations for places on any new human rights commission(s) by non-government organisations and other voluntary sector bodies. The media also have a vital part to play in publicising and explaining the ideas behind any such programme. This too may require the training of journalists in the essentials of human rights principles and their sources in national and international law. This might be sponsored by such human rights commission(s) as may emerge from the peace process without in any way infringing the proper independence of the media or their freedom to criticise.

7. IMPLEMENTATION UNDER VARIOUS POSSIBLE SETTLEMENTS

7.1 It is the task of the parties involved in the peace process to seek agreement on a set of structures which will provide effective protection for human rights within the framework of an overall political settlement. The contribution of this study can only be to suggest some workable structures under each of the potential constitutional regimes which might emerge from those negotiations. The major constitutional options to be considered in this context may be listed as follows:

1. the development of current constitutional arrangements with continuing British-Irish cooperation, involving separate human rights protections in the United Kingdom as a whole or in Northern Ireland and in the Republic of Ireland;

2. the development of common British-Irish authority over Northern Ireland;

3. the development of an all-Ireland regime without formal unification;

4. the development of an all-Ireland regime under a unitary, federal or confederal all-Ireland state;

5. the development of a single human rights regime for the British-Irish Isles;

6. the development of a more autonomous Northern Ireland within the framework of a 'Europe of the Regions'.

The formal legal and constitutional structures under which human rights might be protected under each of these options will be discussed in turn. This does not, of course, mean that any of these options should be regarded as static or mutually exclusive. Constitutional structures typically evolve through time and consideration should always be given to appropriate procedures for future constitutional evolution. The question of what rights should be included and how they should be formulated, however, will not be dealt with further in this context since decisions on those issues are independent of the nature of the option chosen.

Protection under continuing British-Irish cooperation

7.2 The basis of British-Irish cooperation over Northern Ireland lies in the Anglo-Irish Agreement of 1985. Under it both states agreed to work together to resolve their differences over Northern Ireland by recognizing and accommodating the rights and interests of both unionists and nationalists while retaining the ultimate sovereignty of both governments to make their own decisions within their own jurisdictions. They also agreed that Northern Ireland would continue to be part of the United Kingdom until a majority of its people decided otherwise. The continuation of this general policy would mean that the protection of human rights in both parts of Ireland would require concerted action by the two governments to ensure the equal protection of human rights in their own jurisdictions. The British government could take action either on a United Kingdom basis or in respect only of Northern Ireland, subject to consultation with the Irish government under the Anglo-Irish Agreement, though it is more likely that action on both levels would be required. The Irish government would take action in respect of the rest of Ireland. These three dimensions and some ways in which they might be coordinated will be discussed in turn.

(a) the United Kingdom dimension

7.3 The most straightforward and best means of protecting human rights throughout the United Kingdom, as has been pointed out above and as recommended by the United Nations Human Rights Committee, would be to incorporate the relevant conventions into British law. There is growing support for this measure among jusges, lawyers and parliamentarians in Britain and a number of bills to incorporate the European Convention on Human Rights have been promoted in the House of Lords. The current Conservative government, however, is opposed to incorporation on ideological and practical grounds. The principal ideological argument is that under the unwritten British constitution Parliament is the supreme law-making body and that any attempt to incorporate and entrench the terms of the ECHR would either limit its sovereignty or, if it did not, would be ineffective in that subsequent legislation which infringed the terms of the ECHR would have to be interpretated as repealing the act of incorporation. Proponents of incorporation have sought to avoid this formal difficulty by providing that the act of incorporation should be entrenched only in respect of implicit as opposed to express

repeal. This would mean that any subsequent legislation which infringed the provisions of the ECHR would be invalid unless it expressly stated that it would take effect notwithstanding the terms of the act of incorporation. This form of entrenchment was in effect adopted in respect of the incorporation of certain aspects of European law under the European Communities Act 1972. Though it is formally less secure than other methods, it has not thus far given rise to any difficulties. Nor has the similar method of entrenchment adopted in Canada in respect of its Charter of Rights in 1982.

7.4 Any more far-reaching measures would probably require the adoption of a written constitution for the United Kingdom as a whole. This could incorporate a more effectively entrenched bill of rights for the United Kingdom as a whole and might also include more specific provisions governing the status and internal government of its constituent parts, England, Scotland, Wales and Northern Ireland. There is already serious discussion by some political pressure groups of how a written constitution might be formulated and how such a major constitutional change might be achieved. There is also a commitment to the idea within the Labour and Liberal Democratic parties. But it is unlikely that any of the major issues will be settled in the immediate future or that the development of the peace process in Northern Ireland would be widely seen as a compelling argument for moving more quickly than would otherwise be politically acceptable. And since something more than the incorporation of the ECHR, however desirable in itself, would clearly be required to assist in cementing a settlement in Northern Ireland some independent constitutional provision on an exclusively Northern Ireland basis is unlikely to be avoidable.

(b) the Northern Ireland dimension

7.5 The major problem in establishing an effective bill of rights for Northern Ireland as distinct from the whole of the United Kingdom is to ensure that the rights protected cannot be overridden by subsequent legislation. It would be relatively easy to limit the powers of any future legislative assembly for Northern Ireland to enact legislation or authorise governmental action contrary to the terms of a bill of rights. It is more difficult to protect the rights of people within Northern Ireland from subsequent Westminster legislation or action authorised under it. A simple application of the doctrine of the sovereignty of the Westminster Parliament would mean that any

bill of rights for Northern Ireland enacted at Westminster as part of the current peace process could be repealed or amended at any time and also that any subsquent legislation, for example in respect of emergency powers or fair employment, would be valid even if was clearly contrary to the provisions of such a bill of rights. There are, however, a number of ways in which a bill of rights for Northern Ireland alone could be entrenched against future repeal by a new British government. The main options for limited and more extensive protection may be identified for further discussion as follows:

1. the 'ring-fenced' protection of devolved powers;

2. reliance on the special constitutional status of a new Northern Ireland Constitution Act;

3. protection in international law under a new British-Irish Agreement or by a Council of Europe or European Union guarantee.

7.6 When power was devolved to the Northern Ireland Parliament and Government from 1921 to 1972 under the Government of Ireland Act 1920 and to the Northern Ireland Assembly and Executive in 1974 under the Northern Ireland Constitution Act 1973 there was no difficulty in providing that discriminatory legislation or governmental action would be invalid or in providing that the courts should have the ultimate power to decide on its validity. The powers of any future legislative assembly or administration in Northern Ireland could in a similar way be subjected to a more general bill of individual and communal rights. This 'ring-fenced' protection could be achieved both under renewed devolution and under continuing direct rule. The powers of a Secretary of State for Northern Ireland as a member of the British government could as easily be circumscribed by a bill of rights under a new Northern Ireland Constitution Act as those of a new power-sharing Executive or Assembly. But there are some significant drawbacks to this option. Firstly Northern Ireland's current status as a subordinate jurisdiction permanently subject to the authority of the Westminster Parliament, as provided in section 75 of the Government of Ireland Act 1920, means that these protections could be overruled by any subsequent Act of Parliament. Secondly there would be a significant difference between laws adopted and administered on a United Kingdom basis, which would not be subject to the bill of rights, and those which fell within the scope of powers devolved to a Northern Ireland

administration or assembly or administered by the Secretary of State for Northern Ireland under continued direct rule. And thirdly, if an attempt was made to get round this difficulty by providing that all government action in or in respect of Northern Ireland would be subject to the bill of rights, there would be the further difficulty that aspects of UK legislation could be declared to be invalid in Northern Ireland but would remain valid elsewhere. This third difficulty has been raised by successive British governments and others as a reason for not seeking to incorporate the European Convention into Northern Ireland law alone as opposed to the law of the United Kingdom as a whole.

7.7 An alternative approach to protecting the provisions of a bill of rights for Northern Ireland from repeal by a future Westminster Parliament is to build on the special status of Northern Ireland under the Acts of Union of 1800. Some constitutional lawyers have argued that the powers of the Westminster Parliament are not completely unfettered in respect of Scotland since the Acts of Union of 1707 provide that certain matters relating to Scots law and the Church of Scotland shall be protected from repeal by the new united parliament. It is also accepted that the Statute of Westminster of 1931 under which the Westminster Parliament confirmed that it would not in future legislate in respect of the dominions without the consent of the dominion concerned effectively limits the allegedly absolute sovereignty of the Westminster Parliament. A similar argument may be raised with respect to the Irish Acts of Union to the effect that the Westminster Parliament has no power to alter the constitutional status of Northern Ireland as part of the United Kingdom without an act of self-determination by or on behalf of its people equivalent to that which resulted in the secession of the Irish Free State from the United Kingdom in 1921. This too was confirmed by the provisions of section 1 of the Northern Ireland Act 1949 and section 1 of the Northern Ireland Constitution Act 1973. If a new constitutional settlement and bill of rights for Northern Ireland were confirmed by a clear majority in a referendum and if the Westminster Parliament declared that it would not alter its terms without the consent of the people in a future referendum, it is arguable that this too would formally protect the terms of the new constitution from subsequent unilateral repeal by the Westminster Parliament.

7.8 If this argument were accepted were accepted it would provide a simple way of entrenching a new constitution and bill of rights for Northern Ireland within British constitutional law,

while leaving open the possibility of future change provided it was approved by a prescribed procedure ensuring the consent of the people of Northern Ireland. But it would involve a substantial change in the popular view of the sovereignty of the Westminster Parliament and might not carry sufficient conviction in the political arena. Some further support may therefore be needed to create the confidence necessary to a stable settlement. One way to achieve this may be to buttress internal entrenchment in national law with external guarantees under international law.

7.9 There is growing international support, as outlined in paragraphs 4.10-4.12, for the idea the rights of minorities should be protected under bilateral or multilateral treaties by the states most directly concerned. This not only provides strong political and diplomatic backing for the relevant provisions but also makes it possible for any state party to seek independent international adjudication by the International Court of Justice on any dispute which may arise. In respect of Northern Ireland the most obvious form of protection under international law would be a new British-Irish Treaty incorporating the terms of a new political settlement and requiring both states to enact and entrench in their national law the relevant legal provisions, including the precise formula for any agreed bill of rights. But further confidence might be given, as already suggested, to both nationalists and unionists who feared that their interests might be abandoned by future British and Irish governments through the involvement of other interested states or appropriate European institutions as guarantors of the settlement.

7.10 Whatever the extent of international involvement the primary focus of monitoring and enforcement of any individual or collective rights should be through the national legal system. As outlined above, this will involve two essential components: monitoring by an independent human rights commission and adjudication by a human rights courts.

7.11 The first of these might be achieved by reconstituting the Standing Advisory Commission on Human Rights as a formally independent body with statutory powers both to carry out investigations on matters of concern, to take legal action either in its own right or on behalf of individuals or groups and to engage in educational and promotional actvities with a view to developing a general human rights culture. Its members and staff should be clearly representative of all sections of the community

and should have both the expertise and terms of service to enable them to carry out its duties effectively. The current arrangements for consultation on appointments with the Irish Government under the terms of the Anglo-Irish Agreement should be continued.

7.12 The procedures for adjudication on the terms of any new bill of rights or constitutional guarantees for Northern Ireland will require further political discussion. Though there may be some advantages in relying on existing court structures at lower levels, the current procedures for final appeal to the House of Lords in London are unlikely to command widespread support. This suggests that a new constitutional or human rights court for Northern Ireland should be established. A strict application of the concept of British-Irish cooperation as distinct from any form of joint authority would suggest that there should be consultation with the Irish government over appointments rather than a right to nominate an Irish judge. But if agreement could be reached among all the parties concerned, there would be considerable advantage in terms of public confidence if the membership of the court could include a British and an Irish judge and also a nominee of the European Court or Commission of Human Rights. In formal terms it might be possible to constitute a court of this kind in a similar way to the panels of the Judicial Committee of the Privy Council, given the wide discretion in the selection of the judges and an established practice of including judges from relevant common law jurisdictions outside the United Kingdom in appropriate cases.

7.13 There would also be some advantage in formalising the procedures for the appointment of judges and the selection of panels to hear particular cases. The tradition of consensus on judicial appointments which is supposed to operate both in Britain and the Republic of Ireland is already under strain. In a divided society like Northern Ireland a more formal system designed to ensure fairer representation of all sections of the community would be particularly appropriate. At the very least appointments to a constitutional or human rights courts could be made subject to consultation through the Intergovernmental Council under a revised British-Irish Agreement. But the model of the Judicial Services Commission recently established in South Africa might also be considered. Such a body could also be given the task of developing programmes for the training of newly appointed judges and the development of cooperation and discussion between judges in Northern Ireland and those in other

common law jurisdictions such as Canada and Hong Kong in which new charters for the protection of human rights have been adopted.

(c) the Republic of Ireland dimension

7.14 The primary task for the Republic of Ireland within the framework of a cooperative settlement would be to make appropriate changes to the Irish Constitution to reflect the human rights provisions of a new British-Irish Treaty and to ensure that the list of fundamental rights protected under it included the terms of the European Convention on Human Rights and any additional communal rights which might be relevant within the Republic. It would also be desirable, if it were agreed as part of a settlement, for the Irish government to establish parallel structures to those agreed for Northern Ireland or the United Kingdom, notably a human rights commission and perhaps also a judicial services commission with corresponding functions and powers to those in Northern Ireland or the United Kingdom. No other institutional changes would be needed since any provisions for consultation on the appointment of members of a human rights commission and a constitutional or human rights court for Northern Ireland could be handled by an appropriate extension of the current arrangements under the Anglo-Irish Agreement.

(d) provision in the event of constitutional change

7.15 Some additional provision may be required both in the Republic and in Northern Ireland to ensure the continued protection of agreed individual and communal rights in the event of future change in the constitutional status of Northern Ireland. A possible undertaking of this kind was referred to in paragraph 52 of the Framework Document and may have been related to the idea of a joint declaration by the two governments and other parties about the protection of fundamental rights. A declaration in itself, however, as has already been pointed out, has no legal force and without formal implementation of some kind is unlikely to inspire much confidence. A better mechanism for guaranteeing the continuing protection of the rights of all the people and of both communities in Northern Ireland in the event of a future vote by a majority in Northern Ireland for a change in its constitution status may be to include a formal provision in a new British-Irish Agreement binding both governments to introduce whatever changes may be required to ensure the continuing and equal protection of those rights in a united or

federal Ireland. This might involve, for example, specific provisions to ensure that rights of particular concern to members of the Protestant or unionist community in Northern Ireland are entrenched in a united or federal Ireland against future amendment or repeal by a Catholic or nationalist majority, and would thus require substantial changes to the existing provisions in the Irish Constitution for amendment by a simple majority vote. Alternatively it might involve a commitment by the Irish government to adopt a wholly new constitution incorporating those rights and other provisions to take account of the new sitaution. It might also involve specific provisions for the continuing involvement of British or European judges in the adjudication of contested cases in a reciprocal way to any provision for the involvement of Irish or European judges in the protection of individual or communal rights in Northern Ireland as part of the United Kingdom. The alternative of attempting to make and to entrench all the necessary changes to the Irish Constitution as part of the immediate settlement would probably be impractical and might not be acceptable to the Irish electorate in advance of any realistic prospect of unification.

Protection under joint British-Irish authority over Northern Ireland

7.16 The nature of the rights to be protected in Northern Ireland under any form of joint British-Irish authority should not in principle be different from those to be protected under continuing British-Irish cooperation. Some differences in the formal provisions governing of the institutions for their protection, however, might be expected.

7.17 The formal basis of any form of joint authority would presumably be a detailed British-Irish Agreement setting out the rights and responsibilities of the two governments in respect of Northern Ireland. If individual and communal rights are to be effectively protected under such a regime both governments would clearly have to agree to be bound by the same obligations. In the case of most individual rights it might be possible to find a basis in the European Convention on Human Rights for the incorporation of the same set of rights throughout the whole of the United Kingdom and the Republic of Ireland which both governments could then undertake to observe in the joint administration of Northern Ireland. But there might be greater difficulty in finding agreement that the same formulation of communal rights, not least any rights in respect of equal

participation in the processes of government, and perhaps also some specific individual rights in respect of citizenship, voting rights and discrimination should apply throughout both jurisdictions. To the extent that any of these rights were to be formulated in a different way for Northern Ireland the most effective means of proceeding would almost certainly be for both governments to draw up and bind themselves to a formal constitution and bill of individual and communal rights for the government of Northern Ireland.

7.18 In so far as institutions for monitoring and enforcement are concerned there would clearly be a need for formal equality in the powers of both governments in making appointments to a human rights commission and a constitutional or human rights court. In practice, however, there need not be any appreciable difference from a cooperative regime in the actual appointments to either body since it would be expected that under either regime the majority of members would be chosen on a fair and representative basis from within Northern Ireland and that there would be equivalent representation from Britain and the Republic and possibly from European instuitutions.

Protection on all-Ireland basis without formal unification

7.19 A further possibility which was raised in the Framework Document is that provision should be made for the protection of the same fundamental human rights throughout Ireland though Northern Ireland would otherwise remain an integral part of the United Kingdom until a majority of its people decided otherwise. The obvious advantages of such a regime would be that it would emphasise the shared commitment of both traditions in Ireland to the same fundamental rights and make it easier for the same protections to be continued in the event of a future change in constitutional status.

7.20 The formal basis of a regime of this kind would presumably be a greatly expanded role for a new British-Irish Inter-Governmental Council along with the internal entrenchment of parallel rights in both jurisdictions. This would clearly involve some substantial amendments to the Irish Constitution to incorporate the full range of individual and communal rights which were agreed to be appropriate for inclusion in a new constitution or bill or rights for Northern Ireland. There would also be scope for the creation of joint institutions for monitoring, adjudication and enforcement. A single human rights

commission might be created with jurisdiction to investigate and take appropriate legal action in respect of alleged breaches in any part of Ireland. It might be more difficult, however, to establish a single human rights court since the close connection between fundamental individual and collective rights and other provisions of the Irish and Northern Ireland Constitutions might create problems in deciding on the jurisdictions and relative authorities of the human rights court and of the Irish Supreme Court and its equivalent in respect of Northern Ireland. The creation of a single constitutional and human rights court for the whole of Ireland would involve significant limitations on the powers of the Irish Supreme Court.

Protection within an all-Ireland state

7.21 Most of these problems would disappear in the event of agreement on the formal unification of Ireland, whether on a unitary, federal or confederal basis, and the consequent ending of all formal British jurisdiction over Northern Ireland. Under any such regime the full range of individual and communal rights would be set out in a single Irish Constitution which would include any special provisions under a federal or confederal arrangement in respect of Northern Ireland or any other territorial subdivisions. This would be likely to involve a fundamental rewriting of the Constitution both to achieve the full incorporation of all relevant international conventions and also to make appropriate provision for the continuation of British citizenship and full freedom of movement and residence in Britain for those who wished it. It would not be impossible, if it assisted in the process of securing agreement, for continuing provision to be made for some British or European participation in the procedures for monitoring and adjudication on any of these individual or communal rights on an equivalent basis to those which have been suggested in respect of a separate Northern Ireland regime.

Protection on combined United Kingdom/Ireland basis

7.22 Given the long history of intermingling of the British and Irish peoples there would also be advantages in developing cooperative or shared mechanisms for the protection of fundamental individual and communal rights throughout the British-Irish Isles. If agreement could be reached on parallel

procedures for the incorporation of the European Convention on Human Rights and other relevant international conventions, such as the European Framework Convention on the Protection of National Minorities, there would be obvious scope for the creation of cooperative or shared institutions for monitoring and perhaps also for enforcement. The simplest development would be the establishment of a specific human rights committee of the existing British-Irish Interparliamentary Body with powers to investigate and report on general issues of concern in this sphere. It would also be possible to establish a single human rights commission, though it might be more realistic to seek to develop closer working relationships between separate but parallel commissions in each jurisdiction. However, the same objections as those outlined in in paragraph 7.20 could be made to any attempt to create a single human rights court to adjudicate on these issues on an interstate basis. It would be more realistic to leave any final adjudication on differences which might arise in national courts to the relevant European institutions.

Protection in a more autonomous Northern Ireland within the framework of a 'Europe of the regions'

7.23 A final possibility which might emerge in time if Northern Ireland were to become stabilised as a distinctive autonomous regional jurisdiction with ties both to the United Kingdom and to the Republic of Ireland would be the development of a more general European basis for the protection of fundamental individual and communal rights. There are many other interstate regions like Northern Ireland whose populations have formal or informal links with more than one member state. Many of the ideas and institutions which have been discussed above in respect of British, Irish and European cooperation in respect of Northern Ireland might be found to be useful in recognising and guaranteeing the particular individual and communal rights which may assist in achieving stability in all societies or territories in which there are divided allegiances and conflicting claims. In this as in some other respects the development of cooperative or shared institutions under bilateral treaties between the United Kingdom and Ireland over Northern Ireland may be seen as a model which could be followed in other territories and which might eventually form the basis of the protection of fundamental rights in a 'Europe of the regions'.

8. PROTECTION OF HUMAN RIGHTS UNDER EMERGENCY REGIMES

8.1 There is a long history of political violence and coercion in Ireland. All parties to the peace process are committed to ending this pattern once anbd for all. However, even if general agreement is reached on a political settlement, a comprehensive approach to human rights protection must consider the possibility that there might again be a resort to political violence by those who remain or become dissatisfied with the terms of that settlement, or who reject future changes which come about in accordance with its terms. Some consideration is therefore necessary of legal mechanisms for coping with such potential violence.

8.2 Given this historical legacy, discussion of possible emergency powers in the context of the peace process is bound to be fraught with difficulties. But in view of the actual and potential problems in this sphere, it would be unwise for the parties to the process not to consider all aspects of the question. It may therefore be appropriate to outline some of the disadvantages and advantages of making prior provision in this area before examining both the international law dimension and examples of best practice from other countries.

8.3 Broadly speaking, two schools of thought may be identified. The first argues against advance provision for emergency powers on the ground that making such provision may tempt the authorities to invoke the powers too readily, and that once invoked the powers tend to fuel rather than diminish conflict. If the powers are not available, they cannot be used. This argument may be made with particular force in relation to legislation which is permanently on the statute book and whose provisions are either constantly in force or are capable of being activated at any time by the government of the day. An objection to this view is that experience world-wide shows that even where advance provision is not made, governments faced with serious political violence and disorder almost invariably resort to emergency powers, generally with hastily prepared measures. Frequently these are ill-thought-out, have inadequate or non-existent safeguards and are prone to abuse. There is also the possibility that if provision is not made for powers which are clearly designated as 'emergency' in nature, and therefore temporary in effect, equivalent provisions will be introduced which will be labelled 'anti-terrorist' or 'state security'

legislation and which may be permanently in force. Finally, there is a danger, which has been apparent in many jurisdictions throughout the world, that in the absence of a clearly defined legal framework state security forces may respond to political violence in an extra-legal - and frequently illegal - manner.

8.4 The opposing school of thought is that the correct approach is to make provision for emergencies in time of peace when appropriate safeguards can be devised. By clearly marking out exceptional measures as emergency powers, their temporary nature will be emphasised and provision can be made to monitor and control potential abuses. Not all are agreed on the level at which advance provision of this kind should be made. Some argue that statutory emergency powers should be enacted which could, subject to appropriate safeguards, be immediately invoked in appropriate circumstances. Others argue that advance provision should be made at the constitutional level and that the prior adoption of statutory measures is unnecessary. But all face the argument that mere provision of these powers at whatever level may prompt abuse by the government of the day. In order to guard against this possibility, any provisions of this kind would need to be very carefully drafted and would need to be subject to supervision by state institutions imbued with a human rights culture. It would also be necessary to create a legal framework outlawing legislation equivalent to statutory emergency powers but bearing a 'state security' or 'anti-terrorist' designation.

8.5 One possible solution might be to decline to make advance provision at the statutory level, but to include at the constitutional level or at the level of a bill of rights provisions for exceptional powers capable of being invoked only in carefully defined circumstances, for a defined period and in an appropriately regulated manner. Since these powers would not ordinarily be on the statute book, their easy invocation would be avoided, and since appropriate safeguards would be specified at the constitutional level, abuse following their implemenation could be eliminated or at least minimised. It may still be argued that even properly drawn emergency powers would tend to fuel future conflicts. The resolution of that issue clearly lies in the political rather than the legal arena. Whichever option emerges from the peace process, however, must be in accordance with current international law standards.

International standards in respect of state derogations

8.6 When the first international human rights conventions were being drafted it was thought that states would have to be granted the right to derogate from their new international obligations to their own citizens and others in time of war and other similar emergencies. All the major international conventions thus include a formal provision for derogation from at least some of the rights protected under them in such circumstances. The terms of these derogation provisions are broadly similar in each convention. In the European Convention the principal provision is in Article 15:

> In time of war or other public emergency threatening the life of the nation any High Contractng Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

This provision clearly gives to state authorities the right in international law to derogate from relevant human rights obligations during a war or state of emergency. But that right is not unlimited. In the years since the European Convention was signed a considerable body of law has been developed on the precise meaning and limits of the right of derogation.

8.7 These limitations may be summarised under six major heads: the exclusion of certain fundamental non-derogable rights, the requirement of an exceptional threat, the requirement of formal proclamation and notification, the requirements of proportionality and non-discrimination in the measures adopted, and the requirement of appropriate safeguards against abuse:

1. Certain rights, notably the right to life, the right not to be tortured or subjected to inhuman or degrading treatment and the right not to be enslaved, are non-derogable in the sense that the state may not lower the standard to which they are protected whatever the circumstances and however grave the emergency.

2. The state which claims the right to derogate must establish an exceptional threat in the sense of a real and substantial threat to the ordinary life of the nation in the whole or

part of its territory which cannot be dealt with by ordinary legal means.

3. The state is required to make a formal proclamation of the state of emergency and to lodge a formal notification with the secretariat of the relevant international convention both of the reasons for the derogation and of the precise nature of the measures to be introduced.

4. The measures which the state introduces to deal with the emergency must meet the test of proportionality in the sense that they can be shown to be a reasonable response to the particular threat and not to curtail internationally recognised rights more than is strictly required to deal with it.

5. The emergency measures introduced and the way in which they are implemented must meet the test of non-discrimination in the sense that the state must establish that any distinction in their formulation or operation on the grounds of sex, race, colour, nationality or association with a national minority must be objectively justified.

6. The emergency measures introduced must be accompanied by appropriate safeguards against their abuse.

8.8 It has also been established that all of these requirements are subject to international supervision by the body responsible for adjudication under the relevant convention. Both the United Kingdom and the Republic of Ireland have been required to justify emergency measures adopted under derogations, notably internment without trial and extended detention for questioning, before the European Court and Commission of Human Rights. It should be added, however, that all the international bodies concerned regularly accept that the authorities of the state are in the best position to assess the threat and to decide on appropriate measures to deal with it and that international bodies should intervene only when the decisions made by the state are clearly unreasonable.

National safeguards

8.9 These international safeguards have not always proved very effective. Greater emphasis has therefore been placed in recent

international standard setting on the development of more stringent controls in national law. The foundation was laid in two sets of guidelines, known as the Paris Minimum Standards and the Siracusa Principles, prepared by established human rights organisations and experts. The same approach has been given greater international standing in the Moscow Document of the Organisation for Security and Cooperation in Europe, adopted in the immediate aftermath of the failed coup and state of emergency declared in the Soviet Union in 1991. Some of the most significant principles are that advance provision should be made in national constitutional law to govern the procedures for the introduction, implementation and renewal of emergency powers of any kind and in particular that those procedures should include effective legislative and judicial control over the declaration of any emergency and over the measures introduced under it, that the period of any emergency should be strictly limited and that any extension should be subject to similar controls.

8.10 A good example of the deliberate adoption in peacetime of measures of this kind is the Emergencies Act which was enacted in Canada in 1988. The previous emergency powers regime under the War Measures Act of 1914, which had been invoked in 1968 during the political crisis brought about by the activities of the Front pour la Liberation du Quebec (FLQ), lacked any effective safeguards and had led to widespread complaints of abuse. Following the accession of Canada to the International Covenant on Civil and Political Rights in 1976 and the adoption of a new Canadian Constitution and Charter of Rights in 1982 it was decided that new provisions should be made for future states of emergency which took into account these new obligations. The new Emergencies Act authorises the federal government to issue a formal proclamation of an emergency on any one of four specified grounds. But the proclamation must also specify in detail the state of affairs which constitutes the emergency and the special measures which are necessary to deal with it. The measures which are permitted in respect of each type of emergency are strictly limited and except in the case of a war emergency do not include detention without trial. In each case Parliament is granted an express power either to revoke the emergency or to amend any particular order introduced under it.

8.11 The recently adopted South African Constitution is a further highly pertinent example of the application of these principles, not least since there are reasonable fears that the new democratic settlement in South Africa might at some future

date be threatened by renewed communal or paramilitary violence. Section 34 of the Constitution provides that a state of emergency shall be declared only where the security of the state is 'threatened by war, invasion, general insurrection or disorder or at a time of national disaster' and if it is 'necessary to restore peace or order' and that any fundamental rights may be suspended under it 'only to the extent necessary to restore peace or order'. It also requires a two-thirds majority in the National Assembly to confirm or prolong the delaration and provides expressly that any superior court shall be competent 'to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration'. Finally it spells out detailed standards for the treatment of any person detained without trial under any state of emergency.

Implementation in Britain and Ireland

8.12 Under whatever settlement is reached over Northern Ireland the relevant state authorities will continue to be permitted under international human rights law to declare a state of emergency and to derogate from their international obligations in accordance with the principles set out above. Whether provision should also be made in domestic law for such emergencies is an issue to be decided by the parties to the peace process. If it is decided to make such provision, there is clearly scope for the adoption under an entrenched constitution or bill of rights of more effective internal safeguards which define more precisely the roles of the executive, the legislature and the judiciary. The example set by the Canadian Emergencies Act or the South African Constitution might be followed in a number of significant respects. Firstly, there might be a formal constitutional provision, as in most other jurisdictions, setting out the precise grounds on which a state of emergency may be declared and the extent to which fundamental rights which may or may not be restricted under it. This should be drafted in such a way as to rule out the adoption of permanent legislation which is designed to achieve similar ends, such as the Offences Against the State Act in the Republic of Ireland or the Prevention of Terrorism (Temporary Provisions) Act in the United Kingdom. Secondly, there might be a provision requiring a special majority in the relevant parliament to confirm or continue any executive declaration. Thirdly, there might be a specific provision authorising the courts to inquire into the validity of the declaration, both procedurally and in terms of the substantive

requirements for any declaration, and of any action taken under it. And finally, specific safeguards against abuse might be set out.

8.13 If it is agreed that making advance provision for the declaration of any future state of emergency is preferable to an easy assumption that no such emergency should ever need to be contemplated, there would be little formal difficulty in making the necessary provisions within any of the possible constitutional settlements outlined above. In so far as a Northern Ireland Assembly had control over matters of internal security, it would clearly be desirable to ensure by an appropriate weighted majority requirement that the consent of representatives of both communities was required for any declaration. It might also be found desirable in the event of agreement on an all-Ireland framework, with or without formal unification and even under continuing cooperation between the United Kingdom and Ireland, for the consent of both the British and Irish governments to be formally required for any such action. And under any settlement it would be desirable to ensure that the relevant constitutional or human rights court had clear jurisdiction to review both the procedure and the substantive merits of any emergency declaration and of the measures taken under it.

International monitoring

8.14 There may also be a role in this context for proactive international monitoring of any emergency measures. The usual procedures for contesting the legitimacy of emergency measures under the European Convention on Human Rights or the International Covenant on Civil and Political Rights are notoriously long-drawn-out and may not reach a decision on the legitimacy of particular measures or the adequacy of any safeguards until several years have passed. It may therefore be desirable to seek international cooperation in active monitoring of any emergency measures as soon as they are introduced. There are established procedures for the inspection of all places of detention by the International Committee of the Red Cross during civil conflicts. There is also provision under the European Convention for the Prevention of Torture for the inspection of any place in which there are reasonable grounds for fearing that torture or inhuman or degrading treatment might take place. Finally there are new and largely untried procedures under the Moscow Document of the Organisation for Cooperation and Security

in Europe for the appointment of missions of experts to report on matters of human rights concern, not least during states of emergency. Advance provision to facilitate the use of these procedures during any state of emergency would be desirable.