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Unilateral change to the institutions of the 1998 Belfast/Good Friday Agreement

Katie A Johnston
University of Liverpool
Correspondence email: katie.johnston@liverpool.ac.uk

ABSTRACT

This article analyses the international legal obligations imposed on the United Kingdom (UK) and Irish Governments by the 1998 British–Irish Agreement (BIA) – the bilateral international treaty concluded between the two Governments as part of the 1998 Belfast/Good Friday Agreement – and how they affect the manner in which different changes to the 1998 Agreement may be made. In particular, the article seeks to identify the outer limits imposed by the BIA on the sovereign Government's ability to make unilateral changes to the Strand One institutions that depart from the 1998 text of the Multi-Party Agreement. Based on an analysis of the subsequent practice of the UK and Ireland since 1998, applying the international law rules of treaty interpretation, it is argued that while changes to the Strand Two or Three institutions will require the conclusion of a treaty or interpretative declaration by the two Governments to amend their obligations under the BIA and its implementing treaties, at least certain changes to Strand One institutions will not require action on the international plane to modify the BIA, due to the ambulatory nature of the obligation in Article 2 BIA. The article concludes by considering the limits on the ability of the sovereign Government to change the Strand One institutions unilaterally, and the implications of this analysis for reform of the 1998 Agreement, and for the governance of Northern Ireland within a united Ireland.

Keywords: Belfast/Good Friday Agreement; Northern Ireland; treaty interpretation; reform.

INTRODUCTION

The 27 years since the conclusion of the 1998 Belfast/Good Friday Agreement (the 1998 Agreement) have been marked by several periods in which the devolved institutions of Northern Ireland (NI) – in particular the NI Assembly and Executive – have not been operational. The most recent period of suspension, from February 2022 to February 2024, has brought increased attention to the question of reform of NI's political institutions. A November 2023 report by the UK Parliament's NI Affairs Committee, as part of its inquiry into the 'effectiveness of the institutions of the Belfast/Good Friday Agreement', recommended specific changes to the NI Assembly and Executive, and that the UK Government commission a formal review of the institutions of the

Agreement, with a view to making recommendations for reform.[1] Several major NI political parties have expressed a desire for at least some change to the 1998 institutions.[2] The Alliance party[3] and Social Democratic and Labour Party (SDLP)[4] have set out detailed proposals for reform of the institutions which would, to some extent, depart from the text of the 1998 Agreement. However, although they have expressed some support for specific institutional changes in the past, in recent years the two largest parties in NI, Sinn Féin and the Democratic Unionist Party (DUP), have not shown strong interest in actively pursuing institutional reform, which may in practice delay further progress.[5] The Irish Government has expressed interest in institutional reform,[6] but it does not appear to be an urgent priority for the governments in either Dublin or London.[7] Nevertheless, there appears to be broad support for possible reform to the Assembly and Executive among the general public: a July 2022 survey found that 81.5 per cent of respondents agreed that there 'should be an independent review of the Assembly and Executive to explore how

1 House of Commons Northern Ireland Affairs Committee, *The Effectiveness of the Institutions of the Belfast/Good Friday Agreement, First Report of Session 2023–2024* (House of Commons 29 November 2021). For an overview of the reform debate, see Alan Whysall's comment in this issue.

2 See Freya McClements, 'UUP's Beattie calls for realignment of Assembly power structures: party leader tells conference mandatory coalition "no longer delivers good government"' *Irish Times* (Dublin 9 October 2021); House of Lords Constitution Committee, 'Corrected oral evidence: future governance of the UK' (15 September 2021), Evidence of Sir Jeffrey Donaldson, Q128; Ben Hatton, 'Sunak says east–west council proposed by DUP has "considerable merit"' *The Independent* (London 19 October 2023).

3 Alliance Party of Northern Ireland, 'Sharing power to build a shared future' (23 June 2022).

4 UK Parliament, Northern Ireland Affairs Committee, Written evidence submitted by the Social Democratic and Labour Party (SDLP), relating to the effectiveness of the institutions of the Belfast/Good Friday Agreement inquiry (GFA0053) (January 2023).

5 See Conor J Kelly, Alan Renwick and Alan Whysall, 'Reform of Stormont: options for discussion' UCL Constitution Unit (March 2025) 16–17.

6 See statement of Micheál Martin (then Minister of Foreign Affairs, now Taoiseach), Dáil Éireann debate, 'Recent developments in Northern Ireland: statements' (14 February 2024) vol 1046, no 5: 'the realities of today are not those of 1998 and that there is scope to consider some reform'.

7 See Kelly et al (n 5 above) 23–25. The previous Conservative UK Government provided a Response to the Northern Ireland Affairs Committee's Report on 19 February 2024, concluding, at app 1, para 31: 'Given the recent restoration of the Northern Ireland Executive, a review of the Agreement, or amendment of the Northern Ireland Act 1998 is not being considered at this time.'

they could function better'.[8] Academics and commentators have also expressed support for various institutional reforms.[9]

With substantial, although not universal, support for the view that the institutions established under the 1998 Agreement require reform, attention is now turning to the further issues of, first, identifying the specific changes that such reform might involve, and second, the process(es) by which any such changes might be brought about. This article analyses the international legal obligations imposed on the UK and Irish Governments by the 1998 British–Irish Agreement (BIA) – the bilateral international treaty concluded between the two Governments as part of the 1998 Agreement – and how they affect the manner in which different kinds of changes to or departures from the terms of the 1998 Agreement may be made. It seeks to identify, from the complex and sometimes apparently inconsistent body of practice by the UK and Ireland since 1998, the most coherent analysis of how they interpret their obligations under the BIA.

In particular, this article will seek to identify the outer limits imposed by the BIA on the sovereign Government's ability to make unilateral changes to the Strand One institutions (the NI Assembly and Executive) that depart from the 1998 text of the Multi-Party Agreement. That is, it seeks to identify the degree or kind of change that would require the UK to seek the Irish Government's agreement to prior reinterpretation or amendment of the BIA, in the absence of which the change to Strand One would breach the UK's international obligations under the treaty. It is argued that this line between changes that can be made unilaterally and those that require both Governments to take action to reinterpret or amend the BIA depends on the correct interpretation of the obligation in Article 2 BIA that the parties should 'support, and where appropriate implement' the Multi-Party Agreement, and in particular whether, and to what extent, its terms have an evolving nature.

The identification of these limits is important for three reasons. First, although it currently appears unlikely that the UK would take unilateral action to modify the Strand One institutions in a manner unacceptable to the Republic of Ireland, or that would potentially put the UK in breach of its BIA obligations, the rollercoaster in British–Irish relations that has followed the UK's decision to leave

8 Institute of Irish Studies, University of Liverpool and *Irish News*, 4th Attitudinal Survey (July 2022).

9 See eg UK Parliament, Northern Ireland Affairs Committee, Written evidence submitted by Professor Jon Tonge, University of Liverpool, relating to the Effectiveness of the Institutions of the Belfast/Good Friday Agreement inquiry (GFA0002) (November 2022); Alan Whysall, 'Northern Ireland's political future: challenges after the Assembly elections' (The Constitution Unit, University College London, discussion paper May 2022).

the European Union (EU) is a reminder that agreement between the two Governments, even on fundamental questions of the status of NI and the interpretation of the 1998 Agreement, cannot be taken for granted.[10] Second, on a more practical level, many of the various proposals for reform of the NI institutions involve departures from the 1998 text of the Multi-Party Agreement. The Strand One institutions were 'designed to ensure that no single party or community could dominate decision-making' and based on the principle of power-sharing.[11] However, certain features of these institutions have been criticised as outdated, or as preventing the formation and operation of effective governments in NI.[12] Identifying the limits of the changes that can be made to the Strand One institutions through UK domestic legislation alone will thus identify those reform proposals which, in addition, would require action by the British and Irish Governments to reinterpret, amend, or even replace the BIA. Finally, the 1998 Agreement does not contain any explicit provision for its termination, including in circumstances where NI becomes part of a united Ireland. Although many uncertainties exist as to how the provisions of the 1998 Agreement would apply in a situation where the Republic of Ireland has sovereignty over NI,[13] including how governance in NI may be need to be adapted to accommodate such a transfer in sovereignty, identifying the legal obligations of the current sovereign state in relation to the Strand One institutions is an important step towards clarifying how any such changes could be made.

THE HYBRID NATURE OF THE 1998 AGREEMENT AND ITS MODIFICATION

The 1998 Belfast/Good Friday Agreement was the culmination of a years-long peace process, involving the UK and Irish Governments and political actors within NI, which brought an end to the worst of the violent conflict in NI since 1968, known as the 'Troubles'.[14] The 1998 Agreement is comprised of two separate instruments, with

10 Unlike the peace process leading to the 1998 Agreement, which was marked by cooperation between London and Dublin, '[l]ow trust, conflicts of interest with no overarching aim, megaphone diplomacy, populism, and polarisation characterised the period 2016–22': see Etain Tannam, *British–Irish Relations in the Twenty-First Century: The Good Friday Agreement, Brexit, and the Totality of Relations* (Oxford University Press 2024) 78 and, generally, 53ff.

11 Kelly et al (n 5 above) 7.

12 See eg Alliance Party (n 3 above).

13 See Richard Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press 2018) 59–61.

14 For a concise account of the origins of the 1998 Agreement and political developments since 1998, see Kelly et al (n 5 above) 5ff.

different legal statuses: 1) a political agreement reached on 10 April 1998 following multi-party negotiations between the UK Government, Irish Government, and representatives of political parties in NI (the Multi-Party Agreement or MPA); and 2) the BIA, a bilateral international treaty concluded by the UK and the Republic of Ireland. The MPA – divided into three 'strands' or parts – sets out in detail the agreement reached on NI's constitutional status; the existence and structure of the new NI democratic institutions, including the Assembly and power-sharing Executive (Strand One); North–South institutions (Strand Two); and East–West (British–Irish) institutions (Strand Three). The MPA also sets out agreed guarantees on 'Rights, safeguards and equality of opportunity' and addresses other issues, such as policing and justice. The first annex to the MPA contains a draft of the BIA, which was also signed on 10 April 1998, entered into force on 2 December 1999, and was registered with the United Nations Secretariat on 11 July 2000.[15] The BIA, in turn, includes the MPA as an annex to that treaty. Both instruments are thus annexes of the other, emerging simultaneously from the same negotiations and with their texts agreed as part of the same process.

The use of innovative or hybrid forms is common in the design of peace agreements and reflects the need to accommodate the diverse range of actors that may be involved in negotiations to end a conflict.[16] Using non-legal instruments in combination with binding international treaties, constitutional changes, or domestic legislative measures can create 'a set of obligations that will best lock a range of state, nonstate, and international actors into a set of future relationships capable of implementing the peace agreement'.[17] The 1998 Agreement employed all these different tools, with the Multi-Party Agreement also setting out agreed draft text for UK legislation and draft amendments to the Constitution of the Republic of Ireland. As an international treaty, the BIA creates binding obligations under international law for its two states parties, the United Kingdom and the Republic of Ireland. In the UK, the 1998 Agreement was incorporated into domestic law by the Northern Ireland Act 1998 which, *inter alia*, provides for the existence and functioning of the Strand One institutions, and provides for participation by Executive ministers in the Strand Two and Three bodies.[18]

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15 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (adopted 10 April 1998, entered into force 2 December 1999) 2114 UNTS 473.

16 Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 128–135, 142–143.

17 Ibid 161.

18 Northern Ireland Act 1998, pts II–V.

Concluding an international treaty as part of the 1998 Agreement underscored the seriousness with which the political commitments were undertaken by the Governments of the UK and the Republic of Ireland. By creating international legal obligations for the two states to implement the political commitments in the MPA, a bilateral treaty also provides a guarantee to other participants in the negotiations that those commitments cannot easily be resiled from following a change of government.[19] If one of the states parties to the BIA were to breach its obligations under the treaty, that state would be committing an internationally wrongful act under international law, which entails the international responsibility of the wrongdoing state.[20]

Article 1 BIA sets out specific legal obligations for the two Governments with regard to constitutional issues. The content of the obligations created by Article 1 is expressly set out in the text of the BIA: the six sub-paragraphs of Article 1 contain commitments by the two Governments that were negotiated as part of the Multi-Party Agreement and the language used in Article 1 BIA is drawn from its text. For example, both Governments 'recognise' the principle of consent to any change to NI's constitutional status. That Article 1 gives rise to binding international legal obligations, despite its hortatory language, is not seriously questioned.[21] For example, in 2004 a 27th amendment to the Irish Constitution was proposed, which provided that 'a person born in the island of Ireland … who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality'. In light of concerns raised about the consistency of the proposed amendment with Article 1 BIA, in which the two Governments 'recognise' the 'birthright' of all people of NI to identify themselves as British or Irish or both, and 'confirm that their right to hold both British and Irish citizenship is accepted by both Governments',[22] the two Governments in April 2004 agreed an 'Interpretative Declaration'.

19 See Christine Bell, 'Peace agreements: their nature and legal status' (2006) 100(2) American Journal of International Law 373–412, 412.

20 ILC, 'Articles on the responsibility of states for internationally wrongful acts with commentaries' in *Report of the International Law Commission*, 53rd session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 43, Articles 1–2. These provisions reflect customary international law.

21 For example, although not in doubt, the UK has explicitly confirmed this understanding in a 2017 position paper, which implicitly refers to the provisions of Art 1 BIA: 'The British–Irish Agreement is binding on the UK Government and Irish Government, and gives the commitments on equality, parity of esteem and citizenship legal force in international law.' UK Government, 'Position Paper by the United Kingdom: Northern Ireland and Ireland' (16 August 2017) para 13.

22 See eg Dáil Éireann debate, 'Twenty-seventh Amendment of the Constitution Bill 2004: Second Stage' 21 April 2004, vol 583, no 6.

In that declaration they 'give the following legal interpretation':

> that the proposal to amend Article 9 of the Constitution of Ireland ... is in accordance with the intention of the two Governments in making the said [British–Irish] Agreement and that this proposed change to the Constitution is not a breach of the said Agreement or the continuing obligation of good faith in the implementation of the said Agreement.

The interpretative declaration undoubtedly served a political purpose in public debate leading up to the referendum on the adoption of the amendment, by countering the objection about possible inconsistency with the 1998 Agreement. Yet that the Governments went to the trouble of addressing the question in a joint declaration also demonstrates the seriousness with which they treated the BIA as a source of binding obligations under international law: these are not merely aspirational or political commitments.

The 1998 Agreement thus created a complex set of political commitments, domestic legal obligations, and international legal obligations, which differ in their content and bind different actors. Moreover, these commitments and obligations are closely interconnected, as the BIA and MPA cross-refer to each other to define the content of the political commitments or legal obligations they create. This use of hybrid forms in the design of peace agreements complicates the interpretation and modification of those agreements after their adoption. Reform to one aspect of the 1998 Agreement cannot be undertaken without considering the potential impact on other parts of the Agreement. In particular, the international legal obligations created by the BIA mean that certain changes to or departures from the terms of the multi-party political agreement may require a corresponding modification of the BIA (and, as will be discussed below, its subsequent implementation treaties). The Multi-Party Agreement itself appears to foresee that at least some modifications to the functioning of the 1998 institutions will require treaty action by the two Governments. The 'Validation, implementation and review' section of the MPA provides that '[i]f difficulties arise which require remedial action across the range of institutions, *or otherwise require amendment of the British–Irish Agreement* or relevant legislation' the review process 'will fall to the two Governments in consultation with the parties in the Assembly'.[23]

23 Multi-Party Agreement, 'Validation, implementation and review', para 5 (emphasis added).

CHANGING TREATY OBLIGATIONS: AMENDMENT, MODIFICATION AND INTERPRETATION

Before considering how changes may be made to the 1998 Agreement in particular, it is necessary to give a brief overview of the international law rules governing change to treaties generally, and address some of the more controversial aspects raised by the 1998 Agreement. The rules that govern the operation of international treaties are set out in the 1969 Vienna Convention on the Law of Treaties (VCLT). This 'treaty on treaties'[24] contains a definition of 'treaty' for the purpose of the Convention and rules on the conclusion, interpretation, termination and modification of treaties. Both the UK and Ireland are now parties to the VCLT and bound by its provisions. However, although the BIA was concluded after the VCLT entered into force generally and for the UK, Ireland only acceded to the VCLT on 7 August 2006. As a result, the BIA does not fall within the temporal scope of the VCLT and is instead subject to the rules of the customary international law of treaties.[25] In most cases, this makes little practical difference as many VCLT provisions codify identical rules of customary international law.[26]

Under international law, there are different mechanisms by which the content of the obligations created by a treaty may undergo change: amendment (Articles 39 and 40 VCLT), modification (Article 41 VCLT),[27] interpretation (Articles 31, 32 and 33), and replacement by a later treaty, in whole or in part (Article 30). However, although the VCLT provides for these possibilities as distinct processes, the questions of the dividing line between them, and how a particular change to a treaty can or should be qualified, are both difficult to answer in practice and raise challenging conceptual issues.

A bilateral treaty such as the BIA may be amended by agreement between both parties to the treaty, applying the rule in Article 39 VCLT;[28] for example, through their adoption of another bilateral

24 See Robert E Dalton and Richard D Kearney, 'The treaty on treaties' (1970) 3 American Journal of International Law 495–561.

25 Art 4, VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (VCLT).

26 For example, the customary international law rules on treaty interpretation are codified in Art 31 VCLT, *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Reports 279, para 100.

27 In Art 41 VCLT, the word 'modification' is used to refer to the situation where a subset of parties to a multilateral treaty (ie a treaty with more than two parties) agree to change the obligations created by that treaty among themselves. However, this process is not relevant to a bilateral treaty like the BIA, and in the remainder of this article 'modification' is used to refer to a change in the content of the obligations created by a treaty.

28 Art 39, VCLT.

treaty which provides for amendment of the earlier treaty. However, this immediately demonstrates that the VCLT categorisation of these processes as clear-cut and separate is misleading. For amendment of a bilateral treaty applying the rule in Article 39 is indistinguishable in practice from the operation of Article 30(3) VCLT: a bilateral treaty is implicitly amended where both its parties conclude a later bilateral treaty and the provisions of the earlier bilateral treaty are incompatible with the later treaty. In that situation, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[29] Although the parties may choose to characterise what has happened as either an 'amendment' of the earlier treaty, or its replacement by a later one in accordance with Article 30(3), the legal process and effects are identical.[30]

Evolutionary interpretation

The VCLT also sets out rules governing the interpretation of treaties in Articles 31, 32 and 33. Article 31(1) sets out the basic rule of treaty interpretation, which requires an interpreter to interpret a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This rule requires an interpreter to take a 'single combined approach' whereby all these elements listed in Article 31(1) – ordinary meaning, context, and object and purpose – 'would be thrown into the crucible, and their interaction would give the legally relevant interpretation'.[31]

The question of whether, to what extent, and in what circumstances the content of a treaty obligation can *change* through the process of interpretation is contested, as will be discussed further below. However, although the precise contours of the doctrine are still debated,[32] it is now widely accepted that one way the content of treaty obligations can change through interpretation is by the employment of an evolutionary

29 Ibid Art 30(3). Similarly, if both parties to the bilateral treaty become parties to a later multilateral treaty which conflicts with the earlier treaty, the earlier treaty is applicable only to the extent it is compatible with the later one. As with virtually all rules set out in the VCLT, the parties to a treaty may derogate from these default rules on how their treaty would function; in particular, it is common for treaties – especially multilateral treaties – to make specific provision for amendment procedures that differ from those in the VCLT. See, for example, UN Charter, Arts 108–109.

30 Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013) 232.

31 ILC, 'Draft Articles on the law of treaties with commentaries' (1966) II (187) Yearbook of the International Law Commission 219–220, para 8.

32 Malgosia Fitzmaurice, 'Dynamic (evolutive) interpretation of treaties' (2008) Hague Yearbook of International Law 101–153, 153.

approach in determining the 'ordinary meaning' of particular terms in a treaty in accordance with Article 31(1).[33] For example, in *Costa Rica v Nicaragua*, the International Court of Justice (ICJ) found that the term 'commerce' in a bilateral treaty was to be interpreted not as having the meaning it had at the time of the treaty's conclusion in 1858 – trade in goods only – but as having the ordinary meaning it now had at the time of application of the treaty (2009), which encompassed trade in goods and services, including tourism.[34] This effectively resulted in an expansion in the scope of the right of free navigation enjoyed by Costa Rica under the treaty, which now extended to commerce in the broad 2009 meaning of the word. If the meaning of a term or terms in the BIA are properly interpreted as having an evolving meaning, then it is possible that the content of the obligations that treaty creates could change or have changed in a similar manner, without requiring any joint action by the parties to reinterpret or amend the treaty.

Whether a term in a treaty is to be interpreted in line with its meaning at the time of its conclusion (contemporaneous or static interpretation), or as having a meaning that evolves so that by the time of its application it may have changed (evolutionary or dynamic interpretation), is a question that international tribunals have addressed on a case-by-case basis. The ICJ, for example, has sometimes taken an evolutionary approach and sometimes a static approach.[35] Which approach is appropriate is to be determined through an application of the rules of interpretation in Articles 31 and 32 VCLT to the treaty term concerned.[36] In some cases, it will be clear that a term is referring to a concept whose meaning is time-bound and which should therefore be

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33 Eirik Bjorge and Robert Kolb, 'The interpretation of treaties over time' in Duncan Hollis (ed), *The Oxford Guide to Treaties* 2nd edn (Oxford University Press 2020) 489, 494; Julian Arato, 'Subsequent practice and evolutive interpretation: techniques of treaty interpretation over time and their diverse consequences' (2010) 9 The Law and Practice of International Courts and Tribunals 443–494, 465. See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Reports 16, para 53; *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body (1998) WT/DS58/AB/R, para 130; European Court of Human Rights, Grand Chamber, *Öcalan v Turkey* (2005) App No 46221/99, para 163.

34 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Reports 213, paras 58–59.

35 Ibid Declaration of Judge Guillaume (Guillaume Declaration), paras 10–12.

36 Ibid para 9; ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' in *Report of the International Law Commission*, 70th session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 11 (ILC Subsequent Practice), Conclusion 8, commentary paras 5, 9.

given a static interpretation.[37] For example, the meaning of the phrase 'the states which, having participated in the United Nations Conference on International Organization at San Francisco', in Article 3 of the UN Charter, will not change over time. Conversely, in some cases it will be clear that a term is to be interpreted using an evolutionary approach because it refers to a concept that by its nature changes over time. For example, the World Trade Organization (WTO) Appellate Body has found that 'the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"'.[38]

It is, however, rare that a term will clearly be 'by definition evolutionary' or that a treaty will explicitly make provision for whether a term is to be given a static or evolutionary meaning. The interpretative process will therefore usually involve the application of certain presumptions, which have been developed by the ICJ and other tribunals.[39] In particular, the ICJ has held that where the parties use a term 'of a generic kind' it is to be presumed that 'its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'.[40] This presumption is not, however, to be applied in isolation and other factors may mean that a generic term should nevertheless be understood as having a static meaning.[41] The ordinary meaning of the terms is only one element in the interpretative process and the object and purpose of the treaty in particular will have a crucial role in determining whether its terms should be given an evolutionary

37 Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht 2007) 75–77.

38 *US – Import Prohibition of Certain Shrimp and Shrimp Products* (n 33 above) para 130. Also *China – Publications and Audiovisual Products*, WTO Appellate Body (2009) WT/DS363/AB/R, para 396. See Catherine Redgwell, 'The never-ending story: the role of GAIRS in UNCLOS implementation' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 171.

39 Guillaume Declaration (n 35 above) para 15; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion of 2 April 2015) ITLOS Reports 2015, 4, Separate Opinion Judge Lucky, para 19.

40 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Reports 3, paras 77–78; *Costa Rica v Nicaragua* (n 32 above) para 66. See Linderfalk (n 37 above) 86–87.

41 Guillaume Declaration (n 35 above) para 15.

meaning.[42] The Court has found that the presumption that generic terms are to be given an evolving meaning is strengthened by the fact that the treaty in which they are contained is one concluded 'for a very long period'[43] or is 'of continuing duration'.[44] In the case of the BIA, a treaty concluded to underpin a long-term peace settlement for NI, the object and purpose does seem to support a presumption that certain terms could be given an evolving meaning. However, to reach a firm conclusion as to whether a particular term in the BIA is to be given an evolving meaning will require further interpretation of the specific provision. Significantly for present purposes, subsequent agreement and practice in application of a treaty can also contribute to an interpretation whereby a treaty term is to be given an evolving meaning.[45]

Interpretation using subsequent agreement and practice of the parties

The content of the legal obligations created by a treaty may also change through subsequent agreements or subsequent practice by its parties which (re-)interpret its provisions, in accordance with the rules in Article 31(3)(a) and (b) VCLT respectively. Article 31(3) VCLT, which along with the rest of Article 31 reflects customary international law,[46] provides:

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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42 Fitzmaurice (n 32 above) 117–118; Rosalyn Higgins, *Themes and Theories* (Oxford University Press 2009) 873. Where the other elements point towards a static interpretation, this may overcome the presumption raised by use of a generic term; conversely, other factors may strengthen the conclusion reached via the presumption that the term is to be given an evolving meaning. In the ICJ's decision in the case concerning *Rights of Nationals of the United States of America in Morocco (France v USA)* (Judgment) [1952] ICJ Reports 176, following an analysis of the circumstances of the treaty's conclusion the generic term 'disputes' was held not to have an evolutionary meaning but to have the meaning it had at the time of the treaty's conclusion – covering both civil and criminal disputes – rather than what France submitted was its ordinary meaning at the time of interpretation, limited to civil disputes only (189).

43 *Costa Rica v Nicaragua* (n 34 above) para 66; *Aegean Sea* (n 40 above) para 77.

44 See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Reports 7, para 140, where the court appears to suggest that continuing obligations are 'necessarily evolving'; also *Iron Rhine*, para 82. Although cf *Costa Rica v Nicaragua* (n 34 above) Separate Opinion of Judge Skotnikov.

45 ILC Subsequent Practice (n 36 above) 65.

46 *Legality of Use of Force* (n 26 above) para 100.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

Article 31(3)(a) and (b) are concerned with agreements and practice that arise *subsequent* to the entry into force of the treaty being interpreted;[47] so, in the case of the BIA, subsequent to 2 December 1999. The parties must have taken a position regarding the interpretation of the treaty, as it is this which forms the subject of their agreement.[48] In accordance with its use elsewhere in the VCLT, an 'agreement' for the purpose of Article 31(3)(a) need not take the form of a treaty or other written agreement, nor does it need to be binding.[49] The International Law Commission (ILC) identifies the crucial distinction between Article 31(3)(a) and (b) as being that whereas 'an agreement of the parties can be identified as such, in a common act or undertaking', in the case of subsequent practice it is 'necessary to identify an agreement through separate acts that in combination demonstrate a common position'. While Article 31(3)(a) 'presupposes a deliberate common act or undertaking by the parties', Article 31(3)(b) 'encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement'.[50] Although it is contested whether agreement among *all* parties to a multilateral treaty is necessary for subsequent practice or agreement to be taken into account in interpretation under the rules in Article 31(3)(a) and (b), this question does not need to be resolved here: for a bilateral treaty such as the BIA, any agreement between parties will necessarily be an agreement between all/both parties to the treaty.

If an agreement among all the parties or practice establishing such agreement exists then it must be taken into account as part of the process of interpretation under Article 31, since Article 31(3) forms part of the general rule of treaty interpretation.[51] This also follows from the text of Article 31(3) itself ('shall'). However, since such an

47 Linderfalk (n 37 above) 165.

48 ILC Subsequent Practice (n 36 above) Conclusion 6.

49 Ibid Conclusion 4.

50 Ibid Conclusion 4, commentary paras 9–11. See *CCFT v United States (Award on Jurisdiction)* (2008) IIC 316, paras 184–188.

51 It is not just the basic rule in Art 31(1) that is the 'general rule of interpretation', but Art 31 as a whole, and sub-ss 31(2) and (3) 'are not discretionary add-ons, but prescriptive and mandatory aspects of the "general rule"': Duncan French, 'Treaty interpretation and extraneous legal rules' (2005) 55 International and Comparative Law Quarterly 281–314, 301.

interpretation would be agreed by all the parties, it is also for that reason conclusive as to the correct interpretation of the treaty.

Amendment through interpretation

As Arato notes, the proposition that a treaty can be 'modified' or 'amended' through interpretation is controversial.[52] In one sense, the interpretation and the modification of treaties can be easily distinguished: they refer to two separate processes within the law of treaties, the first regulated by Articles 31–33 VCLT and the latter by Articles 39–40 (and the corresponding customary norms they codify). Yet much ink has been spilled attempting to identify a *conceptual* distinction between interpretations and modifications of treaty provisions.[53] There are clearly cases which can uncontroversially be classified as interpretation or modification. For example, using the ordinary meaning and context to interpret 'the parties' in Article 31(3)(a) VCLT as referring to the states bound by the treaty being interpreted, or a modification to the text of a treaty provision using its formal amendment process, respectively. However, at the boundary between the two categories the distinction is difficult to draw.[54] Even those who draw a conceptual distinction between the two – for example, that modification occurs only where the substance of the change to the treaty provision 'conflicts' with the original contents of the provision – concede that the distinction is exceedingly difficult to apply in practice.[55]

Yet the conviction that such a distinction exists, and can sensibly be applied in practice, has generated a further controversy: where a given case falls into the *conceptual* category of interpretation or modification, can it only be effected by the *corresponding legal process* under the law of treaties? That is, if all the parties to a treaty, acting together, wish to give a meaning to a treaty provision, the nature of which is such that it inherently constitutes a modification of that provision, will the parties be unable validly to do so unless they use the correct legal process, that of amendment? Even if it were possible to draw a conceptual line between an interpretation and a modification of a treaty, it is not clear

52 Arato (n 33 above) 456. See also Maria Xiouri's article in this issue.

53 See Julian Arato, 'Treaty interpretation and constitutional transformation: informal change in international organizations' (2013) 38 Yale Journal of International Law 289–358, 311. Application is best understood as a form of interpretation; see Linderfalk (n 37 above) 12.

54 Aust (n 30 above) 214.

55 Chittharanjan Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005) 460–461; Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018) 135; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2016) 275.

that there does exist any specific rule of treaty law, either in the VCLT or custom, that provides that *subsequent agreement of all the parties* under Article 31(3)(a) or (b) can only accomplish interpretation and not modification.[56] The rejection at the 1969 Vienna Conference of a draft Article explicitly allowing modification of treaties by subsequent practice does not necessarily mean, as some argue, that states wished to exclude this possibility or considered it impossible, but rather that states did not wish to address the question at that time or in that context.[57]

In its recent work on subsequent agreements and subsequent practice, the ILC tentatively concludes that it is 'presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it'. This is not unreasonable – the presumption should be that if parties intended to amend the treaty they would have used amendment provisions they created for this purpose or followed the amendment process set out in the VCLT. However, the ILC's conclusion that '[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized' is difficult to justify, and it is conceded in the commentary 'that there are examples to the contrary in case law and diverging opinions in the literature'.[58] In practice, it has frequently been shown that some legal processes of interpretation have been validly used to effect what, by any plausible

56 Although 'this is still an open issue of international law': Fitzmaurice (n 32 above).

57 ILC Subsequent Practice (n 36 above) Conclusion 7, commentary para 26; Amerasinghe (n 55 above) 462 and fn 42; Michael Akehurst, 'The hierarchy of the sources of international law' (1976) 47(1) British Yearbook of International Law 273–294, 277; cf José Alvarez, 'Limits of change by way of subsequent agreements and practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 126. In the VCLT 'modification' is not used as a synonym for amendment; indeed, pt IV seems to use the two terms to distinguish between a change to the treaty that applies to all the parties (amendment, Arts 39 and 40), and a change to obligations among a more restricted set of parties (modification, Art 41). In discussions in the ILC when the draft Article was being developed, objections to the Article were based more on concerns about how the draft Article would cohere with the draft as a whole, rather than a rejection of the principle itself: Malgosia Fitzmaurice and Panos Merkouris, 'Re-shaping treaties while balancing interests of stability and change: critical issues in the amendment/modification/revision of treaties' (2015) 20 Austrian Review of International and European Law 41–98, 70–1; Buga (n 55 above) 120, 131.

58 ILC Subsequent Practice (n 36 above) Conclusion 7, commentary para 21; eg Aust (n 30 above) 233. See, for example, European Court of Human Rights, Grand Chamber, *Öcalan v Turkey* (n 33 above) para 163.

definition, could only be described (conceptually) as a modification of a treaty provision.[59]

More significantly, the interpretation/modification debate often fails to recognise that in the law of treaties not all interpretations are equal. One party to a treaty is, of course, entitled – and in practice will need to – come to its own conclusion about the proper interpretation of a treaty and its obligations under it. In international law generally, where mandatory authoritative dispute settlement is the exception rather than the rule, auto-interpretation is ubiquitous. Article 31 sets out the basic rule on interpretation of treaties, but an interpretation that a single interpreter, such as one state party to a treaty, arrives at through a correct application of its provisions will not be a binding or conclusive interpretation of the treaty. There are limits on the interpretations that may be validly arrived at through its application.[60] An interpretation that misapplies the basic rule of interpretation, for example by not taking into account one of the elements in Article 31(1), risks being rejected as incorrect, for example by a judge adjudicating a dispute arising from the treaty, or by the other parties to the treaty.[61] It is for this reason that there are limits to the changes in a treaty rule's content that can be effected by evolutionary interpretation under Article 31(1). An interpretation of a treaty provision that is incompatible with the ordinary meaning of the text or contrary to its object and purpose would not be a valid interpretation under Article 31(1). To effect such a change in the content of a treaty provision would require a state party to seek amendment of the treaty.

However, no such limits apply to interpretations arrived at by all the parties, including under Article 31(3)(a) and (b). As Crawford writes, it is the parties to the treaty that 'own' the treaty and they can do what they like with it;[62] provided they are all in agreement. As interpretations agreed by all parties to the treaty, such interpretations will be not only valid but conclusive as to the interpretation of the provision, even if they run contrary to the ordinary meaning of the text, or the object

59 Both before and after the VCLT, international courts and tribunals have used subsequent practice of the parties to justify interpretations that amount to treaty modifications, Arato (n 53 above) 311. The jurisprudence of the ICJ also does not suggest any general rule to that effect, ILC Subsequent Practice (n 36 above) Conclusion 7, commentary para 35.

60 Eirik Bjorge, 'The Vienna rules, evolutionary interpretation, and the intentions of the parties' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 204.

61 Eg Charles Brower, 'Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA Article 1105' (2006) 46 Virginia Journal of International Law 347–363, 362–363.

62 James Crawford, 'Chance, order, change: the course of international law' (2013) 365 Receuil des Cours 17, 31.

and purpose of the treaty, as both were previously understood.[63] If every party to the treaty is in agreement, then they can override the interpretation of a provision that would be reached through the usual rules of treaty interpretation, for example the rule in Article 31(1). Interpretations by all the parties are therefore binding in the sense that they definitively determine the content of the binding obligations under the treaty. Interpretations by all the parties are also 'binding' on interpreters in that they are dispositive of the legal question of how the treaty should be interpreted.[64]

Finally, the ILC has taken the view that subsequent agreements *that have the effect of amending or modifying a treaty* are instead subject to the rule in Article 39 VCLT, which provides that '[a] treaty may be amended by agreement between the parties', and should be distinguished from Article 31(3)(a) interpretative agreements.[65] However, this is based on the flawed premise that interpretations and modifications of treaties are capable of being distinguished, discussed above. In practice, it is difficult to see how an Article 31(3)(a) agreement will differ from an agreement to amend the treaty under Article 39 and, in most cases, it is not clear what difference this would make: neither Article 31(3)(a) nor Article 39 impose any requirements of form; both require the agreement of all parties if it is to be binding upon them all; and the value of an interpretative agreement of all parties and a treaty amendment is identical. The only difference would seem to be that Article 39 agreements must themselves be binding treaties (unless the treaty provides otherwise), whereas a subsequent agreement under Article 31(3)(a) may be binding in itself, but need not be.[66]

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63 As a result, in certain cases subsequent practice confirms the initial, formal expression of the parties' will, while in other cases it may modify the text of the treaty or the previously existing legal situation: Maurice Kamto, *La volonté de l'État en droit international* (Nijhoff 2007) 127; Amerasinghe (n 55 above) 462–463.

64 There are diverging views as to whether an interpretation reached through agreement of all the parties is decisive and legally binding, or if it is merely one among several factors to be 'taken into account' in interpretation: see Dapo Akande and Antonios Tzanakopoulos, 'Treaty law and ICC jurisdiction over the crime of aggression' (2018) 29(3) European Journal of International Law 939–959, 947–948. The former view is taken here, although, as these authors point out, a subsequent agreement or practice can never be completely decisive since, like the treaty itself, the agreement reached will require interpretation, which will in turn require consideration of the other elements of interpretation.

65 ILC Subsequent Practice (n 36 above) Conclusion 7, commentary para 21.

66 Although Art 39 VCLT also uses the word 'agreement', the second sentence of that provision – 'The rules laid down in Part II [Conclusion and Entry into Force of Treaties] apply to such an agreement except insofar as the treaty may otherwise provide' – suggests that the term should here be understood to mean a binding agreement, unless the treaty provides for a different amendment procedure.

It is in this context that the obligations created by the BIA, and the practice of the parties since 1998, must be analysed. It is possible that the obligations created by the BIA in 1998 may have changed through the operation of one or more of the processes above. Moreover, looking ahead to how reform or revision of the 1998 Agreement could occur in future, there are possible avenues going beyond simple amendment or replacement of the Agreement. The existence of binding international obligations in the BIA thus certainly does not prevent reform of the 1998 institutions. However, as demonstrated by the complexity of the processes set out above, the existence of binding international obligations may impose requirements as to the legal processes by which those changes to the 1998 Agreement are accomplished.

THE OBLIGATIONS CREATED BY THE BIA AND ITS SUBSEQUENT IMPLEMENTATION AGREEMENTS

To identify the situations in which change to the institutions of the Agreement will require treaty action to reinterpret or amend the BIA, it is first necessary to interpret the treaty provisions to identify the content of the obligations they create for the two Governments. This Article focuses primarily on the implications of the obligations created by the BIA for reform of the institutions established under Strands One, Two and Three of the MPA. However, it is worth noting that the arguments below also entail that both Governments are under a binding international legal obligation, derived from Article 2 BIA, to 'support, and where appropriate implement' the other sections of the MPA. For example, the section on 'Rights, safeguards, and equality of opportunity' provides that 'The British Government will complete incorporation into NI law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention …'. As others have highlighted, this obligation presents serious obstacles should the British Government seek to 'unincorporate' the ECHR from UK domestic law (at least to the extent that it affects NI), for example through repeal of the Human Rights Act 1998, or should the UK seek to withdraw from the ECHR entirely.[67]

67 Colin Murray, Aoife O'Donoghue and Ben Warwick, 'The implications of the Good Friday Agreement for UK human rights reform' (2016-2017) 11–12 Irish Yearbook of International Law 71–96; Anurag Deb, 'The Good Friday Agreement and the European Convention on Human Rights' (*UK Human Rights Blog* 29 August 2023). Art 2 BIA has also now been joined by the obligation in Art 2(1) EU–UK Withdrawal Agreement, Protocol on Ireland/Northern Ireland (now also known as the Windsor Framework), for the UK to ensure 'no diminution of rights, safeguards or equality of opportunity', and which under s 7A EU (Withdrawal) Act 2018 enjoys primacy over even primary UK legislation.

Although such a move seems unlikely under the current Labour Government,[68] leader of the opposition Kemi Badenoch has expressed qualified support for ECHR withdrawal,[69] while her defeated rival for the Conservative leadership Robert Jenrick, and the 2024 Reform manifesto, are strongly in favour.[70]

The obligations created by Article 2 BIA in relation to the Multi-Party Agreement

It is Article 2 BIA that sets out the obligations of the two Governments in relation to the MPA, and which are most relevant to the creation, operation and possible modification of the institutions across all three Strands. The obligations created by Article 2 BIA are complex: the two sentences comprising the provision differ in their choice of language, and their content is derived in large part from a cross-reference to the MPA in annex 1 to the BIA, the status of which is itself the subject of debate.[71] Article 2 BIA provides that:

> The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:
>
> i) a North/South Ministerial Council;
>
> ii) the implementation bodies referred to in paragraph 9 (ii) of the section entitled 'Strand Two' of the Multi-Party Agreement;
>
> iii) a British–Irish Council;
>
> iv) a British–Irish Intergovernmental Conference.

The language of the *first* sentence of Article 2 is not straightforward, as rather than providing – for example – that the Governments 'shall' implement the MPA, the parties instead 'affirm their solemn commitment to support, and where appropriate implement' that agreement. The roundabout drafting could be taken to express merely political undertakings. However, the better interpretation of the provision, considering its context within the BIA, is that this

68 See Attorney General Lord Hermer's Speech at Summer School in the Law of the Council of Europe (8 July 2025).

69 Chris Mason, 'Badenoch launches review into possible ECHR exit' (*BBC News* 5 June 2025).

70 Paul Seddon, 'Tories must back ECHR exit to survive, says Jenrick' (*BBC News* 30 September 2024); Dominic Casciani, 'Reform UK election pledges: 11 key policies analysed' (*BBC News* 17 June 2024). Conservative think tank Policy Exchange has also published a recent report on the subject: Conor Casey, Richard Ekins and Stephen Laws, *The ECHR and the Belfast (Good Friday) Agreement* (31 August 2025).

71 See *Dillon* [2024] NIKB 11, paras 532–535.

'solemn commitment' does create a legally binding obligation. In the BIA's preamble the Governments already explicitly 'reaffirm' their 'commitment' (or 'total commitment') to certain principles, including democracy, non-violence, and equality. That the parties then chose to 'affirm' a further 'commitment' *in the body of the treaty itself* strongly suggests that this first sentence of Article 2 was intended to be more than merely hortatory. It is unclear why the drafters would put one of those affirmations in the text of the binding international treaty (and not just its preamble) if not to create a legally binding obligation. Moreover, the preceding Article 1 BIA also uses the term 'affirm' to create what are indisputably legally binding obligations.

Turning to the second sentence of Article 2, the 'shall be established' language clearly creates a legal obligation on the parties to establish the institutions named in subparagraphs (i) to (iv) 'in accordance with the provisions of the Multi-Party Agreement'. This obligation is best interpreted as a one-off, finite obligation, which has no further relevance once the Strand Two and Three institutions are created. By contrast, the obligations to 'support' and 'implement' the provisions of the MPA, set out in the first sentence, are continuing obligations which, as indicated by the phrase 'in particular', encompass the more specific obligation to establish the Strand Two and Three institutions.

The 1999 implementation treaties

On 8 March 1999 four bilateral treaties were concluded, by which the British and Irish Governments implemented this obligation to establish the Strand Two and Three institutions.[72] The Strand Two and Three bodies were new institutions, negotiated as part of the Multi-Party Agreement, to include North–South and East–West cooperation in the peace settlement. The March 1999 treaties provided that 'The [North/South Ministerial Council/British–Irish Council/British–Irish Intergovernmental Conference respectively] shall be constituted and

72 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing a North/South Ministerial Council 2224 UNTS 389; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing a British–Irish Intergovernmental Conference 2224 UNTS 383; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing a British–Irish Council 2224 UNTS 395; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing implementation bodies 2224 UNTS 333 (all signed 8 March 1999, entered into force 2 December 1999). Para 10, Strand Two MPA provides that: 'The two Governments will make necessary legislative and other enabling preparations to ensure, as an absolute commitment, that these [implementation] bodies … function at the time of the inception of the British–Irish Agreement.' Presumably, 'inception' refers to the entry into force of the BIA.

shall operate in accordance with the provisions of the Multi-Party Agreement'.[73] The use of mandatory language ('shall') thus created additional, binding, continuing obligations on the two Governments to 'operate' the Strand Two and Three institutions in accordance with the MPA.

As a result, even since before the 1998 BIA entered into force, its provisions have never constituted a comprehensive or accurate account of the two Governments' international legal obligations under the 1998 Agreement. Particularly in relation to the Strand Two and Three institutions, the BIA must be read alongside its implementation agreements. This was implicitly recognised in the preamble to the UK–EU Protocol on Ireland/NI, which affirms:

> that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations, which is annexed to the British–Irish Agreement of the same date, *including its subsequent implementation agreements and arrangements*, should be protected in all its parts.[74]

In considering how reform of the 1998 institutions may be brought about today, there are thus two sets of international obligations to consider. The first sentence of Article 2 BIA creates an obligation for the two treaty parties to 'support and implement' the MPA, which would potentially be implicated by changes departing from the MPA in relation to Strands One, Two, or Three. In relation to Strands Two and Three only, although both Governments have implemented their obligation to 'establish' those institutions, both states remain subject to continuing obligations under the 1999 treaties to operate those institutions 'in accordance with the provisions of the Multi-Party Agreement'.

Interpretation of Article 2 BIA and the 1999 treaties in light of subsequent practice

As noted at the outset, this article's purpose is to analyse the extent to which the UK may unilaterally make changes to the Strand One political institutions in NI, departing from the terms of the MPA as agreed in 1998. It is argued that this depends on the correct interpretation of the obligation in Article 2 BIA, and whether, and to what extent, the term

73 Emphasis added. Art 3(1) of the Implementation Bodies Agreement similarly provided that: 'Each Body shall operate in accordance with the provisions of the Multi-Party Agreement.'

74 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland (signed 24 January 2020, entered into force 1 January 2021), Preamble, para 4 (emphasis added).

'multi-party agreement' has an evolving nature. As set out above, if the ordinary meaning of a treaty term is 'ambulatory' or 'evolutionary', its content will automatically reflect changes to the meaning of that term from time to time, without the need for amendment or reinterpretation of the treaty.[75] In this case, the ordinary meaning of 'multi-party agreement' would evolve to reflect changes made to the operation of the institutions since 1998. By contrast, a 'static' or 'contemporaneous' meaning of a term will be that at the time of the treaty's conclusion. In this case, the static ordinary meaning of the term 'multi-party agreement' would be the MPA *as agreed in 1998*.

Evolutionary or static interpretation in Article 2 BIA

The BIA does not explicitly make provision for whether the term 'multi-party agreement' is to be given a static or evolutionary meaning. However, on balance, an interpretation of Article 2 BIA based solely on the text of the treaty appears to point towards a static interpretation. It is difficult to conclude that the phrase 'multi-party agreement' is 'by definition evolutionary'. The MPA does contain provision for its own review and amendment, but it seems that these are to be resorted to only if 'problems' or 'difficulties' arise in the operation of the institutions.[76] Indeed, although concluded with the object of regulating UK–Irish relations concerning NI for a long and continuing duration, one object and purpose of the BIA is clearly to provide stability and certainty in those relations and in the governance of NI, militating against an evolving meaning. Moreover, 'multi-party agreement' is not a generic term but refers to a specific instrument, which is annexed to the treaty itself; the most natural reading is therefore that it is this 1998 text, attached as an annex, which is being referred to.

Based on the text of the treaty alone, it could therefore be argued that the best reading of the references to 'the multi-party agreement' in the second sentence of Article 2 is that it is a *static* reference to the 1998 text of the MPA. That is, the two Governments have an obligation to 'support, and where appropriate implement' the MPA *as drafted in 1998*. If that is correct, then *any* reform to the 1998 institutions that departed from the 1998 text of the MPA, including those in Strand One, would require reinterpretation or amendment of the BIA if one or both of the parties were not to be in breach of their international obligations. Yet, although interpretation 'must be based above all upon the text of the treaty',[77] this is not the end of the story. As noted above, the customary international law rules of treaty interpretation

75 *Costa Rica v Nicaragua* (n 34 above) paras 63–64, 70.

76 Multi-Party Agreement, 'Validation, implementation and review', paras 5–7.

77 ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Reports 6, para 41.

also require that any subsequent agreement and practice of the parties be taken into account in its interpretation.[78] As discussed above, this can change the interpretation of a treaty provision which would be produced from an analysis of its text alone, applying the general rule in Article 31(1) VCLT.

There has been significant practice since 1998 whereby modifications have been made to institutions from all three Strands of the MPA. It is argued below that the best interpretation of this subsequent practice is that it establishes the agreement of the UK and Ireland that the ordinary meaning of the term 'multi-party agreement' in the first sentence of Article 2 BIA has, at least in some contexts, an evolving meaning. The practice of the parties in the application of the BIA and 1999 treaties reveals a difference of approach in relation to modification of the 1998 institutions, depending on whether the institution derives from Strand One, Two or Three of the MPA. Based on this practice, it is argued that reform that involves changes to the Strand Two and/or Three institutions would require treaty action to modify the obligations of the two Governments in Article 2 BIA and the 1999 implementation agreements, for example through an amending bilateral treaty. However, where changes are made to the Strand One institutions only, no treaty action is needed and any change to the relevant provisions of the MPA will be automatically reflected in the content of the UK and Irish Governments' obligation in the first sentence of Article 2 BIA.

While the practice of less than all the parties to a treaty – that is, in the case of a bilateral treaty the practice of only one party – may be relevant, it is only a supplementary means of interpretation, and it is not mandatory that it is taken into account.[79] For example, in its response to the Northern Ireland Affairs Committee's 2023 report, the UK Government stated that it remains 'committed to upholding the long established three-strand approach to Northern Ireland affairs, meaning that any reforms to the devolved, strand one, institutions are primarily for the Northern Ireland parties and the UK Government'. Although they would 'of course, also seek to ensure that the Irish Government were engaged in the event of substantive reform of the Agreement in line with established practice'.[80] As the practice of less than all parties to the BIA, such a statement is not to be disregarded, but its weight as a means to interpret the BIA is limited. At most, such a statement can prevent an interpretation to the contrary: it

78 Art 31(3) VCLT, codifying custom. See Colin Harvey, 'The 1998 Agreement' in Chris McCrudden (ed), *The Law and Practice of the Northern Ireland Protocol* (Oxford University Press 2021) 21, 26.

79 Art 32 VCLT; ILC Subsequent Practice (n 36 above) Conclusion 2(4).

80 UK Government response (n 7 above) 3.

demonstrates an absence of agreement between both parties as to a possible interpretation of the BIA that requires involvement of the Irish Government in any reform to Strand One. It is also potentially significant that the Irish Government failed to object to this statement by the UK. However, given the political and practical factors that may cause a state to fail to object to conduct by another state, a great deal of caution is required before a conclusion that inaction should be interpreted as acquiescence may be drawn.

This article will focus on three incidents of practice which are most useful in illuminating both parties' agreed interpretation of their obligations under the BIA and its subsequent implementation agreements in relation to modification of the 1998 institutions: the 2002 exchange of notes between the UK and Ireland concerning certain decisions of the North/South Ministerial Council;[81] the 2006 St Andrews Agreement and accompanying March 2007 treaty;[82] and practice around the 2014 Stormont House Agreement.

Change to Strand Two institutions only: 2002 exchange of notes

Subsequent interpretative agreements, such as the 2004 declaration discussed above, have been used not just to clarify, but also to change the content of the obligations created by the BIA, its implementation agreements, and the institutions they created. In October 2002 the NI Assembly was suspended. This created difficulties for, *inter alia*, the operation of the North/South Council (or North/South Ministerial Council), a body established under the 1998 Agreement, 'to develop consultation, co-operation and action within the island of Ireland' on areas of mutual interest such as agriculture, the environment, and tourism.[83] Strand Two of the MPA provides that NI is to be represented on the Council by the First Minister, deputy First Minister, and any relevant minister of the NI Executive, not by the UK Government or NI civil service. However, no functioning Assembly meant there were no NI Executive ministers who could participate in the Council. On 19 November 2002, an exchange of notes between the two Governments provided that:

81 Exchange of notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning certain decisions of the North/South Ministerial Council established by the Agreement between the two Governments signed at Dublin on 8 March 1999 and related matters (signed 19 November 2002, entered into force 3 December 2002) 2224 UNTS 197.

82 Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland (with annex) (signed 22 March 2007, entered into force 9 May 2007) 2558 UNTS 443.

83 MPA, Strand Two, para 1.

> ... in order to protect and maintain the achievements of the British–Irish Agreement and the Multi-Party Agreement, and to ensure the continuation of the necessary public function performed by the Implementation Bodies during the period of temporary suspension of the Assembly, and pending its restoration, our two Governments have agreed that, for the duration of that temporary suspension, the British–Irish Agreement, the Agreement establishing the North/South Ministerial Council and the Implementation Bodies Agreement shall be read and have effect in accordance with the following provisions:
>
> decisions of the North/South Ministerial Council on policies and actions relating to the Implementation Bodies, Tourism Ireland Limited or their respective functions shall be taken by our two Governments. No new functions shall be conferred on the Implementation Bodies.
>
> In the Implementation Bodies Agreement:
>
> any reference to a Northern Ireland Minister shall be read as a reference to the relevant Northern Ireland Department; and
>
> any reference to the Assembly shall be read as a reference to the United Kingdom Parliament.[84]

Although couched in the language of interpretation ('shall be read ... in accordance with'), the effect of the agreement is temporarily to change the content of the obligations created by the BIA, the 1999 Agreement establishing the North/South Ministerial Council and the 1999 Implementation Bodies Agreement to allow the various Strand Two institutions to continue to function despite the suspension of the Assembly and absence of Northern Irish ministers. That is, to permit the two Governments, NI civil service and UK Parliament to exercise functions that the MPA provides should be carried out by devolved institutions in NI. Whether one analyses the exchange of notes as a treaty between the parties which amends the BIA (Article 39), or as a later treaty that prevents application of the conflicting provisions in the earlier treaties (Article 30(3)), or as a subsequent agreement between the parties that reinterprets the obligations in those earlier treaties (Article 31(3)(a)), the effect is the same.

84 Exchange of Notes (n 81 above).

Significance of the 2002 exchange of notes for interpretation of Article 2 BIA

As Humphreys notes:

> [t]he agreement only applies to the suspension commencing in 2002 under the Northern Ireland Act 2000 and not to any possible further future suspensions. The 2000 Act has since been repealed, and the 2002 agreement, therefore, does not seem to have any ongoing meaning.[85]

However, as with the 2004 interpretative declaration regarding the Irish citizenship amendment, what the agreement does is less significant than the fact of its adoption. The exchange of notes demonstrates that the two Governments took the view that action on the international plane to reinterpret or amend their obligations under the BIA and the 1999 Agreements was necessary before acting inconsistently – even temporarily, and to a limited extent – with the 1998 text of the MPA, at least in relation to the Strand Two institutions. In particular, the exchange of notes appears to establish the parties' agreement that their obligations under the BIA to support and implement the MPA, and under the 1999 Agreement on the North/South Council that the Council shall operate in accordance with the provisions of the MPA, mean that *any departure from the 1998 text of the MPA* potentially constitutes a breach of those treaty obligations, unless the departure is provided for through their (temporary) reinterpretation/amendment.[86]

For the purpose of analysing how future changes to the 1998 institutions could occur, the question that arises is: why exactly would such a departure breach the BIA or the 1999 treaties, and what provision(s) of those treaties would it contravene? The exchange of notes provides that the BIA and 1999 Agreement establishing the North/South Ministerial Council 'shall be read and have effect in accordance with' the provision in the notes that Decisions of the North/South Council may be taken by the two Governments. However, there is nothing explicit in the text of the four Articles of the BIA or the 1999 treaties that this provision could 'bite' on. The 1998 BIA and the 1999 treaties make no explicit reference in the text of the treaties themselves as to who should represent NI in the Strand Two bodies; this is only set out in the MPA. Article 2 BIA, as noted above, only creates an obligation for the two Governments 'to support, and where appropriate implement, the provisions of the Multi-Party Agreement', while the 1999 Agreement establishing the North/South Council simply

85 Humphreys (n 13 above) 26.

86 Given that there is no relevant difference in the language used in the BIA and four 1999 agreements to regulate the other Strand Two and Three institutions, this also applies to the implementation bodies; the British–Irish Council and the British–Irish Intergovernmental Conference.

provides that: 'The Council shall be constituted and shall operate in accordance with the provisions of the Multi-Party Agreement.' Thus, if treaty action is needed to amend these treaties when the parties depart from the provisions of the MPA as agreed in 1998, then it can only be because those treaties oblige the parties to act *in accordance with the 1998 text of the MPA* when operating the North/South Council. At the same time, it is notable that it was not the Multi-Party Agreement itself that was amended to reflect the temporary change to the operation of the North/South Council; this suggests that the parties considered the relevant legal obligations to originate in the BIA itself and 1999 treaty, not the MPA. It is in this way that the exchange of notes can help cast light on the proper interpretation of the obligations created by the BIA and 1999 treaties.

Thus, in relation to the Strand Two and Three bodies, this subsequent practice of the parties appears to establish their agreement to an interpretation of Article 2 BIA and the 1999 treaties whereby the parties are obliged to 'support, and where appropriate implement' and 'operate' the bodies in accordance with the provisions of the MPA as drafted in 1998, and any departure from those terms will require amendment of both the BIA and the relevant 1999 treaty.

Change to institutions under all three Strands: 2006 St Andrews Agreement

The analysis above – that modification of the Strand Two and Three institutions that departs from the 1998 text of the MPA requires action to reinterpret or amend the BIA and 1999 treaties – is confirmed by later practice of the UK and Irish Governments in relation to the 2006 St Andrews Agreement. The suspension of the NI devolved institutions that had led to the conclusion of the 2002 exchange of notes persisted until May 2007. Operation of the Assembly was restored following talks between the two Governments and Northern Irish political parties at St Andrews in October 2006, when a political agreement was reached that, in addition to provisions on policing, justice, and a new financial package for NI, included 'changes to the operation of the Agreement institutions'. These changes were set out in an annex to the St Andrews Agreement which made provision for the functioning of institutions under all three Strands.[87]

The political effects of the changes made at St Andrews are still being felt to this day, and several of those advocating for reform have called for their reversal.[88] In relation to the NI political institutions in Strand One, following the St Andrews Agreement the nominee of

87 St Andrews Agreement (October 2006).

88 Kelly et al (n 5 above) 33–34.

the largest party in the Assembly becomes First Minister, while the largest party from the largest designation that does not hold the First Minister position nominates the deputy First Minister. In effect, this new system gives both those parties the ability to block formation of an Executive by refusing to nominate a First Minister or deputy First Minister. For present purposes, the change is significant as it was a clear departure from the text of the MPA, which provides that the First Minister and deputy First Minister 'shall be jointly elected into office by the Assembly voting on a cross-community basis'.[89] Where the St Andrews Agreement made provision for the Strand Two and Three institutions, it both reaffirmed commitments that were already present in the MPA (for example, establishment of a secretariat for the British–Irish Council; establishment of a North–South consultative forum) and addressed matters not dealt with in the MPA or the subsequent agreements (for example, arrangements internal to the NI Executive regarding preparation for and attendance at North/South Council meetings; scrutiny of the implementation bodies by the Assembly/Oireachtas).

In this context, a treaty between the two Governments was concluded in March 2007, which both amends and adds to Article 2 BIA.[90] Since all parties to the BIA are also parties to the 2007 Agreement, the earlier treaty would apply only to the extent that its provisions are compatible with the 2007 treaty.[91] The 2007 treaty provides that:

> **Article 1**
>
> The two Governments re-affirm their solemn commitment as contained in the British–Irish Agreement to protect, support and where appropriate implement the provisions of the Multi-Party Agreement.
>
> **Article 2**
>
> The two Governments affirm their solemn commitment to support, and where appropriate implement, the alterations to the operation of the institutions established under the British–Irish Agreement agreed at St Andrews and as set out in the Annex to this Agreement.

In Article 1 the Governments 're-affirm' their 'solemn commitment to support, and where appropriate implement' the provisions of the MPA, from the first sentence of Article 2 BIA. However, the provision is not simply a 're-affirmation' of the commitment made in the BIA: it *adds* a further commitment, 'to protect' those provisions. Article 2 of the 2007 treaty then provides for a further affirmation, of a new

89 MPA, Strand One, para 15.
90 Agreement 2558 UNTS 443 (82 above).
91 Art 30(3) VCLT.

solemn commitment 'to support, and where appropriate implement, *the alterations to the operation of the institutions established under the British–Irish Agreement agreed at St Andrews*'. The effect of Article 2 of the 2007 treaty is thus to *amend* Article 2 BIA: in relation to the institutions established under the British–Irish Agreement, the Governments are bound to support, and where appropriate implement, the MPA, as altered by the St Andrews agreement.[92]

Changes to Strands Two and Three in the St Andrews Agreement

Although it is possible that 'the institutions established under the British–Irish Agreement' in Article 2 of the 2007 treaty refers to the institutions under all three Strands of the MPA, the more likely interpretation is that this language refers only to the Strand Two and Three institutions: it is these institutions that the second sentence of Article 2 BIA provided 'shall be established'. Thus, like the 2002 exchange of notes, the practice of the UK and Ireland in relation to the St Andrews Agreement and 2007 treaty appears to establish their agreement that their international obligations under the BIA need to be amended where the operation of the Strand Two and Three institutions subsequently departs from the 1998 text of the MPA. In this case, the obligations under the BIA were amended to reflect the new provision made for the Strand Two and Three institutions which added to the existing provisions of the MPA.

The 2007 treaty also refers to three of the 1999 implementation treaties (those concerning the North/South Ministerial Council, British–Irish Council, and British–Irish Intergovernmental Conference), albeit only in its preamble and not in the substantive provisions of the treaty. However, given the coincidence in parties and subject matter of the 2007 and 1999 treaties, it is clear that the latter must be read compatibly with the 2007 treaty. That is, as taking into account the new provision for the operation of those institutions agreed at St Andrews. Therefore, the 2007 treaty must also have implicitly amended the 1999 treaties, modifying the parties' obligations to 'constitute' and 'operate' the Strand Two and Three institutions to be in accordance with the MPA *as altered by the St Andrews Agreement*.

The practice of the parties in relation to the 2006 agreement and 2007 treaty thus again appears to establish their agreement that, in relation to modification of the Strand Two and Three institutions, treaty action is required to amend the BIA and 1999 treaties. The drafting of the 2007 treaty is ambiguous, but the direct reference to Article 2 BIA, as well as the references to the 1999 treaties, are consistent with the analysis of the 2002 exchange of notes above: that the UK and

92 Humphreys (n 13 above) 31 characterises both Art 1 and 2 of the 2007 treaty as an 'amendment' to the BIA 'to give effect to' the St Andrews Agreement.

Ireland are subject to an obligation under Article 2 BIA to 'support and where appropriate implement' the MPA as agreed in 1998, as well as obligations under the 1999 treaties to 'operate' those institutions in accordance with the MPA as agreed in 1998.

The 2007 treaty has been described here as 'amending' the BIA, but could be analysed as an application of Article 39 VCLT (amendment by agreement between the parties); or Article 30(3) (successive treaties relating to the same subject matter); or indeed as a subsequent agreement between the parties that reinterprets the BIA (Article 31(3)(a)). In all cases the legal effect is virtually the same, although in the latter case of reinterpretation through subsequent agreement the original BIA obligations remain applicable and are not replaced by those in the later amending treaty. In any case, arguably, adoption of a treaty to amend the BIA and 1999 treaties was not even necessary in 2007 as the St Andrews political agreement itself, to which both Governments agreed, in addition to the NI political parties, already constituted a subsequent agreement among the BIA parties. Subsequent interpretative agreements need not take the form of a treaty, nor do they need to be binding in themselves.[93] An agreement could simply be a decision adopted by a meeting of parties to the treaty.[94] The 2006 agreement between the two Governments and NI political parties would therefore likely by itself have been sufficient to reinterpret the Article 2 BIA obligation to 'support and where appropriate implement' the MPA, and the obligation under the 1999 treaties to 'operate' the Strand Two and Three institutions in accordance with the MPA, to reflect the modifications to the institutions agreed at St Andrews, without the need to adopt a treaty amending those provisions. The explanation may be that, as the St Andrews Agreement did not explicitly address the technical question of the parties' obligations under the BIA, the two Governments chose to conclude a separate treaty in an attempt to ensure greater clarity with regard to their legal obligations under the BIA.

Changes to Strand One in the St Andrews Agreement

Regarding modification of the Strand One institutions, the practice of the UK and Ireland in 2006 and 2007 is less clear. In relation to the very significant alterations to, in particular, the operation of the Assembly and Executive made by the St Andrews Agreement, no explicit provision

93 ILC Subsequent Practice (n 36 above) Conclusion 4.

94 Aust (n 30 above) 213. For example, a 2001 consensus decision of states parties to the UN Convention on the Law of the Sea extended the deadline for submissions to the Commission on the Limits of the Continental Shelf, effectively amending the treaty: Jill Barrett, 'The UN Convention on the Law of the Sea: A "Living" Treaty?' in Barrett and Barnes (n 38 above) 17–18.

is made in the 2007 treaty. In Article 1 the Governments merely 're-affirm' their 'solemn commitment to support, and where appropriate implement' the provisions of the MPA from the first sentence of Article 2 BIA. The only change made to this existing obligation is to add a commitment to 'protect' the provisions of the MPA; there is nothing which could be interpreted as amending Article 2 BIA to take account of the alterations to Strand One made by the St Andrews Agreement. It is possible that 'the alterations to the operation of the institutions established under the British–Irish Agreement' in Article 2 of the 2007 treaty could refer also to the changes to Strand One institutions but, as argued above, the better interpretation of this language is that it refers rather to the Strand Two and Three institutions only, whose establishment was expressly provided for in the BIA.

The implication of this lack of explicit provision for the Strand One reforms is that the alterations to the operation of the Strand One institutions are already encompassed by the parties' solemn commitment to support and where appropriate implement the provisions of the MPA, which the 2007 treaty merely re-affirms. That is, that the parties are in agreement that the term 'Multi-Party Agreement' in the first sentence of Article 2 BIA is to be interpreted as having an *evolving* meaning, and that it automatically reflects changes made to the Strand One institutions, for example through subsequent political agreements. This conclusion that no treaty action is required for changes to Strand One is further strengthened by the fact that the new process for nomination of the First Minister and deputy First Minister agreed at St Andrews was subsequently further adjusted, with the result that the process implemented in domestic legislation adopted in May 2007 (that is, subsequent to the March 2007 treaty), and followed to this day, is slightly different from that in the text of the St Andrews Agreement.[95]

95 The procedure actually agreed at St Andrews was that the First Minister and deputy First Minister would each now be nominated by the Nominating Officers of the largest parties in the largest and second-largest designations in the Assembly respectively. However, following further discussions, as implemented in the Northern Ireland Act 1998, the procedure became that the nominee of the largest party in the Assembly *overall* automatically became First Minister, while the largest party from the largest designation that did not hold the First Minister position automatically nominated the deputy First Minister, see Northern Ireland Act 1998, ss 16A(4)–(5) and 16C(6) (substituted for s 16 by the Northern Ireland (St Andrews Agreement) Act 2006); cf St Andrews Agreement, annex A, para 9. This slight change made little practical difference until 2022, when Sinn Féin became the largest party in the Assembly overall and entitled to nominate the First Minister, despite unionism being the largest designation, see Kelly et al (n 5 above) 9–10.

The subsequent practice analysed above, whereby very significant departures from the text of the MPA were made in relation to the Strand One institutions, without any amendment to the Article 2 BIA obligation in that regard, therefore appears to establish rather that the two states were in agreement that such modifications did not require treaty action. This can be explained if the term 'multi-party agreement' is interpreted as having an evolving meaning in relation to Strand One. By contrast, given that the 2007 treaty amends the BIA and, implicitly, the 1999 treaties in relation to the Strand Two and Three institutions, this appears to establish the parties' agreement confirming that the term 'multi-party agreement' has a static meaning in that context. Nevertheless, the unclear drafting of the 2007 treaty, the fact that St Andrews involved multiple simultaneous changes to institutions under all three Strands, and the existence of prior political agreement of both parties prior to adoption of the treaty, mean that these conclusions are tentative at best. What is necessary to test the hypothesis is a further example of practice in application of the BIA, involving modification of the Strand One institutions alone.

Change to Strand One only: 2014 Stormont House Agreement

The text of the MPA, although going into some detail as to the characteristics of the Strand One institutions, is not prescriptive as to every aspect of the functioning of the Assembly and Executive. Many unilateral changes could be made by the UK to the operation of the Strand One institutions which would not be inconsistent with the relatively high-level principles set out in the MPA. For this reason, many of the subsequent changes made to the functioning of those institutions are of limited utility as practice interpreting the obligations of parties to the BIA.

For example, the 2020 *New Decade, New Approach* (NDNA) agreement, which allowed for restoration of the NI political institutions following their 2017 collapse, in addition to protections for the Irish language and Ulster Scots culture, provided for changes to the petition of concern, a mechanism which allows 30 members within the Assembly to require a vote to be taken on a cross-community basis. In relation to petitions of concern, paragraph 5(d) of Strand One of the 1998 Agreement provides only that '[i]n other cases such decisions [requiring cross-community support] could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108)'.[96] The petition of concern was provided for in Strand One of the MPA as a safeguard to prevent one community being overridden

96 Multi-Party Agreement, Strand One, para 5(d).

by the other on key issues such as human rights and constitutional questions. However, it had 'become a tool that could be used to block changes on any issue',[97] and reforms were therefore included as part of the NDNA deal to restore the Assembly , including that going forward 'a Petition can only be triggered by members from two or more parties'.[98] NDNA provided that the change would 'be given effect in Standing Orders or legislation' and the new requirement that the petition not be brought by Members of the Legislative Assembly (MLAs) all from the same party was duly introduced through amendment to the Northern Ireland Act 1998.[99] As the MPA makes no provision as to what a petition of concern is, or how it can be triggered, the NDNA reform involved no departure from the 1998 text. Thus, other than confirming that the UK has a broad area of discretion as to how it makes, and modifies, arrangements for the functioning of the Strand One institutions where the MPA is silent, such modifications do not help us establish whether there is an agreed interpretation between the two Governments about whether a corresponding modification of Article 2 BIA is required when changes are made to the Strand One institutions that would depart from the text of the MPA.

However, an instructive example of a modification to the Strand One institutions only which *did* conflict with the 1998 text of the MPA is provided by the Stormont House Agreement.[100] In December 2014, with the aim of preventing a further collapse of the devolved institutions following disputes among the main NI political parties, 11 weeks of negotiations between the British and Irish Governments and the five parties in the NI Executive resulted in a political agreement that dealt with a range of outstanding issues from previous agreements, including finance, flags, and cultural issues. The Stormont House Agreement also provided for Strand One institutional reforms, in particular:

> The number of Assembly members should be reduced to five members per constituency, or such other reduction as may be agreed, in time for the 2021 Assembly election, and the Assembly will legislate accordingly.[101]

Such a modification, although technical and non-political in nature, would nevertheless depart from the 1998 text of the MPA, which provides in paragraph 2 of Strand One that a '108-member Assembly will be elected'. Electing five members per constituency would instead produce a 90-member Assembly.

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97 Kelly et al (n 5 above) 11.

98 *New Decade, New Approach* (2020), annex B, para 2.2.3.

99 S 42(3).

100 The Stormont House Agreement (December 2014).

101 Ibid para 56.

The UK Government had previously held a consultation on the size of the Assembly in August 2012.[102] A 2014 Westminster statute, the Northern Ireland (Miscellaneous Provisions) Act, made the reduction of the number of Assembly members for all constituencies from six to five a reserved matter; that is, the Assembly could legislate for such a reduction with the consent of the Secretary of State for NI.[103] However, despite the clear departure from the 1998 text of the MPA, there was no suggestion that treaty action in relation to the BIA would be required, and the Northern Ireland (Miscellaneous Provisions) Act received royal assent in March 2014. In 2016, after the Stormont House Agreement, the Assembly legislated for the agreed reduction, with the Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016 receiving royal assent in July 2016.[104] This change was implemented at the 2 March 2017 Assembly election, at which 90 members were duly returned. There was no public objection by the Irish Government and no further action on the international plane to reinterpret or amend the BIA to reflect this departure from the terms of the MPA.

The significance of the reduction in Assembly numbers for interpretation of the BIA

Assuming that the absence of action on the international plane was not simply an oversight on the part of the two Governments, there are two possible analyses of this practice in relation to the Stormont House Agreement. First, it may be that the two Governments took the view that the 2014 Stormont House Agreement, to which they both agreed, constituted a subsequent agreement which, as explained above, in accordance with the rule in Article 31(3)(a) VCLT would by itself have the effect of reinterpreting their obligations under Article 2 BIA, such that those obligations now required them to 'support, and where appropriate implement' the MPA *as altered by* the Stormont House Agreement. Thus, by the time the Assembly legislated for the reduction in 2016, the UK's international obligations under the BIA had already been reinterpreted so that the UK would not be in breach.

However, this analysis is undermined by the timing of the adoption of the 2014 Westminster statute, the explanatory notes to which observe that 'as the size of the Assembly flowed from the 1998 Agreement, the Government has been clear that any changes would require sufficient agreement amongst the NI parties'.[105]

102 Northern Ireland Office, Consultation Paper, 'Consultation on measures to improve the operation of the Northern Ireland Assembly' (August 2012).

103 Northern Ireland (Miscellaneous Provisions) Act 2014, s 6.

104 Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016.

105 Explanatory notes, para 38.

Despite the clear departure from the 1998 text of the MPA, there was no suggestion that treaty action in relation to the BIA would also be required. More significantly, this statement was made in March 2014, well before the reduction was agreed in the December 2014 Stormont House Agreement, in which the Irish Government was also a participant. Thus, any argument that through this political agreement the parties had (re)interpreted their obligations under the BIA to reflect the agreed reduction in members, removing the need for any further treaty action, was not available at that time.

The better analysis of this practice, which is also more consistent with the practice in relation to the 2007 treaty, is therefore that the Governments took the view that this modification to Strand One of the MPA only, which relates to the NI institutions, did not require amendment or reinterpretation of the international obligations created by Article 2 BIA. That is, treaty action was in any case required in 2002 and 2007 because changes were being made to the institutions under Strands Two and/or Three of the MPA, but as the Stormont House Agreement only made changes to the Strand One institutions, treaty action was not needed. Subsequent practice thus appears to establish the parties' agreed interpretation of Article 2 BIA, whereby when (at least some) changes are made to the Strand One institutions *only*, this will be automatically reflected in the content of the UK and Irish Governments' obligation in the first sentence of Article 2 BIA: to 'support, and where appropriate implement the provisions of the Multi-Party Agreement'. That is, the treaty term 'multi-party agreement' is, in relation to Strand One, given an evolving meaning reflecting subsequent agreed changes to the functioning of the NI institutions. As noted above, the subsequent practice of less than all the parties to a treaty is only a supplementary means of interpretation that may, but need not be, taken into account in its interpretation. With that caveat, it is nevertheless noteworthy that this analysis is consistent with the recent statement of the UK Government, that 'any reforms to the devolved, strand one, institutions are primarily for the Northern Ireland parties and the UK Government'.[106]

To conclude this section, then, the practice set out above appears to establish agreement between the two states parties to the BIA to an interpretation of Article 2 BIA that requires the parties to 'support, and where appropriate implement' the Multi-Party Agreement as it has been modified in relation to the Strand One institutions, but that both Article 2 BIA and the 1999 implementation treaties require the Strand Two and Three bodies to be operated in accordance with the original 1998 text of the Multi-Party Agreement. This can be inferred from the

106 UK Government response (n 7 above) para 3.

parties' practice establishing their agreement that reform to the Strand Two or Three institutions will require – in addition to any necessary political agreement between the two Governments and NI political parties – the conclusion of a treaty or interpretative declaration by the two Governments to amend or reinterpret their obligations under the BIA and the four 1999 treaties. By contrast, practice since 1998 appears to establish the parties' agreement that at least certain changes to Strand One institutions will not require action on the international plane to amend or reinterpret the BIA. As a result, if the UK makes changes to the functioning of the Strand One institutions which depart from the 1998 text of the MPA, even without the UK and Ireland simultaneously or previously amending or reinterpreting their obligations under the BIA to accommodate that change, in at least some cases the UK will not be in breach of its obligations under the treaty.

THE LIMITS OF UNILATERAL CHANGE TO THE STRAND ONE INSTITUTIONS

This article is concerned only with the international legal mechanisms for reform of the 1998 institutions. It does not address the important questions of what kind of political agreement, consultations or processes, involving which actors, would be needed to bring about legitimate reforms to those institutions,[107] nor indeed what changes to domestic law would be required. If the UK were to modify the Strand One institutions unilaterally without first seeking the agreement of the Irish Government, this may well be considered a failure to observe *political* requirements for modification of the 1998 Agreement, which may bring its own political consequences.[108] The point being made here is simply that the international legal obligations created by the BIA do not appear to prevent the UK from making unilateral changes to Strand One in all cases. An analysis of the text of the treaty, crucially taking into account the subsequent practice of its two parties since 1998, demonstrates that changes to the Strand Two and Strand Three institutions which depart from the 1998 text of the Multi-Party Agreement require treaty action by the two Governments to amend their international legal obligations under the BIA and the implementing treaties concluded in 1999. By contrast, in relation to the Strand One institutions, subsequent practice of the parties shows that at least some changes which depart from the 1998 text of the Multi-Party Agreement do not require treaty action by the two Governments.

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107 See David Torrance's article in this issue.

108 See Conor J Kelly and Alan Whysall, 'The restoration of Stormont and the need for reform' (2024) 493 Fortnight 11–13, 13.

This latter conclusion raises the further question of what, if any, are the limits of the sovereign Government's ability under the BIA to make changes to the Strand One institutions which depart from the text of the Multi-Party Agreement? The conclusion that the UK may make unilateral changes to the Strand One institutions without the BIA requiring the UK Government to at least seek the agreement of the Irish Government to treaty amendment or reinterpretation is troubling. As noted above, at least one reason for including a treaty as part of a hybrid peace agreement is to provide a form of entrenchment, or at least a guarantee that states cannot easily resile from their political commitments without legal consequences.[109] It may, as argued above, be consistent with the UK's obligations under the BIA for the UK to adopt legislation reducing the number of members of the Assembly to below the 108 provided for in the Multi-Party Agreement without action on the international plane to amend or reinterpret the BIA. However, intuitively it seems difficult to accept the further conclusion that, if the UK were to act unilaterally and legislate to – for example – repeal or amend sections 4(5), 18(5) or 73 of the Northern Ireland Act 1998 so as to change the definition of cross-community support, depart from the d'Hondt formula for ministerial appointments, or abolish the Equality Commission, respectively, these more significant unilateral departures from the text of the MPA would be consistent with the UK's obligations under the BIA.

Limits to evolutionary interpretation of treaty terms

This intuitively sceptical response to the prospect of radical unilateral modification of the Strand One institutions is supported by the rules of treaty interpretation. It has been argued above that the best interpretation of Article 2 BIA, taking account of the subsequent practice of the parties since 1998, is that the term 'multi-party agreement' has an evolving meaning in relation to Strand One. That is, the Governments are obliged to 'support, and where appropriate implement' the Multi-Party Agreement, *as it has been modified since 1998*. This allows certain departures to be made from the 1998 text of Strand One of the MPA – for example, changes to how the Assembly operates – without either party, but in particular the UK as the sovereign government in NI, breaching their Article 2 obligation. However, as explained above, even if a term's meaning is evolutionary and can change over time, this is not without limits. First of all, it must remain the ordinary meaning of the term. Even if the term 'multi-party agreement' has an evolving meaning in relation to Strand One, which means it can embrace certain agreed changes to the Multi-Party

109 Bell (n 19 above) 412.

Agreement, its meaning cannot evolve to refer to something that is *not* the 'multi-party agreement', as that cannot be accommodated within the ordinary meaning of that term. Thus, to give an extreme example, complete replacement of the MPA, even in relation to Strand One only, would clearly require amendment of the BIA.

Second, even an evolutionary ordinary meaning of a term is only one element to be weighed in the balance with each of the other means of interpretation in Article 31(1): the ordinary meaning of the terms; their context; the object and purpose of the treaty; and the principle of good faith. Moreover, the Articles of the VCLT that deal with interpretation do not simply tell the interpreter what elements they should take into account in that process, but also how much weight should be given to each element in relation to the others.[110] Article 31(1) requires that *all* the elements set out in that provision be taken into account in arriving at an interpretation. Each element is to be weighed in the balance and placing greater emphasis on one cannot justify disregarding any of the others. The context and object and purpose of the treaty, as well as the principle of good faith, must be part of the interpretative process and are to be given equal weight alongside the ordinary meaning; it is not possible for one or more of these elements to be disregarded in favour of one which is given priority. Therefore, even if the ordinary meaning of a term has undergone a very dramatic and unexpected evolution over time, these other elements will act as limits on the final interpretation reached.[111]

Applied to the 1998 Agreement, this means that, even if the term 'multi-party agreement' in the first sentence of Article 2 BIA has been interpreted by the parties as having an evolving meaning, which reflects changes made to the Strand One institutions from time to time, this evolutionary meaning of the term is constrained by the object and purpose of the BIA, as well as the context provided by the MPA as a whole.[112] The object and purpose of the BIA is to be discerned primarily from its preamble,[113] which refers to key principles such as democracy, partnership, equality and mutual respect. Thus, an attempt at more significant unilateral departures from the 1998 text of the MPA which are inconsistent with the fundamental principles of the 1998 Agreement – for example, abolition of the Assembly itself, or removal of rights and equality safeguards in the Strand One institutions – would

110 Linderfalk (n 37 above) 8.

111 See Alan Boyle, 'Further development of the Law of the Sea Convention: mechanisms for change' (2005) 54 International and Comparative Law Quarterly 563–584, 568.

112 See Arato (n 33 above) 472–473.

113 *Rights of nationals of the United States of America in Morocco (France v USA)* (Judgment) [1952] ICJ Reports 176, 196. See ILC Treaties (n 31 above) 221.

put the UK in breach of its international legal obligations under the BIA. An interpretation of 'multi-party agreement' in Article 2 which could accommodate such a change would not be valid as it would require the object and purpose of that treaty to be disregarded.

In accordance with the rule codified in Article 31(2) VCLT, the MPA as a whole forms part of the context of the BIA, in which the treaty must be interpreted. This is both through the MPA's inclusion as an annex to the treaty, and as an 'agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'. As a result, a unilateral change to the Strand One institutions which was incompatible with other aspects of the MPA, such as the guarantees in the Rights, Safeguards and Equality section, could not be accommodated by an evolutionary interpretation of 'multi-party agreement', again as this would require the context of that term to be disregarded.

All these points are further supported by the requirement in Article 31(1) VCLT that treaty provisions be interpreted in good faith. An attempt to modify the Strand One institutions unilaterally in a manner that disregards the object and purpose of the BIA, or the context provided by the MPA as a whole, could not in good faith be argued to come within the ordinary meaning of the term 'multi-party agreement'. Such changes would, it is argued, require amendment of the BIA, or interpretation by agreement of all the parties under the rules in Article 31(3)(a) or (b) VCLT. Thus, while the UK may lawfully be able to make minor changes to the functioning of the Strand One institutions without the agreement of the Irish Government to modification of the treaty, the BIA appears to accommodate only limited unilateralism.

CONCLUSION

Returning to the focus of this special issue, from the analysis above we can now draw several significant conclusions about the legal processes by which the proposed reforms discussed at the outset of this article may be brought about. Changes to the circumstances in which a petition of concern can be triggered, or what constitutes a petition of concern, will not require treaty action, being undefined in the text of the MPA. It is also clear that minor or technical reforms to Strand One, such as the renaming of the offices of First and deputy First Ministers as 'Joint First Ministers', could be accommodated within the ambulatory meaning of 'multi-party agreement' in Article 2 BIA and would not require treaty action by the two Governments, even though they involve departure from the text of the MPA as agreed in 1998. Another reform supported by several political parties and commentators is a return to the mechanism of electing the First Ministers as provided for

in the original agreement – that is, a reversal of the change effected by the St Andrews Agreement. This also would not require amendment of the BIA. Although the St Andrews Agreement was accompanied by a bilateral treaty in 2007, the analysis above concluded that the best interpretation of the practice as a whole was that the parties understood treaty action as being required in this case only to accommodate the modifications to the Strand Two and Three institutions.

On the other hand, the practice of the UK and Ireland since 1998 establishes their agreed interpretation that any modifications to the Strand Two and Three institutions which depart from the 1998 text of the MPA, even temporarily, would require treaty action, such as an amending treaty or interpretative declaration. Thus, the suggestion from the SDLP that the British–Irish Council expand its areas of formal cooperation beyond the list in the MPA would appear to require treaty action to amend the BIA and the relevant 1999 implementing treaty.[114]

More tricky is the proposal, advanced by a number of those who gave evidence to the NI Affairs Committee's inquiry, to remove community designation entirely and move to a system of voluntary coalition.[115] Arguably, a change to Strand One which not only departs from the text of the MPA but from the principle of cross-community consent deviates from the object and purpose of the BIA and the broader context of the MPA, which establishes a comprehensive framework of minority rights and safeguards. For example, if the UK were to 'reform' the present Assembly and return to a system with no cross-community safeguards, as in the pre-1972 NI Parliament, it is clear that this kind of unilateral action could not be accommodated within the evolving meaning of 'multi-party agreement' and would put the UK in breach of, *inter alia*, its obligation under Article 2 BIA.

On balance, however, and although much would depend on the specifics of the particular reform proposal, it is submitted that a reform removing community designation could potentially be accommodated within the evolving obligation under Article 2 BIA and may not require treaty action, provided that the reformed Strand One institutions could still be said to respect the principles of partnership, equality and mutual respect. Indeed, most proposals to move to voluntary coalition envisage this being accompanied by the safeguard of qualified majority voting, in effect ensuring, by different means, cross-community support for key decisions. In any case, it is interesting to note that the Alliance

114 Written evidence submitted by the Social Democratic and Labour Party (SDLP) (n 4 above) 7.

115 Written evidence submitted by the Alliance Party of Northern Ireland, relating to the Effectiveness of the Institutions of the Belfast/Good Friday Agreement (GFA0023) (12 December 2022) 8–9.

Party, the most vocal advocate for the removal of designations and reform of cross-community voting, foresees that for political reasons the mechanism for such a reform will need to involve cooperation between the two Governments.[116]

Looking further ahead, the analysis above is also relevant for the legal framework that would continue to govern NI after any eventual border poll in favour of unification. The obligation to 'support and where appropriate implement' the MPA in Article 2 BIA would continue to apply to both the UK and Ireland equally, but practical responsibility for implementing Strand One would shift to Ireland, the new sovereign. The ambulatory content of the obligation in Article 2 BIA in relation to Strand One, which can evolve to reflect changes to the MPA, is clearly capable of accommodating such a change. Indeed, such an interpretation could hardly be inconsistent with the object and purpose of a treaty intended to provide for precisely that constitutional change, nor with the context of the MPA which sets out how such a change is to occur. This welcome flexibility allows the BIA, and through it the MPA, to continue to apply even after the change in sovereignty. However, the limits identified above will still provide guardrails for the continuation of the Strand One institutions after a constitutional change to unification. Although requiring analysis on a case-by-case basis, modifications of the Strand One institutions by the Irish Government which would require the object and purpose of the BIA, or the context provided by the MPA, to be disregarded, would violate Ireland's obligations under the BIA.

Finally, in light of ongoing debate about UK withdrawal from the ECHR, it is worth emphasising that the analysis in this article concerns only changes to the institutions of the 1998 Agreement. There is no practice to suggest the UK may make unilateral changes to or departures from the 'Rights, safeguards and equality of opportunity' section of Strand One, and indeed any such departure would seem incompatible with the object and purpose of the BIA and context of the 1998 Agreement as a whole, and thus put the UK in breach of its international obligations under Article 2 BIA.[117]

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116 'The two governments … will need to step in where political parties are unable to secure agreement – whether through engagement and consultation, or simply by calling what they see as the best option on the table': ibid 9–10; see also Oral evidence: The Effectiveness of the institutions of the Belfast/Good Friday agreement, HC 781 Qs 316–339 (28 June 2023) (Naomi Long MLA, Leader of the Alliance Party) 24–25.

117 See nn 110–113 above and accompanying text. Changes to UK law and policy that result in a diminution of the rights protected in the 'Rights, safeguards, and equality of opportunity' section may now also be contrary to Art 2(1) of the EU–UK Withdrawal Agreement's Protocol on Ireland/Northern Ireland.

To conclude, this article has sought to identify, from the ambiguous and sometimes apparently inconsistent practice of the UK and Ireland since 1998, the most coherent analysis of how they interpret their obligations under the BIA. Necessarily, this involves some speculation and inference as to the subjective positions of the two states parties. However, ultimately, the power to clarify, authoritatively, the interpretation of a treaty's terms lies with its parties acting together. Given the ambiguity in the practice, it would be desirable for the UK and Irish Governments to set out their joint agreement as to the correct interpretation of the obligations created by Article 2 BIA and its implementing agreements. Indeed, given that calls for reform are likely to continue and increasingly focus on the form specific reforms may take, and in light of the significant uncertainties that may arise around a possible border poll and eventual transfer of sovereignty, there is a strong argument that the UK and Ireland would be wise to clarify the legal situation now, before debate on both issues becomes more politically charged. Equally, if one of the parties to the BIA does not agree to the interpretation of its obligations that appears to be established by this practice, or believes there is further practice demonstrating that no such agreement exists, they would be well advised to make a statement to that effect.