Legacy and Reconciliation:

The Pursuit of Justice and Peace in Northern Ireland, a Post Conflict Society.

Is the Northern Ireland Troubles Act insofar as it concerns immunity and the cessation of criminal proceedings, compatible with a state's obligation to carry out effective investigations into deaths as an essential component of the right to life under Article 2 of the European Convention on Human Rights?

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Abbreviations

DUP	Democratic Unionist Party
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia-Ejército Popular
GFA	Good Friday Agreement
IACtHR	Inter-American Court of Human Rights
ICRIR	Independent Commission for Reconciliation and Information Recovery
IRA	Irish Republican Army
NI	Northern Ireland
NITLR Act	Northern Ireland Troubles (Legacy and Reconciliation) Act
PIRA	Provisional Irish Republican Army
PSNI	Police Service of Northern Ireland
RUC	Royal Ulster Constabulary
TRC	Truth and Reconciliation Commission (South Africa)
UK	The United Kingdom
UN	United Nations

Introduction

The Irish language short story *An Gnáthrud*, relays a vivid depiction of life in Belfast, Northern Ireland (NI) during the period commonly referred to as the Troubles, through the lens of a fictional character Jimmy.[1] Jimmy is a loving husband and father of young children who wished nothing more than to return home to his family on a Friday evening after thoughtfully retrieving their preferred takeaway. Unfortunately, Jimmy was senselessly shot and killed in the street, the story evocatively informing the reader of his blood mingling with the food he had tucked away in his coat to keep himself warm.[2] This haunting portrayal reminds us of the needless and indiscriminate violence that perpetrated daily life in NI for decades. Jimmy represents many real individuals who were murdered, targeted for their cultural and religious affiliation or merely collateral in a wider agenda. It was rare for a family to remain unscathed by the conflict, as more than 3,500 individuals lost their lives, "the vast majority by armed 'Republican' and 'Loyalist' paramilitary groups who claimed to represent local nationalist and unionist communities".[3] Generally, the nationalist population comprised Catholics, while the unionist community were mainly Protestant, thus these distinguishing titles will be used interchangeably. Apart from these two separate factions, this thesis will centrally assess the role played by the United Kingdom (UK) Government and their state agents.

The *Good Friday Agreement* (GFA), signed in 1998, represents the symbolic culmination of over thirty years of hostilities, initiating the evolution of the contemporary NI that exists today, that despite enduring challenges, is a society committed to peace and prosperity. The wording of the agreement affirmed these ideals, with the governments of Ireland, NI and of Great Britain, collectively declaring, "we firmly dedicate ourselves to the achievement of reconciliation (…) and to the protection and vindication of the human rights of all".[4]

The UK Government introduced The Northern Ireland Troubles (Legacy and Reconciliation) Act (NITLR Act) viewing this procedure as the best means of upholding these ideals. The Act came into effect in May of this year, and self-expresses the intent "to address the legacy of the

[1] Ní Ghrianna, *An Gnáthrud*, Coisceim (1999).
[2] Ibid.
[3] Aiken, The Bloody Sunday Inquiry: Transitional Justice and Postconflict Reconciliation in Northern Ireland, *Journal of Human Rights*, vol.14, n.1 (2015) p.101.
[4] Northern Ireland Peace Agreement (The Good Friday Agreement) (10 April 1998) < https://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf >accessed 27 May 2024.

Northern Ireland Troubles and promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery,".[5] This Commission (ICRIR) assumes responsibility for the investigation and resolution of all Troubles-related offences, which have previously been handled by law enforcement bodies, upon the basis that these institutions are incapable of adequately resolving the existing caseload in a timely manner, an argument that will comprise a central tenet to the UK's defence of the Act. The Commission can furthermore offer immunity to perpetrators of violations if they endeavour to cooperate, in the hopes that it can more robustly ensure truth retrieval and closure for victims.[6]

However, this Act is not only adamantly opposed by victims, apprehensive that their pursuit of justice is now compromised, but also by the two main political parties in NI, representing the interests of both nationalist and unionist populations. Sinn Féin politician Deirdre Hargey, whose party proposes the political ideology of the former, asserted their view that the legislation clearly represents a violation of fundamental rights,[7] while Emma Little-Pengelly of the Democratic Unionist Party (DUP) firmly agreed, labelling the act an "affront to justice".[8] The paradoxical unity of these contrasting parties in their antipathy towards the legislation is revealing of its potential for harm. In response to the public and political opposition to these developments, the Government of Ireland filed an application against the UK with the European Court of Human Rights (ECtHR), challenging this legislation under several provisions.[9] Among these, they question whether the act violates the right to life, an integral provision, and one which bequests duties of effective investigation and prosecution upon states under Article 2 of the European Convention on Human Rights (ECHR).[10]

This thesis will initially explore transitional justice and how it relates to NI, before providing the contextual background to the conflict. I will then elaborate upon the provisions outlined within the NITLR Act, before finally addressing what the ECtHR has previously held in relation to amnesties and the cessation of criminal proceedings, providing a comparative

[5] UK, Northern Ireland Troubles (Legacy and Reconciliation) Act, C.41 (2023) < https://www.legislation.gov.uk/ukpga/2023/41/contents > accessed 20 April.
[6] Northern Ireland Office, Equality Impact Assessment (EQIA), Proposals for addressing the legacy of Northern Ireland's past (May 2022) para.2.
[7] O'Neill, NI Troubles: Legacy Act immunity clause 'breaches' human rights (BBC,28 February 2024) < https://www.bbc.com/news/uk-northern-ireland-68419238 > accessed 15 June 2024.
[8] O'Driscoll, Why the Troubles Act faces a legal challenge in Belfast (The Week UK, November 21, 2023) < https://theweek.com/law/why-the-troubles-act-faces-a-legal-challenge-in-belfast > accessed 15 June 2024.
[9] *Ireland v The United Kingdom*, App no 1859/24 (ECtHR, Press Release 19 Jan 2024).
[10] *Armani Da Silva v The United Kingdom,* App no 5878/08 (ECtHR, 30 March 2016) para. 231.

analysis with a similar mechanism, before surmising what could be the potential outcome in these proceedings when they eventually transpire.

Methodology

This thesis both explores the extensive information and academic opinion available regarding the conflict itself, transitional justice measures, the right to life and its associated procedural obligations, and the more contemporary developments connected with the NITLR Act. Provided the recent adoption of this legislation, there is minimal related academic literature, so opinions on this front will mainly be derived from speeches, reports and governmental commentary. This informational imbalance created the ideal conditions to hone research skills regarding the interpretation of scholarly and factual evidence, but in an experimental process that required independent creativity, to reach conclusions on novel legal advancements.

The methodology utilised in my thesis will be traditional legal desk research, as I delve into existing jurisprudence and legal provisions to inform my academic perspective and facilitate reasoned conclusions. My thesis employs a combined effort of research techniques. Chapter one will operate mainly on a descriptive basis, presenting the main aspects of transitional justice, and the human rights rhetoric from which its philosophy derives. I will set forth a normative assessment of the application of these measures specifically in NI, highlighting both their successfulness and their shortcomings. Chapter two will also be descriptive, introducing historical and legal context to the Troubles and the formative events that preceded the enactment of the Act. Scholarly literature and first-hand testimony will provide both a developed and nuanced approach, but also emotionally tangible accounts of the discrimination experienced. Chapter three will feature doctrinal analysis as I outline the specific intricacies of the NITLR Act itself, highlighting the proffered motivations of the UK Government and the opposing concerns. Critically analysing both the potential it possesses in furthering reconciliation and truth, and that of preventing justice and accountability. Chapter four will incorporate critical analysis, as this thesis will question the compatibility of the legislation with the obligations that the UK assumes under the ECHR. This will require an examination of the ECtHR's relevant jurisprudence which will culminate in an analysis of what conclusion could potentially be reached in the present application. Chapter four will also exhibit comparative elements, as I will refer to the more extensive jurisprudence of the Inter-American Court of

Human Rights (IACtHR). I will also contrast the ICRIR with that of a similar nature that existed in South Africa (SA), forming an estimation on the effectivity of these models.

While a challenging undertaking, this thesis has allowed me to develop my research skills and focus my resources, in both understanding legal history and assessing the conformity of contemporary evolutions. I maintained a human rights-oriented perspective, moulded by both literary sources and academic theory, in nurturing an accurate legal narrative of the issues disputed.

Chapter 1: Transitional Justice in Post Conflict Societies

1.1: What is Transitional Justice?

"The notion of 'Transitional justice' (…) comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[11]

This definition prescribed by the United Nations (UN) is widely circulated and accepted amongst the legal community as encompassing the fundamental aspirations of transitional justice. The attainment of accountability, justice and reconciliation paints a hopeful and idealistic picture of a post conflict society, nevertheless, this achievement represents a significant challenge to fulfil. Whether this occurs in the aftermath of a demoralising internal conflict as will be explicated in the present thesis, or in order to tackle the repercussions of an authoritarian regime, these societies will share similar attributes such as "devastated institutions, exhausted resources, diminished security and a traumatised and divided population".[12] Transitional justice principally seeks to unburden victims of the unjustifiable infractions committed against them, a task which usually demands providing them with truth and justice, which can subsequently result in the preservation of peace and the structural rebuilding of society.[13]

Specific measures aimed at the realisation of this have emerged and can involve "domestic and international(ised) trials, truth commissions, historical commissions, reparation programmes".[14] Which of these actions will occur is context specific. The process should be community led and victim driven, and inevitably depends on the types of violations that transpired. The UN affirmed that there can be no standardised formula for healing a suffering community whom now must endure living alongside their former adversaries or aggressors, "we must learn as well to eschew one-size-fits-all formulas (…) and, instead, base our support

[11] UNSC*, The rule of law and transitional justice in conflict and post-conflict societies,* UN Doc S/2004/616 (23 August 2004) p.4.
[12] Ibid. p.3.
[13] Werle & Vormbaum, *Transitional justice : the legal framework* , Springer (2022) p.31.
[14] McGonigle Leyh, The Socialization of Transitional Justice: Expanding Justice Theories within the Field, *Human Rights and International Legal Discourse,* vol 11, no.1 (2017) p.84.

on national assessments, national participation and national needs and aspirations".[15] Even with a specifically moulded and catered process that involves the local community, sacrifices are inescapable, and the rights of the individual will at times be conciliatorily balanced with those of the community in its entirety, as deemed necessary to make progressive societal advancement. It is generally understood that once a state is functionally democratic, the governing institutions will be reformed and the individuals who occupy fundamental roles in ensuring this will uphold the current system, permitting it to survive further challenges.[16] A system contemplative of these ideals will need to intrinsically ensure human rights protection.

The securement of justice is a vital objective in all legal proceedings and is evidently, a central pillar in transitional justice. Law innately demands that justice is served and miscarriages of this challenge its very purpose. However, obtaining justice can formulate in various forms. We are accustomed to criminal and pecuniary penalties, while some other traditional retributive measures have occupied lasting roles in certain regions. Naturally, there will be different conceptions of how justice should be surmised, by both the defendant and plaintiff, but also amongst their various sympathisers in the public field. This notion can become inherently complex, for example, when you consider attempts to hold previously untouchable leading figures accountable, who oversaw widespread misconduct and corruption, compared to those who they commanded, some of whom endorsed the campaign and others still who felt powerless to contradict it.

One favoured compromising action is the development of a truth commission. They have proved an effective means of establishing an accurate account of past events and can further a victim's sense of healing and validation. Wiebelhaus-Brahm celebrates how these mechanisms can provide "a definitive history of the period", one that will not easily be contradicted by the opposition or those in power.[17] By assembling the various personal accounts and evidence of all those involved, in whatever capacity, they facilitate this. It allows for an official narrative to be made public, which fulfils a vital role for victims, who have often previously been ignored or vilified. However, for these mechanisms to prove successful, it is necessary that they are victim centred and operated in an unprejudicial manner, since they usually supplant judicial proceedings. This displacement of traditional ideas of accountability can prove problematic, if

[15] UNSC (2004) (n.11) p.1.
[16] Mihr in Simic *An Introduction to Transitional Justice*, Routledge (2020) p.7.
[17] Wiebelhaus-Brahm, Global Transitional Justice Norms and the Framing of Truth Commissions in the Absence of Transition, Negotiation and Conflict Management Research (2020) < https://onlinelibrary.wiley.com/doi/pdfdirect/10.1111/ncmr.12194 > accessed 23 May 2024, p.3.

they are ineffective or do not result in the victim feeling truly satisfied. If a commission is imbalanced in favour of the perpetrator the account imparted may not be entirely accurate and may not reflect a precise picture of events.[18] It is argued that hearings should be established expediently, while evidence and memory remain preserved, and grievances are fresh and must be addressed before they are allowed to fester and further deteriorate.[19] Thus the involvement of the local community and the victims is paramount, and they must be catered to expeditiously, if these mechanisms are to be seen to be adequate.

Amnesties are another controversial yet prominent element to the forefront of the transitional justice conversation. They fulfil a juxtaposing existence, being commonly applied and viewed as necessary to move past large-scale conflict or oppression, however, what they dictate is inherently contradictory from a human rights perspective, and inevitably divisive. Contemporary approaches seem to hint that full amnesties will not experience the same widespread use they have previously become accustomed to, as society today places more of an emphasis on human rights protection and vindication.[20] Amnesties can leave the victim feeling silenced and renders the governing structures who implemented these laws vulnerable to valid criticism regarding their motivations for shielding oftentimes violent offenders. Latin America posits a prime example of this evolving trend which involves repealing decades old amnesty laws enacted in the aftermath of totalitarian regimes, and instead endeavouring to prosecute perpetrators of violations, ensuring accountability with prioritised ambition.[21] Many regimes which proffered amnesty as the only viable option initially, now face sustained pressure to revisit and rectify the matter, with harmed individuals seeking justice, and not upon a solely superficial basis. Contrastingly, amnesties that pursue a legitimate aim in pursuing the greater good, are usually conditional and possess safeguards.[22] These conditions usually ensure that although justice is eroded, it permits the unveiling of the truth and is only conferred where necessary in everyone's interest, and not just the perpetrators, to facilitate information recovery and societal reconciliation.

[18] Lundy & Mc Govern, Whose Justice? Rethinking Transitional Justice from the Bottom Up, *Journal of Law and Society*, vol.35, no.2 (2008) p.270.
[19] Fijalkowski in Simic (2020) (n.16) p.103.
[20] Ibid. p.127.
[21] Ibid.
[22] Werle & Vormbaum (2022)(n.13) p.64.

1.2: Transitional Justice in Northern Ireland

"We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements".[23]

The GFA affirmed a clear commitment by all parties to assert political goals and motivations through peaceful means rather than violent ones. The document outlined various transitional justice measures aimed at transforming the Northern Irish governmental landscape, confronting violations and reconciling the fractured nationalist and unionist communities. Berastegi notes that NI does not identically constitute the customary archetype of transitional justice models, in that it had been and remained a democracy while violations occurred. [24] If a state fails to adequately provide accountability, it renders itself vulnerable to issues of a similar nature continuing to arise, and if victims have been routinely disregarded, relations may further deteriorate, and "help to infect future generations with an indiscriminate hatred of the perpetrators and their descendants- and also with an endemic mistrust of the state".[25] Thus, the actions taken by the state at this juncture are critical.

The GFA as a transitional mechanism, was faced with the challenging task of reaching a conciliatory agreement, that would require notable concessions on both sides of the community divide, demanding they set aside well-established personal opinions, so that NI would no longer be embroiled in brutal sectarian violence. It outlined important elements, including how power-sharing bodies would operate in an inclusive and cooperative manner, and likewise the management of the collaborative efforts of both the UK and Ireland.[26] The agreement also contentiously allowed for the liberation of approximately 450 Troubles-related offenders, of both unionist and nationalist background.[27] This particular action is reflective of the difficult sacrificial outcomes of transitional justice measures. While it signifies a renaissance, allowing

[23] GFA (1998)(n.4).
[24] Berastegi, Transitional justice in settled democracies: Northern Ireland and the Basque Country in comparative perspective, *Critical Studies on Terrorism*, vol.10, no.3 (2017) p.544.
[25] Biggar, *Burying the Past: Making Peace and Doing Justice after the Civil Conflict*, Washington DC, Georgetown University Press (2001) p.5.
[26] Nagle, Between Conflict and Peace: An Analysis of the Complex Consequences of the Good Friday Agreement, *Parliamentary Affairs*, vol.71, no.2 (2018) p.397.
[27] Aiken, Learning to live together: Transitional justice and intergroup reconciliation in Northern Ireland, *International Journal of Transitional Justice*, vol.4, no.2 (2010) p.176.

those ensnared by the conflict to be permitted a second chance, it also forces victims to live alongside those who committed grave offences against them. This is an extremely sensitive undertaking, which sees the parties responsible absolved of guilt, or at least the consequences. While positive aspects of the agreement have been applauded, Berastegi suggests that a central flaw in negotiations at this time comprised "the lack of a strategy for dealing with the past and, more specifically, any general agreement for dealing with issues surrounding truth and justice for victims".[28] Thus this area has represented a notable grey area, a discrepancy that the UK Government believes will be rectified under the introduction of the NITLR Act, sentiments not seconded by the Irish government who are equally empowered to ensure a solution.

One moderately successful initiative that did arise in the aftermath of the GFA was the Bloody Sunday Inquiry, which endeavoured to make an accurate surmisal of the events surrounding the killing of unarmed protesters by British Soldiers. These events will be explored in greater detail in Chapter two, however, at this point it is helpful to consider how adept it was at promoting the ideals of transitional justice. The investigation was extensive, with in excess of 900 people questioned and asked for their accounts of what had occurred.[29] The subsequent report issued a more transparent narration of events than had previously been acknowledged, and one that has been given credence and confidence by all across the cultural divide.[30] This represented not only a personal victory for victims' family members, but an entirely progressive moment for Northern Irish society generally, with the long-disputed truth being publicly admitted. After so many years of concealment and denial, this precipitated genuine healing.

The Inquiry ensured that justice was obtained albeit to a somewhat measured extent, in that it attempted to remedy the crimes committed but also the dissemination of misinformation regarding victim culpability that had been proffered under the initial governmental report.[31] The new report acted as "an official exoneration" of those killed, finally, asserting their blamelessness, followed by an apology from the then UK Government and the explicit intention to launch a reparations scheme.[32] However, despite these efforts, the Inquiry did not sufficiently pursue the accountability of the perpetrators, ensuring their anonymity and further shielding those responsible from criminal prosecution, especially refraining from investigating

[28] Berastegi (2017) (n.24) p.548.
[29] Aiken (2010) (n.27) p.178.
[30] Aiken (2015) (n.3) p.108.
[31] Ibid. p.111.
[32] Ibid. p.112.

those in positions of control and power.[33] The lack of an encompassing resolution, but rather one that continues to protect those accountable from facing consequences for their actions can significantly diminish transitional justice efforts, and cultivates distrust among the public rather than hope in the new regime.

Despite these critiques, the report did have a positive effect regarding reconciliation between the two communities in NI, if not entirely between nationalists and the UK Government. The encouraging development of inter-group relations was highlighted by the poignant decision taken by eminent Protestant figureheads in the immediate aftermath of the publication of the report, to visit Catholic neighbourhoods and meet with victims loved ones in a hopeful expression of unity and peace.[34] The Bloody Sunday Inquiry and the resulting efforts by both unionist and nationalist populations to participate in meaningful and empathetic dialogue is an essential catalyst to this occurring. Reconciliation is one of principal aims presented under the NITLR Act, however, NI has already been actively and successfully engaging in such practices. Seeking to reconcile nationalist and unionist communities in NI is no easy feat, where existing divisions are bitter, and perceptions of why the conflict has occurred are contrasting. It is these prejudices that need to be dismantled, for peaceful coexistence to be cultivated. These sentiments were exemplified by Richard Moore, who lost his sight as a young child when he was struck by a rubber bullet fired by a British Soldier. The two have subsequently enjoyed a near twenty-year friendship, with the latter eventually apologising.[35] Moore verbalised his conception of reconciliation, "the fact that I didn't possess any anger, forgave the soldier led me to have a reasonably content and happy life".[36] Despite the traumatic and life altering injuries inflicted so unjustly upon him, Moore decided to forgive, forging positive relationships with those who once wished him harm, ultimately to his own benefit and to the soldier's. This example of what reconciliation looks like in practice and the proof of why it is so worth earnestly striving for, embodies the objectives of transitional justice, that if successfully administered in a way that ensures the inclusion of and addresses the needs of the local population, can lead to a long-lasting and durable peace.

[33] Ibid. p.113.
[34] Ibid. p.116.
[35] BBC news, Richard Moore: Soldier who blinded schoolboy says 'sorry' (1 September 2020) < https://www.bbc.com/news/uk-northern-ireland-foyle-west-53985472 > accessed 27 May 2024.
[36] Hennessy David, Breaking the cycle (The Irish World, 10 February 2022) < https://www.theirishworld.com/richard-moore/ > accessed 27 May 2024.

Chapter 2: The Irish Question: 1921-1998

2.1: Partition: The Division of Ireland

"Think-What have I got for Ireland? Something which she has wanted these past seven hundred years. Will anyone be satisfied at the bargain? Will anyone?".[37]

These poignantly prophetic sentiments were expressed by Michael Collins after the protracted negotiations that led to the signing of the Anglo-Irish Treaty in 1921. He famously consisted one of several Irish plenipotentiaries sent to London, who possessed the impossible burden of securing freedom for a country with varying definitions of what this entailed, and against an unyielding opposition in the form of a government all to accustomed to successful imperialistic control. The people of Ireland had grown weary having spent centuries under the formidable thumb of British rule, with the recent war of independence spurring both governmental representatives by necessity to the negotiation table.

NI represented a focal point of contention, with a substantial percentage of populations of six counties of the nine in in the province of Ulster being composed of those whose ancestors were "Protestant settlors from Britain who in general now strongly supported political union with Britain", as opposed to the Irish who had naturally, consistently rejected these ideals.[38] The Irish delegates sought independence for the island in its entirety, but the conclusion of the treaty, prescribed that NI would continue to exist as a part of the UK.[39] The process of completing the agreement had been arduous, with the threat of militaristic action and a political stalemate looming large, Collins and his associates believed securing home rule for the majority of the island represented significant progress, believing that this could be achieved for the rest of the country with further cooperative discussions.[40] Although commonly understood as a necessary compromise, the treaty metaphorically and physically divided the country. Irish nationalists in NI felt abandoned and forced to occupy the role of a disregarded and

[37] Doherty and Keogh, *Michael Collins and the Making of the Irish Free State*, Mercier Press Ltd (2006) p.134.
[38] Kenny, A Fateful Weekend in 1921: At the Crux of Negotiations for an Anglo-Irish Treaty and an Independent Irish Parliament, *Parliaments, Estates and Representation*, vol. 39, no.1 (2019) p.32.
[39] Lynch, The Anglo-Irish Problem , *Foreign Affairs*, vol. 50 no.4 (1972) p.607.
[40] Donnelly, Ireland in the imperial imagination: British nationalism and the Anglo-Irish Treaty, *Irish Studies Review*, vol. 27, no. 4 (2019)p.494.

discriminated minority.[41] It is expressly these contentious issues that catalysed the Troubles, and the very experiences that have led to the enactment of the disputed legislation. It is vital that the legal actions and political decisions made in NI today, both respect the need for truth and justice, and ensure that in the future, the conflict will never again escalate to the frightful heights it has previously climbed.

2.2: Operation Demetrius: Internment without Trial

"Now as the news comes in of each neighbourly murder we pine for ceremony, customary rhythms".[42]

In the poem *Funeral Rites*, Irish Poet, Seamus Heaney speaks of his experience growing up as a Catholic in rural Derry. This notion of "neighbourly murder" conjures a vivid depiction of the bitter divisions within the Northern Irish community, with those you lived alongside becoming your adversary. The hatred and violence becoming inextricably intertwined with normal everyday practice. The Troubles are often in their simplest form unravelled to describe a conflict between Irish Catholic nationalists and British Protestant unionists, alongside the British Security Forces. A struggle between those who craved a united and free Ireland, and those who wished to remain a part of the UK. A brief exploration of certain events is required to truly understood the legal and political context of NI during this time which has left many searching for justice and fearing that the new Act will prevent this from occurring.

In the post partition era, nationalists faced educational, occupational, and electoral discrimination, further exacerbating political tensions, and solidifying their treatment as second-class citizens in NI.[43] They engaged in a widespread civil rights campaign to secure basic freedoms and entitlements, on par with their loyalist counterparts. These actions were understood as an affront to British sovereignty and were ignored as opposed to ensuring the facilitation of inclusion and equal treatment, which may have prevented intensification These experiences demoralised the nationalist population, eventually leading to the Troubles, generally understood as starting with separatist disturbances in the August of 1969.[44] Shortly afterwards, the British Army were stationed in both Derry and Belfast, and rather than exerting

[41] Loughlin in Kennedy & Olleranshaw, *Ulster since 1600: Politics, Economy, and Society*, 1st ed., oxford university press (2013) p.240.
[42] Heaney, *100 Poems*, Faber & Faber Ltd (2018) p.36.
[43] Loughlin in Kennedy & Ollerenshaw (2013) (n.41) p.240.
[44] Walker in Kennedy & Ollerenshaw (2013) (n.41) p.328.

a steadying influence, they quickly became symbols of oppression to the Catholic minority. The Army is alleged to have played an incendiary role, one plagued with contentions of "covert and undercover operations and alleged collusion with loyalists".[45]

The provisional Irish Republican Army (PIRA) developed as a separate faction from its original namesake and began instigating assaults on British State Forces in retaliation, further perpetuating a vicious, endless cycle, in amplifying clashes with unionist paramilitaries also.[46] These warring paramilitary organisations, possessed completely diverse aspirations, but expressed a willingness to take similarly violent measures to achieve their goals. The police force, the Royal Ulster Constabulary (RUC) became equally equated as being biased and unrepresentative of the community in its entirety. This was evident in that over 90% of recruits possessed a protestant background, further collapsing relations and advancing more widespread dissident republican behaviour.[47] A complicated power struggle existed at this time, between Stormont in Northern Ireland and Westminster in London, with the introduction of internment eventually being agreed upon as the desirable progression in dealing specifically with the increased activity of PIRA, as opposed to that of loyalist paramilitaries also.[48] Internment without trial can be summarised as "an extrajudicial deprivation of liberty by executive action", thus it is a legal exception to established human rights guarantees surrounding rights to liberty and a fair trial, in order to combat discernible threats.[49]

Internment aggravated the situation, rather than presenting a solution. The nationalist community felt singularly and unfairly targeted and PIRA were not weakened but emboldened.[50] A vast number of those interned were innocent or merely possessed an "inactive sympathy" to the republican cause.[51] These blatant rights violations did not encourage trust in governing institutions and in the rule of law, which was already understood to be fragile. One example of the prejudicial application of the process, involved an Edward Campbell, who was present in a residence where soldiers were targeting another specific individual, but upon failing to locate their designated suspect, Campbell himself, was told that he would suffice.[52]

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[45] Ibid. p.329.
[46] Ibid. p.329.
[47] O'Leary & Mc Garry, *The politics of antagonism: understanding Northern Ireland,* Bloomsbury Publishing (2016) p.27.
[48] McCleery, Debunking the Myths of Operation Demetrius: The Introduction of Internment in Northern Ireland in 1971, *Irish Political Studies*, vol. 27, no.3 (2013) p.415.
[49] Lowry, Internment: Detention without Trial in Northern Ireland, *Human Rights*, vol.5, no.3 (1976) p.261.
[50] Walker in Kennedy & Ollerenshaw (2013) (n.41) p.329.
[51] McCleery (2013) (n.48) p. 418.
[52] Ibid. p.416.

There appeared to be no differentiation between Catholics who had committed crimes and those who had not. This generalised punishment further unified the nationalist cause since Catholics felt they would never be treated fairly, regardless. Thus, the use of internment in this context worsened hostilities rather than supressing militaristic action, making the nationalist community, most of whom had taken no part in the violence, feel solely targeted and at risk of oppressive retribution for crimes uncommitted by them personally.[53]

2.3: The Bloody Sunday Incident

"And the battles just begun. There's many lost but tell me who has won?".[54]

In one of rock band U2's most famous songs *Sunday Bloody Sunday*, they pedal a strongly anti-sectarian narrative, as they depict the tragic events that occurred in Derry on 30 January 1972. The city of Derry is of marked historical significance. Dawson vividly describes the symbolism of the very architecture and layout of the city displaying the fractures of the local population, "whose famous walls, designed to defend the lives and property of the settlors within from the colonized Catholic Irish without, have survived intact to this day".[55] Despite a substantial Catholic population, they were systemically and structurally marginalised.[56] Derry had become the epicentre of the Catholic endeavour to secure fundamental civil rights and equal treatment,[57] something that was often vocalised through peaceful demonstrations in the area. During a march of this nature on this date, nearly 20,000 citizens, comprising both adults and children, protested the abusive application of internment and ongoing discriminatory treatment of nationalists,[58] before the First Battalion of the Parachute Regiment of the British Army began shooting at the demonstrators.

Fourteen of those shot tragically lost their lives.[59] The overwhelming injustice of what had transpired was exacerbated by immediate declarations from the UK Government that the soldiers had merely defended themselves against dangerous individuals.[60] The initial Widgery

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[53] Lowry (1976) (n.49) p.274.
[54] U2, Sunday Bloody Sunday,< https://www.u2.com/lyrics/127 > accessed 29 April 2024.
[55] Dawson, Trauma, place and the politics of memory: Bloody Sunday, Derry, 1972-2004, *History Workshop Journal*, vol. 59, no.1 (2005) p.158.
[56] Ní Aoláin, *The politics of force: Conflict management and state violence in Northern Ireland*, Blackstaff Press (2000) p.10.
[57] Walsh, *Bloody Sunday and the rule of law in Northern Ireland*, Springer (2000) p.1.
[58] Dawson (2005) (n.55) p. 160.
[59] Aiken (2015) (n.3) p.104.
[60] Ibid.

Report absolved the regiment of responsibility, and it was not until nearly forty years later that the subsequent Saville Report, detailed the killings as entirely unjustifiable.[61] For many, the assertion that those murdered had irrefutably been unarmed and innocent of wrongdoing came four decades too late. Nevertheless, this development was a palpable improvement on blatant denial. Families of victims continue to lament a lack of accountability, with only one of the soldiers responsible being prosecuted in 2019 and not for all the murders he is alleged to have committed.[62] This thesis ponders whether the NITLR Act may erode these hard fought attempts that have thus far already been repeatedly thwarted, preventing the completion of this progressive trajectory. Bloody Sunday serves as a evocative example of the enduring efforts made to conceal abusive state power and the lingering consequences this permeates amongst the people who are exploited.

This evasion of responsibility on the part of the state is further exhibited in that months prior to the events of Bloody Sunday, the same regiment engaged in the "forgotten massacre".[63] In August 1971, ten individuals were killed in Ballymurphy, a Catholic community.[64] Among those murdered, was a "mother of eight and a Catholic Priest shot in the back while waving a white handkerchief and giving the last rites to a badly wounded man".[65] The brutality of these actions and the blamelessness of the victims is so redolently demonstrated in these examples of figures synonymous with comfort and compassion. A ceaseless repudiation of responsibility was countered in 2018 when an inquest was finally ordered. These events facilitate the observation of a disturbing pattern, where families are forced to devote decades striving for justice and recognition for the crimes committed, without the support or cooperation and at times the prevention, of the state.

These tragic events and a persistent lack of explanation compounds an enduring legacy of impunity. This thesis does not seek to present an overtly one-sided account of crimes committed by the state and recognises that they are far outweighed by those committed by paramilitaries largely PIRA.[66] Justice for all victims is fundamental regardless of perpetrator. However, since it is the UK Government who are introducing the Act, to the discontent of the other involved

[61] The RT Hon The Lord Saville of Newdigate, The Hon William Hoyt OC, The Hon John Toohey AC, Report of the Bloody Sunday Inquiry, Volume V, Sector 3: Events in Rossville Street (Ordered by the House of Commons to be printed on 15 June 2010).
[62] Mc Govern, State violence, empire, and the figure of the "soldier-victim" in Northern Ireland, *Journal of Labour society*, vol.22, no.2 (2019) p.445.
[63] Ibid. p.454.
[64] Ibid.
[65] Ibid.
[66] Ibid. p.443.

parties, it is their actions and motivations that will be scrutinised. Ballymurphy and Bloody Sunday decisively serve to dispute the states "self-portrait of itself as a neutral arbiter".[67] Nationalist minority calls for freedom and respect were answered with discriminatory and senseless brutality. It could be argued that these pretentious notions of playing the role of the unbiased mediator seem to prevail in their reasoning behind introducing the NITLR Act, a role which they have not only failed to display the ability to perform satisfactorily but have acted entirely contradictorily to at times. Since both nationalist and loyalist communities are strikingly united in their condemnation of current legislative developments, it is necessary to explore the Act itself, and what it seeks to achieve and what it might irrevocably prevent.

[67] O'Leary and McGarry (2016) (n.47) p.183.

Chapter 3: An Exploration of the Northern Ireland Troubles (Legacy and Reconciliation) Act

The UK Government claims that the introduction of the NITLR Act derives from provisions in the GFA that stipulate they must promote victim acknowledgement, "as a necessary element of reconciliation".[68] As has previously been outlined, the UK Government unilaterally established the Act, in the absence of consensus from local political parties and victims, upon the proposed basis of achieving this objective, considering ongoing indecision over how to address the problem. The Labour Party has committed to repeal the legislation if elected to power, signifying not only discordance with Stormont, but also within Westminster itself.[69]

3.1: The Perceived Benefits and Shortcomings of The Act

"Victims have been shamefully ignored. We did not want this law, we want answers about what happened to our loved ones, and we want accountability".[70]

This emotive declaration was made by Martina Dillon, who mounted a successful challenge alongside other bereaved family members, regarding the legality of the NITLR Act in the Belfast High Court. These proceedings will be addressed presently, however, The UK Government remains steadfastly committed to its enforcement, citing their positive mission of ensuring more extensive memorialisation and the retrieval of vital information.[71] These ideals are founded upon logical reasoning, justified upon a definitive need for reform in this area.[72] It is proposed that the ICRIR will allow for the expedient acknowledgement of crimes which would otherwise face lengthy judicial delays or biased interference. The recovery of information represents a compelling argument, with the enticement of amnesty inevitably making perpetrators more likely to comply. The time that has elapsed since many of these crimes were committed and the subsequent aging of victims and offenders, makes this objective

[68] GFA (1998) (n.4).
[69] O'Neill, The Troubles: 'Legacy act denies victims like me closure' (BBC, 1 May 2024) < https://www.bbc.com/news/uk-northern-ireland-68930602 >accessed 15 June 2024.
[70] Kearney, Challenge to Troubles legacy law being heard in Belfast (RTE, 21 Nov 2023) <https://www.rte.ie/news/ulster/2023/1121/1417607-troubles-bill-court > accessed 21 Feb 2024.
[71] Northern Ireland Troubles (Legacy and Reconciliation) Bill, Explanatory Notes, Bill 10, 58/3 (2022) p.6.
[72] EQIA (2022) (n.6) para.10.

increasingly confronting. The UK government believes these developments will equip the region to attain a cooperative and progressive outlook, unhindered by previous division, "we are confident that by delivering a way forward that provides information and helps families get answers they have long sought, this will lay the foundation for greater reconciliation".[73] Peace-building and inter-community reconciliation is naturally a forefront aspiration of all transitional justice mechanisms in NI, and if this Act would nurse positive relations and grant the truth that victims deserve, it would be an estimable asset.

However, I will be challenging this perspective. I contend that the achievement of these ambitions will not be facilitated through the introduction of the Act. I will operate on various points on the spectrum of opposition, either that the legislation is in the least ill-advised and incompatible with international legal standards, and at worst a deliberate attempt to escape responsibility for direct governmental involvement and collusion, considering legacy inquests are yielding results and offering transparent evidence of such.[74] The Northern Ireland Human Rights Commission (NIHRC) supports the earlier sentiments enunciated by Ms Dillon, criticising the lack of victim participation or inclusion in the adoption and operation of the new scheme, confirming that the act is "staunchly opposed within NI".[75] This notion will be central to my criticism of the Act, simply that the people it claims it will reconcile, are opposed to its implementation. Furthermore, the Northern Irish community has already undergone significant efforts to attain reconciliation, including cross-cultural dialogue and continuing political debate. This progress is evident in that the violence experienced during the troubles has not since been repeated. Victims believe that this will be jeopardised by the Act rather than promoted. [76] I will proceed by focusing on the ways in which the act seeks to cease criminal proceedings and offer immunity to perpetrators.

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[73] Ibid. para.14.
[74] McEvoy, Bryson, Mallinder (Queens University Belfast) Holder l, McKeown and Gormally (Committee on the Administration of Justice), *Model Bill Team Initial Response to Northern Ireland Troubles (Legacy and Reconciliation) Bill* (May 2022) p.8.
[75] Northern Ireland Human Rights Commission (NIHRC), Advice on NI Troubles (Legacy and Reconciliation) Bill, (September 2022) p.5.
[76] *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland* [2024] NIKB 11 para.73.

3.1.1: Clause 38: The Cessation of Criminal Proceedings

Clause 38 of the act outlines that "on and after the day on which this section comes into force, no criminal investigation of any Troubles-related offence may be continued or begun".[77] Part one of the act explains that murder, manslaughter, and serious harm have been included as offences within this context.[78] To prevent individuals access to the court and to cease proceedings already occurring at great personal and judicial cost, is a bold move which would need to be weightily justified and adequately rectified by the substitute mechanism.

It is indisputable that the existing caseload is overwhelming. Statistics from last year indicate that the Police Service of Northern Ireland (PSNI) was actively dealing with investigations into the killings of approximately 1,200 individuals.[79] Brandon Lewis, the previous Secretary of State for NI defended the Act, expecting that it would impart a greater likelihood of closure for victims than prior mechanisms have, justifying this upon the basis of "the high standard of proof required to secure a successful prosecution, combined with the passage of time and difficulty in securing sufficient evidence".[80] The UK Government equally asserts that the new mechanism is an inevitable development, and its absence would continue to encumber the local authorities and prevent societal progression.[81] The ICRIR would expediate the process as it would bypass the usual legal evidentiary obstacles and challenges. However, on the converse, it would also dissolve institutional safeguards. Reform for the sake of reform cannot substantiate these measures, they must accomplish the endeavoured goals.

Clenaghan acknowledges the failings of the exisiting system, however, she references recent legacy inquests, that display the increasingly successful capacity they have for providing answers to victims.[82] It seems unfortunate that it is precisely when such actions are gaining progressive traction that the government wishes to prevent their functioning.[83] The Model Bill Team commends the improving performance of the exisiting legal avenues, pointing to the resolution of the Ballymurphy Massacre Inquest, which heard extensive testimony and

[77] The NITLR Act (n.5) 38 (1).
[78] Ibid. 1 (5)(b).
[79] UK Government, Explanatory notes (n.71) p.6.
[80] Northern Ireland Office, NI Troubles (Legacy and Reconciliation) Bill: Second Reading Opening Speech by Secretary of State for NI, Brandon Lewis MP (24 May 2022).
[81] EQIA (2022) (n.6) para.19.
[82] Clenaghan, A Barrier to Transitional Justice: Critique of the Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022, *Trinity College Law Review*, vol.26 (2023) p.15.
[83] Ibid. p.17.

corroboration, ultimately professing the unequivocal innocence of the victims and recognising a blatant violation of the ECHR obligations conferred on states.[84] Despite the challenges that the judiciary and the PSNI have faced, which have at times been related to a lack of cooperation on the part of the UK Government, they have demonstrated indisputable promise.[85]

While perhaps taking an overtly critical approach, these factors cause one to question why the UK Government so ardently defends the implementation of a mechanism that halts these developments. They have displayed a concerning affinity for occluding certain evidence from being revealed or denying factual events to protect members of the security forces from criminal prosecution. It has been suggested that perhaps they consider that the actions on the ground are becoming, "too effective" in bringing to light depraved activities they may have partaken in.[86] This is exemplified in the currently unfinished workings of Operation Kenova. This refers to an investigation into the murders committed and the resulting collusion and efforts to conceal these realities on the part of the RUC, by the double agent famously known as 'Stakeknife', who while a member of the PIRA, was actually employed by the British Military.[87] O'Rawe critically questions the latter's actions, and hints at possible motivations they may possess in preventing legal analyses of these undertakings from occurring, "such evidence inevitably raises the question of why the British intelligence services allowed multiple murders of their own citizens to occur when they could so easily have prevented them".[88] The operation has accumulated 50,000 pages of information.[89] The exisiting mechanisms in place, although at times ineffective, hindered or sedate, have shown capability to provide the justice that victims so desperately deserve. I would maintain that this significant legal burden could be offset by diverting financial and staffing resources towards the exisiting bodies who are well accustomed to dealing with these cases and have shown themselves competent in this regard, rather than towards the implementation of the ICRIR.

The NIHRC expressed further concern over the use of the term "review" in replacement of investigation, which immediately causes one to question how effectively these operations will be conducted and whether this will be done in conformity with basic legal standards.[90] While

[84] Model Bill Team (2022) (n.74) p.10.
[85] Ibid. p.12.
[86] Ibid. p.8.
[87] Maguire, Notes from the Field: Lessons Learned from Investigating the Past in Northern Ireland, *International Journal of Transitional Justice*, vol.17, no.3 (2023) p.473.
[88] O' Rawe, *Stakeknife's Dirty War: The Inside Story of Scappaticci, the IRA's Nutting Squad and the British Spooks Who Ran the War*, Merrion Press (2023) Preface.
[89] Model Bill Team (2022) (n.74) p.12.
[90] NIHRC (2022) (n.75) p.6.

the UK Government has assuredly affirmed that their actions will embrace all the elements that make it synonymous with previous measures of investigation, this is not guaranteed within the wording of the provision.[91] This lack of clarity is unsettling. There is a significant legal risk posed in abolishing criminal proceedings in any sense, but when the replacement procedure refrains from describing their actions as investigatory, this makes effectivity and the protection of rights vulnerable. A further source of disquietude derives from the role of the Secretary of State and the effect this would have on whether the commission is "operationally independent".[92] This individual would have authoritative powers revolving around resource allocation and over the functioning of the commission.[93] Clause 20 outlines how they will have extensive control over the governing applicable rules and in determining the issuance of immunity.[94] The perception of impartiality is vital for the community of NI to cultivate trust, while the power bestowed upon the Secretary of State in the present sense, imperils this. As a final point, under clause 9, requests made regarding reviews will no longer be accepted after five years of operation.[95] While posited as an attempt to finalise matters and progress forward, this restrictive expectation on when reviews will be completed, further conveys a lack of careful and empathetic patience, and rather a restless irritation at the sizeable workload.

3.1.2: Clause 19: Immunity from Prosecution

Clause 19 of the Act deals with the granting of immunity for Troubles-related offences in the hope that it will encourage perpetrators to cooperate and engage with the Commission and facilitate the collection of accurate information.[96] This could be viewed as a necessary concession for victims, if it means they will receive answers they otherwise would not have obtained. However, the provision is substantially perpetrator focused, with victims briefly mentioned and guaranteed no meaningful inclusion in the determination process. The Model Bill Team expresses perturbance in this regard, "a conditional immunity that must be granted with minimal due process consideration and little obligation to test the account being offered runs the risk of de facto operating as unconditional amnesty for all who apply".[97] This is not an outlandish surmisal when one considers that in 2021, the UK Government initially pedalled

[91] Ibid. p.11.
[92] Ibid. p.15.
[93] Ibid. p.15, see for example the NITLR Act 2(11), 20(2), 33(1), 33(3), 34(1).
[94] The NITLR Act (n.5) 20(2).
[95] Ibid. 9(8).
[96] The NITLR Act (n.5) 19.
[97] Model Bill Team (2022) (n.74) p.15.

a scheme that would have provided full amnesties to perpetrators.[98] Amnesties, despite their previous widespread use, can further an agenda of impunity and diminish accountability. Therefore, the motivations for their employment must be carefully perused. Where they exist as an attempt to evade liability or even merely to prevent public embarrassment, as opposed to peace and reconciliation, their allowance becomes precarious.

It is necessary to outline several elements of the provision that support these opinions, the first being the three conditions that must be satisfied for immunity to be acquired. These include initially that a person has simply sought immunity from the commission.[99] Secondly, that the immunity requests panel is sufficiently assured that the explanation provided is "true to the best of P's knowledge and belief".[100] This threshold is vague and appears generous to the perpetrator. It refrains from making stringent demands for corroboratory evidence or complete transparency that could more effectively guarantee the collection of the unqualified truth. It is interesting to note that the Act continues by allowing this description to comprise details already known to the Commission or indeed publicly.[101] This does not appear to be an ample substitute to a court process, which would involve the lengthy and detailed exploration of relevant facts that objectively paint an accurate account of what transpired. The third and final condition is simply that the actions divulged would make the applicant liable to be criminally prosecuted.[102] These three conditions taken in conjunction with each other predicate a perceptibly low threshold to meet, and presupposes that immunity could be undemanding to achieve. I would contend that a privilege of such magnitude should not be assumed on such an unchallenging basis.

Another concerning issue can be observed in that while clause 23 allows victims and those affected to issue a personal statement, overall, the process allows for little victim participation.[103] Personal statements will not allow victims to contribute to the decision-making process, rather the panel will simply decide what outcome they perceive as most suitable, irrelevant of what will be expressed therein the statements. Despite assurances that regardless of the indefinite wording of the provision, victims and their families would be kept sufficiently

[98] Ibid.
[99] The NITLR Act (n.5) 19(2).
[100] Ibid. 19(3)(c).
[101] The NITLR Act (n.5) 19(4).
[102] The NITLR Act (n.5) 19(5).
[103] Ibid. 23.

informed of proceedings,[104] the approach does not appear to be victim centred, and therefore cannot adequately aspire to provide justice.

Secretary of State Lewis outlined the defence of veteran soldiers as one of the focal aspirations rooted in this act, "no longer will those who served (…) be subjected to a witch hunt".[105] It is indeed complex terrain to navigate when you consider individuals who were faced with unpredictable and violent conditions, many of whom were merely following hierarchical orders. Nevertheless, it is estimated that 30,000 members of paramilitaries have previously been incarcerated, as opposed to the continued lack of acknowledgment for crimes committed by state agents and their avoidance of imprisonment.[106] As has already been exhibited, it has been holding the State responsible for crimes committed during the Troubles that has proved most elusive for victims, with the Act continuing to shield these individuals. Gavin Robinson of the DUP represented his party's measured criticism of this aspect of the Act, "while it was right that the government addressed the witch-hunt against those who served and defended us against terrorism, an amnesty law was never the way to achieve that end".[107] These sentiments are reflective of the fact that in terms of victims, both nationalist and unionist individuals suffered and face the same pursuit of justice, that will be prevented and not adequately provided for under the NITLR Act. It is of vital import to represent that it is not just those who have been directly wronged by State Forces that oppose this Act, but victims of both paramilitary factions also. Mary McCurrie, whose father was killed by the Irish Republican Army (IRA), expressed little faith in the new Commission, imparting that "the IRA is never, never, never going to admit what they did (…) we're not going to get justice".[108] Victims and the community who endured these tribulations, should be the ones to decide how best justice can be served, and the people of NI simply do not support this Act, nor I would assert, does it represent their interests or value their involvement. Whatever aspirations motivate the UK Government, they appear lonely in possessing them.

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[104] NIHRC (2022) (n.75) p.49.
[105] Lewis Brandon, My NI Legacy plan. No longer will our veterans be hounded about events that happened decades ago (Conservative home, 9 June 2022) < https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/ > accessed 2 May 2024.
[106] Clenaghan (2023) (n.82) p.21-22.
[107] O'Neill (2024) (n.7).
[108] Macauley, 'Day of Shame' as Troubles legacy rules take effect-victims' families (RTE, 1 May 2024) < https://www.rte.ie/news/ulster/2024/0501/1446653-legacy/ > accessed 17 June 2024.

3.2: High Court Ruling

"There is no evidence that the granting of immunity under the Act will in any way contribute to reconciliation in Northern Ireland, indeed the evidence is to the contrary".[109]

As previously mentioned, families of victims collaboratively launched a triumphant legal challenge opposing the NITLR Act in the Belfast High Court. Amnesty International UK acting as an intervenor, supported the complainants' assertions that the Act contravenes both domestic and international legal obligations.[110] The organisation, in displaying their indispensable role in ensuring international human rights protection, firmly resist these legislative developments, finding "that it removes existing judicial and investigative processes and replaces them with a set of mechanisms that fail to discharge the UK's human rights obligations".[111] The plaintiffs represent a striking example of how real victims will be affected, across the political divide, by the cessation of the ongoing investigations into their family members deaths, some of which were finally experiencing progress. The perpetrators of the crimes against them, represent those of varied political affiliation, for example, the complainant, Gemma Gilvary advocated on behalf of her brother, who was brutally tortured and murdered by members of the IRA, representing widespread local discontent.[112]

On the 28 February 2024, Mr. Justice Colton handed down a judgment ardently in favour of the applicants, striking down the clauses regarding immunity and ruling that they violated the ECHR.[113] The Judge in particular noted the states obligation to provide an effective investigation into deaths as an inherent component of the right to life, which demands that "the state must put in place effective criminal law provisions to deter the commission of offences".[114] This is evidently not upheld via the granting of immunity. The case law examined by the Judge will be illuminated in Chapter four, but it is necessary to outline his surmisal that the ECtHR is generally opposed to the use of amnesties, and "in particular that the national authorities should not give the impression that they are willing to allow such treatment to go unpunished".[115] Amnesties leave victims feeling unfulfilled and unvalued, and unlikely to feel

[109] *Dillon* (2024) (n.76) para.187.
[110] NIHRC (2022) (n.75) p.4
[111] *Dillon* (2024) (n.76) para 69.
[112] Ibid. para 17.
[113] Ibid. para 187.
[114] Ibid. para 147.
[115] Ibid. para 126.

more empathetic towards perpetrators. The Judge elaborated upon further problematic elements of the Act, such as the degraded position afforded to victims under the scheme, "there is no requirement for contrition or acknowledgment of the impact of their actions on their victims".[116] A perpetrator may express no remorse for their actions nor sympathy for the victim, and still be absolved of responsibility. The Judge highlighted emphatically that, to reiterate "there is no evidence that the granting of immunity under the Act will in any way contribute to reconciliation in Northern Ireland, indeed the evidence is to the contrary".[117] Such an estimation, by the one of the most superior local courts upon not only the illegality of the Act, but upon the damaging consequences this may have on the carefully nurtured and strengthened peace process within NI, further contradicts the effectivity of the Act. Naturally, the UK Government is appealing this ruling, seeking to have the immunity provisions be subsequently reinstated. This lack of a cohesive legal interpretation further necessitates the relevant expertise and perspective of the ECtHR.

[116] Ibid. para 145.
[117] Ibid. para 187.

Chapter 4: Ireland v The United Kingdom

4.1: The Application

"Most importantly, this legislation is opposed by people in Northern Ireland, especially the victims and families who will be most directly impacted by this act".[118]

The Irish deputy Prime Minister, Micheál Martin placed the rights of the victims and their deep unsatisfaction with the Act, at the forefront of his Government's opposition to its realisation. Recognising that for the victims to vindicate these rights, their judicial pursuits would face lengthy and costly obstacles, while the State could instead acquire this burden and expediate the process on their behalf. This notion came to fruition in December 2023, when the Irish Government filed an inter-state complaint before the ECtHR in response to the UK's introduction of the NITLR Act. They challenged the Act upon the basis of several provisions, including those which provide for the prohibition of torture, the right to a fair trial, the right to an effective remedy and the prohibition of discrimination.[119] However, this thesis will focus upon and explore their claim as it relates to Article 2, which enshrines the right to life and how this incorporates the right to an effective investigation. The Irish Government expressed particular concern as has already been highlighted, with the provisions that grant immunity to perpetrators and those that mandate the cessation of criminal proceedings, as these relate to the preservation of citizens fundamental convention rights.[120]

The UK Government has consistently maintained their conformity with the legal standards demanded under Article 2.[121] They advocate that the Commission will be independent, operating distinctly to the "state bodies it may be investigating".[122] They present that police corruption or complicity will not be a biased factor in their investigatory functions, as it may

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[118] Department of Foreign Affairs, Press Release, Statement by the Tánaiste Micheál Martin on the government decision to initiate an inter-State case against the United Kingdom (20 December 2023),< https://www.gov.ie/en/press-release/82232-statement-by-the-tanaiste-micheal-martin-on-the-government-decision-to-initiate-an-inter-state-case-against-the-united-kingdom/ > accessed 16 May 2024.
[119] *Ireland v The United Kingdom* (2024) (n.9).
[120] Ibid.
[121] House of Commons, House of Lords, Joint Committee on Human Rights, Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill: Government response to the Committee's Sixth report, Fourth Special Report of Session 2022-23, HC 1179 (2 March 2023) p.1.
[122] Ibid.

be in present mechanisms, with authoritative bodies sometimes remaining steadfastly committed to concealing their own wrongdoing. The Government also contends that investigations carried out shall be effective, in that the ICRIR will be entitled to and privy to all evidence and information pertinent to proceedings.[123] These wide-ranging powers are akin to those of a judicial or policing nature and will allow them to formulate a precise surmisal of events. They are furthermore of the opinion that the preclusion of public hearings is not incompatible with the ECHR nor is it required under Article 2's procedural obligations, but instead believe that issuing conclusive reports will suffice.[124] These reports would pertain to provide an unambiguous narrative of what transpired, a cost-effective strategy and furthermore, a way that does not expose victims to further traumatisation or intimidation.

Despite concerns that victims would not be ensured their right to participate in proceedings which would threaten their effectivity, the UK Government instead conveys that "by allowing the Commission to operate on a demand-led basis, it empowers families to lead the process".[125] When victims make the ultimate decision to approach the ICRIR regarding the traumatic events that they have suffered, they retain autonomy over their own pursuals of justice and firmly place themselves at the forefront of the process. It is ensured that the ICRIR would be committed to involving the next-of-kin, "in the same way as the police do when investigating crime".[126] This seems to demonstrate that the victims would be empathetically treated and included, perhaps even on a more personal basis than they would experience under the existing more burdened system.

In relation to immunity, the Government considers that the procedural obligations outlined under Article 2 are not unconditional, viewing their proposed actions as essential, in that they seek "information which would not otherwise come to light, and its recovery via the conditional immunity process is an important part of facilitating reconciliation in Northern Ireland".[127] This will be a central proponent to the legal representation of the UK, that they accept the potential for incompatibility but view any such divergence as necessary, to further the interests of victims and to promote sustained peace and reconciliation in NI. Specifically, that this scheme is a concession which will ensure that information will be retrieved expediently. The alternative to this could be that victims would simply never receive recognition, since many years have and

[123] Ibid. p.3.
[124] Ibid. p.5.
[125] Ibid. p.6.
[126] Ibid. p.6.
[127] Ibid p.8.

continue to pass since these crimes occurred, with the backlog of cases remaining extensive. Although it may not satisfy duties of prosecution, it would grant victims answers, and if regardless, justice will never be achieved, this appears to be a rational sacrifice. Having addressed these defensive aspects of the NITLR Act, this thesis will now explore the legal issues being disputed, before arriving at a balanced assessment of what conclusion the ECtHR might reach.

4.2: Article 2: The Procedural Obligations of The Right to Life

"Everyone's right to life shall be protected by law".[128]

The significance of the right to life is indisputable, exhibited by its consistent inclusion in all major regional and specialised human rights treaties.[129] Its fundamental nature is self-evident, with its fulfilment facilitating every other single legal entitlement.[130] It is therefore, a right that the ECtHR have always endeavoured to stringently protect and uphold with extensive reasoning. The wording of Article 2(1) of the Convention as aforementioned at the onset of this section, is vague which seems contradictory in relation to its complex and indispensable nature. It offers no explicit guidance regarding amnesty or the prevention of criminal proceedings in the wake of unlawful death. Nevertheless, the various entitlements provided under the provision have been addressed and expanded by the Court on previous occasions, displaying that the specific aspects pertinent to this thesis, come firmly within its scope.

It is now well-established that the Article imparts procedural obligations upon states. These duties developed initially regarding the complicity or involvement of state agents in acts of violence, as formatively outlined in *McCann v The United Kingdom*.[131] *McCann* dealt with the killing of PIRA affiliates in Gibraltar by the British Army based upon the belief that they were preparing to immediately detonate a bomb, information that transpired not to be accurate.[132] The Court emphatically surmised that to guarantee the right to life definitively and for the provisions of the ECHR to be truly realised, the right needed to be extended beyond simply not

[128] COE, *European Convention on Human Rights and Fundamental freedoms* (4 Nov 1950) Article 2.
[129] For example, UNGA, International Covenant on Civil and Political Rights, 999 UNTS 171 (16 December 1966) Article 6, OAU, *African Charter on Human and Peoples' Rights*, CAB/ LEG/ 67/3 rev.5, 21 I.L.M. 58 (27 June 1981) Article 4, OAS, *American Convention on Human Rights (*22 Nov 1969) Article 4.
[130] Skinner, *Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*, Bloomsbury Publishing (2019) p.5.
[131] *McCann v The United Kingdom*, App no 18984/91(ECtHR, 27 Sep 1995).
[132] Wicks, *The Right to Life and Conflicting Interests*, Oxford: Oxford University Press (2010) p.62.

arbitrarily taking life and again even further than also protecting individuals from harm. Instead, the convention innately demands, "that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state".[133] This decision positioned the Court on their current trajectory that continues to evolve and further implore states to make efforts of pursuing accountability on behalf of their citizens.[134] In the present context, this demands the Court question whether such a satisfactory investigation can occur by the ICRIR or in any sense in the absence of policing and judicial powers, and with the overwhelming onus on the personal testimony of the perpetrator as opposed to deriving evidence via more objective means.

The necessity for an effective investigation was affirmed by the Court in *Armani Da Silva v The United Kingdom*, confirming that this commitment is a crucial duty under the provision.[135] In these proceedings, the Court clarified the requisites that ensure an investigation is deemed effective, namely that it is sufficiently independent,[136] adequate,[137] and that the outcome is grounded upon the "objective and impartial analysis of all relevant elements".[138] It is contended that these components in the context of NI, in particular the latter, are threatened under the new scheme. The ECtHR has since expanded upon this earlier notion which revolved around examples of state force, and now acknowledges that this obligation is essential in a multiplicity of circumstances, "irrespective of whether those allegedly responsible are State agents or private persons or are unknown or self-inflicted".[139] In *Rod v Croatia*, the Court in determining the admissibility of proceedings, elaborated upon this idea, commenting that "the absence of any direct state responsibility (…) does not exclude the applicability of Article 2".[140] Rather, the responsibility to investigate applies regardless, reinforcing the wide-ranging privileges bestowed under Article 2, which upon application to the NITLR Act, not only pertains to state agents but would also embrace individual paramilitaries or lone dissidents.

Interestingly, some of the Courts most illuminating analysis of the effectivity of investigations, comes from a judgment handed down in 2001 in relation to twelve individuals who lost their

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[133] *McCann v The United Kingdom* (1995) (n.131) para.161.
[134] Chevalier-Watts, Effective investigations under article 2 of the European Convention on Human Rights: securing the right to life or an onerous burden on a state? *European journal of international law*, vol.21, no.3 (2010) p.705.
[135] *Armani Da Silva* (2016) (n.10) para.231.
[136] Ibid. para 232.
[137] Ibid. para 233.
[138] Ibid. para 234.
[139] COE, ECtHR, Guide on Article 2 of the European Convention on Human Rights, Right to Life (updated on 31 August 2022) para.141.
[140] *Rod v Croatia*, App no 47024/06 (ECtHR, 18 Sep 2008) p.5.

lives during the Troubles.[141] *McKerr v The United Kingdom* revolved around the killing of the unarmed Gervaise McKerr by the RUC in the early eighties.[142] The Court clarified that effectivity required the evaluation of a broad spectrum of issues, with the sufficient implementation of one factor not ameliorating the failure to respect another, citing that although the investigation could be deemed to have been made public, the investigation had consequently not been effective.[143] This was grounded upon a number of issues including but not confined to a broader failure to transparently assuage fears regarding their so-called shoot to kill policy,[144] the allowance of statements by perpetrators to displace the need for their physical presence,[145] and that familial participation was severely hindered.[146] The Court made a further qualification in terms of the value of judicial proceedings, viewing them as pivotal in securing a just outcome, "in the normal course of events, a criminal trial with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure".[147] The Court may deem to preclude the present proceedings from falling within this definition due to the abnormality of the context, however, regardless, the replacement of this mechanism with the ICRIR can be presumed to result in a less comprehensive conclusion, and would likely offend these obligations. The Court emotively concluded in finding a violation that these failures of accountability, "will only add fuel to fears of sinister motivations".[148] This manner of thinking echoes resonantly in the concerns surrounding the introduction of the NITLR Act. When a legislation displaces fundamental human rights and the public that it seeks to serve feel aggrieved by its effects, wariness surrounding the incentives underlying its introduction become wholly legitimate.

Hugh Jordan v The United Kingdom highlighted issues of a similar consequence.[149] The Court emphatically noted how once again the killing of an unarmed individual creates the exact conditions for the creation of an event that unavoidably "cries out for an explanation".[150] It is this lack of an explanation where it is so expressly necessitated that is unfortunately a reoccurring factor in a number of these cases and which further provokes a lasting impression

[141] Bell & Keenan, Lost on the Way Home? The Right to Life in Northern Ireland, *Journal of Law and Society*, vol.32, no.1 (2005) p.73.
[142] *McKerr v The United Kingdom*, App no 28883/95 (ECtHR, 4 May 2001) para.11.
[143] Ibid. para.142.
[144] Ibid. para.143.
[145] Ibid. para.144.
[146] Ibid. para. 147.
[147] Ibid. para.134.
[148] Ibid. para.160.
[149] *Hugh Jordan v The United Kingdom*, App no 24746/94 (ECtHR, 4 May 2001).
[150] Ibid. para.124.

of impunity, that becomes increasingly more difficult to disassemble. The introduction of the NITLR Act does not assuage these fears but rather the securement of accountability becomes vulnerable to further erosion. Upon the basis of these cases, Mallinder summarises that the main overriding considerations in terms of an adequate investigation, can be expressed as follows, "independence, promptness, transparency, and effectiveness".[151] I concur that the while the Commission will be capable of working expeditiously, the other components are less assured than they would be under a conventional, judicial framework.

The response by the UK Government to these judgements that deem they have violated their obligations has been underwhelming, as they have refrained from resuming relevant examinations.[152] A ruling that there has been an ineffective investigation, while signifying recognition, if it does not ensure the subsequent carrying out of a sufficient remedial one, does not dramatically further a victim's interest. Rather, the perpetrators and meaningful judicial progression remains evasive. While inevitably an onerous task, these obligations should be a foremost priority of a state, to defend human rights and further the pursuit of accountability. These ideals remain notably applicable to the UK Government in encouraging them to invest in and engage with current mechanisms, rather than unsatisfactorily reinventing them.

4.3: What has the European Court of Human Rights previously imparted in relation to Amnesties and the Prevention of Criminal Proceedings?

4.3.1: Jurisprudence of the European Court of Human Rights

The present application provides the Court with an opportune occasion to provide a legal analysis upon the compatibility of amnesties and the prevention of criminal proceedings, with obligations conferred under Article 2, guidance they have not previously explicitly conveyed. While there is the absence of a precise appraisal, the Court has referred to the matter indirectly, which provides us with insight into the conclusion their ruling may form.[153] Concerns regarding their potential discordance with investigatory obligations under Article 2 revolve around how

[151] Mallinder, Moffett, McEvoy and Anthony Investigations, Prosecutions and Amnesties Under Articles 2 & 3 of the European Convention on Human Rights, *Transitional Justice Institute Research Paper*, no.15-05 (2015) p.8.
[152] Bell & Keenan (2005) (n.141) p.75.
[153] Pérez-León-Acevedo, The European Court of Human Rights (ECtHR) ***vis-à-vis*** amnesties and pardons: factors concerning or affecting the degree of ECtHR's deference to states, *The International Journal of Human Rights*, vol.26, no.6 (2022) p.1107.

they endanger the individual's pursuit of accountability, although granted this is sometimes forfeited in exchange for truth and reconciliation. Regarding amnesties generally, the current legal outlook appears to be generally opposed to their utilisation in a contemporary human rights-oriented society, with their credibility having experienced consistent opposition in recent years.[154] Jackson recognises that this evolving "anti-impunity norm" gaining traction inevitably will not only ensure the ECtHR will face the challenge of adjudicating on the matter but will furthermore potentially spur state parties with accustomed amnesty laws to turn to the Court to aid in their reconsideration.[155]

It is worth noting the inevitable impact of the Court's well-established margin of appreciation doctrine, which grants state parties a degree of workability in applying convention obligations and rulings in a way that is cohesive and congenial to their own domestic legal systems. This doctrine exposes the Court to criticism that the institution is too conservative or even merely performative. It could be argued that this entrenched maxim will prevent the Court from embracing an overtly austere perspective on amnesties, but rather that they will look to the specificities of the NITLR Act and question how dramatically the process will infringe upon ECHR obligations.[156]

In the early nineties, the European Commission of Human Rights, as it was previously formed, confronted the allowability of amnesties in *Dujardin v France*.[157] These proceedings related to the death of unarmed officers in New Caledonia and the subsequent amnesty granted to the perpetrators.[158] The Commission found there to be no violation of Article 2, instead they contended the legislation "was adopted in the context of a process designed to resolve conflicts between the various communities of the islands".[159] The Commission granted considerable weight to the belief that the amnesties at dispute were effected in the interests of reconciliation and resolution, and expressly and truthfully for these reasons. They noted that rather than this approach being one that is generalised in terms of conflict, this was a legal solution specifically moulded to cater to the particular facts. The Commission held that where necessity demanded it, states were perfectly permitted to enact legislation of this nature, so long as due concern was granted to the convention rights of victims.[160] Upon the facts before the Commission in these

[154] Jackson, Amnesties in Strasbourg, *Oxford Journal of Legal Studies*, vol.38, no.3 (2018) p.454.
[155] Ibid. p.455.
[156] Pérez-León-Acevedo (2022) (n.153) p.1108.
[157] *Dujardin v France*, App no 16734/90 (Commission Decision, 2 Sep 1991).
[158] Mallinder (2015) (n.151) p.14.
[159] *Dujardin* (1991) (n.157) p.244.
[160] Ibid. p.244.

proceedings, they held that these amnesty laws were the best means of achieving a peaceful and forward-looking outcome that would benefit all involved. Jackson believes this reasoning retains enduring significance, and will continue to influence the Courts decision-making process, restricting "the permissibility of amnesty to exceptional situations, where the state is pursuing a compelling public interest in good faith".[161] It is worth reiterating at this point that the NITLR Act is opposed by the Northern Irish community, who dispute that it will genuinely or even potentially further reconciliation.

Another surmisal of the matter by the Court arose in *Association 21 December 1989 v Romania*.[162] In this case, relevantly, a draft amnesty law was one of the elements challenged for its compatibility with Article 2. The specific provision granted a full, blanket amnesty to perpetrators. The Court leaned into the philosophical and legal foundations that they have already made clear as to why these procedural obligations are imperative, heralding "the importance of the right of victims (…) to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life, which implies the right to an effective judicial investigation".[163] The right to truth is a central component of transitional justice, and is becoming increasingly valued as an intrinsic human right upon its own prerogative but also within the operation of Article 2. Achieving a truthful account of what are usually extremely sensitive and unjustified events, is most effectively secured by a thorough and transparent investigation. It is interesting to note the Courts highlighting of an implicit "right to an effective judicial investigation", evidently affirming the domestic and international courts as being best placed and qualified to appropriately fulfil and vindicate rights contained within the convention, and as being those most adept to carry out satisfactory investigations. Pérez-León-Acevedo noted the unduly wide-ranging granting of immunity as being decisive for the Court in the present case, but also the misguided incentive behind its implementation, as a deliberate means to prevent access to truth and justice.[164] This case provides an example of the ECtHR analysing legislation that grants immunity, making a well-balanced consideration of its contents and the motivations behind its implementation, and conclusively, finding it flawed.

[161] Jackson (2018) (n.154) p.473.
[162] *Association 21 December 1989 v Romania*, App no 33810/07 (ECtHR, 24 May 2012).
[163] Ibid. para.144.
[164] Pérez-León-Acevedo(2022) (n.153) p.1116.

The most recent exploration of the matter by the Court occurred in *Margus v Croatia*.[165] This case concerned a Croatian military officer who had previously been granted amnesty for his crimes but was subsequently convicted.[166] The Court supported the initiative taken by Croatia, in disallowing the application of amnesty.[167] In doing so, the Court made an assertive statement that signals the potential for amnesties to violate Article 2, "granting an amnesty in respect of the killing or ill-treatment of civilians would run contrary to the State's obligations under Articles 2 (…) since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible".[168] This affirmation by the Court formatively makes an explicit connection between the right to an effective investigation and how this would be prevented through the issuance of amnesties. The ECtHR further proclaims a commitment to combatting impunity in these contexts, continuing to broaden their protection, and manifesting an intent to grant serious consideration to the incompatibility of amnesties. The Court clearly hints that global consensus finds amnesties irreconcilable with contemporary legal standards, in that they conflict "with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights".[169] The Court notes the widespread acceptance of this notion within human rights rhetoric, and continues by commenting that regardless of the permissibility of amnesties, for example, based upon the justification of reconciliation, there were no such mitigating factors in the present case.[170] One could expect the Court to take a similar stance regarding Ireland's application, in generally cautioning against the use of amnesties, but conducting a detailed assessment of the potentially legitimate justifications. The question that then remains to be considered is if the actions taken "are necessary and proportionate" in terms of the purpose aspired to.[171]

[165] *Margus v Croatia*, App no 4455/10 (ECtHR, 27 May 2014).
[166] Lyons Carole, Neighbourly murders, forced forgetting and European Justice: Margus v Croatia (Strasbourg Observers, 2014) < https://strasbourgobservers.com/2014/06/30/neighbourly-murders-forced-forgetting-and-european-justice- margus-v-croatia/ > accessed 14 May 2024.
[167] Pérez-León-Acevedo (2022) (n.153) p.1121.
[168] *Margus v Croatia* (2014) (n.165) para.127.
[169] Ibid. para.139.
[170] Ibid.
[171] Mallinder (2015) (n.151) p.30.

4.3.2: Jurisprudence of the Inter-American Court of Human Rights

The ECtHR in *Margus v Croatia* referred to the more substantial consideration of the matter of amnesties by the IACtHR.[172] A reflection upon the approach taken by this regional body is warranted in that they represent the most potent analysis of the matter in the international sphere,[173] and provided the ECtHR's previous inclusion of their reasoning, one might assume that the IACtHR would continue to serve as inspiring precedent. However, the two systems assume varying positions in terms of subsidiarity, which could result in different judicial outcomes, when one considers that the authoritative margin of appreciation doctrine does not occupy the same persuasive role in the Inter-American system.[174] This has in the past allowed the IACtHR to take a more supranational stance in condemning amnesties, something the ECtHR will likely not so inflexibly impose.[175] This compelling offence towards amnesties was additionally promoted by a powerful victim-led movement in South America, where individuals, discontented with their treatment, campaigned for the termination of amnesties, and the promotion of accountability.[176] This movement was mirrored by a more general transition to democracy that was occurring in a number of member countries, installing governments who normally promoted a more individual friendly perspective and which also established "a supportive political environment for unpicking past amnesties".[177] An example of this in practice was the ultimate judicial overhauling of general amnesty laws in Chile, sanctioned in the seventies, which although not discriminatory or preferential upon the face of their wording, in application, favoured state agents drastically.[178]

A seminal case in this regard is *Barrios Altos v Peru*.[179] This judgement declared that Peruvian amnesty laws that applied to grave infringements upon fundamental human rights were void.[180] The IACtHR explained that clearly and problematically, amnesties "prevent the investigation and punishment of those responsible for serious human rights violations".[181] Duties

[172] *Margus v Croatia* (2014) (n.165) para.60-66
[173] Pérez-León-Acevedo (2022) (n.153) p.1109.
[174] Contesse, Resisting the Inter-American Human Rights System, *Yale Journal of International Law*, vol.44, no.2 (2019) p.226-227.
[175] Pérez-León-Acevedo (2022) (n.153) p.1110.
[176] Mallinder, The End of Amnesty or Regional Overreach? Interpretating the erosion of South America's Amnesty Laws, *International and Comparative Law Quarterly*, vol.65, no.3 (2016) p.648.
[177] Ibid.p.674.
[178] Ibid. p.648.
[179] *Barrios Altos v Peru*, Series C No 75 (IACtHR, 14 March 2001).
[180] Pérez-León-Acevedo (2022) (n.153) p.1109.
[181] *Barrios Altos v Peru* (2001) (n.179) para.41.

surrounding investigation and prosecution, which are so pivotal to fulfilling ones right to life, and which are consistently upheld, validated the Court in formulating an anti-amnesty position. The Court extended this notion further in confirming that the existence of legislation of this nature is "manifestly incompatible with the aims and spirt of the Convention".[182] This further affirms that state deference does not carry substantial decisive value for the IACtHR in the reasoning they impart. Rather, their prioritised commitment to the protection of human rights takes precedence. The IACtHR makes the somewhat revolutionary assessment that perhaps international law, which has remained enduringly state-centric is now becoming more individual focused. Judge Cançado Trindade attests to this viewpoint in his concurring opinion, "the State exists for the human being, and not vice versa.".[183] The Judge affirms that any legal system that seeks to justly serve individuals within that society, must respect and protect them. This may seem simplex when described in this succinct manner, but oppressive and corrupt state power has proved a persistent challenge to the effective implementation of this ideal model of human rights law. The Court subsequently held there to be a violation of the right to life or more specifically Article 4 of the American Convention, the comparative to the very similarly worded Article 2 of the ECHR.[184] The former article has also been expanded beyond the explicit wording in the provision in equivalent ways to that of the ECHR, with the IACtHR citing valid concerns that should they not nullify the disputed legislation, it would interdict the prosecution of responsible parties," because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth".[185]

The Court has recently softened this initial approach to provide for flexibility when dealing with the various contexts in which amnesties may occur, in what will potentially be more reflective of the perspective taken by the ECtHR. This modification appears wise when you consider that in countries such as Brazil for example, the relevant legislation was not applied prejudicially and was predominately publicly endorsed.[186] The IACtHR has since noted a differentiation between amnesties that relate to post-conflict and those that relate to post-dictatorship settings, with the former sometimes legitimately positing reconciliation as a genuine intention.[187] The ECtHR in *Margus v Croatia* acknowledged this development in

[182] Ibid. para.43.
[183] Ibid. Concurring Opinion of Judge A.A Cançado Trindade, para.26.
[184] Ibid. para.51.
[185] Ibid. para.43.
[186] Mallinder (2016) (n.176) p.660.
[187] Pérez-León-Acevedo (2022) (n.153) p.1109.

referencing *The Massacres of El Mozote and Nearby Places v. El Salvador*.[188] In these proceedings, The IACtHR conceded that "the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace".[189] In the immediate aftermath of violent internal hostilities, amnesties can aid a community in healing and rebuilding, as occurred in NI, however, the reintroduction of the notion decades later is markedly less warranted. The IACtHR recognised the permissibility of certain amnesties if these conditions are fulfilled, namely that they pursue a community focused purpose. They do, however, steadfastly reiterate the investigative and prosecutorial duties on states, and that these should only be supplanted when it is of the upmost necessity.[190]

The IACtHR has endeavoured to strongly condemn the use of amnesties, routinely finding them to be incompatible with the American Convention and encroaching upon the rights held therewithin. However, it appears that in the future, the IACtHR will carefully craft individualised assessments of the different amnesty schemes, rather than uniformly striking them down, as they attempt to balance the suppression of impunity with permitting certain sacrifices in the greater interests of harmony and amity.

4.4: A Comparison of the Independent Commission for Reconciliation and Information Recovery with the Truth and Reconciliation Commission in South Africa

"We need to know about the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future".[191]

Having made a comparison between the ECtHR and the Inter-American system, I will proceed by similarly comparing the actions taken by the UK with those of a similar nature taken in SA. First and foremost, it is necessary to outline that SA is not a party to the ECHR and is therefore not constrained by the same specific obligations surrounding the right to life held therewithin.[192] While it can serve as valuable inspiration, the NITLR Act will ultimately need to comply with a more monitored Eurocentric legal standard. The UK Government has compared their intended actions to those taken by SA, while I would contend that the separate models are relatively distinct. Nevertheless, an analysis of both system's attributes will provide

[188] *The Massacres of El Mozote and Nearby Places v El Salvador*, Series C No 252 (IACtHR, 25 October 2012).
[189] Ibid. para.285.
[190] Ibid. para.286.
[191] Truth and Reconciliation Commission of South Africa, Report, vol.1 (1998) para 28, p.7.
[192] NIHRC (2022) (n.75) p.46.

a more in-depth understanding of their effectivity and compliance with human rights obligations. Indeed, there is no one model for Truth Commissions, rather each is unique dependent on the incentives for its development and the conflict it attempts to rectify.

In his role as chairperson, the Reverend Desmond Tutu expressed support for the formation of the South African Truth and Reconciliaiton Commission (TRC) in the post-apartheid era, viewing it as a progressive means of addressing the past, and an essential element in the development of a democratic state. One that acknowledges previous mistakes but does not allow itself to be hindered by them. An immediate underpinning divergence between the two schemes derives from the fact that the TRC in SA was largely founded upon the reality that the exisiting judicial system was entirely overburdened. It would therefore be unable to carry out effective investigations into apartheid-related deaths, with ongoing and developing cases taking priority, and even then, presenting a significant challenge.[193] SA represented a country amid democratic transformation, with the truth commission being initiated in the immediate aftermath of the repealing of segregating legislation. The violent oppression and rampant and legislated discrimination warranted an immediate response. NI comparably was a democracy and has been undergoing peaceful cooperation and the strengthening of its legal and governing institutions for over twenty years, having already experienced significant community healing and political stability, being notably more equipped to handle judicial matters in the conventional sense.

The TRC, which is widely deemed to serve as a successful example of the utilisation of truth commissions in post conflict societies, was established in the nineties under the *Promotion of National Unity and Reconciliation Act*.[194] It was of vital import to its prosperity that its arrangement incorporated the views and preferences of all relevant actors. Thus, providing those who would be centrally affected by proceedings to contribute input into how the model could best benefit them.[195] Immediately, this degree of victim and community involvement serves as a contradiction to the NITLR Act, since the wishes of the people of NI were seemingly disregarded in its construction. Not only were victims uninvolved in the creation of the Act, but the actual process as outlined previously, side lines them and does not place heightened

[193] Van Zyl, Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission, *Journal of International Affairs*, vol.52, no.2 (1999) p.652.
[194] South Africa, Promotion of National Unity and Reconciliation Act, Act 34 (1995) < https://www.justice.gov.za/legislation/acts/1995-034.pdf > accessed 13 May.
[195] Mallinder, Initiative for Democracy and Human Rights: Promoting Justice and the Rule of Law, Global Comparison of Amnesty Laws (Draft), *The International Institute of Higher Studies in Criminal Sciences* (2010) p.107.

value on their role during proceedings either. Victim participation under the South African model, was demonstrated in that individuals were permitted to express their own views and they were provided with the opportunity to probe and challenge perpetrators.[196]

This involvement was further manifested in that in the context of more grave offences, there were "televised public hearings in which victims could be present, victims were legally represented, their legal representatives could cross examine the amnesty applicant, and victims could provide impact statements".[197] This provides victims with what is essentially akin to their symbolic day in court. It dispenses a sense that justice has been served, and provides closure, ensuring that what has occurred has been publicly exposed and honoured. The notion of an inclusive public hearing, while still potentially resulting in amnesty, allows for a more accurate and balanced surmisal of facts, a surmisal that values the input of the victim and possesses empathy for their need to heal. Over a hundred of these hearings occurred, involving around 4,000 individuals who presented their testimony.[198] Public hearings are non-existent under the NITLR Act, and despite publication requirements, the process emits an aura of confidentiality. Traits that make victims susceptible to having their rights flouted, and justice unsatisfactorily discharged.

Furthermore, the actual granting of amnesty in SA required more robust demands regarding the imparting of information. Under this system, amnesty may be granted upon the condition that "the applicant has made a full disclosure of all relevant facts".[199] The granting of amnesty was not a guarantee, and the more stringent safeguards in place can perhaps be demonstrated in that only 16% of 7,000 applications were successful.[200] These conditions can be directly contrasted with the comparable provision in the NITLR Act, expressly, the conveying of information that is "true to the best of P's knowledge and belief".[201] In the absence of clearer stipulations upon the testimony provided by the perpetrators, immunity appears effortless to attain, further corroding the victims sense of justice.

Restricted but existent financial remedy is another aspect that sets the South African model apart from its NI counterpart and represents an aspect that could jeopardise victim satisfaction.

[196] Ibid. p.108.
[197] Model Bill Team (2022) (n.74) p.16.
[198] Van Zyl (1999) (n.193) p.657.
[199] SA Act (1995) (n.194) s.20(1)(c).
[200] Mallinder (2010) (n.195) p.108.
[201] The NITLR Act (n.5) 19 (3)(c).

A purse of approximately $100 million was allocated to provide reparations.[202] Since comparably to the NITLR Act, the amnesty granted in South Africa was both civil and criminal in nature, these reparations attempted to provide monetary consolation to victims for the crimes committed against them. This seems especially pertinent where there will be no judicial prosecution nor subsequent imprisonment. Indeed, in the past in NI, pecuniary damages have been awarded, for example, £1.5 million was awarded to family members of victims and those who survived in relation to the Miami Showband Attack, in which state collusion was alleged.[203] The NITLR Act not only denies the pursual of civil remedies but fails to provide any substitute means of financial reparation.

The TRC was evidently not inviolable to criticism, Winslow finds it paradoxical that despite the notion of reconciliation being so central to the activities of the TRC, it can be validly questioned whether this fulfilled a primary objective.[204] He notes that rather it is the potential of receiving immunity that motivates individuals to cooperate, as opposed to personal feelings of regret.[205] This was strongly felt by some victims who were left displeased by amnesty proceedings, their thirst for justice remaining unquenched due to the nonchalance or the outright disdain exhibited by offenders.[206] Furthermore, in the twenty years since the TRC concluded proceedings, scarcely any indictments have occurred and authorities have been slow to investigate or punish apartheid related misdemeanours more effectively, leaving victims unsatisfied and with lingering questions unanswered.[207] While Truth Commissions can be useful tools in combatting injustice and facilitating truth recovery, "they are the beginning; the truth comes first, but the truth must be followed by justice".[208] This was the experience for many affected individuals in SA ,and the shortcomings identified in the NITLR Act similarly demonstrate the potential that not only will justice be denied, but the truth may not even be adequately retrieved at its expense.

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[202] Van Zyl (1999) (n.193) p.659.
[203] Model Bill Team (2022) (n.74) p.11.
[204] Winslow, Reconciliation: The Road to Healing? Collective good, individual harm? *Track 2: Constructive Approaches to Community and Political Conflict*, Vol.6, no.3 (1997) p.1.
[205] Ibid.
[206] Mallinder (2010) (n.195) p.109.
[207] Ibid.
[208] Schey, Shelton, Roht-Arriaza, Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty, *Whittier Law Review*, vol. 19, no.2 (1997) p.338.

4.5: The Judgment: The Potential Conclusions of the Court

"Politics are never far from our Courtroom, but politics is not what we do".[209]

These thought-provoking sentiments were expressed by the President of the ECtHR, Síofra O'Leary, and assume significant relevance for the fraught political tensions associated with the current application. Despite these complex concerns, the Court affirms their commitment to solely focus on the legal merits of a case. This will involve an assessment exclusively based on the compatibility of the provisions of the NITLR Act with the Convention. The ECtHR is not unaccustomed to tackling novel issues nor the revisiting and reforming of others, indeed, it has prescribed this very challenge for itself on multiple occasions, perhaps most notably in *Tyrer v The United Kingdom*, where it affirmed that "the Convention is a living instrument which (…) must be interpreted in the light of present-day conditions".[210] Despite not previously ruling directly on the compatibility of amnesties or the cessation of judicial proceedings, it will be necessary that their perspective is contemplative of the general public feeling and reflective of contemporary legal academic commentary. Micheál Martin expressed disappointment that this matter could not have been resolved prior, viewing a legal ruling from the Court as an inescapable eventuality, provided the UK's lack of cooperation and the alleged violation of fundamental human rights.[211] The UK Government responded firmly, continuing to defend that the Act legitimately pursues and can adequately provide justice and truth, furthermore, alleging the Irish Government are being hypocritical, since "successive UK and Irish Governments during the peace process worked closely together on a range of initiatives which have provided conditional immunity and early release from prison".[212] The UK Government reiterates the necessity for a reformed solution, and believe they have created such a mechanism. It is for the Court to decide, which of these perspectives will prevail.

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[209] ECtHR, International Academy of Trial Lawyers Conference, Speech by Síofra O'Leary, Killarney National Park, Ireland (21 April 2023) p.12.
[210] *Tyrer v The United Kingdom*, App no 5856/72 (ECtHR, 15 March 1978) para.31.
[211] Department of Foreign Affairs, Press Release, Statement by the Tánaiste Micheál Martin on the government decision to initiate an inter-State case against the United Kingdom (20 December 2023),< https://www.gov.ie/en/press-release/82232-statement-by-the-tanaiste-micheal-martin-on-the-government-decision-to-initiate-an-inter-state-case-against-the-united-kingdom/ > accessed 16 May 2024.
[212] Northern Ireland Office and The Rt Hon Chris Heaton-Harris MP, Press Release, Statement in response to legacy inter-state case by the Irish Government (20 December 2023) < https://www.gov.uk/government/news/statement-on-the-northern-ireland-troubles-legacy-and-reconciliation-act > accessed 16 May 2024.

4.5.1: Has the United Kingdom Violated their Obligations under Article 2?

I contend that the ECtHR should hold the UK to be in breach of their Article 2 obligations, as it concerns their duty to investigate and prosecute perpetrators of human rights violations.

Firstly, with regard to the prevention of any further judicial proceedings, the Court elaborated in *McKerr* and *Jordan*, that in order for an investigation to be effective, it must "be independent and impartial, be thorough, (…) progress with reasonable expedition and be subject to public scrutiny".[213] The UK Government has repeatedly cited the significant caseload that has caused an overwhelming delay, as a justification for the creation of the ICRIR, arguing that they will offer more expeditious answers than the current mechanism. I do not believe that the Court will dispute that this burden significantly impedes victims access to justice. However, despite these pressing challenges, the domestic courts and inquest bodies have recently issued an escalating number of meticulously prepared judgements and inquests, showcasing increased promise to continue following this encouraging trajectory if only they were provided the necessary resource support. Regardless of this developing capability to facilitate the provision of accountability, the substitute procedure offered, while it may provide for the swift closure of cases, will not provide for an effective investigation. Speed alone can offer no guarantee of effectivity nor can it ensure a just outcome. Quite the reverse, if it is merely a tool to finalise proceedings, without any meaningful understanding of what this entails. The Court has previously affirmed in *McKerr*, that the conventional judicial proceedings represent the most secure means of ensuring that an effective investigation has occurred.[214] The Courts are designed purely to fulfil this very purpose and where they fail, safeguards, such as appeal mechanisms exist, to ensure an unbiased outcome. The judicial process allows for the assembling of evidence from a variety of sources, including objective observers and experts. Courts generally allow unencumbered access and transparency with both the parties involved and the wider public, and furthermore, they allow for the extensive cross-examination of an alleged perpetrator. Under the NITLR Act, these entitlements are significantly diminished and, in some respects, entirely disregarded. As has previously been elaborated upon, concerns have been raised about the power wielded by the Secretary of State, as have they been validly raised in relation to the vague use of the term "review" to describe what will constitute the singular

[213] NIHRC (2022) (n.75) p.6.
[214] *McKerr* (2001) (n.142) para.134.

form of investigations into a substantial number of crimes.[215] These matters, and a more general indefinite explanation of how the ICRIR shall function, cumulatively bring the effectivity, the independence and the adequacy of such proceedings into question.

Based on the Courts detailed reasoning in *Margus v Croatia*, I would presume that they would find the immunity provisions compound further evidence that substantiates the finding of a violation. The judgement made clear that such schemes contradict habitually affirmed investigatory obligations demanded of states.[216] If the Court flexibly applies the margin of appreciation doctrine, and comparably takes inspiration from the recent reluctance of the IACtHR to strictly disallow the use of amnesties, the Court will consider the specificities of the disputed immunity provisions, the incentive behind their reasoning, and the distinct context surrounding their use in NI. The time elapsed since the conflict and the constructive progress made ever since shall potentially be a decisive factor, a factor explained previously in differentiating it from the South African Model. NI has experienced over twenty years of peaceful development and substantial social cohesion, unlike a country facing recent or ongoing internal violence, whose infrastructure is ill-equipped to rectify matters and undemocratic in nature. These circumstances contradict the claims proposed by the UK Government regarding the central objective of the act being reconciliation. The Northern Irish community has already been significantly reconciled, and the act only creates fear that this progress will be foiled. Indeed, the GFA did facilitate and oversee the application of amnesties, in agreement with the Irish Government, but the situation is vastly different after the extensive passage of time and amicable societal progression. Another essential element in signalling the inadequacy of the Act is that it leaves little space for victim participation. A victim centred approach is necessary, whereas one which befits the perpetrator with unbalanced generosity will present a more difficult challenge to justify. Therefore, if the Court is to deem there to be an interference, it will need to proceed by carrying out an evaluation of whether these infringements fulfil a legitimate exception and can therefore be justified.

[215] NIHRC (2022) (n.75) p.6.
[216] *Margus v Croatia* (2014) (n.165) para.127.

4.5.2: Whether the Interference is Necessary and Proportionate in Pursuing a Legitimate Aim?

When the ECtHR establishes that there has been an interference, it must then assess whether there is a justification. This includes whether it pursues a legitimate aim, or whether it is necessary or proportionate in achieving this aim. In *Dujardin*, this was elaborated upon in the present context, with reconcilement and resolution in the affected community serving as a valid exception.[217] As previously identified, the principle aim pedalled by the UK government is that the act seeks to cater to the extensive caseload which in turn can further reconciliation and peace.[218] These notions evidently do indicate a genuine aim to ameliorate the situation, however, there is a distinct difference between whether it claims to pursue this and whether this will actually be achieved. Determining whether this Act will strengthen reconciliation, demands one to establish who exactly does it seek to reconcile. My personal interpretation understands that its most practical application would refer to resolving bitterness between private individuals in local society, furthering a sense of community and peaceful co-existence. Since it appears to disproportionately benefit state actors who have more successfully evaded or been shielded from prosecution thus far, and many of whom do not live or have not lived in NI for a long time, the extent to which this act will advance reconciliation in NI is not clear, nor convincing.

The UK Government claimed that "an approach focused on information recovery was more effective than a prosecution based approach".[219] However, to reiterate, this approach grants immunity to perpetrators upon the basis that they only have to share testimony that is, "true to the best of P's knowledge and belief".[220] It need not be original evidence,[221] and offers no material opportunity for victims to influence the solution reached. The Act claims to supplant conventional judicial proceedings in order to secure the truth for victims, but this act allows decisions to be rendered in their absence and does not more vigorously investigate the one

[217] *Dujardin* (1991) (n.157) p.244.
[218] The NITLR Act (2023) (n.5).
[219] UN, The United Nations Office at Geneva, Meeting Summaries, In Dialogue with the United Kingdom, Experts of the Human Rights Committee Welcome Renewed "A" Status for the National Human Rights Institutes of Scotland and Northern Ireland, Ask about the Northern Ireland Troubles Act and the Illegal Migration Act (13 March 2024) < https://www.ungeneva.org/en/news-media/meeting-summary/2024/03/examen-du-royaume-uni-devant-le-comite-des-droits-de-lhomme-les > accessed 17 May 2024.
[220] The NITLR Act (n.5) 19(3)(c).
[221] Ibid. 19(4).

sided account they receive to discover whether it is entirely accurate. Perhaps a more apt solution to deal with the existing caseload would be the creation of a specialist panel of Judges with exclusive jurisdiction over Troubles-related offences, in this way there would be judicial mechanisms singularly focused on obtaining justice for victims operating in coexistence with the ordinary procedure. This is not entirely unlike a process established in Colombia after the conflict between the state and the Fuerzas Armadas Revolucionarias de Colombia-Ejército Popular (FARC-EP), the Special Jurisdiction for Peace.[222] It is preferable that the UK Government would collaborate with political leaders in the North and South of Ireland to establish a mechanism supported by all, but especially by the victims, perhaps more alike this structure.

I contend that the Act does not address the legacy of the conflict, rather it diminishes the rights of victims and jeopardises their lengthy and gruelling pursuance of accountability. Most solidifying of this eventuality, is that the community simply does not endorse it.[223] Any Act that specifically claims to reconcile, support and provide answers to a group of individuals, which is rebuked by that group and strongly felt to imperil the progress they have previously made, cannot in a democratic and just society be seen to be proportionate or necessary.

[222] Piccone, Peace with Justice: The Colombian Experience with Transitional Justice, Foreign Policy at *Brookings* (2019) p.12.
[223] NIHRC (2022) (n.75) p.5.

Conclusion

The Irish Question represents a complex centuries long struggle for identity,[224] illustrated by violent conquest, demoralising discrimination and inter-community antagonism. The UK Government expresses an entirely valid desire to move past the grievances of previous years and to commit wholly to a future decorated by peaceful co-existence and understanding. However, the determination of how this should be achieved is a matter that must be designed by the people of NI, and measures and legislation that they find unsatisfactory cannot feasibly ameliorate matters, only exacerbate them. Nor can such measures promote further reconciliation. John Hume, a widely respected nationalist politician, who famously sought peaceful means of resolution and engaged in effective cross-cultural dialogue, wisely noted how Irish people "are very fond of the past, but (…) a respect for the past tends to paralyze our attitude of the future".[225] In the thirty years since these words were spoken, the NI peace process has drastically altered the political, social and economic landscape of the area, and many individuals in Ireland have balanced this deep respect and preoccupation with the past, with an open and empathetic outlook towards the future. Furthermore, I would contend that this esteem and attentiveness for our history, incorporates an innate sense of justice for victims of grave violations who have been repeatedly ignored. It is of paramount importance that the experiences they suffered are not forgotten, and justice is ceaselessly pursued. Truth and reconciliation constantly need to be balanced with accountability, and any novel developments to investigate and prosecute or rather not prosecute perpetrators must be accepted by victims. The ECtHR has firmly committed to upholding the procedural obligations outlined under Article 2 and has previously assured that the issues of amnesty and the prevention of criminal proceedings fall definitively within the scope of their mandate in this regard. It appears that the contemporary international legal perspective prioritises the rights of victims with heightened value. While the Court will assess whether the NITLR Act is necessary for peaceful development or whether it can legitimately offer answers and closure for victims, I contend that it will find it lacking, and ultimately not the best means of achieving this. Reform needs to be instigated by victims and approved by all national representatives involved, with lessons

[224] Hume John, Prospects for Peace in Northern Ireland, *Saint Louis University Law Journal*, vol.38, no.4 (1994) p.967.
[225] Ibid. p.970.

from negotiations dating back to 1921 constituting clear criteria of how this can be satisfactorily concluded or irretrievably aggravated.

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