ICOS: 23/77127/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION (JUDICIAL REVIEW)

In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial Review

And in the matter of the Northern Ireland (Legacy and Reconciliation) Act 2023

SUBMISSIONS ON BEHALF OF
AMNESTY INTERNATIONAL, UNITED KINGDOM (INTERVENER)

A. INTRODUCTION

1. This judicial review is of profound importance to the investigation of past human rights violations in Northern Ireland, together with the way such violations will be investigated and dealt with going forward. Amnesty International United Kingdom ("AIUK") supports the judicial review.

2. In doing so AIUK does not intend to duplicate the arguments already before the Court. Rather, it intervenes to assist the Court on the following issues in line with its application for leave to intervene dated 27th October 2023 and the Court Order dated 7th November 2023:

    (a) Impact of the legislation on the wider victim community.
    (b) Import of the right to truth and redress in the context of Articles 2 and 3 of the European Convention on Human Rights ("ECHR"). AIUK will confine its discussion of this issue by reference to the parliamentary Briefing Paper it provided for the report stage of the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("the Bill")[1] and focusing on the international law standpoint.
    (c) Rights of victims to justice, truth and reparation, and the importance of reparations for historical human rights abuses and a cross-comparison with other jurisdictions who have established similar forums for truth and reconciliation.
    (d) Wider international law on amnesties and other means of impunity in the context of the rights to post-conflict justice, truth and reparations.
    (e) Provisions in the legislation for dealing with the issue of torture or other inhuman or degrading treatment or punishment under Article 3 of the ECHR.
    (f) Treatment in the legislation of cases of enforced disappearance and the engagement of Articles 2 and 3 of the ECHR.

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[1] NI Troubles (Legacy and Reconciliation) Bill, Report Stage – House of Lords, Amnesty International UK Briefing, June 2023

3. These submissions are informed by Amnesty International's June 2007 report, *'Truth, justice and reparation, establishing an effective truth commission'* and a 2010 follow up[2], which are based on Amnesty International's assessment of the work of truth commissions in many countries around the world over the past few decades. They are also informed by international and regional law standards and jurisprudence on post-conflict justice and truth.

4. In summary, the Northern Ireland (Legacy and Reconciliation) Act 2023 ("the Act") removes existing judicial and investigative processes and replaces them with a set of mechanisms that fail to discharge the UK's human rights obligations and fall far short of any comparable human rights compliant investigative process, within the wider international spectrum. Furthermore, the grant of amnesties or immunities are non-permissible as they are plainly contrary to the international and ECHR obligations to identify, investigate and prosecute where sufficient admissible evidence is found, suspected perpetrators of grave breaches of human rights.

5. The Court is respectfully urged to carefully consider the principles of international law in evaluating this case. The UK, bound by its commitments to international human rights treaties it has ratified, must acknowledge their influence on domestic legislation. This Court is well-versed in using international law as a lens through which to assess the legality of domestic acts, and such an approach is crucial in the current review of the Act where fundamental and inalienable human rights are engaged.[3]

B. BACKGROUND TO AMNESTY INTERNATIONAL AND AIUK

6. As detailed in AIUK's application for leave to intervene, Amnesty International is the world's largest human rights organization. It is present in over 150 countries and territories. Its mission is to undertake research and action focused on promoting respect for and protection of human rights principles. Amongst other accreditations, it has participatory status at the Council of Europe, retains observer status with the African Commission on Human and Peoples' Rights, and has working relations with the Inter-Parliamentary Union and the African Union.

7. There are more than 7,500 Amnesty International groups, including local, youth, and professional groups. AIUK is the UK section of the global Amnesty International movement. It has 520,000 activists and supporters across the UK who campaign on local, national and international issues. Amnesty International is independent of any government, political ideology, economic interest or religion.

NORTHERN IRELAND

8. Amnesty International has an extensive legacy in Northern Ireland of championing the fundamental rights enshrined in international law and has been a diligent advocate against the perpetration of torture and other ill-treatment and for accountability for such acts. AIUK's seminal efforts in this regard can be traced back to its pivotal 1971 publication, *'Report on Allegations of Ill-treatment made by Persons Arrested under the Special Powers Act after 8 August*

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[2] *Truth, Justice and Reparation – establishing an effective truth commission*, Amnesty International, 11 June 2007, at https://www.amnesty.org/en/documents/pol30/009/2007/en/ and *Commissioning Justice: Truth commissions and criminal justice*, Amnesty International, 26 April 2010, at https://www.amnesty.org/en/documents/pol30/004/2010/en/

[3] *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2007] UKHL 26; *Keyu and others v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69

1971'[4]. This report laid the groundwork for subsequent inquiries into human rights violations, particularly those perpetrated against a group later referred to as 'the Hooded Men'. In December of the same year, a delegation led by Thomas Hammarberg, who would later be honoured to receive the Nobel Peace Prize on Amnesty International's behalf, conducted ground-breaking interviews with former internees in Northern Ireland. These interviews culminated in the comprehensive 1972, *'Report of an Enquiry into Allegations of Ill-treatment in Northern Ireland'*[5] that provides an authoritative account of those events.

9. AIUK has contributed significantly to the legal discourse on the absolute right to be free from torture and other ill-treatment—a right enshrined in Article 3 of the ECHR and Article 7 of the UN Convention Against Torture. Its involvement as interveners, as seen in UK Supreme Court case of *Re McQuillan, McGuigan & McKenna*[6], has afforded the Courts with an invaluable insight into the legal and moral imperatives surrounding the use of the so-called 'five techniques' during interrogations. Its expert submissions on the use and means of torture, are informed by long-standing investigative work into similar techniques around the world[7], such as by the British armed forces in Iraq as evidenced by their briefing to the UN Committee Against Torture in May 2013 regarding the conduct of the British armed forces in Iraq[8].

10. Amnesty's commitment to uncovering the truth and seeking justice for past human rights violations has also seen it actively engage with UN Special Rapporteurs and other high-level international entities, thereby reinforcing the importance of aligning the Act with the prevailing standards of international human rights law[9].

11. More specifically, Amnesty has for decades been involved with the question of 'truth recovery' in Northern Ireland as an essential element of the duty to investigate human rights violations and abuses, of a victim's right to remedy, including reparation, and in combating impunity. This is evidenced by its 2013 report *'Northern Ireland: Time to deal with the past'*[10]. Amnesty recognises the importance of truth recovery, but it does not consider that objective can be a permissible replacement for or an alternative to bringing wrongdoers to justice, or that the pursuit of truth somehow counterbalances or tempers the need for justice.

12. Nevertheless, it is clear the Act not only seeks to bring criminal investigations to an end whilst providing an almost automatic immunity to individuals suspected of grave wrongdoing, but its 'information recovery' provisions are a hopelessly flawed mechanism for 'truth recovery'.

ENGAGEMENT WITH THE ACT

13. AIUK raised serious concerns about the Bill from the time it was first mooted, stating that it contravened the UK's human rights obligations as reflected in its 2023 briefing paper, '*NI Troubles (Legacy and Reconciliation) Bill'*. It continued to be actively engaged in the discussions

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4 https://cain.ulster.ac.uk/othelem/organ/ai/1972-03-14_ai.pdf.

5 *ibid*

6 *Re McQuillan, McGuigan & McKenna* [2021] UKSC 55, at https://www.supremecourt.uk/cases/docs/uksc-2020-0019-judgment.pdf

7 Combatting torture and other ill-treatment: a manual for actions, Amnesty Intrenational, 11 November 2016

8 *United Kingdom: Briefing to the UN Committee Against Torture*, 50th Session, Amnesty International, May 2013, at https://www.amnesty.org/en/documents/eur45/002/2013/en/

9 https://www.amnesty.org.uk/press-releases/northern-ireland-united-nations-calls-troubles-bill-be-scrapped

10 *Northern Ireland: Time to deal with the past*, Amnesty International, 2013, at https://www.amnesty.org/en/documents/eur45/004/2013/en/

over the Bill throughout its passage through Parliament. It emphasized the critical viewpoints of a range of stakeholders including the United Nations Office of High Commissioner on Human Rights and United Nations Special Rapporteurs[11], focusing particularly on the principles of truth, justice, and non-recurrence.

14. AIUK also dialogued with the Irish Government regarding its international human rights obligations in relation to Northern Ireland. It also supported meetings with prominent figures such as the Rt Hon Sir Declan Morgan, who is the Chief Commissioner-Designate of the Independent Commission for Reconciliation and Information Retrieval ("ICRIR"), when AIUK echoed the concerns and recommendations made by the UN High Commissioner for Human Rights in January 2023[12], including his concerns over conditional immunity, ability for the ICRIR to work independently, the need for effective remedies and reparations, and the requirements for reconciliation. The Commissioner had also called for the UK government to reconsider the Bill, given the overwhelming and extensive disapproval it had attracted from the Northern Irish community and the substantial compliance issues with the European Convention on Human Rights. He underscored the imperative of centring any future decisions regarding the legacy of the Troubles on the rights and needs of victims. The Commissioner for Human Rights of the Council of Europe reflected similar concerns in her earlier, 2022, report following her visit to the UK[13].

15. AIUK notes that the final amendments to the Bill included the provision, now enacted in section 44 of the Act, that on 1st May 2024 'any inquest into a death that resulted directly from the Troubles is brought to an end, unless it is about to produce a verdict'. Not only is this likely to prematurely end a considerable number of ongoing inquests (as well ensuring that a significant number do not get started at all), but it is also likely to incentivise obstructive behaviour of state parties by providing a target date for which to 'run down the clock'. Permitting state forces and non-state armed groups to evade accountability for murder and other unlawful killings, torture, enforced disappearances, abductions, hostage-taking as well as other severe human rights violations, could signal to other nations worldwide that similar legislative measures to avoid justice, or even proactively shield suspected perpetrators, are acceptable. This not only impedes the course of justice but also diminishes the UK's position of upholding international human rights standards.

16. Moreover, the UK government decided to proceed to have the Bill enshrined in legislation despite overwhelming opposition from victims, victims' groups, political parties in Northern Ireland, the Irish Government, and human rights organizations including Amnesty International. The government's proposed 'game-changing' amendments that were reported as being the product of its *"journey to improve the Bill dramatically"*[14], failed to materialize in a manner that would align the Act with the ECHR, whilst the late announcement of amendments

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11 Special Raporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Special Rapporteur on extrajudicial, summary or arbitrary executions

12 *UK: Rights of victims and survivors should be at the centre of legislative efforts to address legacy of Northern Ireland Troubles*, Volker Türk, Press Release, 19 January 2023, at https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address

13 See paras.126-131, *Country Report, Commissioner for Human Rights of the Council of Europe: Report following her visit to the UK from 27 June to 1 July 2022*, Dunja Mijatović, 18 November 2022 at https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5

14 *Heaton-Harris says 'game-changing amendments' planned for Northern Ireland legacy bill*, UTV, Northern Ireland, 11 May 2023, at https://www.itv.com/news/utv/2023-05-11/big-game-changing-amendments-planned-for-legacy-bill

served to further undermine the process by limiting the time available for public and stakeholder scrutiny.

17. The outworking of this has been to dampen substantive critical response and meaningful legislative examination. This approach is not only detrimental to the rule of law but also disrespects the stakeholders most affected by the Troubles—namely, the victims and their families. Regrettably that 'meaningful legislative examination' is now having to take place through judicial reviews and other legal proceedings.

18. The right to truth recovery is essential to upholding Articles 2 and 3 of the ECHR, as it ensures rigorous investigation into deaths and abuses, aiding in obtaining justice for victims and upholding the right to life and the absolute protection from torture and other ill-treatment. It reinforces the rule of law and trust in public institutions while facilitating healing in post-conflict settings by confronting historical injustices. Accordingly, it is an integral part of any serious attempt at 'reconciliation'. However, AIUK rejects any suggestion that justice can be denied or qualified in return for aspirational reconciliation, especially where the intent appears to be to seek to call on those who have suffered serious human rights breaches to 'reconcile' with the perpetrators whether they want to or not.

19. The Act does not deal with those issues appropriately and lawfully as it effectively excludes any stringent and robust scrutiny of past acts, facilitates *de facto* amnesties, and, by design, fails to ensure that those guilty of crimes and human rights abuses are brought to justice. The effectiveness of the Act needs to be measured against its ability to uphold the tenets of truth and justice as enshrined in the ECHR. A particular element of this is the position of the 'disappeared' and the rights of their families to have a thorough, effective, impartial and independent investigation into disappearances, especially where state involvement is suspected, as is implicitly mandated by Article 2 of the ECHR[15]. Whilst the circumstances and whereabouts of the disappeared is recognised as an aspect of the Troubles and remains unresolved and requires thorough investigation, the failure of the Act to adequately address it stands as a glaring oversight.

20. International law underscores the importance of amnesties not undermining a state's duty to investigate, prosecute, and provide remedies for grave human rights violations, a concept deeply intertwined with truth recovery efforts. Under international human rights standards, particularly those articulated by the United Nations and regional human rights systems, amnesties for serious human rights violations are generally considered incompatible with the right to truth, which is an essential part of broader reparative justice mechanisms. Accordingly such amnesties ought not be provided in any circumstances as they are inimical to the pursuit of truth and justice. However, the treatment of amnesties, in the context of the provisions of the Act as a whole, renders it contrary to all the established human rights principles and is offensive to the victims and their families.

C. WIDER OPPOSITION TO THE ACT

21. There is undeniably widespread and deep opposition to the Act.

[15] See e.g., p.38, *Missing persons and victims of enforced disappearance in Europe, Issue Paper, Council of Europe Commissioner for Human Rights*, March 2016

22. At the level of international bodies, the UN High Commissioner for Human Rights[16], UN Special Rapporteurs[17], the Council of Europe's Commissioner for Human Rights[18], and the Committee of Ministers for the Council of Europe[19], have all raised significant, persistent and ongoing objections to the Act on human rights grounds, as has Amnesty International and other human rights organisations. Yet during the progress of the Bill the government ignored all calls to pause the legislative process, respond meaningfully to the criticisms and commit to a way forward that puts victims at its centre as was being called for[20].

23. The Act is also unpopular with members of the UK public and has united the victims community and political parties in Northern Ireland in opposition to it, including the Commissioner for Victims and Survivors[21]. While not determinative for the legal assessment, it is noteworthy that in this case public opinion very much goes hand in hand with the fact that many aspects of the Act are not compatible with human rights principles. The depth and extent of its unpopularity can be seen from the results of a survey published in June 2023 that AIUK had commissioned from Savanta[22], which revealed not only that 'the majority of the UK public is opposed to this bill', but specifically that:

    - 68% of UK adults said people accused of serious crimes, such as murder, should not be able to receive immunity from prosecution in exchange for providing information about the crimes, while only 19% say they should (13% didn't know).
    - 65% of UK adults said victims and/or the families of victims of serious crimes, such as murder, should have access to an independent inquest.
    - 87% UK adults say that people should still be prosecuted for serious crimes, such as murder, even if they were committed decades ago, while only 6% say they should not (7% didn't know).
    - 53% of UK adults say that those accused of killings in relation to the Troubles, should not be able to receive immunity from prosecution in exchange for providing information about the crimes, while only 22% say they should (25% didn't know).

24. The survey included 2,171 UK adults from 16 years old and was adjusted for representative sampling based on age, gender, region, and social grade, together with the participants' voting patterns. The level of opposition to the Act in Northern Ireland has attracted significant media coverage. This is further evidenced by the substantial volume of judicial review applications filed in protest, which is itself a testament to the dissent of victims. Resistance to the Act is further underscored by the considerable number of civil claims precipitously submitted prior to the 'guillotine' deadline stipulated in the Bill (now s.43 (3) – (6) and s. 63 (2) of the Act).[23] In

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16 https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address

17 https://www.ohchr.org/en/press-releases/2021/08/uk-un-experts-voice-concern-proposed-blanket-impunity-address-legacy

18 https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5

19 https://www.coe.int/en/web/execution/-/committee-of-ministers-recalls-concerns-about-the-northern-ireland-troubles-legacy-reconciliation-bill

20 UN High Commissioner for Human Rights concerned at proposed NI legacy Bill, Belfast Telegraph, 19 January 2023, at https://www.belfasttelegraph.co.uk/news/northern-ireland/un-high-commissioner-for-human-rights-concerned-at-proposed-ni-legacy-bill/42299506.html

21 https://www.cvsni.org/news/legacy-bill-this-is-a-poor-piece-of-law-that-were-forced-to-work-with/

22 *Northern Ireland: Majority of the UK public are against the Troubles Bill - New Poll*, Amnesty Press Release, 23 June 2023, at https://www.amnesty.org.uk/press-releases/northern-ireland-majority-uk-public-are-against-troubles-bill-new-poll

23 See, e.g., reported at https://www.itv.com/news/utv/2022-05-17/more-than-70-emergency-civil-actions-in-response-to-troubles-legacy-bill

addition, it is noteworthy that the Attorney General for Northern Ireland ordered five fresh inquests prior to the Act coming into force, in August of this year.[24]

25. The pursuit of truth and justice has been a protracted journey for the victims of the Troubles, yet the Act fails to offer the long-sought catharsis for those yearning for their closure.

D. RIGHT TO TRUTH

26. The Act raises serious questions about its compatibility with the right to truth. As explained in Amnesty International's report *Truth, justice and reparation*[25], the victims of gross human rights violations and their families, as well as members of society generally, have the right to know the whole truth about past human rights violations. The right to truth is a cornerstone of international justice (by which AIUK in this case also refers to 'transitional justice' in post-conflict situations) and is crucial in efforts to address past human rights violations[26]. The right to truth is engaged by the violation of the rights to access to justice, remedy and information.[27]

27. At an individual level, victims and their families possess an inalienable and non-derogable right to know the truth regarding the circumstances and reasons behind human rights violations, including the identities of the perpetrators and, in cases of death or enforced disappearance, the fate of the victims[28]. In particular, the right to know the fate and whereabouts of 'disappeared' relatives has been confirmed in the jurisprudence of international and regional human rights bodies[29], as well as of national courts[30]. This right, supported by Principle 4 of the Updated Set of principles to combat against impunity[31] and Principle 24 of the Basic Principles and

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[24] https://www.belfasttelegraph.co.uk/news/northern-ireland/five-fresh-inquests-ordered-into-uvf killings/a1004604635.html

[25] *supra*.

[26] See para.224, Inter-American Commission on Human Rights, Report No.136/99, case 10.488, Ignacio Ellacuría et al. (El Salvador), 22 December 1999, at https://www.oas.org/en/iachr/reports/pdfs/compendiumtransitionaljustice.pdf

[27] See, for example, Council of Europe Committee of Ministers, Guidelines on Eradicating impunity for serious human rights violations, approved on 30 March 2011; Inter-American Court of Human Rights, *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232

[28] Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91, 8 February 2006, para. 38 and Conclusions, at https://www.refworld.org/docid/46822b6c2.html

[29] Human Rights Committee, *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay*, (Communication No. 107/1981), Un Doc. CCPR/C/19/D/107/1981, 21 July 1983, para. 14; European Court of Human Rights, *Cyprus v. Turkey* (application no. 25781/94), Judgment of 10 May 2001, Reports of Judgments and Decisions, 2001-IV, para. 157; Inter-American Court of Human Rights, *Ernest Rafael Castillo Páez v. Peru* (petition no. 10.733), Judgment, 3 November 1997, para. 90; Inter-American Court of Human Rights, *Efraín Bámaca Velásquez v. Guatemala* (petition no. 11.129), Judgment, 25 November 2000, para. 200-201. See too Amnesty International's report on Sri Lanka's disappeared, *'Only Justice can heal our wounds'*, at https://www.amnesty.org/en/documents/asa37/5853/2017/en/

[30] Human Rights Chamber for Bosnia and Herzegovina, *The 'Srebrenica Cases' (49 applications) v. The Republika Srpska* (case no. CH/01/8365 et al.), Decision on admissibility and merits, 7 March 2003, para. 174-178

[31] Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, E/CN.4?2005/102/ADD.1. Principle 4 of which provides that: *"Irrespective of any legal proceedings victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate".*

Guidelines[32] on the Right to a Remedy and Reparation, is fundamental to the healing process and the administration of justice.

28. It is crucial to recognize that the government's proposition to substitute established truth recovery methods — such as criminal prosecutions, litigation, and inquests — with a quasi-judicial body represents a shift away from the entrenched safeguards of meticulous examination and accountability. Essential to upholding Article 2 and Article 3 are effective investigations, which hinge on the active involvement of victims, as well as the transparency and oversight that such involvement guarantees. These elements are conspicuously lacking in the present iteration of the Act. Furthermore, the conventional approach afforded victims an unequivocal right to remedies, enabling them to pursue reparations and witness the administration of justice first hand. In contrast, here the government in essence proposes to remove courts from the process of addressing serious crimes and human rights violations.

29. Amnesty International explains in its *Truth, Justice and Reparation* report that the right to truth requires states to provide information on: the causes of the events that have led to a person having become victim of a human rights violation; the reasons, circumstances and conditions of the violations; the progress and results of the investigation; the identity of perpetrators (both subordinates and their superiors); and, in the event of death or enforced disappearance, the fate and whereabouts of the victims.[33]

30. Accordingly, the Act including its establishment of the ICRIR by section 2, significantly breaches these international obligations. By limiting comprehensive investigations and prioritizing closing down paths to justice, the Act and the ICRIR do not satisfy the right to truth for individuals and society. The ICRIR's remit and powers, as currently outlined, do not unequivocally ensure the involvement of the victims and their next of kin, and full disclosure of all aspects of past violations, including the identification of alleged perpetrators and clarification of the victims' fates, all of which are necessary for a thorough truth recovery process. The Act, notably, does not guarantee justice for the aggrieved and violated individuals; instead, it presupposes their willingness to reconcile with their violators and to *'look into'* the violations perpetrated and the circumtances of the death or harmful conduct (s.13 (5)). This legislation notably skews the balance of significance in the overarching assessment of a particular case in favour of the offender, to the detriment of the victim who is deprived in any meaningful role in the process.

31. Moreover, the Act's proposed mechanisms prioritize the closure of historical cases and the issuing of unlawful immunities, over the detailed investigation and public disclosure of facts that the right to truth demands. This approach can effectively deny victims and society the full extent of truth recovery and to an effective remedy.

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[32] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147 at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation. Principle 24 includes a provision that *"victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."*

[33] See also UN Human Rights Committee, General Comment No. 36 (2019), Right to Life, para. 28

32. Considering the collective dimension of the right to truth, the shortcomings of the Act and ICRIR become even more pronounced. Without comprehensive investigations and full transparency, Northern Ireland risks an inability to fully acknowledge past heinous crimes and understand their circumstances, undermining the societal healing process and potentially impeding the deterrence of future violations taking heed of the proposed amnesty.

33. Amnesty in its *Truth, Justice and Reparation* report explained that the investigation of human rights violations should lead, where possible, to the identification of persons, authorities, institutions and organizations involved and shall determine whether the violations were the result of deliberate planning on the part of the state, authority, or political organization, movement or group of individuals.

34. In the global landscape of transitional justice, truth, and reconciliation commissions ("TRCs") have traditionally been vested with certain fundamental powers that are crucial for the effective execution of their mandate. These powers are essential to ensure that TRCs operate with the necessary authority and independence to uncover the truth, facilitate reconciliation, and foster accountability. The core attributes that TRCs should embody include:

    a. ***Independence and Objectivity:***
    TRCs must function as an autonomous entity, separate from government influence or control, which in this case means especially independent from those actors and institutions that may be the subject of an inquiry. This detachment ensures that investigations into past events are conducted impartially and without political interference, thereby upholding the integrity of the process and findings. In contrast, the Act provides for extensive control by the Secretary of State over the ICRIR; it is an inseparable instrument from the Secretary of State insofar as he:
        - retains control of the ICRIR's funding, appoints the Commissioners, decides how many Commissioners there will be and decides how long they will remain a member of the ICRIR (up to a maximum of 5 years (sch.1, paras 6 and 7);
        - receives a report from the ICRIR on its execution, which the ICRIR is compelled to provide (s.2 (7) (b) and 2 (9) (b) and Schedule 1, s.6 (b).
        - may nominate a person to exercise the immunity from prosecution functions, if the Chief Commissioner is unable to do so (s.20(7A);
        - decides the meaning of "sexual offence" for the purpose of the immunity from prosecution provisions (sch.2);
        - controls the ICRIR's resources (s.2(7));
        - makes rules and guidance governing the ICRIR's work, for example on the procedures relating to immunity from prosecution (s.20, 29-31, 52), may prohibit the disclosure of sensitive information on the grounds of national security (s.26); and
        - may bring the operation of the ICRIR to an end (s.33).

    Each of these components fully undermine the ICRIR as an independent and impartial TRC within the compounds of what is accepted on the international sphere.

    b. ***Compulsory Testimony and Legal Rigor:***
    TRCs should have the authority to require the presence of individuals to provide evidence and to conduct interviews with victims and witnesses. These proceedings must be subject the usual standards and means, such as cross-examination by the next of kin's or victim's representative, to verify the credibility of the information obtained. Moreover, the hearings should be transparent, taking place in public to maintain public confidence, but with the option for private sessions when necessary to protect confidential information or the safety

of individuals. The Act establishing the ICRIR fails to provide a mechanism for the compelling of witnesses for the purposes of a public hearing, to ensure transparency.

c. ***Mandate for Cooperation:***
Under international standards, a TRC must have the power to summon individuals or groups, including state officials, obliging them to engage with the process. This ensures that a TRC can access all relevant parties and information crucial to the investigation. Unlike the mechanisms currently in place in the UK (such as inquests), and for the reasons set out below, the procedures proposed under the Act fall far short of the safeguards required, to ensure cooperation in a TRC to establish and ascertain all relevant information, in a transparent manner.

d. ***Enforcement Through Legal Instruments:***
TRCs should have the ability to issue warrants and subpoenas to enforce attendance and cooperation. These legal tools are instrumental in compelling parties to participate in the process, especially those who may be reluctant to do so. The current legislation affords the ICRIR officers with the equatable powers of a police constable, but it does not have but does not specify whether the Commission has the right to compel parties to give oral evidence. Whilst, it specifies a financial penalty can be imposed if someone is deemed to have acted in breach of a section 14 notice or is found to have distorted or destroyed information or a document (sch.4, Part 1) – it does not appear to deal with the seminal question of contempt or perjury for non-compliance or lying under oath.

e. ***Sanctions for Non-Compliance:***
TRCs should be able to impose sanctions akin to contempt of court for those who fail to comply with its directives. This provision is vital in ensuring respect for the process and compliance with its requirements. The enforcement provitions of the Act (sch.4, part 1) does not deal with perjury or contempt but provides for 'light touch' penalties for a failure to comply with a section 14 notice carrying a fine or up to a 6 month prison sentence for distorting or destroying evidence or a document.

f. ***Oath-Taking and Perjury Penalties:***
The power to administer oaths affirms the seriousness of the testimony being given. TRCs should also have the capacity to penalize individuals for perjury or for failing to comply with requests for documents. This power acts as a deterrent against providing false information and ensures the integrity of the evidentiary process. The Act does not specify whether an oath is administered nor does it specifically refer to the giving of 'sworn' testimony. Notably section 14 of the Act only relates to the giving of information and not the giving of evidence.

35. The ICRIR being a non-judicial body, it is unable to use the judicial powers referenced. These elements collectively ensure that a TRC has the necessary framework to conduct thorough and authoritative inquiries into past injustices, providing a pathway towards justice, truth and reconciliation, and the prevention of future violations.

36. AIUK have concerns regarding the capability of the proposed review mechanism to fulfil the criteria of an autonomous and efficacious investigation, consistent with the jurisprudence established by the European Court of Human Rights ("ECtHR"). The potential for considerable influence by the Secretary of State for Northern Ireland over the ICRIR cannot be overlooked.

37. It is of obvious importance that many Troubles' related cases engage state agents and other actors who are potentially culpable of criminal activity. It is trite to say that it is necessary for

those carrying out the investigation into unlawful killings by state agents to be independent from those implicated in the events. Consequently, the ICRIR (a body created and curated by the UK government) will have control over the investigation, meaning a lack of institutional and hierarchical control. The oversight of the Secretary of State over the ICRIR is worrisome, especially considering that the underlying aim of the Act appears to be to end probes into the conduct of British soldiers. Additionally, the UK has consistently been found in breach of its procedural obligations under Articles 2 and 3 of the ECHR concerning actions during the Troubles.[34] Consecutive UK governments have shown a persistent lack of initiative in uncovering the truth about state responsibility for conflict-related offenses in Northern Ireland. This shortfall in conducting adequate investigations also highlights a deficiency in the UK government's ability to maintain adequate independence.

38. The Act notably omits several key elements essential for a truth and reconciliation process compliant with the ECHR. It lacks a clear provision for the mandatory collection of testimony and legal processes such as cross-examination to ensure the credibility of evidence. The Act also fails to outline any authority to enforce cooperation or attendance from individuals, particularly state officials, which is crucial for a thorough investigation. What the Act effectively does, is to depend on the perpetrator involving themselves *in lieu* of a grant of immunity.

39. Moreover, the Act does not specify the procedures for oath-taking or the imposition of penalties for perjury, undermining the seriousness and integrity of the testimonies. The general assertion that the Act is compliant with the Human Rights Act is self-serving and vague, with no details on the enforcement of such compliance, leaving the process without the necessary transparency and legal rigour. This shortfall suggests that the Act does not meet the necessary standards for an ECHR-compliant process, casting doubt on its potential to deliver a credible and accountable review.

40. The Act and the ICRIR seem to place a heavier emphasis on reconciliation and future peace than on the exhaustive revelation of past events, but without providing the means to first establish the truth. The mechanisms within the Act do not ensure the same level of detailed investigation or public disclosure of violations.

41. Moreover, a number of TRCs' processes studied by Amnesty International in its *Truth, Justice and Reparation* report were very public (for example the Truth and Reconciliation Commission in South Africa and the Commission for Reception, Truth and Reconciliation in Timor-Leste), which was instrumental in educating society about the nature of violations and crimes and validating the experiences of the victims. This is also important as it provides victims and perpetrators with a forum for public and private acts of reconciliation. On the other hand, the processes outlined by the Act are opaque and more administratively driven, which will not provide the same level of societal education or, more significantly, collective catharsis. Importantly, the Act does not make provision for public hearings nor does it afford a victim or next of kin the opportunity to suggest questions or cross examine. Of further concern to the essence of public justice, the ICRIR have the power to prohibit the disclosure of their final report should it risk interference with national security as per Schedule 6 section 4(2)-(3).

42. Importantly, the chances TRCs being successful is likely to be linked to their acceptance by stakeholders. The success of the South African TRC, for example, hinged on its broad acceptance and support from a diverse range of stakeholders within society, including political parties, civil organizations, and the victims themselves. The widespread opposition to the Act from victims'

[34] *Re McQuillan, McGuigan & McKenna* [2021] UKSC 55, *Jordan v. UK* 24746/94, *McKerr v. UK* 28883/95, *Shanaghan v. UK* 37715/97

groups, political parties, and human rights organizations in Northern Ireland indicates a lack of the essential consensus and support that is critical to the ffectiveness of the South African TRC.

43. The 2006 Amnesty International report on Liberia's 'Truth and Reconciliation Commission' identifies the 34 truth commissions established in 28 countries in the period 1974 to 2006 and points out the preference for the use of the term 'truth commission' as opposed to 'truth and reconciliation commission' since *"while some form of reconciliation may be the desired outcome of a truth-telling process over the medium or longer term, that cannot be imposed by either a truth commission or any other body or procedure"*[35]. Indeed, AIUK has yet to see an example, far less a successful one, of a purported reconciliation process that has been imposed on unwilling 'stakeholders'[36]. The United Nations has affirmed that the establishment of the facts is a precondition for, and can help to promote, individual and collective reconciliation.

E. THE DISAPPEARED

44. The issue of 'the disappeared', particularly in the context of conflict, is one that cuts to the very core of human rights protections under international law. Article 2 of the ECHR mandates that states are required to effectively investigate disappearances to determine the fate and whereabouts of the individuals is a critical obligation[37]. However, the Act falls short in addressing this crucial issue. There appears to be no provision within the Act for an investigative body with the necessary powers to conduct the sort of thorough and effective investigation that is required. This omission not only undermines the pursuit of truth and justice for the disappeared and their families but also represents a significant gap in the Act's alignment with established international human rights standards.

45. The ECtHR has made it abundantly clear that the disappearance of individuals and the distress caused to their families can constitute torture, inhuman or degrading treatment within the meaning of Article 3[38], especially when it leads to intentional severe mental suffering. It is widely recognized that the concept of victim of an enforced disappearance includes not only the disappeared person but any individual who has suffered harm as the direct result of an enforced

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[35] *Liberia: Truth, Justice and Reparation, Memorandum on the Truth and Reconciliation Commission Act*, pgs.4 and 22, Amnesty International, 22 June 2006. See too Amnesty International's earlier 2004 report, *'Peru: The Truth and Reconciliation Commission – a first step towards a country without injustice'*, p.22 at https://www.amnesty.org/en/documents/amr46/003/2004/en/. See also, Comisión de la Verdad y Reconciliación (CVR) del Perú, Final Report, Vol IX, 'Foundations of Reconciliation', which sees truth as a precondition for reconciliation and justice as its essence, hence at p.27 *"the first step towards reconciliation can only be taken when the perpetrators assume responsibility before the courts and pay their dues to society"*.

[36] Amnesty, *Truth, Justice and Reparation*, pg 23, *supra*. See also Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools, p.2.

[37] *Cyprus v. Turkey 25781/94* Grand Chamber 10/05/01

[38] *Varnava v. Turkey*, 39630/09, Grand Chamber, 13/12/2012. See also: Human Rights Committee, *Edriss El Hassy v. The Libyan Arab Jamahiriya,* Communication No. 1422/2005, para. 6.11; Human Rights Committee, *Sarma v. Sri Lanka,* Communication No. 950/2000, para. 9.5; Inter-American Court of Human Rights, *Contreras et. al. v. El Salvador*, Judgment of 31 August 2011, para. 123; Inter-American Court of Human Rights, *Gelman v. Uruguay*, Judgment of 24 February 2011, para. 133; Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico,* Judgment of 23 November 2009, para. 166. See also, Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, A/HRC/16/48, para. 4.

disappearance.[39] The Act's lack of consideration for 'family member' implications further complicate the matter for those seeking to engage with the process, as it imposes a 'death' or 'harm' requirement that may not encompass the unique and ongoing trauma experienced by the families of the disappeared. International standards are clear that under no circumstances families of victims of enforced disappearance should be required to declare them dead in order to be eligible for reparation.[40] This obstacle may prevent access to justice, a right that is enshrined in Article 13 of the ECHR, which insists on an effective remedy for violations of rights enshrined in the ECHR.

46. The International Covenant on Civil and Political Rights ("ICCPR"), which is binding on the UK, enshrines the right to an effective remedy. Article 2(3) of the ICCPR acknowledges the procedural mandate to undertake independent and thorough investigations into civilian deaths or disappearances. Consequently, in General Comment No. 31 (2004), para. 15, of the Human Rights Committee the body tasked with monitoring the implementation of the ICCPR by state parties, it is emphasized that administrative mechanisms must be established to ensure the prompt, comprehensive, and effective examination of alleged violations by independent and impartial entities. See too para.58 of General Comment No.36 (2019) on the obligation of state parties to *"conduct an* ***effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance***[41]*, ensure…the enforced disappearance of persons is punished with appropriate criminal sanctions, and introduce prompt and effective procedures for cases of disappearance to be investigated thoroughly by independent and impartial bodies… and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation"*.

47. The Act does not have the necessary functions to competently carry out such investigations into those who have been disappeared.

48. Moreover, the right to respect for private and family life as stated in Article 8 of the ECHR highlights the state's duty to alleviate the suffering of families affected by enforced disappearances. The Act's apparent lack of mechanisms to facilitate such support or provide information on the fate of the disappeared is a significant deficiency. Cases like the 2012 Grand Chamber case of *El Masri v. Macedonia* and *Varnava v. Turkey*[42] emphasize the importance of conducting effective investigations into disappearances. Without such provisions, the Act does not seem to offer the necessary means to honour the state's obligations under the ECHR or to provide the essential solace and closure needed by those who continue to live with the unbearable uncertainty of a loved one's disappearance. In fact, under international standards an enforced disappearance is be deemed continuous or permanent, i.e., it continues to be committed, as long as the fate or whereabouts of the person or the remains has not been determined.[43]

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[39] International Convention for the Protection of All Persons from Enforced Disappearance, Article 24. See also, European Court of Human Rights, *Bazorkina v. Russia, Application No. 69481/01*, para. 139; Inter-American Court of Human Rights, *Contreras et. al. v. El Salvador*, Judgment of 31 August 2011, para. 123.

[40] UN Human Rights Committee, General Comment No. 36 (2019), Right to Life, para 58; Prutina et al. v. Bosnia and Herzegovina (CCPR/C/107/D/1917/2009,1918/2009,1925/2009 and 1953/2010), para. 9.6.

[41] All emphasis is added, save where it appears to the contrary.

[42] *El Masri v. Macedonia* and *Varnava v. Turkey,* 39630/09, Grand Chamber, 13/12/2012

[43] Article 8(1)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article III of the Inter-American Convention on Forced Disappearance of Persons. See also, Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, A/HRC/16/48, para. 39; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988 (merits), para. 155; Inter-American Court of

F. REPARATIONS

49. Reparations in the aftermath of human rights abuses is a cornerstone of international justice see e.g., UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations humanitarian law[44]. Illustrative of the general principles is Amnesty International's *'Truth, justice and reparation, establishing an effective truth commission'* report, in which it is explained that victims of gross violations of international human rights law or international humanitarian law have the right to be provided with full and effective reparation in its five forms, i.e., (i) restitution; (ii) compensation; (iii) rehabilitation; (iv) satisfaction; and (v) guarantees of non-repetition.

50. These forms of reparations are vital not merely as a remedy for the victims but also as a robust declaration by the state of its commitment to reckon with its past and secure a future where such violations do not recur. There is extensive European and international legal guidance on reparations which recognizes the five forms of reparations as detailed above.[45].

51. Amnesty International states in its *Truth, Justice and Reparation* report that the proper establishment and functioning of a truth commission is in itself a form of reparation. It is further, explained in that report that, by officially acknowledging that a pattern of human rights violations occurred in the past and taking measures to investigate the facts and disclose the truth, the state provides victims and their families with an initial form of satisfaction.[46]

52. In this way reparations serve not only as recognition of the sufferings endured by victims but also as a significant step towards healing and rebuilding a just society. An example of this is best seen at para.9 of the 2014 report of the Special Raporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence[47].

53. In sharp contrast, the Act and the proposed ICRIR fall short in meeting these international standards. Pertinent, is that the mechanisms proposed lack the comprehensive scope to offer full and effective reparation in accordance with the severity of the violations experienced during 'The Troubles'. The approach adopted appears incapable of delivering reconciliation, given that detailed processes necessary for effective reparation are not provided, notwithstanding that the

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Human Rights, *Ticona Estrada v. Bolivia,* Judgment of 27 November 2008, para. 56; Inter-American Court of Human Rights, *Garcia and family members v. Guatemala,* Judgment of 29 November 2012, para. 95; Inter-American Court of Human Rights, *Heliodoro Portugal v. Panama*, Judgment of 12 August 2008, para. 112; Committee on Enforced Disappearances, *Concluding Observations on Uruguay,* CED/C/URY/CO/1, para. 14; Committee on Enforced Disappearances, *Concluding Observations on Paraguay,* CED/C/PRY/CO/1, para. 29; Committee against Torture, *Concluding Observations on El Salvador,* CAT/C/SLV/CO/2, para. 14.

[44] UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations humanitarian law at https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf

[45] UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations humanitarian law; and *Z and Others v. the United Kingdom* [GC], 2001, § 109; *E. and Others v. the United Kingdom*, 2002, § 110; *O'Keeffe v. Ireland* [GC], 2014, § 115). HRC General Comment No.31 (2004)

[46] See Amnesty, *Truth, Justice and Reparations*, p.11, *supra.*

[47] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/564/67/PDF/N1456467.pdf?OpenElement

stated purpose of the Act is *"to address the legacy of the Northern Ireland Troubles and promote reconciliation"* between the relevant parties in Northern Ireland[48].

54. The ICRIR's mandate and capacity to recommend and implement reparations are not clear-cut, and this ambiguity does not satisfy the criterion for initial satisfaction through truth-telling as envisioned in the principles of reparation. Moreover, without robust provisions to ensure the investigation of facts and disclosure of the truth, the mechanisms for achieving satisfaction and guarantees of non-repetition remain precarious.

55. As explained, reparations are not a peripheral component but are central to the objectives of truth commissions. They carry a symbolic weight and are fundamental to restoring the dignity of victims, which is often stripped away during conflict and repression. They also play a crucial role in re-establishing trust between the state and its citizens and among the citizens themselves.

56. Further, specific to the issue of torture, the UK is a party to the UN Convention against Torture ("UNCAT"). Article 2 (i) of UNCAT obliges the state *"take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."* See article 24 of the International Convention for the Protection of all Persons from Enforced Disappearance, which the UK has ratified, in relation to investigation and the right of victims to reparation and prompt, fair and adequate compensation[49].

57. The content of that general obligation is particularised in Article 14, which provides that the UK *"**shall ensure in its legal system** that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."*

58. As the prohibition on civil actions will, in principle, remove an avenue for pursuing tortious claims for damages in respect of torture with no alternative provided for in respect of reparations, AIUK considers that the right to redress and compensation under Article 14 of UNCAT is engaged.

G. INTERNATIONAL LAW AND AMNESTIES

59. International and European human rights jurisprudence has evolved to address the issue of amnesties, particularly in post-conflict settings. The interplay between the desire for national reconciliation and the imperative for justice has resulted in a body of case law that views amnesties for grave human rights violations, as contrary to international and European jurisprudence. Amnesties serve as a bulwark to truth recovery and an obstacle to victim closure and ought not to be capable of procurement. Accordingly, amnesties and similar measures of impunity that prevent the emergence of truth, a final judicial determination of guilt or innocence, and full reparations to victims and their families, in the case of grave human rights violations should not be accepted. In particular, states should not grant amnesties or immunity from prosecution to any person suspected or convicted of committing torture or other acts of ill-treatment, or acts of disappearance.

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[48] See the long title of the Act

[49] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

60. At the international level, the United Nations has consistently held that amnesties should not be extended to those responsible for war crimes, genocide, crimes against humanity, or other serious violations of human rights. This stance is evident in instruments such as the 1993 Vienna Declaration and Programme of Action and the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, which states that *"Amnesties are generally incompatible with the duty of States to investigate"* such crimes. The jurisprudence of regional human rights courts[50] and of international tribunals, such as the International Criminal Court ("ICC"), reinforces this position by asserting that granting amnesty to suspected? perpetrators of serious human rights violations and international crimes, such as extra-legal executions or enforced disappearances, contravenes fundamental principles of international law, strongly suggesting that the prohibition of amnesties for such cases is a rule of customary law[51].

61. Specifically for torture and other acts of ill-treatment, the UN Committee against Torture has based its opposition to *"amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment"* on the non-derogable nature of the absolute prohibition of torture.[52] The UN Human Rights Committee found amnesties to be generally incompatible with the duty to investigate acts of torture, to prevent such acts, and to ensure non-reoccurrence.[53] The International Criminal Tribunal for the former Yugoslavia explicitly subscribed to this approach.[54]

62. In Sierra Leone both an international criminal tribunal and a TRC was set up. The latter was established for the purpose of assisting in information gathering, with the underlying agreement providing for the possibility of amnesties.[55] The former was tasked with ensuring top level perpetrators were held accountable, and in fact ruled that such amnesties could not bar the Court's exercise of jurisdiction over international crimes, and that governments could not grant amnesties for serious crimes under international law.[56]

63. In European human rights law, the ECtHR has approached the issue of amnesties with particular attention to the rights of victims. In cases like the 2013 Grand Chamber case of *Marguš v. Croatia*[57], the Court found that amnesty laws that prevent the prosecution and punish grave breaches of human rights are incompatible with the ECHR, particularly with the duty to

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[50] See, among others, Inter American Court of Human Rights, *La Cantuta v. Peru*, Judgment of 29 November 2006, para. 225; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations, and Costs), paras 137, 180; IACtHR, *Barrios Altos v. Peru*, Judgment of 14 May 2001, para. 44.; African Commission on Human and Peoples' Rights, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Decision of 15 May 2006, paras 201 et seq.

[51] Amnesty International, International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity, 2015, Index: IOR 40/1227/2015, pp. 15-23. See also, for example, Report of the Special Rapporteur on the Question of torture and other cruel, inhuman or degrading treatment or punishment (Nigel Rodley), UN Doc. A/56/156, 3 July 2001, para. 33.

[52] CAT General Comment 2, §5; see also CAT, Concluding observations, Spain, CAT/C/ESP/CO/5, 9 Dec. 2009, para.21(2): *"The State party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty."*

[53] HRC General Comment 20, §15.

[54] ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, paras.155-6, and n. 172.

[55] Sierra Leone peace accord, Lomé, July 1999, U.N. Doc. S/1999/777, Art. IX.

[56] SCSL, Appeals Chamber, *Prosecutor v. Moinina Fofana*, Decision on preliminary motion on lack of jurisdiction: illegal delegation of jurisdiction by Sierra Leone, 25 May 2004, para.3

[57] *Marguš v. Croatia*, no.4455/10, Grand Chamber, 27/05/2014, at at https://www.legal-tools.org/doc/949d0f/pdf/

investigate and provide an effective remedy under Articles 2 and 3 of the ECHR. The Court's jurisprudence emphasizes the necessity of individual accountability and the victims' rights to truth and justice. The Court had already stated this principle in 2004 in the case of *Abdülsamet Yaman v. Turkey* and in 2009 in *Ould Dah v. France* with regard to torture.[58]

64. The Grand Chamber's ruling in *Margus v. Croatia* delineates a critical international legal perspective on the issue of amnesties, particularly in the context of grave human rights violations. See §139:

> "*A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of states to prosecute and punish grave breaches of fundamental human rights.* ***Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims****, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances."*

65. In addition to the question of which type of act is open to be included in an amnesty, at the core of this ruling is the recognition that amnesties may only be considered tolerable under certain stringent conditions, such as the presence of a genuine reconciliation process coupled with some form of victim compensation. From this angle, the Act too falls short of these standards, primarily due to its lack of broad community backing and a clear mechanism for reparations. Without a victim centred approach and a structured plan to redress the harm done, the Act's framework does not constitute a 'reconciliation process' in any substantive sense. The absence of these foundational pillars not only undermines the potential for genuine reconciliation but also brings the Act's provisions into question concerning their compliance with the expectations set forth by the ECtHR.

66. Moreover, the ECtHR's jurisprudence suggests that for an amnesty or immunity provision to align with the Convention's principles, it must operate within the bounds of a reconciliation process that is victim-centric and reparative in nature.[59] The Act, however, appears to diverge from this path by not sufficiently engaging with or securing the consent of those directly affected by the conflicts. This disconnect with the victim communities challenges the notion that the process proposed by the government can be legitimately termed as one of reconciliation. Therefore, the government's ability to justify amnesties under the guise of a 'reconciliation process' is highly contestable. This lack of a genuine, supported reconciliation process could consequently render the amnesty provisions of the Act as incompatible with the stance of the ECtHR, placing them outside the scope of what is permissible under international human rights standards.

67. The Act fails to properly propose a means of addressing past serious human rights abuses or meaningfully fostering reconciliation. By such, its approach to amnesties diverges from the established international and European legal framework. The Act provides a broad amnesty (with an exceptionally law bar for procuring same) without ensuring accountability and

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[58] ECHR, *Abdülsamet Yaman v. Turkey*, Judgment of 2 November 2004, para. 55 at https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67228&filename=001-67228.pdf, *Ould Dah v. France,* Decision of 17 March 2009 at https://www.legal-tools.org/doc/6c588a/pdf .

[59] https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v5.pdf

effective remedies for victims, and so is in contravention with the principles laid out in the case law mentioned above.

68. As per section 19 of the Act, it offers immunity to those who have truly described the conduct concerning a Troubles related event and amounts to serious criminal conduct . The ICRIR only need be satisfied that the individual provided an account that in their view was accurate to the best of his knowledge (s.21 (2). By way of example, in Timor-Leste no immunity was provided save for those who were deemed to be guilty of low-level offending and who co-operated with the process[60]. The idea behind this was that those guilty of high-level offending, or being the strategists or masterminds of the offending were held accountable. Further, the South Africa TRC process provided amnesties to offenders, but it was not automatic, and the application was carried out via public hearings.

69. Applications for immunity under the Act requires that an application be made, but instead of a rigorous procedure it appears to be an administrative procedure whereby the perpetrator need only give an account to the best of their knowledge. Additionally, victims had the opportunity to give input during the amnesty process and could oppose the granting of amnesty in South Africa. Furthermore, under the Act immunity will be granted even if no family is to benefit from the information recovery.

70. Of further concern is the lack of scrutiny that needs to be applied to the account given by the perpetrator and the evidential burden to be applied to his or her account to afford immunity. The amnesty process of the South African TRC was already considered to be unacceptable under international law.[61] However, the comparative observations above show that the present approach of the Act and the ICRIR falls short even by that standard, and only compounds the shortcomings in the present case. This confirms that the overall approach of providing for amnesties and other measures of impunity for serious human rights violations is not permitted under international and European human rights law, and that the Act is incompatible with human rights.

H. LIMITATION PERIOD

71. The provisions set forth by the ICRIR stipulate that no inquiries of any kind can be initiated once a five-year period has elapsed since its inception as per s. 10 and 10(3). This holds true regardless of whether new and crucial evidence emerges after this timeframe, evidence that could implicate State operatives in illicit killings or other serious offenses. The same applies if there were extraordinary reasons that prevented the initiation of an investigation before the five-year deadline. While such scenarios would necessitate an investigation under the procedural obligations of Articles 2 or 3 of the ECHR, the stipulations of the ICRIR would fail to fulfil this requirement. Consequently, this will result in an unavoidable violation of those procedural obligations.

72. Under international law, statutory limitations do not apply to crimes under international law, such as torture. Therefore, neither criminal nor civil proceedings should be subject to a time limit in circumstances where Article 2 and/or Article 3 ECHR are engaged. This is supported by statements of the UN Committee against Torture, jurisprudence of international criminal

[60] Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor ss32 and 38.1; sch1(4).

[61] See for example: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, supra, par. 618.

tribunals, and other international legal instruments.[62] By way of example, the Committee Against Torture ("CAT") has expressed a clear stance that imposing any statute of limitations on torture claims does not align with a proper enforcement of Article 14 of UNCAT. This position was evident in the 2019 case of *A v. Bosnia and Herzegovina*[63], where the CAT held that a statute of limitations, which would extinguish a claim five years after the victim became aware of the harm and the perpetrator, was not permissible. In European human rights law, the ECtHR in the 2004 case of *Abdülsamet Yaman v. Turkey* held that if a state agent has been charged with crimes involving torture or other ill-treatment, for the purposes of an effective remedy criminal proceedings and sentencing must not be time-barred.[64] Given these observations, introducing any limitation period for torture claims Should be deemed incompatible with the obligations of the United Kingdom under the UNCAT.

I. CONCLUSION

73. AIUK expressed persistent concerns about the Northern Ireland Troubles (Legacy and Reconciliation) Bill, highlighting that it breached the UK's human rights commitments from its first emergence. AIUK emphasized that the proposed legislation interfered with the justice system, potentially setting a dangerous global standard by allowing state entities and unlawfully operating armedgroups to avoid accountability for serious human rights offenses. AIUK also criticized the UK government for ignoring widespread opposition and pushing the Bill into law, noting that the lack of meaningful amendments and limited time for scrutiny has disrespected those impacted by the Troubles.

74. Notwithstanding all the comments and criticisms received in relation to the Bill the legislation as enacted, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, fails to ensure an effective investigation into past abuses, thereby contravening Articles 2 and 3 of the European Convention on Human Rights, and falling short of international standards on truth recovery and reparative justice, which are crucial for reconciliation and upholding the rule of law. Furthermore, and despite its title, it fails to deal with the legacy of the 'Troubles' either adequately or in a human rights compliant manner and seeks to impose reconciliation on the stakeholders in the absence of any proper acceptance by then, and therefore undermines a critical element of its stated purpose.

75. Its true purpose may be seen from the Secretary of State's opening speech on the Bill at its second reading[65].

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[62] See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/ CO/3 (2013) §8; Guatemala, UN Doc. CAT/C/GTM/CO/5-6 (2013) §8; Japan, UN Doc. CAT/C/JPN/CO/2 (2013) §8. See also *Prosecutor v. Furundzija*, Yugoslavia Tribunal (1998) §157; Principle 23 of the Updated Impunity Principles; Basic Principles on Right to Remedy and Reparation, §6; Article 29 of the Rome Statute.

[63] *A v. Bosnia and Herzegovina* (2019) CAT/C/67/D/854/2017, at https://trialinternational.org/wp-content/uploads/2019/08/Decision-CAT-A-BIH-2August2019.pdf

[64] ECHR, *Abdülsamet Yaman v. Turkey*, Judgment of 2 November 2004, para. 55, https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-113014&filename=OULD%20DAH%20v.%20FRANCE.docx&logEvent=False

[65] Text of Second Reading Opening Speech for the Northern Ireland Troubles (Legacy and Reconciliation) Bill, delivered by NI Secretary, Brandon Lewis MP on 24 May 2022, at https://www.gov.uk/government/news/northern-ireland-troubles-legacy-and-reconciliation-bill-second-reading-opening-speech

"No longer will our veterans, the vast majority of whom served in Northern Ireland with distinction and honour, have to live in perpetual fear of getting a knock at the door for actions taken in protection of the rule of law many decades ago. With this Bill, our veterans can have the certainty they deserve - and we will fulfil our manifesto pledge to end the cycle of investigations that has plagued too many of them for too long..."

*"We have also heard those in our veterans' community who were uncomfortable with any perceived moral equivalence between those who went out to protect life and uphold the rule of law, and terrorists intent on causing harm...**So we have adjusted our approach to a conditional immunity model**."*

"To gain immunity, individuals must provide an account to the new commission of their involvement which is true to the best of their knowledge and belief, drawing parallels with aspects of the Truth and Reconciliation Commission implemented in South Africa. The commission will require individuals to acknowledge their involvement in serious Troubles-related incidents - and to reveal what they know."

76. The government has delivered not a victim-centred Act, as it was continually asked and obliged to do, but rather one which prioritises perpetrators of human rights violations at the expense of victims rights. From that perspective the deficiencies in the Act can be clearly understood as can the extent to which it does not and cannot comply with either international human rights standards or the government's human rights obligations to victims and their families.

77. The provisions in the Act for dealing with the past do not adequately ensure the rights of victims, especially when it comes to the investigation of serious offenses, potentially shielding perpetrators from accountability and denying victims and their families the right to truth and justice. Furthermore, the Act's limitations on prosecution may undermine the rule of law by creating exceptions to the legal accountability standards that are expected in a rule-based society. It is for this reason that AIUK supports the judicial review and invites the Court to find accordingly.

13 November 2023