JUST NEWS

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Introduction to the Special Issue on Legacy

This Special Issue of Just News addresses the complexity of justice for serious human rights and humanitarian law violations committed during the Northern Ireland conflict. In May, an Act of Parliament—the Northern Ireland Troubles (Legacy and Reconciliation) Act 2024, or the Legacy Act—ended inquests and criminal investigations into serious conflict related abuses. During the conflict and the transition that followed, the British government has maintained a practice of impunity with respect to abuses committed by or with the collusion of agents of the State. The most recent Legacy Act extends that well-documented pattern of impunity. These issues of state impunity and transitional justice engage several domestic and international human rights standards, including Articles 2 (the right to life) and 3 (prohibition of torture) of the European Convention on Human Rights; the UK Human Rights Act; as well as elements of the Good Friday Agreement and the Windsor Framework. We take a close look in this Issue at the impact of recent legal and political developments addressing legacy issues in Northern Ireland.

The Special Issue begins with a summary by Barry McCaffrey of key findings from the recently published report, 'Bitter Legacy: State Impunity in the Northern Ireland Conflict.' It was written by an international panel of experts convened by the Norwegian Centre for Human Rights at the request of CAJ. McCaffrey details how the UK government has perpetuated a 'deliberate and protracted denial of access to justice for victims' families' both during and after the conflict.

The Special Issue continues with two articles on the impact of the Legacy Act on investigations into serious conflict-related harms, and the host of recent legal challenges to the Act. Anurag Deb, Queen's University Belfast, picks up on this topic analyzing the Belfast High Court's judgement concerning the Legacy Act in the Dillon case.

The Special Issue concludes with a discussion of a human-rights based approach to reconciliation by Anna Bryson and Louise Mallinder, both professors at the Queen's University Belfast, School of Law. Bryson and Mallinder consider how the European Court of Human Rights may interpret and define reconciliation when considering the legality of the UK Legacy Act, currently being challenged in an inter-state case lodged by Ireland.

Each of the authors in this issue consider not only the legal implications of the Legacy Act, but also the human rights implications for victims and survivors of serious conflict-related harms. The Special Issue reflects on the complexity of legacy issues in a transitional context in the UK and globally.

Inside this issue:

International Panel of Experts Finds State Impunity in the Northern Ireland Conflict

Barry McCaffrey, Journalist

Hundreds of thousands of words have been written about the British government's role in this region's 30-year conflict but the newly published report, 'Bitter Legacy: State Impunity in the Northern Ireland Conflict' is arguably one of the most important studies ever undertaken into this most controversial issue.

While many significant reports have been published revealing the State's involvement in torture, ill-treatment, killings and other violations of human rights standards, there has only ever been small number of reports which have been able to successfully identify patterns demonstrating that these abuses were part of an overarching coordinated pattern of government policies.

The Norwegian Centre for Human Rights' report runs to more than 210 pages and 107,000 words. Its analysis is objective, forensic and authoritative. The report's authors are internationally respected academics, lawyers, human rights experts, and former police officers who have investigated human rights violations across the globe, working for eminent institutions such as the United Nations as well as the South African and Sierra Leone Truth Commissions.

Panel members visited Northern Ireland seven times to gather evidence from victims' families, NGOs, lawyers, and senior legacy representatives from both the British and Irish governments. The group met Police Ombudsman Marie Anderson, her predecessor Dr Michael Maguire, former Lord Chief Justice and new ICRIR Chief Commissioner Sir Declan Morgan as well as new PSNI Chief Constable Jon Boutcher.

From the outset the report makes clear the overarching need for all Troubles human rights violations, including those carried out by republican and loyalist paramilitaries, to be properly and fully investigated. It acknowledges that the majority of those killed during the conflict died at the hands of republican and loyalist paramilitaries.

However, the report insists that the state, as the sole authority charged with investigating and prosecuting serious wrongdoing, must be seen to uphold and protect its international human rights obligations. The report's most damning conclusion is that the UK government deliberately and repeatedly failed to observe those human rights obligations over three decades.

While much has been written about the state's involvement in collusion, there have been few documented studies analysing the lesser-known issue of an 'Impunity Gap' – the state's deliberate failure to properly investigate or prosecute members of the security forces who had been implicated in murder and other serious crimes, including torture and ill-treatment.

The panel cites data collected by the Pat Finucane Centre that counts at least 374 individuals killed between 1969 and 1998 by RUC or British army personnel. The majority of those killed were civilians and unarmed at the time of their deaths. Of those killed by state forces, 321 came from the Catholic community (86%). The data also shows that only four soldiers were ever convicted of killings committed while on duty between 1969 and 1998. Similarly, there were no prosecutions of serving police officers or soldiers between 1969 and 1974, when at least 200 people were killed by security forces.

The report identifies that during a four-year period (1969 to 1973) the RUC and British army operated an agreed interview policy informally known as 'Tea and Sandwiches' questioning for any soldier involved in a fatal shooting or serious crime. Under this highly unusual arrangement RUC investigators were prohibited from questioning any soldiers involved in any killings. Instead, the suspects were informally questioned by the Royal Military Police (RMP). None of the interviews were conducted under legal caution and as a result nothing they said was admissible in legal proceedings.

Fast forward 35 years to 2007 and then Police Ombudsman Nuala O'Loan found a similar tactic still in use to protect RUC Special Branch agents within the Mount Vernon UVF. Mrs O'Loan found that when arrested for involvement in UVF murders the Special Branch agents were 'baby sat' throughout questioning by their RUC handlers 'to help them avoid incriminating themselves.'

Successive British governments have claimed that collusion was never sanctioned but was the action of a few 'bad apples.' Shockingly the panel's report concludes that rather than the actions of a few rogue policemen, collusion was instead regarded by British security forces and successive governments as a 'useful tactic.'

Oversight bodies such as the Police Ombudsman's office were found to have been deliberately poorly resourced by the state. Moreover, these agencies were then also faced with legislation with exemptions for new evidence and limited mandates to investigate security agents, which ultimately prevented them from properly investigating allegations of police officers' involvement in murder and other serious crimes:

> 'The investigatory mechanisms which operated through this period did not – and could not – effectively address allegations of collusion, due to their limited mandates, resources and powers, and the lack of political will.
>
> 'Very few prosecutions were brought against state actors, and substantial questions remain not only in relation to specific incidents but as to the broad underlying degree and level of collusion, and the responsibility of various state agencies, including what those in senior levels of government knew about allegations of collusion and what – if any – actions they took.'

The report highlights the fact that the British Attorney General, who was always a serving member of the government, had the ultimate power to decide whether soldiers in Northern Ireland should be charged or prosecuted for serious crimes. Throughout the Troubles the Director for Public Prosecutions (DPP) in Northern Ireland was under no legal obligation to provide any public explanation for its decision not to charge soldiers or police officers implicated in unlawful killings.

Alarmingly the report finds that even when the state did investi-

gate allegations of security force wrongdoing, these investigations 'appeared superficial and incomplete, with a clear failure in many instances to perform some of the most obvious and rudimentary steps.'

The panel examined 54 killings investigated by the RUC during the 1970s, 80s, and 90s. It found that these investigations: 'demonstrated gross incompetence and negligence at best.' 'Investigations appeared superficial and incomplete, with a clear failure in many instances to perform some of the most obvious and rudimentary steps.'

The report found that the government's policy of operating an 'Impunity Gap' involved deliberate and protracted denial of access to justice for victims' families: 'In many cases, the State has pushed the onus of truth recovery onto families and NGOs rather than on itself. The State has proved to be an unreliable ally in establishing the truth, habitually losing evidence, taking a long time to find witnesses, and fighting in the courts for timelines to be pushed back.'

Highlighting how the 'Impunity Gap' was used to prevent victims' families from finding out the truth about the deaths of their loved ones, the report states: 'The systematic nature of impunity is further evident in the state's institutional failure to act upon complaints, adequately resource investigations and prosecutions, correct investigative failings, and provide oversight – parliamentary or otherwise – of state agencies such as the police, military and intelligence services.'

The Panel concluded that the British government's use of the 'Impunity Gap' to protect state actors continues in 2024 with its controversial imposition of the Legacy Act, blocking all future criminal investigations into Troubles related killings. Former South African Human Rights expert Yasmin Sooka wrote: 'What little accountability that existed has been replaced with complete impunity.'

The report warns that the UK government's reputation as a defender of democracy could be severely damaged worldwide, with rogue states being further enabled to perpetuate a pattern of impunity, knowing they can argue that the British government has already engaged in similar actions: 'If its decision to effectively allow impunity for human rights abuses, through the Legacy Act, is allowed to go ahead, it is likely to be used by repressive regimes around the world to justify and legitimise their own policies of impunity... In short, while the effects of impunity on the people of Northern Ireland are critical, the stakes are also high when considering the international consequences and reverberations.'

Critics will no doubt argue that the NCHR report is a biased and flawed report drawn up by foreign academics who have failed to understand the huge difficulties faced by state forces fighting a protracted war against terrorism. However, the report's forensic analysis of the state's own documents and official records to analyse hundreds of human rights abuses makes this defence difficult. Who was better to have carried out this important investigation other than a respected team of internationally respected human rights experts.

International Panel of Experts launching investigation report, 'Bitter Legacy: State Impunity in the Northern Ireland Conflict' on April 29, 2024. Credits to Mal McCann.

The Guillotine Comes Down on Legacy Cases

On 1 May 2024 the Northern Ireland Troubles (Legacy and Reconciliation) Act—or the Legacy Act—shut down legacy investigations into deaths during the Northern Ireland conflict.

In the weeks and days coming up to this guillotine date there were several legal challenges relating to legacy inquests, with former opposition Secretary of State, Lord Hain, raising concerns in the UK Parliament that key inquests were being 'deliberately delayed' to seek to run down the clock until curtailed by the Legacy Act.

There have been a number of instances of highly public intervention by government Ministers to seek to prevent coroners revealing 'national security' information, understood, and on occasions confirmed, to relate to the involvement of state agents in past human rights violations.

The inquest into the death of Sean Brown (deceased 19 May 1997) is one example. In this inquest, a High Court judge sitting as Coroner released a limited 'gist,' or summary, of sensitive material which confirmed that more than 25 people had been linked by intelligence information to the loyalist murder of Mr. Brown, including several state agents. The Secretary of State, and Police Service of Northern Ireland (PSNI), challenged his decision to release this material. In a ruling on the claim for Public Interest Immunity, the Coroner stated he would not be able to carry out an inquest compliant with Article 2 of the European Convention on Human Rights (ECHR) due to sensitive material not being disclosed under Public Interest Immunity certificates; the Coroner then wrote to the Secretary of State requesting that a public inquiry into this murder be held instead of an inquest. The Coroner also stated that the Independent Commission for Reconciliation & Information Recovery (ICRIR), which was set up as part of the Legacy Act to replace existing legacy mechanisms, would not be the appropriate mechanism to investigate this murder. On 22 April RTÉ aired a documentary 'Murder of a GAA Chairman' highlighting the obstacles the next of kin have faced in seeking truth and justice in relation to this murder.

The inquest into the death of Liam Paul Thompson (deceased 27 April 1994) in which CAJ acts, is another case where the Secretary of State intervened to prevent the publication of information. The inquest was due to resume in February 2024 for a three-week hearing but, due to late Public Interest Immunity claims made in relation to disclosure, this did not proceed. The Secretary of State (and initially the PSNI), sought to prevent the Coroner from publishing a gist of national security information. Following the first set of proceedings, the PSNI accepted the position of the Court and agreed to the publication of the 'gist', proposing revised wording. The Secretary of State appealed and continued to argue that the courts should implement a government policy of 'neither confirm nor deny' (NCND) regarding sensitive material. Two High Court decisions on both versions of the gist and one Court of Appeal decision, on the eve of the 1 May 2024, rejected this approach finding that there was no legal basis for such a doctrine. In balancing the principles of open justice and the need to prevent harm to national security, the Court of Appeal noted that all inquests were conducted by independent judicial office holders. The Court dismissed the Secretary of State's appeal. An application to appeal to the Supreme Court has been made by the Secretary of State. A date for this is pending.

It is notable by contrast that a power to redact out such 'sensitive' 'national security' information, which the Secretary does not have over the independent judiciary, will be vested in ministers to prevent the publication of such material in ICRIR reports. The new legacy body – the ICRIR – is prohibited from making disclosures of 'sensitive' information, defined as relating to UK national security interests or information relating to the intelligence services or intelligence branches of the police and military, without the permission of the Secretary of State.

The Coroner in the Thompson inquest, in light of the legal challenges preventing the inquest from completing, wrote to the Secretary of State requesting that a public inquiry be established to allow a full examination of the evidence concerning this death.

Following similar attempts to prevent the disclosure of 'sensitive' information in legacy inquests by the Secretary of State but not the PSNI, lawyers for the family in the Fergal McCusker inquest (deceased 18 January 1998), raised concerns of 'an unprecedented political intervention.' It was revealed

that the Secretary of State had written to the Chief Constable (who is operationally independent) to complain that it was 'unwelcome' such a decision had been taken without 'reference to me as Secretary of State.' The Chief Constable reportedly replied in 'fairly robust terms' pointing out that 'I am independent of the executive and not subject to the direction or the control of government ministers, department or agencies.' Again, it is notable that there will be similar Ministerial direction and control over the content of ICRIR reports.

Also, in relation to the sectarian loyalist murders of Kevin and Jack McKearney and Charlie and Tess Fox in the Moy in 1992, the Coroner Judge Richard Greene KC also said he had reached a provisional view that an inquest into the four deaths could not proceed because sensitive files were being withheld from the proceedings on national security grounds.

The PSNI Chief Constable, appearing before the Northern Ireland Affairs Committee in April, challenged the application of the NCND doctrine when stretched to the extent of preventing investigations into agents of the State and granting de facto immunity, stating:

> 'There is no immunity process… Saying that you cannot investigate a crime any further because there is an agent involved is poppycock. That is not right….
>
> 'That is why all I am asking is for [the NCND doctrine] to be reviewed and re□codified in the context of the Northern Ireland troubles.
>
> 'Nobody who commits murders should be protected by the policy of NCND. I do not think anybody could disagree with that.'

Embedding the Secretary of State's wishes for a more regressive policy of NCND regrettably appears to be very much part and parcel of the legal framework for the ICRIR.

Legal Challenges to the Legacy Act: The Inter-State Case and the High Court Ruling

United Nations and Council of Europe experts and mechanisms, along with all Northern Ireland political parties and many human rights experts, had long queried the compatibility of the 2023 UK Legacy Act with binding international obligations. Even those appointed to run the Independent Commission for Reconciliation and Information Retrieval (ICRIR), the legacy body the Act sets up to replace existing mechanisms, were reluctant to unequivocally confirm that the legislation was compatible with the European Convention on Human Rights (ECHR).

It was therefore foreseeable that once the Legacy Act completed Parliamentary passage and became law, there would be a deluge of legal challenges. CAJ organised a seminar in Queen's University Belfast in June 2023 with keynote speaker Robert Spano, former president of the European Court of Human Rights, to discuss likely legal challenges.

Within a few weeks from the law's passage in September 2023, there were 20 cases before the High Court in Northern Ireland. Moreover, multiple further pre-action letters were issued, with Mr. Justice Colton indicating that given the existing volume of applications before the Court more would not welcome.

Justice Colton indicated he would narrow the challenge to a series of test cases. Four law firms with major legacy caseloads (KRW Law; Harte Coyle Collins (HCC); Madden and Finucane; Pádraig Ó Muirigh Solicitors) put forward a joint position paper to the court of best suited cases. Narrowing of the cases was also sought by the Crown Solicitor's Office, representing the UK Government as respondents, who preferred the cases be restricted to the challenges brought by McCord and Phoenix Law. The Court ultimately narrowed the cases to those represented by Phoenix Law (*Dillon, McEvoy, McManus & Hughes*) with cases by other firms stayed except insofar as they raised ancillary points not covered by the test cases (i.e. *Gilvary* and *Fitzsimmons* covering the issue of torture and internment challenges respectively). The reason given by the Court for this narrowing was to expedite the proceedings.

Turning to Strasbourg, from the introduction of the Bill CAJ had raised the prospect of Ireland taking an Inter-State case against the UK to the European Court of Human Rights (EctHR). An Inter-State case has the advantage of not being tied to specific individual cases does not require the exhaustion of domestic remedies as well as elevating the issues to a matter of international concern. Having engaged in prolonged (but defied) diplomacy to dissuade the UK from passing the Legacy Act, Ireland ultimately lodged proceedings with the ECtHR in December 2023. A previous *Ireland v the UK* case had challenged the use of torture during the NI conflict in the 1970s. The new Ireland v UK case (Ireland v. United Kingdom, (III) [1859/24]) presents a broad challenge to the Legacy Act, well beyond the amnesty scheme it contains, raising concerns also regarding the ECHR-compatibility of the ICRIR and other elements of the Act. CAJ has applied to intervene in the case in partnership with the International Federation of Human Rights (FIDH), the Irish Council for Civil Liberties, the Pat Finucane Centre and Human Rights First.

The UK response to the Irish case, far from respecting the right of states to settle disputes through established international legal mechanisms, flaunted diplomatic conventions, with UK government Ministers taking to the airwaves to raise unspecified 'consequences' for UK-Irish relations. The *Daily Telegraph* newspaper (describing the Legacy Act as *'a flagship British law that gives immunity to hundreds of soldiers'),* stated that *'*Military leaders and Tory MPs united in outrage, accusing Irish PM of meddling in British politics in trying to overturn soldiers' immunity' and cited a senior Government source as stating: 'Ireland needs to back off. The Irish Government, Sinn Fein and Joe Biden are all cut from the same cloth' and of considering 'retaliation.'

The Inter-State case is now before the ECtHR and a timetable is awaited. With Labour committing to repealing the Legacy Act if they win the next UK general election, the possibility of a future friendly settlement to the case remains, should this commit-

ment be honoured.

Back in Belfast at the end of February 2024 the High Court issued its judgment on the domestic challenge to the Legacy Act, in a 203-page ruling.

It was unsurprising that the High Court found that the 'conditional immunity' amnesty scheme was incompatible with the ECHR. It also found that retrospectively curtailing civil proceedings to the date of introduction of the Bill was incompatible, but that curtailing future such proceedings after the commencement of the Act was broadly permissible. The Court also found provisions relating to the exclusion of evidence in civil proceedings to be incompatible with the ECHR.

The Court also found the same provisions were not compatible with rights under the Good Friday Agreement, whose legal effect is now underpinned by the provisions of Article 2 of the Windsor Framework (neé Protocol) to the UK-EU Withdrawal Agreement. This was significant as the effect is to disapply the provisions in question, rather than await a remedial order. For more detail on the Windsor Framework and the High Court's ruling, turn to page 7 of this issue for Anurag Deb's analysis.

The Court dismissed the Government's contention that the 'Immunities scheme' would somehow promote reconciliation (a position wholly unconvincingly pressed by Government to argue an ECHR-compatible basis for the scheme). In doing so the Court stated that there was no evidence that the scheme would promote reconciliation, and that 'indeed, the evidence is to the contrary.' Whilst the Court did not elaborate, Professors Anna Bryson and Louise Mallinder provide analysis of both the interpretation of the concept of 'reconciliation' in international law and its application to the Legacy Act on page 8 of this issue.

Knocking out the immunities scheme dismantled UK Ministers' whole rationale behind closing the existing Package of Measures dealing with legacy cases (these measures included the Police Ombudsman, Inquests, PSNI and independent police investigations), and replacing them with the ICRIR.

Ministers had previously told the UK Parliament that the absence of the immunities scheme would 'critically undermine' the 'principal aim' of the Legacy Act and that the ICRIR would have no 'chance' of working without the immunities scheme in place. The Secretary of State had described the amnesty scheme as '*a crucial aspect of the information recovery process'* and this contention had underpinned a dubious ministerial claim that the ICRIR would therefore provide more information than the existing mechanisms.

Whilst Ministers stated rationale for the Legacy Act, in the words of Prof Kieran McEvoy, was 'holed below the waterline' by the ruling, the response of the UK authorities to the judgment (whilst appealing it) was notably quite upbeat focusing on overstating the extent to which the High Court ruling gave a green light to the ICRIR meeting ECHR requirements. The ICRIR itself claimed in a stakeholder email on 1 March that the 'Court has confirmed that the Commission is independent' and 'capable' of carrying out ECHR compatible investigations and that the ICRIR 'is therefore properly and lawfully established.' However, this is an overstatement of what the Court held. The Court alluded to the proceedings not dealing with a 'specific case' and held *at a remove* it could not conclude that the ICRIR could *de facto* never provide an Article 2/3 compliant investigation, conceding that whilst undesirable for such matters having to be dealt with on numerous individual cases this would ultimately occur.

In relation to ICRIR independence the Court briefly addresses the question of the appointed Commissioner of Investigations, Peter Sheridan. Mr Sheridan is a senior former RUC/PSNI officer, and the Court found that '*Self-evidently, he must recuse himself from any review involving an incident in which he was involved as a former RUC/ PSNI officer, or in respect of which there is a personal conflict of interest*.' It is not clear however how a case-by-case assessment would work when dealing with a former officer whose career was not restricted to junior roles. Rather the postholder was also a senior officer, who hence would be regularly overseeing ICRIR reviews which engage the actions of former colleagues, including subordinates for whom he was ultimately responsible. The extent of this is heightened by his ultimate role within the PSNI hierarchy over the 'special branch' (renamed c3)– the unit responsible for paramilitary informants and covert operations, where there are most concerns regarding past unlawful practices and agent-involvement in violations.

There is a lengthy narrative section of the judgment, totaling 70 paragraphs entitled 'Development of the Act: How did we get here?', drawing on Government submissions. This publishes extracts from hitherto unseen Government position papers indicating that the rejection of the Package of Measures or implementing the Stormont House Agreement was grounded in the contention that both would continue investigations into military veterans. Beyond this however this section largely reflects the UK Government's heavily contested narrative as to how the Legacy Act came about.

Other aspects of the High Court ruling are contested and subject of cross-appeal. The High Court ruling does not prevent the closure of Inquests or other elements of the current Package of Measures and their replacement by the ICRIR. If this position is retained on appeal, challenges to the independence of the ICRIR are likely to continue on a case-by-case basis, as the High Court has foreseen.

The Court of Appeal heard the appeals and cross appeals to the High Court ruling over four days in June 2024 with its verdict expected at the end of the summer. A timetable on the Inter-State case is awaited. In the meantime the UK General Election is scheduled for July 4, with the Labour manifesto repeating the party's pledge to 'repeal and replace' the Legacy Act.

Dillon: A Study in (Ir)responsible Lawmaking

Anurag Deb, Queen's University Belfast

Since the start of 2020, the UK Parliament has been busy reasserting its sovereignty. Having freed itself from restraints of EU membership, the mother of parliaments has enacted certain statutes which explicitly override or disregard fundamental pillars of human rights law in the UK. In 2023, Westminster enacted one of the most controversial such statutes, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (from here on, Legacy Act). Through this statute, Westminster and the UK Government earned the dubious honour of bringing together Northern Ireland's fractured polity in widespread and universal condemnation at what the statute promised. The statute brought in a sweeping amnesty from criminal prosecutions, buttressed by an end to all police investigations throughout the UK, civil actions seeking compensation for deaths and injuries and inquests seeking clarity into our troubled past. Questions relating to the Conflict would be funneled through a new body – the Independent Commission for Reconciliation and Information Retrieval (ICRIR), with critics sounding the alarm over its capacity for independence and effectiveness.

In late February 2024, the High Court handed down a timely reminder in its ruling in *Dillon and Others* that Westminster had enacted the UK-EU Withdrawal Agreement into domestic law – and with it, provided for its own statutes to be stripped of their legal effect in some limited circumstances. *Dillon*, which challenged the Legacy Act, is the first such example of precisely these circumstances.

Unsurprisingly, the breadth of the Legacy Act's amnesty engaged the duty to investigate killings involving state actors under Article 2 of the European Convention on Human Rights (ECHR). For Mr Justice Colton in *Dillon*, the starting position was the method by which this duty operates in the domestic legal order. The UK Supreme Court has recently clarified that this method involves a degree of caution, lest domestic courts should bind the state more strongly than the European Court of Human Rights would. Consequently, *Dillon* can be fairly described as unsurprising in its reasoning, and its length is partly explained by the Judge's repeated references to clear and consistent case law from Strasbourg. These references underscore a key point which might surprise critics of the judgment: its reasoning is firmly orthodox. Nowhere is this orthodoxy more apparent than in the way the Court considered the sweeping amnesty in the Legacy Act.

From a fairly equivocal start in the 1990s, the case law around amnesties under the ECHR has evolved to a very clear point: immunity is a breach of Article 2 unless it is a part of wider reconciliation efforts. The respondent in *Dillon* (the Northern

Ireland Secretary) tried to argue that the immunity provisions did not stand alone, but were part of a wider reconciliation process, including through information recovery via the ICRIR. This was a strange argument to have adopted. Cases like *Margus v Croatia* (2014) accepted the need for amnesties in highly specific circumstances: '*where they represented the only way out of violent dictatorships and interminable conflicts*' (*Margus*, para 113).

The Northern Ireland Secretary could not conceivably argue that Northern Ireland was subject to a violent dictatorship. Moreover, the Troubles had, by the definition used in the Legacy Act itself, ended in 1998. The need for a sweeping amnesty some 25 years later is thus, in a way, inexplicable. This led to the obvious conclusion that the immunity provisions in the Legacy Act did not meet this requirement of necessity and thus amounted to breaches of Article 2 ECHR. In all, Colton J only went as far as Strasbourg *clearly* showed him.

The Court's orthodoxy was also prominent in its consideration of one of the main challenges to the Legacy Act – that the new Independent Commission on Reconciliation and Information Recovery (ICRIR) was institutionally incapable of complying with the requirements of the investigative obligation under Articles 2 and 3. These requirements are quite familiar in Strasbourg case law, having been repeated in some of the more notable judgments concerning the Troubles. Colton J began by observing that these requirements were '*inter-related*' and '*should not be analysed in isolation*' (para 258). Without delving too deeply into any one of these elements, two main points ultimately defeated the applicants' challenge in this context. First, the ICRIR had yet to start a review, meaning that any challenge was somewhat premature (see e.g. para 267). Second, the powers, appointments and frameworks by which the ICRIR proposed to carry out its functions were, at least on paper, either compliant with the requirements of the duty under Articles 2 and 3 or still subject to consultation in which victims were able to take part (see e.g. paras 319, 341 and 357). It was also significant that the Chief Commissioner of the ICRIR is the former Lord Chief Justice

of Northern Ireland Sir Declan Morgan, '*a person of huge judicial experience*' (para 272). All of these factors when taken together militated against finding breaches of Article 2 and 3 '*at this remove*' (para 367). But, just as the Court was being cautious, it was also putting the ICRIR on notice of the extent to which these issues will be open to challenge if its practice in any of these regards fails to reflect the requirements of the ECHR.

There is an important link between the EU Charter of Fundamental Rights (CFR) and the ECHR aspects covered here. The CFR explicitly declares (Article 52(3)) that where its rights correspond with those in the ECHR, the 'meaning and scope' of the former shall 'be the same' as the latter. Consequently, as the CFR falls within the body of EU law applicable in Northern Ireland via the Withdrawal Agreement, Colton J simply and succinctly followed as the law directed him (para 541).

The key provision in this context is Article 2 of the Protocol on Ireland/Northern Ireland (from here on, the Protocol). Article 2 forbids the UK from diminishing the domestic law relating to rights set out in part of the Good Friday Agreement, and underpinned by EU law, which existed before 31 December 2020 (the last day on which the entire body of EU law applied to the UK). What this means is that the courts have both a right and a duty to interfere in any attempt to diminish such a law or laws.

As a result, the breach of Articles 2, 3 and 6 of the ECHR (as identified above) corresponded with a breach of Articles 2, 4 and 47 of the Charter insofar as EU law applied to the Act (through the application of the EU Victims' Directive, transposed into Northern Ireland by Stormont legislation in 2015).

This meant that the sections of the Legacy Act declared incompatible under the Human Rights Act were also disapplied under the European Union (Withdrawal) Act 2018. Disapplication of these provisions means that they do not have legal effect (in Northern Ireland, at least).

Dillon is now before the Court of Appeal, which is due to hear the appeal in early June. It may be destined for the Supreme Court, given how rare it is for the courts to disapply an Act of the UK Parliament. The disapplication in *Dillon*, moreover, marks some of the most extensive in history, and the first such example after the UK left the EU. These last two points lie at the heart of much of the surprise and criticism of the judgment. But, as set out above, *Dillon* is one of the more orthodox judgments concerning human rights in recent years. Mr Justice Colton went, I argue, only as far as the law directed him.

Instead, any surprise should be directed at the UK Government moving – and the UK Parliament enacting – a statute with seemingly little to no consideration of the consequences. Although the doctrine of parliamentary sovereignty is frequently expressed in absolute terms, so that lawmaking is effectively reduced to an exercise in certification (whether both Houses passed a Bill) and royal assent, *Dillon* is a reminder that laws are not enacted in a vacuum and a vote in either House is a powerful and consequential exercise of democratic will. Those who are conferred this privilege should exercise it responsibly.

Reconciliation and the Legacy Act: A Human Rights Perspective

Anna Bryson and Louise Mallinder, Queen's University Belfast

In February 2024, the High Court in Belfast declared in *Dillon and others* that fundamental aspects of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 are unlawful and should be disapplied. Most notably, it ruled that provisions for immunity from prosecution for serious violations are incompatible with Articles 2 and 3 of the European Convention on Human Rights and Article 2 of the Windsor Framework.

We focus here on an aspect of the ruling that has received much less attention, namely the extent to which this Act can deliver on its principal objective which is to 'promote reconciliation'. Although the High Court concluded, rightly in our view, that 'there is no evidence that granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland' and that 'indeed, the evidence is to the contrary' [187], it did not address the extent to which other aspects of the Act are likely to do so. In this article, we draw on academic and judicial writings to argue that the legal, political and institutional processes underpinning the Northern Ireland Legacy Act are not founded on a transparent and human rights-based understanding of reconciliation. In particular, we note that: the weakness of the truth recovery functions of the Independent Commission on Reconciliation and Information Recovery inhibits its ability to contribute to reconciliation; the Legacy Act is opposed by almost all key stakeholders, including victims; and the proposed memorialisation work is deliberately designed to privilege a particular narrative of the conflict.

How do Academics Understand Reconciliation?

Reconciliation is commonly understood by scholars from multiple disciplines as a process that is intended to improve relationships between specific actors (such as individual victims and perpetrators, antagonistic communities, people and the state or opposing states). For some, reconciliation simply connotes the absence of physical violence but most favour 'thicker' conceptualizations that emphasize (re-)building peaceful relationships based on mutual respect, co-operation, and trust. This generally involves creating spaces where individuals, communities and institutions can listen to and respect the narratives of others. This dialogue is backward- and forward-looking - identifying how and why relationships have broken down and the steps necessary to redress harms and prevent repetition. Such processes will ideally help to: reduce stereotyping and prejudice; increase political tolerance and support for human rights principles; and extend the legitimacy of democratic institutions.

How do International Courts Understand Reconciliation?

Reconciliation has frequently been referenced by international human rights courts and criminal tribunals. Indeed, the International Criminal Court has repeatedly cited the promotion of reconciliation as one of its objectives. The European Court of Human Rights mentioned reconciliation when considering the le-

gality of amnesties in its *Margus* and *Ould Dah* cases but did not define the term. Reviewing the case law of international criminal tribunals and the Inter-American Court and Commission, it is nonetheless possible to pinpoint key elements of a human rights compliant approach to reconciliation. These closely align with core transitional justice principles concerning victim-centricity; inclusivity and gender sensitivity; and the need to address the root causes of mass violence.

International courts have repeatedly emphasized the importance of truth and acknowledgment for reconciliation. The Inter-American Commission has argued that 'truth is a precondition to reconciliation' [136]. The International Criminal Tribunal for the Former Yugoslavia when mitigating sentences after guilty pleas argued that 'truth cleanses ethnic and religious hatreds' [21] and 'provides closure to victims' [111]. It also contended that the revelation of truth by offenders publicly condemns the crimes [76] and reduces the possibility of revisionist denial narratives [260].

They have also emphasized that reconciliation should entail victim-centred approaches that seek to remedy the harm experienced by victims and to 'rebuild trust among citizens and between citizens and public institutions' [182]. Thus, for international courts, reconciliation is associated with repairing harms experienced by victims and rebuilding relationships between antagonistic groups and between citizens and the state.

Several of these decisions indicate the importance of symbolic and material reparations to reconciliation. For example, the Inter-American Commission of Human Rights argued that an amnesty law 'disregards the legitimate rights of the victims' next-of-kin to reparation. Such a measure will do nothing to further reconciliation' [215].

These decisions indicate that human rights centred approaches to reconciliation must seek to encourage offenders to disclose the truth about their actions and acknowledge their wrongdoing and provide reparations to individuals and communities to repair the harm and prevent repetition.

Minimum Standards for Reconciliation

With respect to reparations, the International Criminal Court argued that they should be 'culturally and locally relevant' [182], should have community involvement [188], address the root causes of the violence [218], and be gender sensitive [188]. They should also refrain from favouring one side of the conflict over another [183]. In addition, the Inter-American Commission observed that: 'No state policy on ... reconciliation can omit the victims, without seriously violating their international human rights obligations'. These decisions emphasize that measures to promote reconciliation should be developed and implemented with the involvement of victims and affected communities, including women, and that they should be oriented to addressing the needs of the affected society rather than serving other political or policy objectives.

The fact that many judicial discussions of reconciliation have come from sentencing judgments following criminal convictions indicates that prosecutions are not viewed as inherently in tension with reconciliation, as suggested by the UK government. In addition, these sentencing decisions follow guilty pleas based on public, often televised, Court proceedings. Disclosures of truth and acknowledgement of guilt were not given anonymously or confidentially. Nor was the substance of the truth they disclosed kept secret. Furthermore, offenders' disclosures were not taken at their word. Instead, the ICTY expressly connected reconciliation to facts being proven beyond a reasonable doubt and the capacity of offenders' public admissions to establish socially accepted truths about past violence.

Why the Legacy Act will not contribute to Reconciliation

Weakness of the Truth Recovery Functions

The Legacy Act will permanently close existing police and judge-led investigations into offences connected to the armed conflict in Northern Ireland from 1966 to 1998 (including criminal investigations, civil litigation, coroners' inquests, Police Ombudsman

Investigations, and public inquiries). In their place, a new Independent Commission on Reconciliation and Information Recovery (ICRIR) has been established to review Troubles related-violence that resulted in deaths or serious physical and mental injuries. The reviews are primarily geared towards producing reports for bereaved families. As reviews are a lighter-touch process than criminal investigations, the Council of Europe Human Rights Commissioner and the Northern Ireland Human Rights Commission have raised concerns that they do not equate to thorough and effective investigations.

The ICRIR is also controversially tasked with granting immunity to persons who have committed serious Troubles-related crimes, including killings and torture. This immunity is conditional on the offender disclosing information that is 'true to the best' of the person's 'knowledge and belief'. This is a very low and subjective bar, particularly since the disclosed information can be details that the person has previously disclosed. The ICRIR has discretion over whether to conduct a review relating to the disclosed information. If there is no review, it seems unlikely that the disclosed information will contribute to the type of societal truth that the international courts associate with reconciliation.

Opposition of Victims and Wider Society

In *Dillon and others*, the Court observed that there is 'widespread opposition to these proposals' and 'the measures are not supported by groups who represent victims' [501]. They have indeed been opposed in the strongest possible terms by victims and survivors groups, all of the Northern Ireland political parties, the Northern Ireland Human Rights Commission, the Irish government, the Council of Europe, the United Nations and leading members of the US Congress. This resounding local and international opposition and the fact that the legislation was introduced unilaterally make it impossible to see how the Legacy Act can be framed as resulting from the type of dialogic and victim-centred process that international courts argue is essential for reconciliation.

Rewriting History

Criticism of the government's motivation in bringing forward this legislation has focused on the former Secretary of State for Northern Ireland's pledge that: 'no longer will our veterans be hounded and hauled in for questioning about events that happened decades ago.' What has attracted less attention is the desire to 'halt the rewriting of history'. Writing in Conservative Home, Brandon Lewis explained that this was the objective behind Part IV of the Act which provides for a 'Troubles-related work programme' (to include a major new oral history initiative, a memorialization strategy and academic research into 'themes and patterns'). The government will also commission an 'official history' of the Troubles.

The Act does not define reconciliation, but Government amendments emphasized that the 'Troubles-related work programme' should promote 'reconciliation, anti-sectarianism and nonrecurrence of political and sectarian hostility between people in Northern Ireland'. This coupling of reconciliation and antisectarianism was highlighted by Cillian McGrattan as a victory for the Malone House Group – who 'pushed for the inclusion of anti-sectarianism as a robust way of promoting the recalibration of the story told about the past, which republicans have long dominated.' We agree that these amendments speak to a desire to resurrect a 'two sectarian tribes' version of the Troubles that shifts public attention away from state culpability. It is difficult to square such an approach with the international case law that underlines that reconciliation requires all narratives to be heard and respected – including those that are critical of the state.

Reconciling History and Impunity

The final point we wish to consider is the danger of a distorted 'reconciliation process' serving to conceal the more sinister aspects of the legislation. The UN recently reported that 'the obligation to adopt memorialization processes in societies that have suffered gross violations of human rights and serious violations of international humanitarian law derives from both primary and secondary sources of international human rights law.' The Special Rapporteur was careful to note, however, that 'memory processes complement but do not replace mechanisms for truth, justice, reparation and guarantees of non-recurrence' and that 'Memory mechanisms should never serve as a pretext for granting de jure or de facto impunity to the perpetrators of gross violations of human rights or serious violations of international humanitarian law.' In the Northern Ireland context, we have grave concerns that the provisions for oral history, memorialisation and academic research are designed to promote a flawed conception of reconciliation in a cynical attempt to whitewash impunity and control the narrative of the past.

Notes for Publication

Both authors have contributed equally to this article.

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