Written evidence from the Bar Council (SIT 13)

Public Administration and Constitutional Affairs Committee
The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

About us

1. The Bar Council is the representative body for the Bar of England and Wales, representing approximately 17,000 barristers. A substantial – and growing – number of its members conduct practices with an international element, and many amongst them are also admitted as practitioners in other jurisdictions or regularly appear before international courts and tribunals, themselves established under treaty. Its members therefore have, between them, a considerable body of accumulated experience in the treaty process, including in particular the interpretation of treaties, and their application, against the background of their negotiation and national approval. More generally, the independent Bar plays a crucial role in upholding and realizing the constitutional principles of government accountability under law and vindication of legal rights through the courts. It provides a pool of talent, from increasingly diverse backgrounds, from which a significant proportion of the judiciary is drawn, and on whose independence the rule of law and our democratic way of life depends.

Executive Summary

2. Treaties continue to be the only instrument available to States to create specific rights and obligations between themselves to collaborate and cooperate in a globalized world. Treaty-making is therefore extensive, and treaties vary widely in their subject-matter, length and complexity (paras. 9-12).
3. The Bar Council's focus is on legally binding agreements, especially those which are given effect in UK law, and it would welcome a mutually beneficial relationship between Parliament and the Executive aimed at practical effectiveness and positive benefit to all users of the treaty system, including practising lawyers (paras.1, 6-8).
4. In summary, the Bar Council's views on the questions posed are:
    a. The Crown cannot, by concluding treaties, change the law of the land; this can only be done by Act of Parliament. The respective constitutional roles are harmonised through the long-established practice of ratifying treaties only after any necessary implementing legislation is in place. Treaties not incorporated into statute may impact domestic law, but only indirectly, through the Courts interpreting the law so to avoid placing the UK in breach of its international obligations (paras.14-17).
    b. The devolved nations fall under UK treaties, and the Crown Dependencies and Overseas Territories may have UK treaties extended to them, but these entities may still be responsible for treaty implementation and have an interest in their content, so that access to treaty texts and consultation need to be real and meaningful. There may be good sense in an evaluation and comparison of the mechanisms under the Concordat on International Relations with the Devolved Administrations with those employed for the Crown Dependencies and Overseas Territories (paras.19-25).

c. The details of how the scrutiny mechanisms available to Parliament under the Constitutional Renewal and Governance Act (CRAG) operate in practice are difficult to identify, as are which parts of the parliamentary machinery are engaged, the division of responsibility between them and their procedures. The Bar Council regards this as inimical to a serious and educated public interest in treaty matters (paras.26-34, 38-39).

d. It is not evident that any advantage would be obtained by extending CRAG to non-legally binding understandings and exchanges, given their number and functions and the need for confidentiality, though guidance would be welcome on when Parliament could be informed about informal understandings which, although not legally binding, may have significant effects and on any Parliamentary process developed to handle such documents (paras.35-37).

e. Where legislation is required to implement a treaty, the connection with the underlying treaty should be made clear in any White Paper and/or the explanatory notes to the Bill, and statutory instruments should be laid either in advance of or at the same time as the treaty itself under CRAG (paras.40-47).

f. Public access to information concerning treaty-making appears adequate. For parliamentary committees, the general principle should be that information capable of being shared is shared as early as possible, subject to necessary safeguards to ensure confidentiality to protect the UK's negotiating position and any other public interest (paras.55-63).

g. Given the volume and variety of subject-matter of treaties any new treaty scrutiny body should be a joint one of both Houses, to combine experience, avoid duplication, and build specific expertise on treaty questions, and to carry out a triage function to identify those treaties which require detailed scrutiny and those which do not (paras.64-65).

5. To be properly effective, any proposals for revised scrutiny procedures should be informed by:

   a. An empirical study of contemporaneous UK treaty-making (covering e.g. its volume, the different types of treaty involved, and their subject areas) (paras.12, 27).

   b. A comparative study of current treaty scrutiny practices in Parliament with recommendations for its rationalisation (para.33).

   c. A study of treaty scrutiny processes in other countries, especially common law jurisdictions (para.66).

Introduction

6. In international law 'treaty' is simply a term of art denoting legally binding international agreements cast in written form.[1] Many different titles are employed in international practice, but the title given to a particular instrument has on its own no effect on its status.[2] This evidence will use the term 'treaty' throughout to refer to

[1] Vienna Convention on the Law of Treaties, 1969, Article 2(a); oral treaties are theoretically possible but highly exceptional.

[2] Ibid. For a listing of treaty titles that have been employed in international practice, see Aust, Modern Treaty

international agreements of all kinds, but will preserve an important distinction of principle between treaties, properly so called, and on the other hand informal intergovernmental understandings and exchanges which are not intended to be legally binding.

7. The Bar Council recognizes that treaty-making is simply one facet of the formation and execution of foreign policy and, as such, is subject to whatever processes are in operation for accountability to Parliament for the exercise by Ministers and their Departments of the relevant elements of the Royal Prerogative. The Bar Council would welcome the development of a mutually beneficial relationship between Parliament and the Executive in the treaty field, which, in its view, would be in keeping with modern conceptions of the rule of law. Such a relationship should aim to be feasible and effective in practice and should be designed to bring positive benefit to all users of the treaty system, including practising lawyers. But the Bar Council will refrain from comment on the broader policy aspects, as they extend well beyond its own sphere of responsibility and expertise.

8. The comments that follow will base themselves around the fundamental constitutional principle that, in respect of international law arising out of treaty, the United Kingdom has a 'dualist' system, i.e., that the Crown cannot, by concluding treaties, change the law of the land, which can only be done through Parliament. In other words, whatever its subject-matter, and whatever the process of its negotiation and conclusion, a treaty cannot, of itself, take effect in the law of the United Kingdom except as may have been permitted or required by statute.[3] The Bar Council's particular interest is in treaties that are to be given effect in UK law – either through legislation enacted to modify UK law so as to enable relevant aspects of the regime of the treaty to be applied, or (should Parliament so choose) by incorporating provisions of the treaty itself directly into UK law. It notes that, when Parliament has done the latter, what the Courts will give effect to is the terms of the legislation, not those of the treaty as such.[4] And, beyond that, an unincorporated treaty only has limited secondary effect, to the extent that the Courts will apply a presumption in favour of interpreting statutes (and common law) in a way which will not place the UK in breach of its international obligations, though subject always to the terms of the statute itself.[5] But it remains a matter of general public interest that treaties concluded by the UK should be properly understood in themselves and in their effects. The Bar Council therefore has a broader interest in all UK treaties, even those the implementation of which does not require legislative action.

1) ROLE AND PURPOSE OF INTERNATIONAL TREATIES/AGREEMENTS

Question 1: What roles and functions do treaties and international agreements perform in the 21st century?

9. The treaty continues to be the only instrument available to States who wish to create specific rights and correlative obligations as between themselves under international

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Law and Practice (3rd ed.,2013) ("Aust") 22-4.

[3] Under the alternative 'monist' system (which operates in many of the UK's close partners, though not by and large in the common-law world), treaties, once formally approved by the State, take effect automatically in national law, sometimes even taking precedence over ordinary statute law, and such States usually have treaty approval processes that have been developed accordingly.

[4] *Thomas v Baptiste* [2000] 2 AC 1 at p.23.

[5] *R v Lyons* [2003] 1 AC 976 at paras.27-28.

law, whether globally, or bilaterally (as between one State and another), or in any multilateral formation or combination between the two. There is no prospect of this role being superseded by other forms of international cooperation. Even where States wish to establish between themselves advanced forms of collaboration that involve the creation of supranational organs endowed with law-making or other compulsory powers, as in the case of the European Union or the United Nations Security Council, the legal basis for doing so invariably rests on a treaty or treaties. And the founding treaty or treaties will then define the specific powers being so conferred on the international organ.

10. It is now recognized, in addition, that international organizations of all kinds also possess treaty-making power, within the scope of their functions,[6] and treaty-making by the leading international organizations has grown in importance, including in the creation of legal relations between international organizations and third States, as well as with their own Member States.

11. The current volume of treaty-making on the international scene is very substantial. The UN Treaty Series[7] contains, year on year, some 400 items. UK Treaties Online, the official public record maintained by the Foreign, Commonwealth and Development Office (FCDO), refers to some 14,000 treaties to which the UK is or has been a party. Year by year, the annual numbers of new treaties published in the UK Treaty Series and Miscellaneous or Country Series amounts on average to some 50.[8] This is a reflection of globalization in a world of interdependent States, and the need it brings for States to collaborate and cooperate across a wide variety of subject-matters, which are too numerous and disparate to list, but range from global efforts to combat climate change or drugs trafficking to the situation-specific minutiae of visas, or cross-border tax or social security arrangements.

12. The only realistic working assumption must therefore be that the treaty will continue, as in the past, to serve a kaleidoscopic variety of purposes and functions, and will, accordingly, continue to vary significantly in terms of complexity and length.[9] These features of treaties and treaty-making in the 21st century will necessarily have an effect on the structure and design of effective mechanisms for treaty scrutiny at the national level. Further analysis of the implications of the bald figures in paragraph 11 above would be greatly enhanced by a proper empirical study of contemporaneous UK treaty-making; to the knowledge of the Bar Council, no such study exists. The Bar Council strongly encourages the Committee to procure a study of this type, perhaps jointly by the House of Commons Library and the FCDO's Treaty Section, setting out what has happened in practice, say over the most recent five-year period, and designed to bring out its volume, the different types of treaty involved, their subject areas, and their substance. Without empirical information of that kind, it may prove difficult to conceive to best effect a realistic and durable Parliamentary role. Some initial suggestions are at paragraphs 64-65 below.

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[6] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

[7] The record maintained by the UN Secretariat of treaties registered with it by Member States as required under Article 102 of the UK Charter. The series is freely available online.

[8] The numbers fluctuate from year to year, and can for example be affected by specific circumstances such as the withdrawal of the UK from the EU.

[9] The UN Convention on the Law of the Sea 1982 has 320 articles and nine separate annexes. Free trade agreements and their annexes and schedules typically run to several hundred pages. For example, the Agreement on Trade Continuity with Canada runs to 109 pages and CETA, which it incorporates by reference, runs to 1057 pages in the full version published on EurLex.

2) CONSTITUTIONAL RELATIONSHIPS

Question 2: Where should the balance lie between Parliament and Government in developing, agreeing and implementing international treaties?

13. The Bar Council will not attempt a response to this question, which it regards as lying beyond its own sphere of responsibility and expertise (see paragraph 3 above).

Questions 3: To what extent is there a tension between the sovereignty of Parliament and the ability of the Government to sign treaties that require or constrain future legislative changes, and what can be done to resolve any such tension?

14. One characteristic of the dualist system (paragraph 3 above) is that the Crown cannot, by concluding treaties, either require Parliament to enact new legislation or amend or repeal existing legislation, or constrain it from doing so, even where such action (or inaction) by Parliament would be necessary to enable the UK to comply in full with its treaty commitments.

15. This limitation on the Crown's treaty-making power has recently been confirmed by the Supreme Court in *Miller (No.1)*.[10] At the level of basic principle, the Supreme Court reaffirmed that "[a]*n important aspect of the fundamental principle of parliamentary sovereignty is that primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers*" (§25) and that "*the Crown cannot through the use of its prerogative powers … change domestic law in any way without the intervention of Parliament*" (§33).

16. Precisely because the Government's entry into a treaty does not of itself effect any change in domestic law, there is a theoretical possibility of treaty commitments being assumed which cannot be fully implemented in law, potentially bringing the UK into breach of its international obligations.[11] To guard against that risk, there has emerged a long-established practice that the Government will not give the UK's formal consent to be bound by a treaty requiring legislation to give it effect in domestic law, until that legislation has been enacted by Parliament. This practice is reflected in the FCDO's *Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures* (2013).[12] In some instances, the Government has been required significantly to delay ratification of international treaties because Parliament has not enacted the necessary implementing legislation.[13]

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[10] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

[11] Under international law, a State is not entitled to invoke provisions of its domestic law as a defence for failure to abide by treaty obligations: Vienna Convention on the Law of Treaties 1969, Article 27 and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Article 3. The need for a State to bring its internal law into conformity with treaty obligations is the reason that ratification is a separate stage of the treaty-making process from signature: see Sir Robert Jennings and Sir Arthur Watts KCMG QC, *Oppenheim's International Law: Volume 1 — Peace* (9th ed, OUP, 2008), §602.

[12] Available at: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures. See p.6: "*Accordingly, if domestic legislation is required to enable the UK to give effect to its obligations under a treaty, the legislation should be in place* ***before*** *the treaty comes into force, so that the two can come into operation at the same time. It is FCDO practice, therefore, to insist that any necessary UK legislation, i.e. an Act or Order-in- Council, must be in place before a treaty is ratified or acceded to*" (emphasis in original). See also *Satow's Diplomatic Practice* (7th ed, OUP, 2016), Book VII: Treaties and Treaty-Making, §34.7, describing it as a "firm rule."

[13] For example, the UK signed the First and Second Additional Protocols to the 1949 Geneva Conventions on 12 December 1977; however, it ratified those Protocols only on 28 January 1998, following the enactment of the Geneva Conventions (Amendment) Act 1995.

17. This practice effectively harmonises Parliament's legislative function and the Government's treaty-making powers by ensuring that the UK is able to fulfil its treaty obligations from the moment they become legally binding on it. It cannot, however, entirely eliminate the risk of domestic legislation not permitting full effect to be given to the UK's treaty obligations. A risk of that kind would come into play, for example, if Parliament had not chosen to enact the terms of the treaty directly into law, and if it later emerged over time that the proper interpretation of the treaty differed from what had been assumed at the time of ratification. In such a case, however, it is difficult to imagine that any degree of parliamentary scrutiny at the time of ratification could offer an absolute guarantee against misalignment of the UK's international obligations and its domestic law.[14]

18. Questions arising from treaties not requiring implementing legislation and/or ratification are addressed below, at paragraphs 26 and 44.

Question 4: What role should devolved governments and legislatures, Crown Dependencies and Overseas Territories have in relation to international treaties and arrangements?

19. The starting point is that the devolved nations are constitutionally part of the United Kingdom, whereas the Crown Dependencies (CDs), and Overseas Territories (OTs) are not. At the same time, the CDs and OTs are not sovereign States in international law with a treaty-making capacity of their own.[15] Under international law, a treaty is binding on each party in respect of its entire territory unless the treaty provides otherwise.[16] This means that all UK treaties automatically extend to the entire UK, including therefore the devolved nations. In respect of the OTs and CDs, by contrast, the UK's standing practice is that UK treaties will not apply to an OT or CD unless the treaty in question has been expressly extended to it at the time of conclusion (or later, if the terms of the treaty so permit). The consequence of this somewhat complicated situation is that, while necessary legislative action of the kind described at paragraph 16 above may fall within the province of the devolved nations or that of the CDs or OTs, it is the UK that will remain internationally responsible in law for any breach of the treaty which may arise.[17] Thus the devolved nations, CDs or OTs have an important practical role in both the implementation of the UK's treaty obligations and their observance. They may also have an interest or stake in the matters of international policy at play.

<u>Devolved nations</u>

20. Under the devolution settlement, the UK Government retains responsibility for international relations. In particular, the Foreign Secretary has "overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom."[18] This is reflected in the legislative framework, under which the conduct of

[14] For example, in *R (Steinfeld) v Secretary of State for the International Development* [2018] UKSC 32, [2020] AC 1, the Supreme Court declared that, to the extent that they precluded different sex couples from entering into a civil partnership, sections 1 and 3 of the Civil Partnership Act 2004 were incompatible with the UK's treaty obligations under Article 14, taken in conjunction with Article 8, of the European Convention on Human Rights. Parliament rectified this incompatibility by enacting the Civil Partnerships, Marriages and Death (Registration etc) Act 2019.

[15] Aust, p.63 (Scotland and Northern Ireland) and p.68 (overseas territories).

[16] VCLT Article 29.

[17] See International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 4(1).

[18] Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, Concordats on

international relations is a reserved matter (Scotland and Wales) or excepted matter (Northern Ireland), whereas the observance and implementation of international obligations are not.[19]

21. The division of responsibilities between the UK Government and the devolved nations is addressed in the Concordat on International Relations, a non-binding arrangement accompanying the 2013 Memorandum of Understanding between the UK Government and the devolved administrations, which stipulates, *inter alia*, that the former will:

    a. consult the devolved administrations about the UK's negotiating position as regards both devolved matters and non-devolved matters that impact upon devolved matters;[20]

    b. formally notify the devolved administrations of any new international commitment relating to devolved matters as soon as the instrument is concluded, so as to allow the devolved legislature to adopt any necessary legislation;[21] and

    c. consult and agree implementation proposals with the devolved administrations where an international obligation is to be implemented by UK legislation.[22]

22. The Bar Council shares the view that if consultation processes exist, they should be real and meaningful, and should ideally take place both at the inter-governmental and the inter-parliamentary level.[23] While noting that the Concordat provides the relevant framework for that process,[24] the Bar Council is not in a position to comment on whether the process has worked satisfactorily in practice, and can therefore see good sense in the suggestion for a re-evaluation of the existing mechanisms, and in particular of whether there is any need for a more formalised and prescriptive procedure, with precise timelines applying to individual steps (as in the case of the OT/CD consultation process, discussed below). The Bar Council also sees sense in the suggestion that devolved institutions should where possible and practicable have early access to treaty texts, rather than having to wait upon the treaty's formal signature or conclusion.[25]

<u>OTs and CDs</u>

23. The UK Government is responsible for the external relations of the OTs and CDs,[26] and, as indicated above, neither OTs nor CDs can enter into treaties in their own right[27]

International Relations ("the Concordat"), D1.3 (Scotland), D2.3 (Wales), D3.3 (Northern Ireland).

[19] Scotland Act 1998, s. 30(1) and Schedule 5, para. 7(1); Northern Ireland Act 1998, s. 4(1) and Schedule 2, para. 3; Government of Wales Act 2006, s. 108A and Schedule 7A, Part I, para. 10; *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022, § 30. See also See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, §129. The UK Government retains the power to ensure that the devolved administrations do not act in a manner that is incompatible with the UK's international obligations: see further FCDO's *Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures* (2013), fn.6.

[20] Concordat, D4.5 (Common Annex).

[21] Concordat, D4.8 (Common Annex).

[22] Concordat, D4.10 (Common Annex). Under normal circumstances, HMG will not ask Westminster to legislate in any area of devolved competence without the agreement of the relevant administration: D4.11.

[23] House of Lords, International Agreements Sub-Committee, 11th Report of Session 2019-2021, *Treaty scrutiny: working practices*, 20 July 2020, §§51-52. See also House of Lords, Select Committee on the Constitution, *Parliamentary Scrutiny of Treaties*, 20th Report of Session 2017-2019, 30 April 2019, §§140-141 and 156.

[24] HMG, *Government Response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices*, 25 September 2020, p.3.

[25] As suggested by the House of Lords, European Union Committee, 42nd Report of Session 2017-2019, *Scrutiny of international agreements: lessons learned*, 27 June 2019, §49.

. Instead, HMG's long-standing practice is to extend the application of a treaty to OTs and CDs by way of specific declaration.[28] A treaty will generally not be extended unless the OT or CD consents,[29] and it will often, depending on the subject-matter, be for the OT or CD to pass whatever implementing legislation may be required. Otherwise, the UK Parliament will legislate for OTs and CDs in general in respect of treaty obligations.[30] In accordance with the FCDO's standard practice,[31] this legislation should be in place before a treaty comes into force for that CD or OT. Early consultation with the relevant governments as to the potential extension is therefore crucial, and might, for example, reveal that extension of a treaty would be dependent on the possibility of the UK Government being able to make a reservation[32] adapting its terms.

24. The UK Government has a developed consultation process with both OTs and CDs:

    a. As regards OTs, the FCDO encourages consultation with territory governments during the course of a treaty's negotiation, principally in the form of a consultation paper. If the relevant territory government seeks extension, there are specific steps that the lead government department should undertake to secure it.[33]

    b. As regards CDs, the process is overseen by the Ministry of Justice as "a matter of essential policy and administration".[34] The specific consultation process is set out in detailed guidance notes, which also require early engagement during the treaty negotiation process.[35]

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[26] Ian Hendry and Susan Dickson, *British Overseas Territories Law* (2nd ed., 2018) ("Henry and Dickson"), pp.279-280; Aust, pp.185-6.

[27] Unless expressly authorised to do so by way of an entrustment. General entrustments are in effect in respect of the BVI, Cayman Islands, Monserrat, and Turks and Caicos Islands, and Bermuda: see Hendry and Dickson, p.286.

[28] See Hendry and Dickson, pp. 280-282 (practice for OTs since 1967); see House of Commons Library, *The Crown Dependencies*, Briefing Paper CBP 8611, 5 July 2019, p.19 (practice for CDs since the 1950 Bevin Declaration). This practice constitutes a 'different intention' for the purposes of the default territorial application rule in Article 29 of the Vienna Convention on the Law of Treaties.

[29]Hendry and Dickson, p.282. In the Cayman Islands, there are constitutional requirements relating to consent to treaties. See Cayman Islands Constitution Order 2009/1379, Schedule 2, Article 55(3): "The Governor shall not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the Cabinet, unless instructed otherwise by a Secretary of State."

[30] On occasion, the UK legislates for the OT or CD in respect of treaty obligations: see e.g. State Immunity (Overseas Territories) Order 1979/458.

[31] FCDO's *Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures* (2013), p.6.

[32] A reservation is defined in Article 2(1)(d) of the VCLT as a "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State". See further *Satow's Diplomatic Practice* (7th ed., 2016), §§35.20-35.46. Several significant treaties expressly preclude reservations (e.g. UN Convention on the Law of the Sea 1982, Statute of the International Criminal Court, 1998, Energy Charter Treaty, 1994).

[33] FCO, *Guidelines on extension of treaties to overseas territories*, 19 March 2013, pp.6 (extension on ratification) and 8 (extension after ratification).

[34] HMG, *Government Response to the Justice Select Committee's Report 'Crown Dependencies: developments since 2010'*, March 2014, p.24.

[35] Ministry of Justice, *Annex B: How to Note on the Extension of International Instruments to the Crown Dependencies*.

25. The Bar Council considers that the existing procedures are consistent with the rule of law, and recommends that they be so managed as to meet the aim of facilitating timely and productive engagement.

3) EFFECTIVENESS OF CURRENT SCRUTINY MECHANISMS

Question 5: Does Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) enable effective parliamentary scrutiny of international treaties and other agreements?

a) Treaties

26. Like the Ponsonby Rule which preceded it, CRAG applies only to treaties which are subject to an act of formal confirmation such as ratification.[36] It does not apply to treaties which enter into force immediately upon signature or exchange. In the absence of empirical information (paragraph 12 above), the Bar Council is unable to assess to what extent the latter category may represent a significant element in UK treaty-making.[37]

27. International law allows for the possibility of a treaty being applied provisionally, in full or in part, by the Parties in general, or by some of them individually, even before the treaty's formal ratification and entry into force. This requires the agreement of the treaty parties either within the treaty itself or aliunde; provisional application will however come to an end in respect of a Party if it notifies the other treaty Parties that it does not intend to ratify the treaty.[38] In respect of some UK treaties (notably certain trade agreements taking effect from 1 January 2021), the parties have agreed to their provisional application.[39] The majority of these trade agreements are designed to 'roll-over' and maintain certain of the UK's treaty rights and obligations in existence prior to its departure from the European Union, and therefore fresh implementing legislation will not be required to give municipal legal effect to them. The provisional application of such treaties therefore creates little risk of misalignment between the UK's international obligations and its domestic law. Beyond this special case, the Bar Council does not have complete information as to whether provisional application represents a regular feature of UK treaty practice and, if so, on what terms.[40] This is

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[36] See FCDO Note, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', p.7: "*all treaties (except those listed below) that are subject to ratification, acceptance, approval, the mutual notification of completion of procedures, or to which the UK intends to accede*". In addition, certain categories of treaties are expressly excluded from the scope of application of CRAG by s.23.

[37] Or whether it is confined to less significant treaties; written evidence from Sir Michael Wood to the House of Lords Constitution Committee, para.12, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/parliamentary-scrutiny-of-treaties/written/93385.html.

[38] Vienna Convention on the Law of Treaties, Article 25. Provisional application may also come to an end in accordance with any specific agreement as to its duration.

[39] See for example the United Kingdom – Turkey Free Trade Agreement, article 13.3(3). Further, for all treaties, once the UK has signed a treaty (even before ratifying it), it is bound under international law to refrain from acts which would defeat the object and purpose of a treaty: Vienna Convention on the Law of Treaties, 1969, Article 18(a).

[40] The provisional application of treaties is one of the topics currently the subject of study by the International Law Commission. The UK submitted two comments to the Commission, in 2014 and 2020. In its 2014 comments the UK provided a list of around 74 examples of UK practice provisionally applying bilateral and multilateral treaties dating back to the GATT in 1947. It noted that "*Many of these treaties concern the provision of air services, where the provisional application of a treaty is generally provided for in a memorandum of understanding (MoU) and as such is not legally binding. Such MoUs are usually terminated by a subsequent*

one further element that would be clarified by an empirical study of the kind suggested in paragraph 12 above.

28. Although CRAG requires treaties to be laid before both Houses of Parliament for a period of 21 sitting days, together with an explanatory memorandum setting out the Government's reasons for seeking ratification, it contains no guidance on the mechanics for treaty scrutiny. This is a matter for Parliament.

29. An assessment of whether CRAG enables effective scrutiny of treaties requires a thorough understanding of the relevant Parliamentary mechanics and how these have been functioning in practice.

30. The Bar Council understands that many different parts of the Parliamentary machinery (in both Houses) may potentially play a role in scrutinising different treaties. [41] So far as the Bar Council is aware, Parliamentary scrutiny may in principle be achieved through two main routes: through debates (via various avenues, not all of which would secure a vote on ratification[42]) and through the work of Parliamentary committees. In practice, so the Bar Council understands, debates on treaties rarely take place on the floor of either House outside the EU context, and Committees have played a more significant role.

31. However, it has proved notably difficult to identify all the relevant parts of the Parliamentary machinery, to understand how they might be engaged, the division of responsibility and potential overlap between them, and the procedures each employs to undertake such scrutiny, including what powers there may be to promote further scrutiny by Parliament of the contents or effect of a treaty, or whether it should be ratified. The Bar Council understands that there are no generally applicable procedural rules governing such matters and that the position varies, in part depending on the specific mandate of each particular part of the parliamentary machinery.

32. There are many Parliamentary committees but the Bar Council is not aware of any detailed public explanation of such basic matters as: (a) which committees are engaged in scrutinising which types of treaties, (b) how the FCDO determines which committee should receive a copy of a treaty, (c) how each relevant committee decides whether to scrutinise a given treaty (or which other committee to pass the treaty to) and, if it does scrutinise a treaty, how each committee decides whether to report for information or draw the treaty to the special attention of the House (assuming such

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MoU which updates or amends the provisions of the original MoU." (See United Kingdom - Provisional application of treaties.)

In its 2020 comment, the UK explained it "*uses provisional application, on an exceptional basis, to apply a treaty prior to the completion of Parliamentary procedures. However, it does so with caution: provisional application is not, and cannot be used as a means of bypassing Parliamentary procedures (and nor is it a substitute for the application of the standard international rules and processes for securing full legal entry into force of treaties. In the view of the United Kingdom, retaining the flexibility of the provisional application mechanism is key to managing the tension between bringing into effect a treaty at the international level, and the need ultimately to complete domestic constitutional procedures…* " (see Provisional application of treaties: Information provided by the United Kingdom (2020), para.5).

[41] The Parliament website states: "*Parliamentary committees are the key bodies scrutinising treaties. Since November 2000, the Foreign and Commonwealth Office (FCO) has been expected to send a copy of each treaty laid before Parliament to the departmental select committee that it considers relevant. The committee can then decide whether to scrutinise the treaty, and publish a report, or it can pass the treaty on to another committee or committees. If it scrutinises a treaty, it can draw special attention to the House or report for information*." See: https://committees.parliament.uk/committee/448/international-agreements-committee/content/116407/treaty-scrutiny-under-the-constitutional-reform-and-governance-act-2010/.

[42] With respect to debates in the House of Commons, see: https://researchbriefings.files.parliament.uk/documents/SN05855/SN05855.pdf.

powers exist). In general terms, the Bar Council is aware that certain Parliamentary Committees have accumulated particular experience of treaty scrutiny (including, principally, the House of Lords EU Committee and, more recently, the International Agreements Committee[43]) and have acquired influence and respect in consequence. It is also aware that these and other committees which have considered the issue of treaty scrutiny practice have recently published reports identifying what are seen as shortcomings in CRAG.[44]

33. The Bar Council is strongly of the view that the state of affairs described in the previous paragraph is inimical to a serious and educated public interest in treaty matters, and is confident that the Committee will be looking to ways of ameliorating it. The Bar Council would welcome a comparative study of the current practice of Committees in regard to treaties,[45] with recommendations for its rationalisation.

34. The Bar Council is also unclear whether each relevant committee which is involved in scrutinising treaties is able to receive advice other than from the Government in cases where there may be particular outside expertise in the subject matter of the treaty. As a result, the Bar Council is simply not in a position to know whether or how it might itself be able in future to offer assistance to Parliamentary Committees in their treaty scrutiny function.

b) Other international 'agreements' (non-legally binding)

35. The Bar Council notes (see paragraph 26 above) that CRAG was designed to apply only to treaties, i.e., agreements (whatever their formal designation) which are binding under international law.[46] It does not apply to other international documents which, even though arrived at by some form of 'agreement' between Governments, are not intended by them to be legally binding. It follows that there is no opening under CRAG for Parliamentary scrutiny of other intergovernmental understandings of that kind.

36. It is not at first sight clear, however, what advantage would be gained by attempting to extend CRAG to such other informal intergovernmental understandings, except perhaps in very limited circumstances (as to which see paragraph 39(b) below). To do so would seem to pose acute problems of definition and demarcation, not as between binding and non-binding instruments, but as between those in the latter category that might justify some form of scrutiny and those which don't.[47] It might moreover entail bringing within the net an incalculably large number of documents, some of which will not be public for understandable reasons, owing to the areas with which they deal, e.g., security and intelligence, joint weapons programmes, police cooperation, control

[43] The House of Lords International Agreements Committee was formerly a sub-committee of the EU Committee.

[44] See the reports of the Lords Constitution Committee (April 2019), the Lords EU Committee (June 2019), the Commons International Trade Committee (December 2018), and the Lords International Agreements Sub-Committee (July 2020).

[45] To cover such topics as: whether explanatory memoranda are sufficiently informative; whether 21 days is long enough and the implications if this period were to be changed or provision made for extensions on request; whether there have been instances when a debate had been requested but time was not made available; and the operation in practice of the exceptional circumstances provision in s.22.

[46] S.25(1), CRAG. See also paragraph 4 above.

[47] An instructive current example is the recent New Atlantic Charter 2021 (https://www.gov.uk/government/publications/new-atlantic-charter-and-joint-statement-agreed-by-the-pm-and-president-biden/the-new-atlantic-charter-2021) which, although based on international agreement at high level, is plainly not binding in any legal sense, and which, if Parliamentary attention were called for, would not be by a treaty scrutiny process.

of nuclear materials, and the like. The Bar Council will therefore, as already indicated, limit its focus to treaties properly so called, and in particular those designed to be given effect in UK law.

37. However, the Bar Council notes the existence of a limited category of international exchanges which even if they are (or are said to be) non-binding and are not implemented through legislation, may still be capable of having an impact on the domestic plane. For example, the Harry Dunn case has highlighted an exchange of notes relevant to the diplomatic status and immunities of certain US personnel in the UK, which had not previously been made public. The Bar Council is not able to comment further, as the matter is currently before the courts, but mentions it as an example of an international exchange which, irrespective of whether it amounts to a treaty, had a direct impact on the operation of the law in the UK.

Question 6: How effectively are constitutional conventions, such as remaining aspects of the Ponsonby rule on making time for treaty debates, and informing Parliament of non-treaty international agreements, operating alongside CRAG? Do these conventions need to be formalised?

38. This question appears to assume the existence of constitutional conventions "*on making time for treaty debates, and informing Parliament of non-treaty international agreements, operating alongside CRAG*". The Bar Council is however unaware of whether this is the case in practice, and therefore reserves further comment for the time being.

39. Subject to the above, the Bar Council makes the general observation that, while there is certainly a potential role for constitutional conventions in the area of treaty-making, specific undertakings by the Government would provide greater clarity and certainty. In particular, the Bar Council would welcome written guidance identifying the criteria which the Government apply in deciding

    a. whether "*exceptional*" circumstances exist for the purpose of CRAG s.22; and

    b. under what circumstances Parliament could or would be informed about informal intergovernmental exchanges or understandings which are not regarded as legally binding but which may have significant domestic effects. The Bar Council notes that during the passage of CRAG the then Lord Chancellor accepted that some such instruments might be examined by a Select Committee on an ad hoc basis, if need be in confidence.[48]

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[48] See the Joint Committee on the Draft Constitutional Renewal Bill, Volume II: Evidence, Session 2007-8, Q752, pp.331-332, at https://publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166ii.pdf, which records the following exchange:

> "**Q752** ***Lord Williamson of Horton:*** This is a specific point on treaties. We have been told that many treaty-like documents, such as memoranda of understanding, exchange of letters between governments, UN security resolutions and so on, may be more important in their effect than most treaties but do not fall under the Ponsonby Rule. I think, for example, the stationing of ballistic missiles, which is pretty important, was the subject of a memorandum of understanding between the US and the UK. What steps would the Government foresee to ensure effective scrutiny of such documents? It is a bit weird to settle everything on treaties but to leave out some very important things.
>
> *Mr Straw:* I think, my Lord, they would have to be done on an *ad hoc* basis. It is certainly the case that there could be a memorandum of understanding on X, which is a much bigger issue, than a treaty on Y. What, however, we have to deal with here is the legal status of these instruments. Since memoranda of understanding do not have the same status in international law as treaties, presumably that was why it was

Question 7: Should scrutiny of treaty making be more integrated with scrutiny of corresponding implementing legislation?

40. One of the Bar Council's chief interests is in promoting mechanisms that lead to considered and well-drafted legislation including that which results from the treaty-making process. The Bar Council's assumption is that Parliament and Government will be at one in the objective that the UK's domestic laws and international obligations should be in harmony with one another, and that the former should not avoidably put the UK in breach of the latter.

41. As noted in paragraphs 4 and 16 above, the Government will only proceed to take steps towards ratification of a treaty after any implementing legislation has been adopted. This has meant in practice, so it appears, that the laying of the treaty before Parliament pursuant to s.20 of CRAG will also be postponed until that stage.

42. This position has its logic, in that the CRAG process is directed specifically to the formal decision to ratify or not. Nevertheless, in the case of treaties requiring implementation through the adoption of primary legislation, the debate in Parliament on the Bill is likely to touch on the substance of the treaty. Such scrutiny will often, however, to be incidental to consideration of the substance of the Government Bill, rather than being focussed on the treaty itself or on whether it should be ratified.

43. In the different situation where a new treaty can be implemented through delegated legislation under already existing powers, the procedure to be followed will depend upon the terms of the relevant primary legislation.[49] If the relevant legislation provides for the negative resolution procedure, there will be a correspondingly reduced opportunity for Parliamentary scrutiny. In certain recent instances, notably in respect of rolled-over trade agreements in the wake of UK exit from the EU, the laying of the draft statutory instrument has not preceded the laying of the treaty under CRAG.[50]

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chosen to be a memorandum of understanding rather than a treaty, then it would not fall within this area. For the future, I could envisage that, if such a memorandum were disclosable, albeit in confidence, it might be examined by a Select Committee, it might be examined by Intelligence and Security Committee, and certainly would have been examined, I suspect, by at least the chairmen of the relevant Congressional Intelligence and Security Committees."

As regards the Harry Dunn case referred to in paragraph 33 above, the there was a subsequent 2020 exchange of notes and the Bar Council understands the Foreign Secretary made a written statement to Parliament, informing it of the existence and essence of the exchange.

[49] The applicable procedure stipulated by the relevant primary legislation varies considerably. Certain legislation relating to particular categories of treaties expressly require a positive resolution of the House of Commons approving a draft Order in Council: see e.g, as regards double taxation treaties, Taxation (International and Other Provisions) Act 2010, s.2, 3 and 5(2) (although such treaties are in any case among those excluded from the scope of application of CRAG: see CRAG, s.23(1)). Under the Taxation (Cross-border Trade) Act 2018, the adoption of regulations in relation to import, export and excise duty (including, for instance, those adopted in order to implement a free trade agreement) are subject to the 28-day affirmative procedure and are subject to annulment pursuant to resolution of the House of Commons. Under ss.1(1), 2(1) and 4 and Sch. 2 and 3, Trade Act 2021, different procedures apply for the adoption of regulations implementing the Agreement on Government Procurement and rolled-over international trade agreements (including free trade agreements) depending on whether they are made by a Minister or devolved authority acting alone, or by a Minister acting jointly with a devolved authority

[50] Such an approach has occurred notably with implementation of post-Brexit trade agreements, where the Government in its Explanatory Memoranda has on occasion stated that tariffs and tariff quotas will be implemented under regulations to be made under the Taxation (Cross-border Trade) Act 2018. See e.g. the Explanatory Memorandum in respect of the UK-Turkey Free Trade Agreement: Department for International

44. In other cases, in which ratification of the treaty does not require implementing legislation, either because the treaty has no effect as such on domestic law, or because domestic law is already compliant, the only opportunity for Parliamentary scrutiny will be when the treaty is laid before Parliament under CRAG.

45. It appears from the above that, under current procedures, Parliamentary scrutiny of whether a treaty should be ratified often comes as the last stage in the process, and that there is a disconnect between, on the one hand, scrutiny of whether a treaty should be ratified, and, on the other, scrutiny of the manner in which relevant obligations are to be implemented in the domestic legal system.

46. In these circumstances, the Bar Council recommends that:

    a. in those cases where the passing of primary legislation is required for implementation, the connection with the underlying treaty should in all cases, as a matter of routine, be made clear in any White Paper and/or the explanatory notes to the Bill and the text of the treaty be made available to Parliament at latest at the same time as publication of the Bill. In this manner, even in advance of the formal laying of the treaty under CRAG, scrutiny of the treaty and whether or not it should be ratified can form a part of, and inform, the debate on the implementing legislation.

    b. as regards those treaties which can be implemented via statutory instrument under existing powers, it would in general enhance the opportunity for effective scrutiny if any relevant implementing legislation is laid either in advance of, or at latest at the same time as, the treaty itself is laid under CRAG.

47. The opportunities for realistic scrutiny will also be enhanced if, as a matter of course, in all cases when a draft statutory instrument intended to implement a treaty is laid before Parliament, the accompanying Explanatory Note makes clear the connection with the treaty it is intended to implement, and the text of the treaty is made available to Parliament. This has already been the approach in some fields (e.g. statutory instruments made under s.3(1) of the Consular Relations Act 1968 to give effect to bilateral consular treaties). Such an approach would provide an enhanced opportunity for scrutiny of the treaty at the same time as the terms of the implementing statutory instrument, and could be undertaken even if the laying of the treaty under CRAG is not expected to take place for some time.

Question 8: How effectively is the implementation of international treaties, including the decisions of new decision-making bodies, being scrutinised?

48. This question takes the enquiry beyond Parliamentary scrutiny of treaty-making as such. The Bar Council notes that, while there is much to be said for a mechanism for reporting and recording formal amendments to treaties in force for the UK, in the

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Trade, *Explanatory Memorandum on the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Turkey* (24 February 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964278/EM_CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.odt, para.5.1; Explanatory Memorandum in respect of the Interim Agreement establishing the UK/Cameroon Economic Partnership: Department for International Trade, *Explanatory Memorandum on the Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Cameroon* (20 April 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978693/EM_MS_2.2021_UK_Cameroon_Interim_Agreement_Economic_Partnership.odt, para.5.1.

typical case the amendment can itself only take place by treaty, which would thus come under the standard scrutiny process in its own right. Less formal amendment procedures are less common (although included in a number of trade agreements, where "joint governance" bodies are given the power to make amendments, normally on technical aspects); such powers of amendment are most appropriately dealt with when the parent treaty comes under scrutiny in the first place. Moreover, to extend the present scope of scrutiny so as to embrace the 'regulations, rules, measures, decisions or similar instruments' currently excluded by s.25(2) of CRAG is likely to sweep up a huge array of subsidiary instruments (including, to take two examples, binding decisions of dispute settlement bodies, and decisions of the UN Security Council under Ch. VII of the UN Charter), which are simply not suited to being subjected to a scrutiny process.

4) ROLE OF THE HOUSE OF COMMONS

Question 9: What role should Parliament, and the House of Commons in particular, have at *different stages* of the treaty making and implementation process?

Question 10: What role should Parliament, and the House of Commons in particular, have in relation to *different types* of treaties, and on what basis?

Question 11: Given that international agreements affect people's lives, how can the House of Commons increase the democratic accountability of international agreements?

49. The Bar Council proceeds on the basis of the following objectives, which have its full support:
    a. the constitutional allocation of functions to Parliament and to the Executive should be maintained and respected, and a harmonious relationship between them in the treaty-making field should be encouraged;
    b. the competences and special perspectives of the devolved administrations, OTs and CDs should be respected; and
    c. the standing of the UK's courts and legal professions should be maintained, and so far as possible enhanced.
50. The assumption is that the framework for such a process will for the foreseeable future remain that laid down in CRAG. That puts much of the responsibility in the hands of Government, and therefore much of the focus on ensuring its sustained engagement with Parliament, but at the same time a correlative responsibility on Parliament in ensuring a constructive response in return. The Bar Council nurtures the hope that a revised and improved scrutiny process might, at its best, generate expert and authoritative reports on individual treaties which could be of real help to a wide variety of users in understanding treaties and interpreting and applying them.
51. There is no 'legal' answer to the question of whether some treaties merit greater scrutiny by Parliament (or the House of Commons) than others under CRAG or any other process. To an extent any answer must be informed by the volume and practicalities of modern treaty practice referred to at paragraphs 11-12. For this reason, and as elaborated below, at paragraph 64, the Bar Council suggests that consideration of any scrutiny process consider inclusion of a 'triage' function so the scrutiny body can make that assessment itself treaty by treaty.

5) INFORMATION AND RESOURCING REQUIREMENTS

Question 12: How, and at what stages of the treaty making process, should the Government share information with Parliament?

52. Much as with the question of what role Parliament, and the House of Commons in particular, should have at different stages of the treaty-making and implementation process or in relation to different types of treaties, there is no discernibly 'legal' answer to this question. The answer ought rather to emerge pragmatically in each case in the light of the practical realities of treaty-making and the principles set out above.

53. There may be sensitivities which impose secrecy or which otherwise make it undesirable to share information more widely than strictly necessary. Disclosure of information may compromise the UK's negotiating position. That said, the Bar Council sees no reason why the general principle should not be that all information capable of being shared with the relevant Committee or Committees should be shared as early as possible, subject to any necessary safeguards (discussed further below at paragraphs 55-60).

54. Lastly, though the question is posed in the context of treaties, it is perhaps more acute in the context of non-legally binding intergovernmental understandings, which may be entered into precisely because sensitivities of one sort or another make it unrealistic to conclude a formal treaty (see also paragraph 39(b) above).

Question 13: Should Parliament have access to confidential information and, if so, what mechanisms might assure the continued confidentiality of that information?

55. In accordance with the answer to the previous question, it is difficult to be prescriptive as to whether confidential information should routinely be made available to Parliament as a whole, or even to more restricted groups within Parliament, such as committees.

56. Even on the basis that the presumption should be one of transparency and that information will be shared as early as possible, the decision as to what information (including confidential information) should be shared with Parliament, at what point in the treaty-making process, and subject to what safeguards to preserve any confidentiality must be one for the Government.

57. As to the mechanisms that might assure the continued confidentiality of that information, the expectation must be that any attempt by a member of the public to seek disclosure of information provided in confidence could be resisted under the exemptions from disclosure in the Freedom of Information Act 2000, namely ss.27 (international relations), 34 (Parliamentary privilege), 36 (prejudice to the conduct of public affairs) and 41 (information imparted in confidence).

58. The DIT has proposed that committees scrutinizing the negotiation of Free Trade Agreements (FTAs) could receive private briefings from negotiating teams which would need to be on an understanding of confidentiality.[51] This has been welcomed by the House of Lords EU Committee.[52] The Bar Council is unaware whether this has

[51] Department for International Trade, "Processes for making free trade agreements after the United Kingdom has left the European Union", Command Paper, February 2019, p.6.
[52] "Treaty scrutiny: working practices" by the House of Lords European Union Committee (11th Report of Session 2019-21, p.23.

taken place or how well it has worked in practice, including to protect the confidentiality of the information shared.

59. The more difficult question is how to protect such information from inadvertent or intentional disclosure by the members of Parliament (and any support staff) to whom it has been communicated, given that disclosure of such sensitive information could prejudice the UK's negotiating position or damage the public interest in some other way.

60. Mechanisms deployed in other contexts, such as court proceedings,[53] to protect confidential information might provide useful precedents to be explored. These include closed or private hearings, confidentiality rings, limited numbered copies being made available, material being made available to read only in a specified secure location, redactions and gisting.[54]

Question 14: What treaty information should be publicly available in respect of the UK's current treaty obligations and to facilitate scrutiny of new treaties?

61. The Committee on Standards in Public Life states that "holders of public office should act… in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing".[55] However, there will be some circumstances in which it is necessary to keep information confidential, e.g., to protect national security or international relations, or where disclosure might compromise the UK's negotiating position.

62. The Government already provides a large amount of information publicly online on gov.uk on existing treaties and concerning negotiations of new treaties (such as press releases by ministers), and on legislative processes including those concerning the adoption of implementing legislation.

63. In so far as members of the public seek information not published online, in the Bar Council's view the current legislative framework in the Freedom of Information Act 2000 is sufficient for both the purpose of providing the public with a route to access such information, in so far as it is not already available, and withholding information where it falls within one of the exemptions or would be unreasonably burdensome.

Question 15: What sort of expertise does Parliament need to scrutinise treaties?

64. It follows from paragraphs 11-12 that it is inherently unlikely that any given Parliamentary Committee would have the expertise, including in particular the specialised legal expertise, needed to perform a useful scrutiny of all treaties across the board. That would seem, in turn, to imply the following consequences:

    a. Treaties have two aspects: the specifically treaty-like characteristics of a particular instrument (Parties, entry-into-force, reservations, amendment or modification, withdrawal, settlement of disputes, and the like) versus its substantive provisions governing the treaty's main subject-matter. This mirrors the distinction between the expertise and oversight function of the FCDO over UK treaties and treaty practice in general, and the subject-matter expertise of whichever Government Department carries policy responsibility (and there may be more than one) for a treaty's substantive content. Any new scrutiny

[53] Though breach in the context of judicial proceedings carries with it the threat of contempt proceedings.
[54] Providing some form of summary or reformulation that would convey any point of substance without causing harm to the public interest.
[55] The Committee on Standards in Public Life, "The Seven Principles of Public Life", published 31 May 1995, https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2.

processes under contemplation could usefully reflect that distinction, e.g., through the creation of a scrutiny body specifically designed to build up competence and expertise over treaty questions (as mentioned above), the natural governmental interlocutor of which would be the FCDO, without the risk of interference with the specialist functions of other Departmental Select Committees and their governmental interlocutors.

b. Any scrutiny processes should incorporate a triage function, through which the limited number of treaties considered apt for detailed substantive scrutiny were separated out from those which were routine or required no more than perfunctory examination. This triage function could also be assigned to a scrutiny body of the kind foreseen in a. above.

65. A further point in this connection is that the Questions raised by the Committee focus, and correctly so, on the scrutiny of treaties by Parliament rather than either House on its own. The Bar Council would be strongly in favour of any new scrutiny mechanism being a joint one of both Houses, and thus able to bring to bear the combined experience and expertise available in both and avoid duplication of effort.

66. The Bar Council concludes with the thought that useful lessons are bound to be available from the treaty scrutiny and approval processes of other countries, especially, but not limited to, those in operation in countries with similar legal systems to the UK. The most recent comparative analysis of which the Bar Council is aware was compiled some years ago under the aegis of the American Society of International Law.[56] An organization like the British Institute of International & Comparative Law (BIICL) is likely to be well placed to produce an updated study efficiently and in good time. The Bar Council would warmly welcome an initiative by the Committee to commission a study of this kind and would happily lend such a project its encouragement and practical support.

July 2021

[56] Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, in association with the American Society of International Law, 2005).