# A Human Rights Bill for Scotland: Consultation response

**Dr David M Scott** - Postdoctoral Research Associate in International Law & Governance, Glasgow Centre for International Law and Security, School of Law, University of Glasgow, and Scottish Council on Global Affairs.[*]

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## Part 4: Incorporating the Treaty Rights

### 1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

**- Allow**

Supportive of the proposal, if grounded in domestic rather than international law. See comments on the integration of international materials in the response to Question 3.

### 2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligation (MCOs)?

**- Allow**

Supportive of the proposal, if grounded in domestic rather than international law. See comments on the integration of international materials in the response to Question 3.

### 3. What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

The Scottish Government's aim to engage with the international system of human rights protection is laudable. Yet it is also novel, both domestically and internationally. Domestically, the Scottish Human Rights Bill seeks for the first time to make the UK's international obligations enforceable for only one part of its territory.[1] In the past, the UK has passed legislation—such as the European Communities Act 1972 and the Human Rights Act 1998—to incorporate its international obligations into domestic law across the UK. The Scottish Human Rights Bill marks the first domestic development in the devolved enforceability of international obligations beyond their implementation by the UK Parliament, creating a differentiated protection of international law across the country.

Internationally, the Scottish Human Rights Bill also marks the creation of an unprecedented link between the international mechanisms for human rights protection and a substate actor within a state.

[*] Email: david.scott@glasgow.ac.uk.

[1] While the UN Convention on the Rights of the Child (UNCRC) is enshrined in Welsh law through the Rights of Children and Young Persons (Wales) Measure 2011, this only places a duty on Ministers to have due regard to the UNCRC when developing or reviewing legislation or policy. The Scottish Human Rights Bill goes further, including a 'duty to comply' for the rights contained in the International Covenant on Economic, Social, and Cultural Rights, marking a more significant incorporation of international law as a hard legal obligation.

International actors, of course, frequently work with substate governments. UN treaty monitoring bodies, for example, collect evidence from devolved administrations as to the compliance of the UK with its human rights obligations. Additionally, while possibly not linked to treaty monitoring bodies in the same way, many federal systems around the world distribute the implementation of international obligations across national, regional, and state-level governance. Yet the literature on federalism and human rights has focused largely on the issue of implementation gaps—the ways in which international obligations fail to be implemented as a result of disputes over which level of government is to be tasked with meeting these obligations.[2] In Scotland's case, however, the question is not one of determining who is required to implement these obligations, but rather the extent to which Scotland can go beyond the domestic implementation afforded to these obligations by the 'parent' state of the UK.

In practice, the international distinctiveness of the Scottish case may be a difference of degree rather than kind. Disputes within federal systems will still revolve around determination of the nature and limits of the international obligations that have been agreed to by the federal state, as well as disputes over who has the final right to decide how these obligations are to be implemented.[3] Nevertheless, the conceptual distinction is important to bear in mind. Where federal systems conceive of the overlaps in power between national and state-level governments as lines which can be reshaped according to the terms of their (normally written) constitutions, Scotland's power to domesticate international law stems solely from the powers given to them by the UK Parliament. As such, the issue is not determining *who* is responsible for which parts of an international obligation, but rather the *limits* of the Scottish Parliament's and Scottish Minister's authority to implement international law.

For this reason, the inclusion of international materials in the interpretation of the Scottish Human Rights Bill raises difficulties for two, interconnected reasons:

- First, because Scotland is only able to domesticate international law to the extent to which its 'parent' state of the UK has agreed to these obligations, it needs to be careful not to create or extend these obligations beyond what the UK has agreed; and
- Second, because of the unclear legal status of the international materials themselves, it can be difficult to determine how exactly how to integrate these materials within the limits of Scotland's constitutional position.

My response to the Consultation will focus on the difficulties associated with the legal status of the identified international materials, in order to show that care is needed to ensure the Scottish Human Rights Bill and its implementation remains within the limits of devolution.

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[2] For a study of the US, see Mark Tushnet, 'Federalism and International Human Rights in the New Constitutional Order' (2001) 47 Wayne Law Review 841; for a review of federal states in Africa, see Solomon Ebobrah and Felix Eboibi, 'Federalism and the Challenge of Applying International Human Rights Law Against Child Marriage in Africa' (2017) 61 Journal of African Law 333; for Switzerland, see Eva Maria Belser, 'Why the Affection of Federalism for Human Rights is Unrequited and How the Relationship could be Improved' in Eva Maria Belser, Thea Bächler, Sandra Egli, and Lawrence Zünd (eds), *The Principle of Equality in Diverse States: Reconciling Autonomy with Equal Rights and Opportunities* (Brill 2021); for Canada, see Alex Neve, 'Closing the Implementation Gap: Federalism and Respect for International Human Rights in Canada', IRPP Study No. 90, May 2023 <https://centre.irpp.org/wp-content/uploads/sites/3/2023/05/Closing-the-Implementation-Gap-Federalism-and-Respect-for-International-Human-Rights-in-Canada.pdf>.

[3] See, for example, the disputes over international law's relevance for the carrying out of state-level death penalty cases in the US in the *Breard* and *Soering* cases, discussed in Mark Tushnet, 'Federalism and International Human Rights in the New Constitutional Order' (2001) 47 Wayne Law Review 841, 848–50.

My response to this question is broken down into four parts:

- First, I set out the constitutional position of Scotland and the limits on its ability to domesticate international law into Scots law **[A]**.
- Second, I set out the position of UN treaty monitoring bodies in international law, to suggest the basic framework in which we can understand the significance of their materials for interpreting international human rights law **[B]**.
- Third, the response then turns to the specific authority of the different international materials given in the Consultation, namely, state reports and General Comments **[C]**.
- The response closes with some general recommendations as to the significance of this analysis for the Scottish Human Rights Bill **[D]**.

This response is not an exhaustive appraisal of international human rights law, nor is it representative of the full range of international materials that could be relevant for interpreting UN human rights treaties. Rather, it is only intended to demonstrate the preliminary difficulties with applying the international materials identified in the Consultation. Ultimately, this response submits that the Scottish Human Rights Bill will be on safer ground if it embeds human rights in domestic processes, avoiding the risk of being seen to extend beyond the international obligations which the UK has signed up to.

As currently proposed, the suggestion that courts 'can' consider these materials should on its face be acceptable from a constitutional perspective. Any stronger commitment, however, for example that courts 'must' take into account such materials, would likely risk legal challenge. An awareness of the difficulties interpreting these international materials, then, should be helpful for the design and implementation of the Bill, particularly in the proposed public consultations on defining the Minimum Core Obligations in Scotland, development of guidance for public authorities once the Bill is passed, and training for the courts and the legal profession. Therefore, while this response is given in response to Question 3 of the Consultation, its conclusions are relevant for Questions 1 and 2 on human dignity and Question 24 on Minimum Core Obligations, which concern the interpretation and use of international materials, and Questions 13, 24, and 39 on the participatory processes for defining these rights in the Scottish context.

### *A. Scotland and international law*

The first point to determine is the relationship between Scotland and the international system of human rights protections it seeks to domesticate through the Scottish Human Rights Bill. Our starting point is Schedule 5 of the Scotland Act 1998, which provides for the devolutionary limits of acts of the Scottish Parliament and the Scottish Ministers. Paragraph 7 of Part 1 of Schedule 5 reads:

> **Foreign affairs etc.**
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> 7. (1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.
>
> (2) Sub-paragraph (1) does not reserve—
>
> > (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law.

Sub-paragraph 1 of Paragraph 7 sets out the default position of the constitutional settlement of powers over international relations. International relations are reserved matters, with any action on the part of the Scottish Parliament or Scottish Ministers to alter these being *ultra vires*. Sub-paragraph 2 then represents a 'carve-out' from this rule.[4] The observation and implementation of international obligations are not reserved, so long as that implementation remains within the general competence of the Scottish Parliament and Scottish Ministers (that is to say, that they are not implementing international obligations in respect of otherwise reserved matters). In its *Continuity Bill Reference* judgment on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, the UK Supreme Court emphasised this point by summarising Scotland's position in relation to the UK's international obligations:

> In the eyes of the outside world a state is a subject of international law and as such a unitary entity. Other states or international organisations are not concerned with its internal distribution of powers, duties or competences….The UK is of course free to provide domestically for the observation and implementation of its EU and other international obligations by the devolved administrations and legislatures. But they remain the UK's international obligations, and the UK remains responsible at the international level for their proper discharge.[5]

For the international treaties domesticated through the Scottish Human Rights Bill, then, the critical issue for the Scottish Government is to ensure that the Bill implements these treaties only to the extent of the UK's obligations at the international level—that is to say, that the Scottish Human Rights Bill remains within the 'carve-out' of sub-paragraph 2 of Paragraph 7, and does not stray into the making of 'new' international relations, which remain reserved under sub-paragraph 1.

### *B. The legal status of UN treaty monitoring bodies*

With the domestic law position set out, we can now turn to the international materials produced by UN treaty monitoring bodies that are identified in the Consultation, in order to ascertain their legal authority for determining the UK's international obligations under these treaties.

The starting point for determining this legal authority should be the general rules of treaty interpretation. By examining the treaties which establish these monitoring bodies, we can determine the legal position granted by states to the monitoring bodies within those treaties. Article 31 of the 1969 Vienna Convention on the Law of Treaties provides:

> **Article 31: General rule of interpretation**
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> 1. A treaty shall be interpreted 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.
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> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> > (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[4] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, para. 31.
[5] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, para. 29.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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;

(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.

4. A special meaning shall be given to a term if it is established that the parties so intended.[6]

Beginning with the text of the treaties, these treaties established monitoring bodies to review the reports made by States Parties as to their observance of the rights contained in the treaties, on the basis of which these bodies will make Concluding Observations as to the human rights situation within that State Party.[7] These bodies are also empowered to adopt General Comments, which set out a treaty body's interpretation of particular human rights provisions within their treaties.[8] However, none of these provisions give *legal* authority to the findings of these bodies. While states are legally obliged to submit reports, the resulting Concluding Observations of these bodies, and the interpretations of the treaty obligations therein, are not granted legal authority in the treaty. Similarly, while treaty monitoring bodies 'may' make General Comments, these attach no legal obligation to be followed by states.

Subsequent practice has confirmed this position. First, in the election of the experts who make up these monitoring bodies, states have not chosen to give a judicial character to these bodies,[9] selecting a mixture of lawyers, judges, academics, diplomats, and others drawn from government service.[10] This

[6] Article 31, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. While the VCLT is not retroactive, meaning it should only apply to treaties signed after 1969 (Article 4, VCLT), human rights bodies 'have generally acknowledged the applicability of the VCLT rules of interpretation as customary international law': Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 739.

[7] Article 16 of the International Covenant on Economic, Social, and Cultural Rights; Article 9 of the Convention on the Elimination of Racial Discrimination; Article 19 of the Convention on the Elimination of Discrimination Against Women; Article 35 of the Convention on the Rights of Persons with Disabilities.

[8] Article 9(2) of the Convention on the Elimination of Racial Discrimination; Article 21(1) of the Convention on the Elimination of Discrimination Against Women; Article 39 of the Convention on the Rights of Persons with Disabilities. The power of the UN Committee on Economic, Social, and Cultural Rights to give General Comments is grounded not in the treaty but in United Nations Economic and Social Council, Resolution 1985/17 on review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/RES/1985/17.

[9] See the comments of Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 86–9, who suggests that any change to the composition of treaty bodies (and therefore the expectations as to their function and legal significance for the treaty regimes they monitor) would need to stem from states parties to the treaty.

[10] For a more detailed assessment of the composition of these monitoring bodies, see Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 76–86.

lack of legal expertise has been cited by domestic courts as a reason to distinguish the views of treaty bodies from the legal assessment of judicial bodies. For example, in the Supreme Court of Ireland's judgment in *Kavanagh v Governor of Mountjoy Prison*, Fennelly J remarked that:

> The notion that the 'views' of a Committee even of admittedly distinguished experts on international human rights experts, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable. To be fair, even in international law, neither the Covenant nor the Protocol make such a claim. Neither the Covenant nor the Protocol at any point purports to give any binding effect to the views expressed by the Committee. The Committee does not formulate any form of judgment or declare any entitlement to relief. Its status in international law is not, of course, a matter for this court. It suffices to say that the appellant has not furnished any arguable case for the effect of the Committee's views.[11]

This does not mean that the pronouncements of monitoring bodies are without value, however. Indeed, the mixed character of their members is often identified as a strength, granting these bodies the persuasive ability to consider human rights issues from a variety of angles distinct from a strictly legal reading of the treaties.[12] Nevertheless, they do not carry out a strictly legal function and as such should not be seen as equivalent to that of judicial bodies—a point which has been noted by experts who have served on these treaty bodies themselves.[13]

This assessment of the treaty monitoring bodies is reflected in the practice of courts. The UK Supreme Court has previously rejected the legal authority of UN Committees[14]—a position which has also been taken by international courts[15] and domestic courts in other countries.[16] Where international courts

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[11] *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 11.

[12] See discussion below at fn 19 and accompanying text; and Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 76: '[It is important] that the treaty bodes possess sufficient legal expertise at the highest professional level in interpreting the human rights conventions. But this does not prevent the usefulness of other professions in informing the treaty bodies, whether they are social scientists or other professionals.'

[13] Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012), discussed below; Cecilia Medina Quiroga, 'The Role of International Tribunals: Law-Making or Creative Interpretation?' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

[14] See, for example, Lord Wilson's comments in *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41, para. 35 (stating that, 'as a matter of international law, the authority of [the UN Committee on the Elimination of Discrimination Against Women and the UN Committee on Economic, Social and Cultural Rights] recommendations is slight'); Lord Reed's comments in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, para. 64 ('it is unfortunate that the General Comments of the [UN Committee on the Rights of the Child] have been described in some dicta in this court as "authoritative". In context, all that appears to have been meant was that the comments were issued by a body possessing relevant experience and expertise').

[15] International Court of Justice, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Qatar v United Arab Emirates*, Preliminary objections, Judgment, 4 February 2021, paras 100–101, where the Court explicitly refused to endorse the UN Committee on the Elimination of Racial Discrimination's interpretations of Article 1(1) of CERD set out in its UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 30 on discrimination against non-citizens'. For further discussion, including the practice of regional human rights systems, see Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) paras. 49–54.

[16] See discussion of the caselaw of courts in Japan, Australia, and Canada in Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) para. 62; and generally International Law Association, *Final Report on the*

such as the International Court of Justice have positively cited the findings of UN treaty monitoring bodies, this has occurred where the conclusions of those monitoring bodies have confirmed rather than mandated the Court's own interpretation of international law.[17]

### *C. The outputs of UN treaty monitoring bodies*

For the purposes of the Scottish Human Rights Bill, the lack of legal authority of treaty monitoring bodies must be borne in mind when seeking to integrate their materials into the determination of the UK's international obligations. With the general character of the UN treaty monitoring bodies now set out, we can turn to consider in detail their Concluding Observations on state reports **[1]** and General Comments **[2]**, with the aim of showing how these materials can be parsed to determine which aspects Scottish courts and public authorities may be able to rely on as reflecting the international obligations of the UK, and where these materials may risk overextending the interpretation of these obligations.

#### *1. State reports and Concluding Observations*

State reporting is mandatory under the UN human rights treaties. Usually every four or five years (or every two years in the case of the Convention on the Elimination of Racial Discrimination),[18] states must submit reports to these bodies outlining the measures adopted by them to give effect to their obligations under the treaty and the progress made in the further realisation of those rights. After inviting feedback on these reports from civil society actors, the monitoring bodies will issue Concluding Observations which set out the achievements made by the state party in implementing the treaty and principal concerns and recommendations which the state party should work to progress before the submission of their next report.

While states are obligations to submit these reports, there is no legal obligation to implement the Concluding Observations made by the treaty monitoring body on the basis of these reports. Moreover, even if these Observations had legal authority, concerns about a human rights issue in Concluding Observations does not mean that the treaty monitoring body is asserting a violation of the treaty has occurred. Walter Kälin, who previously served on the ICCPR's Human Rights Committee, notes that '[i]n many cases, the [Human Rights Committee] raises concerns that cannot, from a legal perspective, be considered violations of the ICCPR':

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*Impact of the Findings of the United Nations Human Rights Treaty Bodies*, Berlin Conference (2004); Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

[17] See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 184, paras 107–13, where the Court affirms the Human Rights Committee's findings on the territorial scope of the International Covenant on Civil and Political Rights as 'consistent' (para. 109) with the Court's own interpretation of the jurisdictional scope of the treaty; and *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits, ICJ Reports 2010, 639, para. 66, where the Court states that—while it should ascribe 'great weight to the interpretation adopted by [treaty monitoring bodies]…established specifically to supervise the application of that treaty'—'the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [treaty] on that of the Committee'.

[18] Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 16, fn 3.

> Examples include recommendations to withdraw (valid) reservations; to take measures to combat discrimination such as 'intensified public information campaigns to overcome prejudices against ethnic minorities'; to reinforce 'measures to ensure equality between men and women in all spheres'; to adopt certain laws; to create a National Human Rights Institution and/or provide it with adequate human and financial resources' to publish and disseminate annual reports of a national mechanism for the prevention of torture; to abolish the death penalty and consider acceding to the Second Optional Protocol to the ICCCPR; or to intensify human rights training for law enforcement agents. *Non-implementation of such measures would not constitute a violation of the Covenant*. However, such recommendations are still legitimate, as obligations that states assume under international human rights conventions are not limited to abstaining from violations….Many concerns and recommendations by treaty bodies, including the examples just mentioned, do not refer to the duty to respect human rights, but rather the additional duties to protect and fulfil such rights, which are obligations that require positive action….At the same time, such recommendations are arguably less authoritative and thus have less weight…as states have a wider margin to decide what measures to take under their duty to fulfil than they have in areas where their duty to respect is at stake.[19]

This reflects the mixed make-up of these monitoring bodies, in terms of their inclusion of legal and non-legal expertise, and the expectations of states parties as to the function of these monitoring bodies within the treaty regime. To quote Kälin again:

> [T]he examination of states' reports is not a quasi-judicial mechanism focusing on violations, but rather an instrument to assess the stage of implementation of treaty obligations in a given country comprehensively and holistically. Thus, treaty bodies would not fulfil the task entrusted to them were they to limit themselves to identifying violations. One of the particular strengths of these expert bodies is the fact that their members come from different parts of the world and often have particular experience that may help states to better implement their treaty obligations by taking policy measures that have led to improvements in other countries.[20]

Nevertheless, while Concluding Observations do not have legal authority as statements of the obligations of and violations committed by a state party, they can still be useful for determining the *scope* of obligations under these human rights treaties. For example, in in its list of issues for the next (seventh) periodic report of United Kingdom of Great Britain and Northern Ireland, the UN Committee on Economic, Social, and Cultural Rights requested information on 'the measures taken to regulate and monitor private and for-profit providers of child protection services in the State party, such as children's homes' under Article 10 of ICESCR (the rights of families, mothers, and children).[21] This does not mean that the current provision of child protection services in the UK are in violation of the ICESCR, but it does indicate that these services should be considered as falling within the state's obligations

[19] Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 56–7. [emphasis added] [citations omitted]

[20] Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 60. See also, for a history of states parties' expectations as to the function of the treaty monitoring bodies, ibid. 35–7.

[21] UN Committee on Economic, Social, and Cultural Rights, 'List of issues in relation to the seventh periodic report of United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/Q/7, 23 March 2023, para. 27.

under Article 10.[22] In turn, a state's future reporting on this issue to the treaty body can indicate whether it agrees that this issue should fall within the scope of the treaty right. Were a treaty body to expand the scope of a right too far, the state would be able to lodge its objections to this expansion in its report to the treaty monitoring body.[23] This can be seen in the International Court of Justice's treatment of the Human Rights Committee's reports in the *Israeli Wall* Advisory Opinion, where the Court noted that its own interpretation of the territorial scope of the treaty was consistent with 'the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee'.[24] This dialogue between states and treaty monitoring bodies creates subsequent practice relevant for the interpretation of the treaty under Article 31(b) of the Vienna Convention on the Law of Treaties.

For the Scottish Human Rights Bill, this means that Concluding Observations can be relevant for determining the *scope* of the rights that the Bill seeks to domesticate, provided attention is paid to the dialogue between the treaty monitoring body in question and the UK's submissions for its periodic state reports, but not necessarily their legal content, in terms of the actual thresholds which would constitute a violation.

### *2. General Comments*

Alongside the examination of state reports, UN treaty monitoring bodies are empowered to issue General Comments (or 'General Recommendations', in the cases of the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women) which elaborate on the treaty body's interpretation of aspects of its underlying treaty. As Geir Ulfstein writes:

> While such comments are formally not 'legislation', and not issued by a body competent to undertake law-making, they are issued by the authors as interpretation of the respective conventions, to be applied in their examination of state reports and in complaints procedures. Realistically speaking, setting out in more detail the obligations contained in the conventions

[22] Note that the clarity of Concluding Observations for this purpose varies across treaty bodies. Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 49–50, notes that, while the monitoring bodies for the ICCPR, the ICESCR, and the CAT are careful to group their Observations by Article, '[t]he CERD Committee is less coherent', sometimes mentioning 'relevant articles of the CERD at the end of the paragraph listing a concern, sometimes…at the end of the recommendatory paragraph, and sometimes there are no references to the Convention at all'. Kälin concludes that '[s]uch inconsistencies do not mean that [the treaty body] is necessarily overstepping its competences, but it does jeopardise the transparency of the procedure by making it more difficult to see whether it limits itself to examining the implementation of relevant treaty obligations.'

[23] This can be seen in the International Court of Justice's treatment of the Human Rights Committee's reports in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 184, paras 110, where the Court notes that its own interpretation of the territorial scope of the treaty is consistent with 'the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee'. See also Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 40, who notes that 'statements made [by states parties] on difficulties in fulfilling obligations as well as implementing them' can help 'form an element of the development of soft or even customary law'.

[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 184, paras 110.

> may be regarded as a form of soft legislation, and will have the authority of the organ designated to act as the expert organ of the convention.[25]

However, like Concluding Observations, General Comments can serve a variety of functions, including a 'robust legal analytical function, which enables the treaty bodies to develop objective standards for monitoring compliance with the treaties and promotes their compliance by fleshing out the scope and content of vaguely articulated rights therein; policy recommendation function, which helps States parties realise their obligation to ensure the enjoyment of treaty rights; and practice direction function, which assists States parties with fulfilling their reporting obligations'.[26] This means that, like Concluding Observations, they must be parsed to appreciate where a treaty monitoring body is making an assessment of the legal content of a right, and where it is suggesting policy measures for their improved implementation and realisation.

General Comments have not always been accepted by states parties to the treaties. In 2009, the UN General Assembly failed to take note of the adoption of the Human Rights Committee's General Comment No. 33 (2008) on the obligations of States parties under the Optional Protocol and the Committee on Economic, Social, and Cultural Rights' General Comment No. 20 (2009) on discrimination on the grounds that some States found these general comments problematic.[27] The initial draft of the Human Rights Committee's General Comment No. 33 was also rejected by states parties on the grounds that it characterised the Committee's 'jurisprudence' as binding 'subsequent practice' for the purposes of the Vienna Convention on the Law of Treaties.[28] These statements were removed in the final version of General Comment No. 33, again suggesting a dialogic function between treaty monitoring bodies and states parties. Nevertheless, General Comments remain an authoritative, if not legally-binding, interpretation of these treaties, with the International Court of Justice citing the Human Rights Committee's General Comment No. 27 in its interpretation of the International Covenant on Civil and Political Rights in the *Israeli Wall* Advisory Opinion.[29]

Similar to Concluding Observations, then, the implementation of the Scottish Human Rights Bill must be careful not to overstate the importance of General Comments for determining the UK's legal obligations under the relevant treaties. Attention should be paid to the reception of General Comments by states parties to assess how well the General Comment reflects the opinions of states parties as to their obligations under the treaty, as well as separating between legal interpretations of the content and threshold of the specific human rights obligation, as opposed to more general policy recommendations for their further realisation and implementation.

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[25] Geir Ulfstein, 'Reflections on Institutional Design—Especially Treaty Bodies' in Jan Klabbers and Åsa Wallendahl, *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 438.

[26] Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) para. 23, citing Helen Keller and Leena Grover 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

[27] Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) para. 46.

[28] Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) para. 49.

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 184, paras 136.

*D. Conclusion*

The above analysis has provided only a brief summary of the position of treaty monitoring bodies within international law. Nevertheless, it has emphasised the non-legal character of their international materials, their different function compared to pronouncements of judicial bodies, and the difficulties in parsing whether these materials reflect interpretations of legal obligation and policy recommendations.

As such, over-engagement with these materials runs the risk of extending the implementation of the Scottish Human Rights Bill beyond the limits of the devolved powers of the Scottish Parliament and Scottish Ministers. Courts and public authorities will therefore be in a more secure position if their interpretations of these rights are grounded in Scots law, as developed through the public participation mechanisms suggested elsewhere in the Consultation. Constitutional lawyers will be better positioned to advise on how to reflect these limits within the text of the Bill, but it is worth noting the UK Supreme Court's statements to this effect in the *Continuity Bill Reference* case, where the Court noted that the Bill, while designing its obligations in line with EU law, would nevertheless be grounded in domestic law rather than the 'carve-out' exemption under sub-paragraph 2 of paragraph 7 of Schedule 5:

> The [EU Continuity] Bill is not within the carve-out from the reserved matter for the observation or implementation of obligations under EU law. It has nothing to do with the observation or implementation of those obligations….The Scottish Bill is concerned with the purely domestic rules of law which at that point will replace EU law. The fact that those domestic rules may be substantially the same as the rules which previously applied as a matter of EU law does not make them obligations under EU law. Their juridical source is purely domestic.[30]

A similar domestic grounding of the meaning of the rights contained in the Scottish Human Rights Bill, either in the text of the Bill itself or through subsequent statutory guidance, would help secure the interpretation of these rights outside of the difficulties of the international context.

## 4. What are your views on the proposed model of incorporation?

In light of the response to Question 3, a direct treaty approach to incorporation is suitable provided that the content of those rights is carefully grounded in domestic law. However, an additional concern arises as to the proposal to remove 'any text that relates to areas reserved to the UK Parliament'.[31] While some rights—such as the right to work in the International Covenant on Economic, Social, and Cultural Rights—clearly relate to reserved matters, others are split across devolved and reserved matters, such as the right to social security in Article 9 of the International Covenant on Economic, Social, and Cultural Rights, which is delivered by both the UK and Scottish administrations.

These difficulties continue when we consider the international materials produced by treaty monitoring bodies. While treaty monitoring bodies receive reports from the Scottish Parliament and other devolved administrations, they do not always disaggregate their concerns and recommendations according to these administrations. Additional care therefore needs to be taken to ensure that expressions of concern about the human rights situation across the UK as a whole as encompassing Scotland.

[30] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, para. 31.
[31] Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 18.

This problem is compounded by the indivisibility and interdependence of rights. In its General Comment No. 12 on the Right to Adequate Food, for example, the UN Committee on Economic, Social, and Cultural Rights affirmed that the right to adequate food is 'inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all'.[32] Without full control over economic policies such as the adequacy and availability of Universal Credit, for example, the content of this right may require adjustment to reflect the limits of the devolved competence of the Scottish Parliament and Scottish Ministers. Grounding the content of these rights in domestic law, again, would help circumscribe these issues, but further dialogue with UN treaty monitoring bodies and international human rights experts, as well as comparative reflection on human rights protection in federal systems (see the introduction of the response to Question 3), would also be valuable to determine how Scotland can best implement international human rights in full while remaining within its constitutional limits.

## Part 6: Incorporating Further Rights and Embedding Equality

### 12. Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?

No comments on the Human Rights Act specifically, but the issue with the indivisibility and interdependence of human rights (response to Question 4) also applies to the interactions between civil and political rights and economic, social, and cultural rights. In its General Comment No. 14 on the Right to Health, for example, the UN Committee on Economic, Social, and Cultural Rights noted that '[t]he right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including…the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement'.[33] Further consideration should therefore be given as to whether civil and political rights, through either the Human Rights Act or the International Covenant on Civil and Political Rights, should be reflected in the Scottish Human Rights Bill as an indispensable part of the interpretation of other interdependent socio-economic rights.

### 13. How can we best embed participation in the framework of the Bill?

No comments on the method of participation but see response to Question 3 for the importance of public participation in grounding these human rights in Scots law as opposed to international law.

[32] UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food', E/C.12/1999/5, 12 May 1999, para. 4.
[33] UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', E/C.12/2000/4, 11 August 2000, para. 4.

**14. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?**

This response draws from my expert report on 'Incorporating International Human Rights: The protection of Care Experienced People's Rights in the Scottish Human Rights Bill', prepared for the Human Rights Consortium Scotland and Who Cares? Scotland.[34]

While the incorporation of CEDAW, CPRD, and CERD offers only a procedural duty to pay due regard to the rights contained within those treaties, so far as these rights are within devolved competence, the Consultation also states that the Scottish Government intends to include a non-discrimination clause into the SHRB, similar to Article 2 of ICESCR or Article 14 of the ECHR, in order to 'ensure everyone can access the rights under the Bill without discrimination'.[35]

In their respective treaties, these non-discrimination clauses have been powerful tools for challenging gaps in rights protection. Even where a practice would not breach the individual rights given within a treaty, non-discrimination articles allow for an individual to allege a separate violation of their rights on the grounds that their treatment directly or indirectly offers them less protection of their rights compared to other groups. In this light, Article 14 of the ECHR has been used to challenge discriminatory practices such as the unequal granting of rights to children born out of marriage,[36] educational tests which were biased against Roma children's right to education,[37] and the systematic denial of permits for gay pride parades in Russia,[38] while Article 2 of ICESCR has been elaborated in the UN Committee on Economic, Social, and Cultural Rights' General Comment No. 20, where the Committee reiterated the 'immediate and cross-cutting' nature of the obligation to prevent direct and indirect discrimination in the enjoyment of any rights contained in ICESCR.[39]

The Consultation acknowledges that, if modelled word-for-word on the ICESCR or ECHR models, the rights of LGBTI and older age people would not be explicitly protected and as such would need to fall within the 'other status' section of the non-discrimination clause.[40] But because the impetus behind the Bill is in part to offer protection for the rights of precisely these groups, the Scottish Government are considering naming these groups in the text of the non-discrimination clause to 'help to ensure

[34] David Scott, 'Incorporating International Human Rights: The protection of Care Experienced People's Rights in the Scottish Human Rights Bill', expert report for the Human Rights Consortium Scotland and Who Cares? Scotland, 18 September 2023 < https://hrcscotland.org/wp-content/uploads/2023/09/Final-Care-Experienced-People-and-Human-Rights-Bill-Report-Sept-2023.pdf>.

[35] Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 25.

[36] *Marckx v Belgium*, no. 6833/74, 13 June 1979.

[37] *DH and others v the Czech Republic* [GC], no. 57325/00, 13 November 2007.

[38] *Alekseyev v Russia*, app nos 4916/07, 25924/08, and 14599/09, 21 October 2010. For a more detailed overview of the European Court of Human Rights' caselaw, see European Union Agency for Fundamental Rights, 'Handbook on European non-discrimination law' (2018), and the Court's own factsheets on different aspects of the prohibition of discrimination.

[39] UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights', E/C.12/GC/20, 2 July 2009, para. 7.

[40] Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 26. Note that the rights of LGBTI+ people and older age people are already well-established as falling under the 'other status' clause of non-discrimination clauses in international law. See European Union Agency for Fundamental Rights, 'Handbook on European non-discrimination law' (2018), pages 224–6.

clarity of exactly who the provision is intended to protect'.[41] This would ensure members of these groups can challenge discriminatory protection of their rights under the Bill, including before courts.[42]

While 'other status' is a broad category which has been given expansive interpretation by international bodies, including fatherhood,[43] marital status,[44] sexual orientation,[45] health status such as HIV status,[46] military rank,[47] and the parenthood of a child born out of wedlock,[48] care experience has not yet been recognised under this category in international law. Explicit inclusion of care experience in the text of the non-discrimination clause, then, would ensure that Care Experienced people's rights are considered and protected by public authorities across Scotland, grounding their rights in the text of domestic law and helping challenge the disadvantage and discrimination Care Experienced people face every day compared to the rest of the population.

While the Scottish Government is rightly careful to ensure the SHRB's non-discrimination clause does not infringe on or alter the terms of the Equality Act 2010, a power reserved to the UK Parliament,[49] inclusion of Care Experienced people would fall within the exceptions granted to the Scottish Parliament to legislate to prevent, eliminate, or regulate discrimination by certain public authorities in Scotland when exercising their Scottish functions, or, alternatively, to legislate to encourage equal opportunities as long as it is not prohibiting or regulating discrimination.[50] This would cohere with the Scottish Government's commitment to 'Keep the Promise' to Care Experienced people across Scotland and the existing recognition of the specific human rights needs of Care Experienced people,[51] as well as aligning the SHRB with the recent practice of public authorities such as the Scottish Qualifications

[41] Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 26.
[42] Note that the Equality Act 2010 already offers legal protection against discrimination for older people and LGBT (but not intersex) people under the protected characteristics of 'age', 'sexual orientation', and 'gender reassignment'.
[43] European Court of Human Rights, *Weller v. Hungary*, no. 44399/05, 31 March 2009.
[44] European Court of Human Rights, *Petrov v. Bulgaria*, no. 15197/02, 22 May 2008.
[45] European Commission of Human Rights, *Sutherland v. the United Kingdom*, no. 25186/94, 1 July 1997.
[46] European Court of Human Rights, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011; UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights', E/C.12/GC/20, 2 July 2009, para. 33.
[47] European Court of Human Rights, *Engel and Others v. the Netherlands*, nos. 5100/71 and others, 8 June 1976.
[48] European Court of Human Rights, *Sommerfeld v. Germany* [GC], no. 31871/96, 8 July 2003; European Court of Human Rights, *Sahin v. Germany* [GC] No. 30943/96, 8 July 2003.
[49] sL2 of the Scotland Act 1998, Schedule 5.
[50] These exemptions are acknowledged in the Consultation: see Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 17. For a similar argument, in respect of corporate parents, see the comments of the Equality and Human Rights Commission in Who Cares? Scotland and the Equality and Human Rights Commission, 'Care Experience and Protected Characteristics', 1 March 2018, page 6: ' The Equality Act 2010 does not prevent corporate parents from taking action to address the needs of, or disadvantages faced, by people with care experience, unless this causes unlawful indirect discrimination against people sharing one of the protected characteristics. Corporate parents can therefore treat people with care experience more favourably than people who do not have care experience. This would only be unlawful if doing so puts (or would put) people who share a protected characteristic at a particular disadvantage and that can't be justified, i.e. it is not a proportionate way of achieving a legitimate aim.'
[51] The SHRB is described as a 'key measure' for introducing a human-rights based approach to 'Keeping the Promise': see Scottish Government, 'Keeping the promise to our children, young people, and families', 30 March 2022, page 57. See also the recognition of the need for particular attention to the realisation of the rights of Care Experienced people in National Taskforce for Human Rights Leadership, 'National Taskforce for Human Rights Leadership Report', 12 March 2021, page 41.

Authority,[52] the Scottish Funding Council,[53] and North Ayrshire, Falkirk, and Edinburgh City Councils,[54] which have all chosen to recognise care experience as a protected characteristic.

### 15. How do you think we should define the groups to be protected by the equality provision?

See response to Question 14.

### 17. If you disagree, please provide comments to support your answer.

See response to Question 13, fn 40: LGBTI and older age people have already been recognised under the 'other status' under international human rights law, although the Scottish Government may wish to include them explicitly in the text of the Bill, alongside other marginalised groups, in order to visibly ensure or further develop their protections beyond international law.

## Part 7: The Duties

### 24. What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via minimum core obligations (MCOs) and progressive realisation?

See response to Question 3 for the importance of determining compliance against Scots law as opposed to international law.

## Part 9: Implementing the New Scottish Human Rights Act

### 39. What are your views on our proposals to establish minimum core obligations (MCOs) through a participatory process?

No comments on the method of participation but see response to Question 3 for the importance of public participation in grounding these human rights in Scots law as opposed to international law.

[52] Scottish Qualifications Authority, 'SQA is a proud corporate parent', March 2018.
[53] The Scottish Funding Council, 'Care Experience as a Protected Characteristic: A Best Practice Guide prepared by Who Cares? Scotland', 1 May 2017.
[54] See North Ayrshire Council, 'Minutes of 29 March 2023 meeting', page 20; Edinburgh City Council, 'Protected Characteristics—Care Experienced', 27 April 2023; and Falkirk Council, 'Falkirk Council votes to recognise care experience as protected characteristic', 6 July 2023. For a UK-wide perspective, demonstrating similar practices across English local authorities, see Terry Galloway, 'Care Experience as a Protected Characteristic Briefing Report', 8 July 2023.