

# Rethinking Amnesty: A Critical and Prescriptive Response to Amnesty in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

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## ABSTRACT

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (‘Troubles Legacy Act’) is a recent piece of legislation intended to ‘promote reconciliation’ in Northern Ireland following the Troubles. However, its amnesty provisions have generated outrage from victims’ families, political parties in Northern Ireland, and international actors alike. Following the recent Northern Ireland Court of Appeal decision in *Dillon and Others*, which largely endorsed the earlier determination of the Belfast High Court that the Act’s conditional amnesty provisions violate the UK’s obligations under the European Convention on Human Rights (‘ECHR’) and the Windsor Framework, it appears that the Troubles Legacy Act’s days are increasingly numbered. Although this article agrees with the Act’s many critics that these amnesty provisions are ill-suited to Northern Ireland today, it disagrees that the correct response is to repeal the Act entirely. Instead, the article outlines two possible replacements for the current amnesty provisions that would serve similar ends without incurring an unjustified prima facie wrong. Overall, its analysis shows that the amnesty of the Troubles Legacy Act is prima facie wrongful, and that this wrongfulness is not justified, but that alternative provisions that do not have the same problems would render the Act permissible.

*Keywords:* Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, human rights, jurisprudence, the Northern Ireland Troubles, transitional justice

## I. INTRODUCTION

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (‘Troubles Legacy Act’) is a recent piece of legislation intended to ‘promote reconciliation’ in Northern Ireland following the Troubles.<sup>2</sup> The Troubles Legacy Act seeks to replace existing methods of

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<sup>1</sup> Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (‘Troubles Legacy Act’), s 2(4).

<sup>2</sup> The Troubles was a 30-year period of sectarian violence in Northern Ireland between the late 1960s and 1998. The end of the Troubles in 1998 was marked by the signing of the Good Friday Agreement: Secretary of State for Northern Ireland, *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland* (Cm 3883, 1998) (‘Good Friday Agreement’).

Troubles-centred truth recovery,<sup>3</sup> which primarily involved investigations through the courts, with a truth commission called the Independent Commission for Reconciliation and Information Recovery ('ICRIR').<sup>4</sup> The amnesty provisions that accompany this truth commission have generated outrage from victims' families, political parties in Northern Ireland, and international actors alike.<sup>5</sup>

These are troublesome times for the Troubles Legacy Act. On 20 September 2024, the Northern Ireland Court of Appeal delivered its judgment in *Dillon and Others*.<sup>6</sup> The appeal had been brought by the Secretary of State for Northern Ireland against the earlier determination by the Belfast High Court<sup>7</sup> that the Troubles Legacy Act's conditional amnesty provisions violate the UK's obligations under the European Convention on Human Rights ('ECHR') and the Windsor Framework.<sup>8</sup> Colton J in the High Court had found that certain provisions of the Troubles Legacy Act were incompatible with articles 2 and 3 of the ECHR.<sup>9</sup>

It is noteworthy that, during the proceedings, the Secretary of State announced that he would 'no longer... pursue' the appeal against these declarations of incompatibility, though he still intended to pursue the other grounds of appeal relating to Colton J's interpretation of the Windsor Framework.<sup>10</sup> The Court of Appeal's decision is significant for largely endorsing the trial judge's position and for making additional declarations of incompatibility in relation to sections of the Act.<sup>11</sup> Following the initial High Court decision, the Government announced that it would begin preparations for 'a draft remedial order... to remedy' the High Court's declarations of incompatibility; however, the Secretary of State has now stated that he will review these preparations in the light of 'the additional declarations of incompatibility made by the Court of Appeal'.<sup>12</sup> It thus appears that the Troubles Legacy Act's days are increasingly numbered.

Although this article agrees with the Act's many critics that these amnesty provisions are ill-suited to Northern Ireland today, it disagrees that the correct response is to repeal the Act entirely. However, in order to prescribe an appropriate solution, we must first diagnose the specific problem at hand. The purpose of this article is to identify exactly what is wrong about the amnesty provisions of the Troubles Legacy Act and to propose solutions to this that would preserve the remainder of the Act.

<sup>3</sup> Anna Bryson and Kieran McEvoy, 'Human Rights Activism and Transitional Justice Advocacy in Northern Ireland' (2023) 17 *International Journal of Transitional Justice* 453, 454.

<sup>4</sup> Troubles Legacy Act 2023, ss 2-37.

<sup>5</sup> See for example *Re Dillon and Others' Applications* [2024] NIKB 11 ('*Dillon* (NIKB)') [501] (Colton J); Freya McClements and Martin Wall, 'Controversial Northern Ireland Legacy Bill to Become Law after Final Westminster Vote' *The Irish Times* (Dublin, 6 September 2023) <<https://www.irishtimes.com/world/uk/2023/09/06/northern-ireland-legacy-bill-to-become-law-after-final-westminster-vote/>> accessed 7 October 2024.

<sup>6</sup> *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59 ('*Dillon* (NICA)').

<sup>7</sup> *Dillon* (NIKB) (n 5).

<sup>8</sup> See for example *ibid* [187], [518], [613], [710] (Colton J); Seánín Graham and Freya McClements, 'Legacy Act: Immunity for Troubles-Era Killings Breaches Human Rights Law - Judge' *The Irish Times* (Dublin, 28 February 2024) <<https://www.irishtimes.com/crime-law/courts/2024/02/28/legacy-act-troubles-northern-ireland-international-human-rights-law-court-rules/>> accessed 7 October 2024.

<sup>9</sup> *Dillon* (NIKB) (n 5) [710] (Colton J); see also *Dillon* (NICA) (n 6) [13] (Keegan LCJ).

<sup>10</sup> *Dillon* (NICA) (n 6) [15] (Keegan LCJ).

<sup>11</sup> See for example *ibid* [173]; Hilary Benn, 'Written Ministerial Statement - Legacy - Northern Ireland' (Northern Ireland Office, 7 October 2024) <<https://www.gov.uk/government/speeches/written-ministerial-statement-legacy-northern-ireland>> accessed 7 October 2024.

<sup>12</sup> Benn (n 11).

After outlining the amnesty provisions contained in the Troubles Legacy Act in Section II, Section III then presents an argument in the instrumentalist tradition,<sup>13</sup> arguing that amnesty is a *prima facie* wrong that stands in need of justification.<sup>14</sup> Section IV addresses the situations in which amnesty can be justified and explains that the Troubles Legacy Act is not one of them. Finally, Section V outlines two possible replacements for the current amnesty provisions that would serve similar ends without incurring an unjustified *prima facie* wrong. Taken together, the analysis shows that the amnesty of the Troubles Legacy Act is *prima facie* wrongful, and that this wrongfulness is not justified, but that alternative provisions could be put in place that would render the Act permissible.

## II. AMNESTY IN THE TROUBLES LEGACY ACT

Amnesty refers to the granting of exemptions from prosecution to a group or class of people.<sup>15</sup> Blanket amnesties are those offered unconditionally to all perpetrators for all crimes committed.<sup>16</sup> Conditional amnesties require perpetrators to satisfy certain conditions, such as a full disclosure of wrongdoing, before being eligible for amnesty.<sup>17</sup>

The Troubles Legacy Act contains two amnesty provisions. The first provision is a conditional amnesty scheme offered in return for cooperation with the ICRIR.<sup>18</sup> The second provision is a blanket amnesty that is established by the elimination of current and future criminal proceedings,<sup>19</sup> civil proceedings,<sup>20</sup> and inquests<sup>21</sup> related to Troubles-era conduct.

The conditional amnesty provision is intended to induce the perpetrators of Troubles-related crimes to disclose information about their wrongdoing to the ICRIR. The conditions for this amnesty to be granted are as follows:

- (2) *Condition A*: P has requested the ICRIR to grant P immunity from prosecution.
- (3) *Condition B*: the immunity requests panel is satisfied that the ICRIR is in possession of an account ('P's account') that—
  - (a) has been given by P,
  - (b) describes conduct by P which is, or includes, conduct forming part of the Troubles ('P's disclosed conduct'), and
  - (c) is true to the best of P's knowledge and belief...
- (5) *Condition C*: the immunity requests panel is satisfied that P's disclosed conduct would tend to expose P—

<sup>13</sup> Juan Espindola, 'The Case for the Moral Permissibility of Amnesties: An Argument from Social Moral Epistemology' (2014) 17 *Ethical Theory and Moral Practice* 971, 974.

<sup>14</sup> See Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 *OJLS* 467, 471–72.

<sup>15</sup> Kent Greenawalt, 'Amnesty's Justice' in Robert I Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 189; Gwen K Young, 'All the Truth and as Much Justice as Possible' (2003) 9 *UC Davis Journal of International Law & Policy* 209, 211.

<sup>16</sup> See for example Young (n 15) 218; Max Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics & Global Politics* 1, 6; Espindola (n 13) 973.

<sup>17</sup> Kenneth Christie, *The South African Truth Commission* (Palgrave Macmillan 2000) 123–24; Patrick Lenta, 'Amnesties, Transitional Justice and the Rule of Law' (2023) 15 *Hague Journal on the Rule of Law* 441, 443.

<sup>18</sup> Troubles Legacy Act 2023, s 19.

<sup>19</sup> *ibid* s 38.

<sup>20</sup> *ibid* s 43.

<sup>21</sup> *ibid* s 44.

- (a) to a criminal investigation of, or
  - (b) to prosecution for,
- one or more particular serious or connected Troubles-related offences identified by the panel...<sup>22</sup>

If a person meets these three conditions, the immunity requests panel may grant either specific amnesty ('immunity from prosecution for all of the *identified* possible offences'),<sup>23</sup> general amnesty ('immunity from prosecution for *all* serious or connected Troubles-related offences'),<sup>24</sup> or both. All Troubles-related crimes where the perpetrator meets these three conditions are eligible for amnesty. However, the attractiveness of this conditional amnesty as an incentive to disclose information is severely diminished by the Troubles Legacy Act's second amnesty provision, which provides a blanket amnesty.

The blanket amnesty provision was initially intended to protect British army veterans and ex-police officers in Northern Ireland from 'vexatious legal claims' about the events of the Troubles.<sup>25</sup> The elimination of current and future investigations into Troubles-related crimes protects all perpetrators of such crimes from prosecution. For this reason, the blanket amnesty provision applies to everyone unconditionally—including those who would also be eligible for the Act's conditional amnesty provision.

When referring to the Troubles Legacy Act's amnesty provisions in its analysis, this article will be referencing both the conditional amnesty and the blanket amnesty established by the Act. The combined effect of these provisions is to exempt all perpetrators of Troubles-related crimes from prosecution regardless of whether they cooperate with the ICRIR and, additionally, to exempt those who do cooperate and meet certain conditions.

### III. THE CASE FOR AMNESTY AS A PRIMA FACIE WRONG

This section will argue that amnesty in transitional justice contexts is prima facie wrongful. The implication of this argument for the Troubles Legacy Act is that, if amnesty is a prima facie wrong, then the blanket amnesty provision of the Troubles Legacy Act is prima facie wrongful. The next section will address the circumstances in which amnesty can be justified and will determine whether the amnesty of the Troubles Legacy Act falls under one of these circumstances.

#### A. PRIMA FACIE WRONGFULNESS

An action that is prima facie wrong is an action that requires justification.<sup>26</sup> Prima facie wrongfulness is a preliminary assessment of an action's wrongfulness. Once other considerations and justifications are factored in, the action may be found to be either justified or

<sup>22</sup> *ibid* ss 19(2)–(3), 19(5).

<sup>23</sup> *ibid* s 19(8) (emphasis added).

<sup>24</sup> *ibid* s 19(9) (emphasis added).

<sup>25</sup> The Conservative and Unionist Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) 52 <[https://assets-global.website-files.com/5da42e2cae7cbd3f8bde353c/5dda924905da587992a064ba\\_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7cbd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf)> accessed 7 October 2024. See also Bryson and McEvoy (n 3) 456; Laura McAtackney, 'Troubles Legacy Bill: "It's Almost as if the UK Is Writing Itself Out of the North's History"' (*The Journal*, 8 September 2023) <<https://www.thejournal.ie/readme/northern-ireland-troubles-legacy-bill-6162581-Sep2023/>> accessed 7 October 2024.

<sup>26</sup> Dempsey and Herring (n 14).

unjustified.<sup>27</sup> This is distinct from another sense in which an action can be wrong, which Michelle Madden Dempsey and Jonathan Herring refer to as ‘all-things-considered’ wrongs—these are actions that can never be justified regardless of other considerations.<sup>28</sup>

One further characteristic of prima facie wrongfulness is that, even when justified, these actions leave behind a ‘moral residue of regret’, whereas non-wrongful acts do not.<sup>29</sup> The effect of this is that we should prefer less wrongful alternatives to justified prima facie wrongs if those alternatives can achieve the same outcome.<sup>30</sup>

In arguing that amnesty is a prima facie wrong, this article is claiming that the provision of amnesty is an act that requires justification. While the wrong of amnesty could conceivably be outweighed by other considerations, and thus justified, our preliminary assessment of amnesty is still that it is morally wrong. Additionally, if alternative measures can achieve the same outcome as amnesty without incurring a wrong, those measures are preferable and states should pursue them where possible.

This article argues that amnesty is a prima facie wrong for two reasons: first, due to the risk of harm that amnesty poses to victims of human rights violations; and secondly, due to the ‘negative social meaning’ of amnesty.<sup>31</sup>

## B. RISK OF HARM

When an action poses a nontrivial risk of significant harm to another person or persons, that action is prima facie wrongful.<sup>32</sup> For the action to be considered a prima facie wrong, the risk posed must be sufficiently likely to occur and the harm risked must be sufficiently serious.<sup>33</sup> Harms that render an action prima facie wrongful include, but are not limited to, significant psychological harms.<sup>34</sup>

Amnesty poses a nontrivial risk of harm to the victims of human rights violations in two ways: first, through violations of the right to justice; and secondly, through violations of the right to truth. Rights violations are wrong in and of themselves,<sup>35</sup> but violations of these particular rights also cause significant psychological harm to victims and their families. For these reasons, amnesty constitutes a prima facie wrong based on the risk of harm to victims of human rights violations.

### (i) *The Right to Justice*

This subsection will argue that amnesty violates the right to justice. The implication of this argument is that, insofar as amnesty violates the right to justice, amnesty constitutes a prima facie wrong based on the risk of harm it poses to victims.

The right to justice in the context of post-conflict amnesty encompasses several interconnected concepts, including the following: a victim’s right to a remedy;<sup>36</sup> a victim’s right to

<sup>27</sup> See for example Jeremy Waldron, ‘A Right to Do Wrong’ (1981) 92 *Ethics* 21, 26; *ibid.*

<sup>28</sup> Dempsey and Herring (n 14).

<sup>29</sup> *ibid.* 488.

<sup>30</sup> *ibid.* 489.

<sup>31</sup> *ibid.* 481.

<sup>32</sup> *ibid.* 475.

<sup>33</sup> *ibid.* 476.

<sup>34</sup> *ibid.* 479.

<sup>35</sup> See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 188.

<sup>36</sup> See for example UNCHR (Sub-Commission), ‘Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Final Report Prepared by Mr Joinet Pursuant to Sub-Commission Decision 1996/119’ (1997) UN

see their oppressor held accountable through the criminal justice system;<sup>37</sup> and a victim's right to reparations.<sup>38</sup> These rights create a correlative duty on the part of states to 'investigate, prosecute, and compensate' violations of human rights.<sup>39</sup>

Amnesty violates the right to justice by preventing the perpetrators of human rights violations from standing trial for their actions.<sup>40</sup> This violates victims' rights to a remedy, denies victims the opportunity to see their oppressor held accountable, and deprives victims of reparations for the harm that has occurred.

In its landmark decision of *Barrios Altos v Peru*,<sup>41</sup> the Inter-American Court of Human Rights ('IACtHR') found that Peru's amnesty laws:

prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case.<sup>42</sup>

The two amnesty laws in question had granted amnesty to government officials who carried out human rights violations under the Fujimori regime.<sup>43</sup> The IACtHR explained that these amnesty laws violated the victims' rights to a fair trial, which are protected under article 8 of the American Convention on Human Rights ('ACHR'), and victims' rights to judicial protection, which are protected under article 25 of the ACHR.<sup>44</sup> The IACtHR upheld this decision in the later case of *Almonacid-Arellano v Chile*,<sup>45</sup> where it found that states had an obligation under the ACHR to 'prevent, investigate, and punish all violations of the rights recognized by the Convention'.<sup>46</sup>

The United Nations Human Rights Committee ('UNHRC') came to a similar decision in *Rodríguez v Uruguay*,<sup>47</sup> where it stated that amnesty laws are incompatible with state obligations to investigate past human rights abuses.<sup>48</sup> The UNHRC found that such amnesties

Doc E/CN.4/Sub.2/1997/20 (Joint Report'), para 26; Juan Pablo Perez-Leon-Acevedo, 'The Control of the Inter-American Court of Human Rights over Amnesty Laws and Other Exemption Measures: Legitimacy Assessment' (2020) 33 *Leiden Journal of International Law* 667, 673, 675; Lenta (n 17) 446–47.

<sup>37</sup> See for example Joint Report (n 36); Perez-Leon-Acevedo (n 36) 671–73.

<sup>38</sup> See for example *ibid*; Young (n 15) 245.

<sup>39</sup> Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59 *Law and Contemporary Problems* 93, 95. See also Joint Report (n 36) para 27; Perez-Leon-Acevedo (n 36) 671–73, 675.

<sup>40</sup> Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 *German Law Journal* 1203, 1204.

<sup>41</sup> *Barrios Altos v Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001).

<sup>42</sup> *ibid* para 42.

<sup>43</sup> Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 *The International and Comparative Law Quarterly* 645, 655; Thomas M Antkowiak, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 434.

<sup>44</sup> *Barrios Altos* (n 41) para 42; see also Lisa J Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 *Virginia Journal of International Law* 915, 962.

<sup>45</sup> *Almonacid-Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006).

<sup>46</sup> *ibid* para 110.

<sup>47</sup> UNHRC, 'Communication No 322/1988' (9 August 1994) UN Doc CCPR/C/51/D/322/1988 ('*Rodríguez v Uruguay*').

<sup>48</sup> *ibid* para 12.4.

violate a victim's right to a remedy, which is protected under article 2, paragraph 3 of the International Covenant on Civil and Political Rights ('ICCPR').<sup>49</sup>

In *Marguš v Croatia*,<sup>50</sup> the ECtHR found that amnesties for killing and ill-treatment violated states' obligations to prosecute human rights violations.<sup>51</sup> Additionally, the ECtHR stated that such amnesties violated the right to life, which is protected under article 2 of the ECHR, and the right not to be subjected to ill-treatment, which is protected under the article 3 prohibition against torture.<sup>52</sup> The ECtHR argued that granting amnesty for such acts 'render[ed] illusory the guarantees in respect of' these rights.<sup>53</sup>

Overall, the IACtHR, the UNHRC, and the ECtHR have all found that amnesty violates the right to justice. When human rights abusers are not prosecuted for wrongdoing, this violates victims' rights to a remedy, their rights to see their oppressor held accountable, and their rights to reparations. Given that rights violations constitute harms in and of themselves and that amnesty violates the right to justice, amnesty therefore constitutes a prima facie wrong through its risk of harm to victims.

### (ii) *The Right to Truth*

This subsection will argue that amnesty violates the right to truth. If amnesty is proven to violate the right to truth, then this is another way that amnesty constitutes a prima facie wrong due to the risk of harm posed to victims. While it is often argued that amnesty accompanied by a truth commission will not violate the right to truth, this subsection will suggest that very few truth commissions have avoided this rights violation, and the ICRIR is not one of them.

The right to truth refers to two different concepts. The first of these is a collective societal right to know the events surrounding human rights violations in order to prevent re-occurrence.<sup>54</sup> The second is the right of victim-survivors and the families of the deceased to know the truth surrounding instances of human rights violations that affected them.<sup>55</sup> Similarly to the right to justice, the correlative duty on states is to investigate human rights violations.<sup>56</sup> States must uncover information about the events of human rights violations in order to fulfil both the victims' and society's right to truth.

Amnesty violates the right to truth by preventing investigation into the events surrounding human rights violations, thus preventing information about those events from coming to light.<sup>57</sup> As a result, neither the collective right to truth nor the individual victim's right to truth is fulfilled.

In *Barrios Altos*, the IACtHR found that Peru's failure to investigate and clarify the events that took place in the Barrios Altos neighbourhood prevented surviving victims and the families of deceased victims from finding out the truth of what happened.<sup>58</sup> In this way, Peru's amnesty laws violated their right to truth.

<sup>49</sup> *ibid* paras 12.2, 12.4. See also Young (n 15) 216; Perez-Leon-Acevedo (n 36) 675.

<sup>50</sup> (2016) 62 EHRR 17.

<sup>51</sup> *ibid* [139].

<sup>52</sup> *ibid* [127].

<sup>53</sup> *ibid*.

<sup>54</sup> Joint Report (n 36) para 17.

<sup>55</sup> *ibid*; Perez-Leon-Acevedo (n 36) 672. For the term 'victim-survivors', see Laplante (n 44).

<sup>56</sup> See for example *Barrios Altos* (n 41) para 48; Young (n 15) 236.

<sup>57</sup> Young (n 15) 243.

<sup>58</sup> *Barrios Altos* (n 41) paras 47–48.

In Argentina, families whose loved ones had disappeared argued that Argentina's amnesty laws violated their right to truth by preventing investigation into the fate of their loved ones.<sup>59</sup> When the Argentine Supreme Court upheld the amnesty laws, victims' families petitioned the Inter-American Commission on Human Rights.<sup>60</sup> The parties later reached a friendly settlement in which Argentina recognised the victims' families' right to truth and the accompanying obligation on the state to '[exhaust] all means to obtain information on the whereabouts of the disappeared persons'.<sup>61</sup>

Overall, by preventing investigations into human rights abuses and thus preventing the truth surrounding those human rights abuses from coming to light, amnesty violates the right to truth. This violation extends to the following: the collective societal right to know the events surrounding atrocities in order to prevent reoccurrence; surviving victims' rights to know the truth surrounding human rights abuses that they suffered; and the right of families of the deceased and disappeared to know the fate of their loved one(s).

The natural response to this claim, particularly in the context of the Troubles Legacy Act, is to say that amnesties that are accompanied by truth commissions may not violate the right to truth; in fact, such measures may better fulfil the right to truth than criminal investigations would. In some cases, it is conceivable that a successful truth commission could reveal the truth surrounding human rights violations better than criminal trials could. This view will be discussed in detail in the next two sections.

However, it is not certain that truth commissions do fulfil the right to truth better in all cases, and there is reason to think that truth commissions not accompanied by blanket amnesties are more successful at this than truth commissions that are so accompanied. Kenneth Christie, Priscilla B Hayner, and Naomi Roht-Arriaza each posit that the success of South Africa's Truth and Reconciliation Commission ("TRC") was due in part to the credible threat of prosecution for those who were not granted amnesty.<sup>62</sup> Perpetrators of human rights violations were therefore motivated to disclose information by both the 'carrot' of amnesty and the 'stick' of potential prosecution, leading to more information being disclosed.<sup>63</sup> A truth commission accompanied by a blanket amnesty, as in the Troubles Legacy Act, lacks this 'stick' and is less likely to induce confessions.<sup>64</sup> Thus, while it is possible for an amnesty to fulfil the right to truth if accompanied by a truth commission, it is not certain that a toothless truth commission will be able meaningfully to fulfil this right.

This subsection has argued that amnesty violates the right to truth. Insofar as it does, amnesty poses a risk of harm to surviving victims of human rights abuses, to the families of deceased victims, and to society as a whole. For this reason, amnesty constitutes a prima facie wrong due to the harm risked by its violation of the right to truth.

<sup>59</sup> Mallinder (n 43) 650; see also Joinet Report (n 36) 27.

<sup>60</sup> Mallinder (n 43) 651.

<sup>61</sup> Inter-American Commission on Human Rights, Report No 21/00, Case 12,059, *Carmen Aguiar de Lapacó v Argentina* (29 February 2000), para 17.

<sup>62</sup> Roht-Arriaza (n 39) 102; Christie (n 17) 126; Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 100.

<sup>63</sup> Christie (n 17) 126.

<sup>64</sup> *ibid*; see also John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 34, 36.



### C. SOCIAL MEANING

The ‘negative social meaning’ of an action can render that action prima facie wrongful.<sup>65</sup> Dempsey and Herring use the example of a person waving a Confederate flag in the USA who commits a prima facie wrong because of the negative social meaning that American society attaches to this flag.<sup>66</sup> The prima facie wrongfulness of these actions is not dependent on the intentions of the perpetrator; even if the flag waver only intends to convey positive values, such as community pride, the action still has a negative social meaning due to the racist connotations of the Confederate flag.<sup>67</sup> As with any prima facie wrong, actions with negative social meanings could still be outweighed by other considerations. However, the ‘moral residue of regret’ that accompanies even justified prima facie wrongs means that any alternative action that could achieve the same ends without committing a wrong should be preferred.<sup>68</sup>

Actions can have multiple social meanings, some of which are positive and some of which are negative.<sup>69</sup> To prove that an action is a prima facie wrong, it is enough to show that one of these social meanings is sufficiently negative to render the action wrongful.<sup>70</sup> This section will argue that amnesty has at least two such negative social meanings: first, endorsing impunity; and secondly, granting forgiveness to human rights violators.

#### (i) Impunity

First, amnesty’s endorsement of impunity renders it a prima facie wrong. The UN Commission on Human Rights defines impunity as ‘the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account’.<sup>71</sup> One of the social meanings associated with amnesty is an endorsement of impunity, as amnesty prevents human rights violations from being investigated and thus prevents perpetrators of these violations from being brought to account.<sup>72</sup> Certain forms of amnesty appear to be granted for the sole purpose of providing impunity.<sup>73</sup> These include blanket amnesties, which apply to all crimes and all perpetrators, and self-amnesties, which apply to government officials and their allies.<sup>74</sup> Amnesty and impunity are considered so closely linked that the final report of the South African TRC recommended against general or blanket amnesties ‘[i]n order to avoid a culture of impunity’.<sup>75</sup>

The first problem with this social meaning of endorsing impunity is that impunity violates a core principle of the rule of law, which is that everyone is equal under the law.<sup>76</sup> Amnesty privileges certain groups by virtue of their position as ex-government officials and allies (in the case of self-amnesty) or by virtue of the time period in which they committed

<sup>65</sup> Dempsey and Herring (n 14) 481.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.* 483.

<sup>68</sup> *ibid.* 482.

<sup>69</sup> *ibid.* 485.

<sup>70</sup> *ibid.*

<sup>71</sup> Joinet Report (n 36) 17.

<sup>72</sup> See for example Young (n 15) 215; *Margus* (n 50) [127]; Lenta (n 17) 444.

<sup>73</sup> Espindola (n 13) 973.

<sup>74</sup> *ibid.*

<sup>75</sup> Christie (n 17) 141.

<sup>76</sup> See for example Pinsky (n 16) 9; Lenta (n 17) 444, 446.

human rights violations (in the case of blanket amnesties).<sup>77</sup> By allowing groups of people to be considered above the law and to escape prosecution for human rights violations, amnesty's endorsement of impunity indicates a disregard for the rule of law. As a result, amnesty constitutes a *prima facie* wrong.

An example of amnesty indicating a disregard for equality under the law took place during the South African TRC. The TRC granted a blanket amnesty to 37 senior African National Congress ('ANC') leaders in November 1999 and did not apply the strict conditions for amnesty that all other perpetrators were required to abide by.<sup>78</sup> This blanket amnesty was later overturned, but the perceived impartiality of the TRC was undermined as a result.<sup>79</sup> In this case, the provision of amnesty to these ANC leaders endorsed impunity and disregarded the principle of equality before the law, as the leaders were treated differently due to their position within the ANC.

The second problem with this social meaning is that impunity ignores the preferences of victims, who broadly tend to desire justice through the courts.<sup>80</sup> Even when criminal trials are unlikely to uncover information or to identify perpetrators successfully, the idea that justice can be reached through the courts is of immense 'symbolic value' to victims.<sup>81</sup> By ignoring victims' strong preference to see the perpetrators of human rights violations being held accountable, amnesty's endorsement of impunity indicates a disregard for the victims of human rights violations. This is especially harmful because a state that has experienced human rights violations owes a reparative obligation to victims, as the harm suffered was due in part to the state's failure to protect victims from harm.<sup>82</sup> As a result, amnesty's disregard for victims through this social meaning constitutes a *prima facie* wrong.

An example of this disregard for victims' preferences can be seen in Northern Ireland, where surviving victims and the families of deceased victims have opposed the Troubles Legacy Act since it was first proposed.<sup>83</sup> Despite protests against the amnesty provisions from the beginning, the UK Parliament passed the Act into law without considering victims' preferences.<sup>84</sup> In response, victims of Troubles-related crimes took to the courts to challenge the legality of these amnesty provisions.<sup>85</sup>

In conclusion, one of the social meanings of amnesty is that it endorses impunity. This endorsement is harmful because it disregards both the rule of law, in particular the principle of equality before the law, and victim's preferences, which are overwhelmingly in favour of perpetrators of human rights violations being made to stand trial. For these reasons, amnesty constitutes a *prima facie* wrong based on its social meaning as an endorsement of impunity.

<sup>77</sup> Lenta (n 17) 444, 446.

<sup>78</sup> Christie (n 17) 128–29.

<sup>79</sup> *ibid* 129.

<sup>80</sup> Laplante (n 44) 929, 931.

<sup>81</sup> Bryson and McEvoy (n 3) 456.

<sup>82</sup> Espindola (n 13) 975.

<sup>83</sup> McClements and Wall (n 5).

<sup>84</sup> Seanin Graham, "It's as if My Whole Life Has Been this Waste of Time": Protest in Belfast over Troubles Legacy Bill' *The Irish Times* (Dublin, 13 September 2023) <<https://www.irishtimes.com/ireland/2023/09/13/its-as-if-my-whole-life-has-been-this-waste-of-time-protest-in-belfast-over-troubles-legacy-bill/>> accessed 7 October 2024.

<sup>85</sup> Graham and McClements (n 8).

*(ii) Forgiveness*

This subsection argues that amnesty's offer of forgiveness to perpetrators of human rights violations renders it a *prima facie* wrong. Forgiveness is 'a conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm'.<sup>86</sup> According to both Gwen K Young's and Christie's definitions, amnesty consists of an act of forgiveness towards perpetrators that is granted or sanctioned by the official state.<sup>87</sup> The idea of amnesty is inherently connected to the idea of forgiveness.

Martha Minow attempts to distinguish between forgiveness and amnesty by claiming that the former involves attitude and relationship shifts, while the latter involves 'merely relinquishing the authority to punish'.<sup>88</sup> However, this is a false distinction. Amnesty does involve changes in attitude, even if this attitude shift is on the part of the state rather than on the part of the victims. By rendering the prosecution of a perpetrator impossible, the state's attitude towards that person shifts away from viewing them as a criminal who needs to be held to account. This is a form of forgiveness.

Even if this were not the case, amnesty is still seen as an act of forgiveness. This is especially true when an amnesty is granted in pursuit of societal reconciliation, for which forgiveness and a reduction in hostilities are a prerequisite.<sup>89</sup> The Troubles Legacy Act is an example of this, as the Act states throughout that its purpose is to 'promote reconciliation'.<sup>90</sup> For these reasons, state forgiveness of wrongdoing is one of the social meanings associated with amnesty.

The problem with the idea that amnesty implies forgiveness of wrongdoing is that the state does not have the authority to forgive on behalf of victims.<sup>91</sup> This is true in cases where victims suffered due to a government failure to protect them from harm,<sup>92</sup> but this is especially true in cases where perpetrators were acting as agents of the state. When the state forgives, or is perceived to forgive, perpetrators, it robs victims of the opportunity either to forgo their grievances or to choose not to do so.<sup>93</sup> Additionally, victims are less likely to learn who the perpetrator was or to see that perpetrator show repentance.<sup>94</sup> The UN Commission on Human Rights stated on this matter that '[f]or forgiveness to be granted, it must first have been sought'.<sup>95</sup>

In summary, one of the social meanings of amnesty is that it is tantamount to an act of forgiveness. This forgiveness wrongs victims because the state has no authority to forgive on their behalf and this robs victims of the opportunity to choose whether or not to forgive perpetrators themselves; they are removed entirely from the equation. For this reason, amnesty constitutes a *prima facie* wrong through its perceived equivalence with forgiveness.

<sup>86</sup> Martha Minow, 'Forgiveness, Law, and Justice' (2015) 103 *California Law Review* 1615, 1618.

<sup>87</sup> Christie (n 17) 120; Young (n 15).

<sup>88</sup> Minow (n 86).

<sup>89</sup> See Young (n 15) 214.

<sup>90</sup> See for example Troubles Legacy Act 2023, preamble, ss 2(4), 50(4)(a).

<sup>91</sup> Minow (n 86) 1629.

<sup>92</sup> Espindola (n 13) 975.

<sup>93</sup> Minow (n 86) 1619, 1629.

<sup>94</sup> Joint Report (n 36).

<sup>95</sup> *ibid.*

#### IV. WHEN CAN AMNESTY BE JUSTIFIED?

Having established that amnesty is prima facie wrongful, this section will now explain the circumstances in which amnesty can nevertheless be justified. Section IV.A explains how amnesty can be justified as a necessary evil in contexts where no alternative transitional justice mechanism is possible. Section IV.B then discusses forms of limited conditional amnesty that may be permissible when accompanied by a truth commission. Section IV.C compares its analysis up to this point to the amnesty of the Troubles Legacy Act to determine whether the Act's amnesty provisions are justified, ultimately finding that they are not. Overall, this article argues that, while there are conditions in which amnesty is justified, the amnesty of the Troubles Legacy Act is not one of these cases.

This article's analysis in this section will implicitly respond to the retributivist position on amnesty which argues that amnesty is never permissible.<sup>96</sup> Retributivists view amnesty as an 'all-things-considered' wrong, meaning that there is no context in which amnesty could ever be justified because crimes must be punished.<sup>97</sup> By outlining the circumstances in which amnesty is justified, this article counters this position and suggests that there are cases where amnesty is permissible.

##### A. AMNESTY AS A NECESSARY EVIL

It is possible to identify contexts in which amnesty is prima facie wrongful, yet this wrongfulness is outweighed by other considerations. In these cases, amnesty is rendered a justified prima facie wrong by external circumstances.<sup>98</sup> This article will address two such cases: first, where amnesty is a necessary concession to guarantee a successful transition to peace; and secondly, cases where the criminal justice system is too biased to provide adequate access to justice, rendering amnesty the only viable alternative.

###### (i) *Urgent Peace Negotiations*

In states negotiating an end to conflict, amnesty has often been a necessary concession to secure a successful peace treaty.<sup>99</sup> This article argues that, in such cases, amnesty is permissible because the benefits of securing peace outweigh the prima facie wrongfulness of amnesty, thus rendering it a justified prima facie wrong.

Securing a stable peace outweighs the prima facie wrongfulness of amnesty for two reasons. First, conflict poses a threat to the right to life of citizens, which is protected under article 6 of the ICCPR.<sup>100</sup> The right to life is a prerequisite to accessing any other right. Therefore, states must prioritise fulfilling this right over the fulfilment of the rights to justice and to truth.<sup>101</sup> Secondly, ending the conflict prevents further human rights violations from taking

<sup>96</sup> Espindola (n 13).

<sup>97</sup> See for example Dempsey and Herring (n 14); Pensky (n 16) 8-9.

<sup>98</sup> See for example Dempsey and Herring (n 14); Lenta (n 17) 453.

<sup>99</sup> See for example Christie (n 17) 122; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002) 4; Laplante (n 44) 916; Lenta (n 17) 443, 453.

<sup>100</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6.

<sup>101</sup> UNHRC, 'General Comment No 36' (3 September 2019) UN Doc CCPR/C/GC/36, para 2.

place, thus fulfilling the state's duty to protect its citizens from harm.<sup>102</sup> As a result, despite the threat that amnesty poses to the rights to truth and to justice (as outlined in the previous section), amnesty is still permissible when it is necessary to negotiate an end to conflict.

An example of amnesty serving this role took place in South Africa in the early 1990s. One of the conditions of South Africa's peace negotiations was that amnesty would be granted for political acts during apartheid.<sup>103</sup> This amnesty served as an incentive for different actors to engage in these negotiations in good faith and to uphold their commitments;<sup>104</sup> the decision to condition amnesty on cooperation with a truth commission came later.<sup>105</sup> The success of these peace negotiations was crucial as South Africa was on the brink of a civil war at the time.<sup>106</sup> Given that the promise of amnesty encouraged different actors to engage in peace negotiations, thus preventing an outbreak of civil war in South Africa, amnesty in South Africa was permissible due to its necessity for guaranteeing peace.

Another example of amnesty incentivising key actors to engage in urgent peace negotiations was the accelerated release scheme of the Good Friday Agreement.<sup>107</sup> While this was not a full amnesty, the scheme guaranteed the early release of paramilitary prisoners who met certain conditions.<sup>108</sup> Additionally, the Good Friday Agreement committed to releasing all eligible prisoners within two years, which has since been interpreted as a maximum prison sentence of two years for Troubles-related offences.<sup>109</sup> In return for shorter prison sentences for their members, paramilitary groups in Northern Ireland were required to observe a ceasefire.<sup>110</sup> The early release policy, while controversial, incentivised paramilitary organisations to uphold their commitments to peace.<sup>111</sup> For this reason, the provision was critical for guaranteeing an end to the Troubles and a successful transition to peace.

### *(ii) Biased Criminal Justice System*

In states that have recently transitioned from military dictatorships and other authoritarian regimes, criminal justice is often not an option because former leaders and human rights violators are still in positions of power.<sup>112</sup> This is particularly problematic when those individuals continue to wield influence within the judiciary or as prosecutors.<sup>113</sup> This article argues that, in these cases, amnesty may be permissible because the harms incurred by a biased or seemingly biased criminal justice system outweigh the prima facie wrongfulness of amnesty.

<sup>102</sup> See for example Espindola (n 13) 975; Mallinder (n 43).

<sup>103</sup> Christie (n 17) 122.

<sup>104</sup> *Ibid.*

<sup>105</sup> Hayner (n 62).

<sup>106</sup> Christie (n 17) 133.

<sup>107</sup> See Northern Ireland (Sentences) Act 1998, s 3.

<sup>108</sup> Eligibility for accelerated release was determined by an independent commission. Prisoners were deemed eligible for early release if they were affiliated with a paramilitary organisation that had observed a ceasefire, if they did not support an organisation that was not observing a ceasefire, and if they were not considered a threat to society: see for example Kieran McEvoy, 'Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict' (1999) 22 *Fordham International Law Journal* 1539, 1559–60; Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1095, 1113–14.

<sup>109</sup> Kieran McEvoy and others, 'Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland' (April 2020) 11 <<https://caj.org.uk/wp-content/uploads/2020/04/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf>> accessed 7 October 2024.

<sup>110</sup> Good Friday Agreement (n 2).

<sup>111</sup> McEvoy (n 108) 1561–54.

<sup>112</sup> See for example Laplante (n 44) 924; Binder (n 40) 1207–08.

<sup>113</sup> See for example Minow (n 86) 1630; Lenta (n 17) 464.

Newly democratic regimes are particularly fragile and require a certain level of trust in the state in order to secure a stable democracy and entrench the rule of law.<sup>114</sup> The resources available to the criminal justice system may also be limited relative to the number of perpetrators of human rights violations.<sup>115</sup> In these circumstances, the risk—real or perceived—that the criminal justice system exhibits bias towards perpetrators of human rights violations will lead to less public trust in the impartiality of the courts.<sup>116</sup> This bias signals that impunity is granted to those who held power in the previous regime which, as argued in Section III, renders an action prima facie wrongful on the basis of its social meaning. Additionally, a failure to attempt to investigate all human rights violations without bias violates victims’ rights to justice.<sup>117</sup>

Amnesty can be justified in these circumstances on the basis that the only alternative (namely, a biased or seemingly biased criminal justice system) is more wrongful than amnesty. If the right to justice is compromised by both amnesty and a biased criminal justice system, and both have a negative social meaning of sanctioning impunity, then amnesty may be combined with a truth commission to offer some fulfilment of the right to truth which otherwise would not be possible.<sup>118</sup>

When Chile transitioned from a military dictatorship to civilian rule in 1990, the previous military dictator, Augusto Pinochet, still had significant influence within the government and judiciary.<sup>119</sup> His successor inherited a blanket amnesty law passed in 1978 and a legislature and judiciary that were unwilling to overrule this law.<sup>120</sup> In this case, where the lingering influence of the previous regime protected all perpetrators of wrongdoing in the 1970s from prosecution, President Patricio Aylwin instead accepted the amnesty and established a truth commission.<sup>121</sup> He stated in his inaugural speech that he would prioritise ‘[f]ull disclosure of the truth, and justice to the extent possible’.<sup>122</sup> Where there is no meaningful access to criminal justice, even an imperfect amnesty can be combined with a truth commission to constitute a preferable alternative. Therefore, in these cases, amnesty can be permissible because the alternative is a worse violation of rights with comparably poor social meaning.

## B. LIMITED AMNESTY IN PURSUIT OF TRUTH

There are certain formulations of conditional amnesty that may be justified when combined with a truth commission: first, amnesty of a limited scope that is proportionate to the information received in return; and secondly, amnesty with strict conditions where prosecution remains a meaningful alternative for perpetrators who do not meet these conditions. These amnesties fulfil victims’ rights and are therefore not prima facie wrongful on the ground of the risk of harm to those rights.

<sup>114</sup> Lenta (n 17) 464.

<sup>115</sup> Jakob v H Holtermann, ‘The End of “the End of Impunity”? The International Criminal Court and the Challenge from Truth Commissions’ (2010) 16 Res Publica 209, 224.

<sup>116</sup> Lenta (n 17) 464.

<sup>117</sup> Joint Report (n 36) paras 26–27.

<sup>118</sup> Laplante (n 44) 924.

<sup>119</sup> *ibid.*

<sup>120</sup> Young (n 15) 218; *ibid.*

<sup>121</sup> Young (n 15) 218–19; Laplante (n 44) 924.

<sup>122</sup> Laplante (n 44) 924 (citing Aylwin’s speech on 12 March 1990); see also Jorge Correa Sutil, ‘“No Victorious Army Has Ever Been Prosecuted...”: The Unsettled Story of Transnational Justice in Chile’ in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997) 133.

While these forms of amnesty are still *prima facie* wrongful on the ground of their negative social meaning, the fulfilment of rights outweighs this social meaning, thereby rendering the amnesty permissible.

(i) *Proportionate to Information*

To begin with, amnesty of a limited scope that is linked to a commission of inquiry or truth commission may be effective at fulfilling the right to truth.<sup>125</sup> In cases where disclosure of specific information to a commission of inquiry will fulfil either society's collective right to truth or victims' individual rights to truth,<sup>124</sup> then amnesty that incentivises the disclosure of that information may be permissible. Amnesty is justified in such situations if it is limited to 'specific amnesty' in return for information,<sup>125</sup> meaning that the information provided cannot be used as evidence in criminal proceedings against the person who disclosed it.<sup>126</sup> This is distinct from 'general amnesty', which would protect the person disclosing information from prosecution entirely, which is not proportionate to the information provided.<sup>127</sup>

The right to truth is an incredibly important right. The collective right to know the truth about events surrounding human rights violations is required to prevent such violations from reoccurring in the future.<sup>128</sup> Surviving victims and the family members of deceased victims also have the right to know about the events surrounding the human rights violations that harmed them.<sup>129</sup> The absence of this information can be deeply upsetting for victims, which is why many victims have gone to great lengths to overturn amnesty laws that violated their right to truth.<sup>130</sup> For this reason, fulfilment of the right to truth is a very important benefit; limited amnesty provisions that fulfil the right to truth can be justified on the basis that this benefit outweighs the negative social meaning of amnesty. To examine such amnesty provisions, we can draw upon two examples from Northern Ireland: the Northern Ireland (Location of Victims' Remains) Act 1999 ('Location of Victims' Remains Act'); and the Saville Inquiry.<sup>131</sup>

First, the purpose of the Location of Victims' Remains Act was to locate the bodies of individuals who were 'disappeared' (i.e. murdered and secretly buried) by the Irish Republican Army ('IRA') during the Troubles.<sup>132</sup> In order to incentivise the IRA to share information that would otherwise have been incriminating, the Act contained a conditional immunity: no information provided or evidence gathered when locating victims' bodies was admissible in criminal proceedings.<sup>133</sup> Overall, the initiative was a success and 13 of the 16 'disappeared' victims' bodies were recovered.<sup>134</sup> For the families of these deceased victims who otherwise would have never learnt of their loved ones' fate, this was a hugely important fulfilment of their right to truth and allowed them to gain closure.<sup>135</sup>

<sup>125</sup> Espindola (n 13) 971.

<sup>126</sup> Joint Report (n 36) para 17.

<sup>127</sup> Troubles Legacy Act 2023, s 19(8).

<sup>128</sup> See for example Bell (n 108) 1126; Lauren Dempster, *Transitional Justice and the 'Disappeared' of Northern Ireland: Silence, Memory, and the Construction of the Past* (Routledge 2019) 152.

<sup>129</sup> Troubles Legacy Act 2023, s 19(9).

<sup>130</sup> Joint Report (n 36) para 17.

<sup>131</sup> *Barrios Altos* (n 41) para 47; Joint Report (n 36) 27.

<sup>132</sup> Mallinder (n 43) 650-57; see also *Dillon* (NICA) (n 6) [6] (Keegan LCJ).

<sup>133</sup> See generally Lord Saville, William L Hoyt and John L Toohey, *Report of the Bloody Sunday Inquiry* (Stationery Office 2010).

<sup>134</sup> Bell (n 108) 1125-26; Dempster (n 126) 7-10.

<sup>135</sup> Bell (n 108) 1126; Dempster (n 126).

<sup>136</sup> Dempster (n 126) 9-10.

<sup>137</sup> Joint Report (n 36) 27.

The second example of limited amnesty fulfilling the right to truth is the Saville Inquiry. The Saville Inquiry was a public inquiry into the events of Bloody Sunday, a 1972 civil rights protest which turned violent with the involvement of British Army paratroopers.<sup>136</sup> This inquiry offered a similar form of conditional immunity to the Location of Victims' Remains Act: information provided by a perpetrator to the Saville Inquiry was not admissible in criminal proceedings against them.<sup>137</sup> The Saville Inquiry, which was established in 1998 and published its findings in 2010, found that the 13 civilians shot dead by the British Army on Bloody Sunday were innocent of any wrongdoing.<sup>138</sup> This finding was crucial for the fulfilment of the following rights: the collective right to truth in Northern Ireland of the events surrounding violations of human rights; the right of surviving victims to knowledge of the human rights violations that harmed them; and the right of the families of deceased victims to the truth about their relatives' fate.

Taken together, the Location of Victims' Remains Act and the Saville Inquiry demonstrate why amnesty is permissible in cases where it is limited in scope and uniquely allows for the fulfilment of the right to truth.

### *(ii) Strict Conditions*

This article argues that conditional amnesty with strict conditions and a credible threat of prosecution can be justified when accompanied by a truth commission. The best example of this is the conditional amnesty of the South African TRC, where anyone who disclosed information but did not meet the conditions for amnesty would face prosecution.<sup>139</sup> Additionally, anyone whose wrongdoing was revealed by another person's testimony but who had not applied for amnesty themselves would also face prosecution.<sup>140</sup> In this way, perpetrators were dually motivated to cooperate with the TRC by the 'carrot' of amnesty and the 'stick' of potential prosecution.<sup>141</sup>

To qualify for amnesty, a perpetrator's crime had to be politically motivated rather than personally motivated, the act had to be proportional to the political objective, and the perpetrator had to make a full disclosure to the TRC.<sup>142</sup> The TRC received over 7,000 applications for amnesty, but many were refused because the applicant did not meet one of these criteria.<sup>143</sup> For example, the TRC denied 4,500 applications for amnesty solely due to lack of political motive.<sup>144</sup> One disappointment of the TRC was that, although the TRC provided a list of 300 suspected perpetrators to the authorities in 1999 where there was strong evidence to believe that these individuals had committed human rights violations, only 21 were deemed worthy of investigation.<sup>145</sup> Nonetheless, the threat of prosecution alone motivated far more

<sup>136</sup> See for example Bell (n 108) 1103-05; Cheryl Lawther, 'Peace without the Past? Truth, Transition and the Northern Ireland Case' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi (eds), *Theorizing Transitional Justice* (Routledge 2015) 34.

<sup>137</sup> Kieran McEvoy and others, 'The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland' (March 2015) iv <[https://cain.ulster.ac.uk/victims/docs/mbt/2015-03-24\\_MBT\\_Amnesties-NI.pdf](https://cain.ulster.ac.uk/victims/docs/mbt/2015-03-24_MBT_Amnesties-NI.pdf)> accessed 7 October 2024.

<sup>138</sup> See for example Lawther (n 136); Bryson and McEvoy (n 3) 457.

<sup>139</sup> Holtermann (n 115) 210; Hayner (n 62).

<sup>140</sup> See for example *ibid*; Rohit-Arriaza (n 39) 102; Christie (n 17) 126.

<sup>141</sup> Christie (n 17) 126; Hayner (n 62); see also Braithwaite (n 64) 34.

<sup>142</sup> See for example Christie (n 17) 126; Hayner (n 62) 99-100; Holtermann (n 115) 210.

<sup>143</sup> Christie (n 17) 130; Hayner (n 62) 101.

<sup>144</sup> Hayner (n 62) 101.

<sup>145</sup> *ibid* 101-02.



perpetrators to testify to the TRC, leading to the successful accumulation of more information.<sup>146</sup>

The conditional amnesty of the South African TRC was not *prima facie* wrongful on as many grounds as other forms of amnesty. First, the TRC fulfilled victims' rights to justice because more information became available about apartheid-related crimes. Not everyone who applied for amnesty received it, but prosecutions were rendered possible by the increased information provided through increased testimonies—even though the prosecuting authorities ultimately chose not to pursue many of these cases.<sup>147</sup> Secondly, the fact that amnesty was not granted to everyone who applied meant that this amnesty provision was not closely tied with the idea of impunity in the way that amnesty usually is.<sup>148</sup> Thirdly, the increased information provided to the TRC due to the combined 'carrot' of amnesty and 'stick' of prosecution led the TRC to uncover and publish more of the truth surrounding human rights violations in apartheid South Africa.<sup>149</sup> Taken together, the TRC's conditional amnesty was not only *prima facie* wrongful on fewer grounds than other forms of amnesty, but the fulfilment of the rights to justice and the rights to truth as a result of this provision is a benefit that substantially outweighs the *prima facie* wrongfulness of the amnesty. For this reason, the conditional amnesty of the TRC was justified, and similarly strict conditional amnesties with similarly credible threats of prosecution are also justified.

### C. THE TROUBLES LEGACY ACT

Having outlined the circumstances in which the *prima facie* wrong of amnesty can be justified, this article now turns to the Troubles Legacy Act to determine whether the Act's amnesty provisions can be justified. Overall, it concludes that the Troubles Legacy Act is not a case where the use of amnesty is justified. This means that the Act's amnesty provisions are unjustified *prima facie* wrongs and are therefore impermissible.

#### *(i) Amnesty as a Necessary Evil*

Section IV.A established that there are two cases in which amnesty is a necessary evil: when amnesty is a necessary concession to secure peace negotiations; and when the criminal justice system risks exhibiting too much bias. Section IV.C now argues that neither of these situations applies to the Troubles Legacy Act, meaning that the Act's amnesty provisions cannot be justified on the basis of amnesty being a necessary evil.

The first case does not apply to the Troubles Legacy Act as Northern Ireland is not currently experiencing conflict. The 1998 Good Friday Agreement formally ended the violence of the Troubles and Northern Ireland has been at peace ever since.<sup>150</sup> Additionally, the amnesty provisions of the Troubles Legacy Act are profoundly unpopular with both nationalist and unionist political parties in Northern Ireland; the Act's primary supporters are veterans' organisations and the UK Conservative Party.<sup>151</sup> It is therefore unclear who the amnesty provisions of the Troubles Legacy Act would be intended to appease even if Northern Ireland

<sup>146</sup> Christie (n 17) 130; *ibid* 126, 132.

<sup>147</sup> Hayner (n 62) 101-02.

<sup>148</sup> See for example Young (n 15) 209; Lenta (n 17) 444.

<sup>149</sup> Christie (n 17) 126; Hayner (n 62).

<sup>150</sup> Rory O'Connell, Fionnuala Ní Aoláin and Lina Malagón, 'The Belfast/Good Friday Agreement and Transformative Change: Promise, Power and Solidarity' (2024) 57 *Israel Law Review* 4, 5-7.

<sup>151</sup> McClements and Wall (n 5).

were currently experiencing conflict. For these reasons, the amnesty of the Troubles Legacy Act is not justified on the basis of necessity to secure peace.

The second case in which amnesty can be justified as a necessary evil is when the criminal justice system cannot be trusted to be impartial. However, there is a reduced risk of impartiality in Northern Ireland today. While the Northern Ireland justice system was seen as politically biased at the end of the Troubles, the Good Friday Agreement introduced a series of reforms that have significantly improved the state of the criminal justice system.<sup>152</sup> These reforms included the establishment of an independent commission on police reform, which led to the creation of a new police force in Northern Ireland.<sup>153</sup> 26 years after the end of the Troubles, there is far less risk of political bias within the criminal justice system. Consequently, the amnesty provisions of the Troubles Legacy Act are unlikely to be justified based on the real or perceived lack of impartiality of the criminal justice system.

Overall, the amnesty provisions of the Troubles Legacy Act cannot be justified on the basis of either necessity to secure peace or necessity to avoid real or perceived bias within the criminal justice system. For this reason, the Troubles Legacy Act's amnesty provisions are not justified on the basis that amnesty is a necessary evil, meaning that, unless otherwise justified, this amnesty constitutes an unjustified *prima facie* wrong.

*(ii) Limited Amnesty in Pursuit of Truth*

Section IV.B established that, when amnesty accompanies truth commissions or commissions of inquiry, there are forms of conditional amnesty that can be permissible. The first case is amnesty of a limited scope that is proportionate to specific, sought-after information. The second case is amnesty with strict conditions and a credible threat of prosecution. This article argues that the amnesty provisions of the Troubles Legacy Act do not match either of these descriptions and that therefore the provisions are not justified on this basis.

The first case does not apply to the Troubles Legacy Act because the ICRIR is not specifically tied to any particular information, but rather seeks information about 'harmful conduct forming part of the Troubles' more broadly.<sup>154</sup> This is a far broader scope than the narrower commissions of inquiry previously established in Northern Ireland. Additionally, the scope of the amnesty provisions is also broader than previous commissions of inquiry. The conditional amnesty of both the Location of Victims' Remains Act and the Saville Inquiry was limited to a guarantee that the information provided was not admissible as evidence in criminal proceedings.<sup>155</sup> By contrast, both amnesty provisions of the Troubles Legacy Act offer amnesty for more wrongdoing. The blanket amnesty provision protects perpetrators from all civil proceedings, criminal proceedings, and inquiries.<sup>156</sup> The conditional amnesty provision allows the immunity requests panel to grant general amnesty at the panel's discretion.<sup>157</sup> For these reasons, the Troubles Legacy Act is not a case where amnesty of a limited scope is offered in exchange for specific information.

The second case, which is amnesty with strict conditions and a credible threat of prosecution for those who do not meet these conditions, is also not applicable to the Troubles

<sup>152</sup> Linda Moore, 'Policing and Change in Northern Ireland: The Centrality of Human Rights' (1999) 22 *Fordham International Law Journal* 1577, 1580-81.

<sup>153</sup> Christian Mailhes, 'Northern Ireland in Transition: The Role of Justice' (2005) 0 *Estudios Irlandeses* 77, 84.

<sup>154</sup> Troubles Legacy Act 2023, s 2(5)(b).

<sup>155</sup> See for example Bell (n 108) 1126; McEvoy and others, 'The Historical Use of Amnesties' (n 137); Dempster (n 126).

<sup>156</sup> Troubles Legacy Act 2023, ss 38, 43-44.

<sup>157</sup> *ibid* s 19(9).

Legacy Act. The criteria for the conditional amnesty of the Troubles Legacy Act are far less strict than those of South Africa's TRC.<sup>158</sup> These conditions are that the perpetrator ('P') requests immunity, that they disclose Troubles-related conduct which is true to the best of their knowledge, and that the conduct would otherwise expose P to criminal investigation and prosecution.<sup>159</sup> The condition that this information is 'true to the best of P's knowledge and belief' is far more subjective than the requirement of full disclosure in South Africa's TRC.<sup>160</sup> Additionally, the blanket amnesty provision of the Troubles Legacy Act removes any truly credible threat of prosecution, meaning that there is no 'stick' to induce perpetrators to disclose information to the ICRIR.<sup>161</sup> For these reasons, the Troubles Legacy Act is also not a case of amnesty with strict conditions where those who do not comply will face prosecution.

Overall, while the amnesty provisions of the Troubles Legacy Act do accompany a truth commission, these provisions are neither proportionate to specific sought-after information nor accompanied by strict conditions with a credible threat of prosecution. For this reason, the amnesty of the Troubles Legacy Act is not a permissible form of conditional amnesty.

## V. NEXT STEPS FOR THE TROUBLES LEGACY ACT

Having established that the amnesty of the Troubles Legacy Act is *prima facie* wrongful and that this wrongfulness is not justified by the context of Northern Ireland, this section will propose two alternative policies for the Troubles Legacy Act. Section V.A will address the removal of amnesty from the Act entirely, which is the option favoured by victims in Northern Ireland.<sup>162</sup> Section V.B will propose a version of the South Africa model, imposing stricter conditions on the provision of amnesty and removing the Act's blanket amnesty provision. Overall, Section V will provide two possible solutions to the wrongfulness of the Troubles Legacy Act's amnesty provisions which would render the Act justified.

The implication of this section on the Troubles Legacy Act is that pursuing one of these two alternative policies would preserve the remainder of the Act. The alternative (namely, repealing the Act entirely) would also mean abolishing the ICRIR and the memorialisation efforts that the Act contains. Preserving the Act is preferable as there are benefits to the ICRIR and its ability to empower the right to truth which can only be served by a truth commission.<sup>163</sup>

### A. NO AMNESTY

This sub-section will introduce the first proposal for the Troubles Legacy Act, which is to remove the amnesty provisions entirely but preserve the remainder of the Act. Given that amnesty is *prima facie* wrongful, as argued in Section III, this is a preferable alternative to the current amnesty provisions because it does not incur a *prima facie* wrong in the first place.

<sup>158</sup> See Bryson and McEvoy (n 3).

<sup>159</sup> Troubles Legacy Act 2023, ss 19(2)-(3), 19(5).

<sup>160</sup> See Bryson and McEvoy (n 3).

<sup>161</sup> Christie (n 17) 126; Hayner (n 62).

<sup>162</sup> McClements and Wall (n 5).

<sup>163</sup> Hayner (n 62) 4-6.

There are four reasons why this proposal is superior to the current amnesty provisions. First, absent amnesty provisions, there is no risk that the Troubles Legacy Act will violate the UK's obligations under the ECHR.<sup>164</sup> Secondly, the absence of the Act's blanket amnesty provision will allow victims to continue to seek justice through the courts. This better fulfils the right to justice.<sup>165</sup> Even if not many prosecutions are likely to take place, the 'symbolic value' of access to the courts is very important to victims in Northern Ireland.<sup>166</sup> Thirdly, the ICRIR would continue to exist under this option, the difference being that the ICRIR would lack the power to grant immunity. Therefore, the ICRIR could continue to seek out information to fulfil the collective and individual rights to truth through investigations and the collection of testimony from those who are not at risk of prosecution.<sup>167</sup> Fourthly, a version of the Troubles Legacy Act that does not contain amnesty provisions would not signal either forgiveness or impunity towards perpetrators, thus avoiding the negative social meaning of the current amnesty provisions.<sup>168</sup> For these reasons, this policy is preferable to the current amnesty provisions of the Troubles Legacy Act.

However, it is also noteworthy that this proposal would be unlikely to draw support from veterans' organisations who largely feel that the amnesty of the Troubles Legacy Act is necessary to protect veterans from politically motivated legal claims.<sup>169</sup> Consequently, Section V.B will propose a second solution which could serve as a compromise between both the pro-amnesty and anti-amnesty camps.

## B. THE SOUTH AFRICA MODEL

The second proposal for the Troubles Legacy Act would implement similar amnesty provisions as the TRC in South Africa. This would involve removing the blanket amnesty provision and imposing stricter conditions to become eligible for amnesty. Such conditions could include a requirement that perpetrators make a full disclosure to the ICRIR as the South African TRC required,<sup>170</sup> rather than the Act's current weaker requirement that the information disclosed is 'true to the best of P's knowledge and belief'.<sup>171</sup>

There are three reasons why this policy is preferable to the current amnesty provisions in the Troubles Legacy Act. First, this policy creates a stronger incentive for perpetrators to cooperate with the ICRIR and to apply for amnesty because there is a credible threat that they could otherwise be incriminated by another person's testimony.<sup>172</sup> As a result, more information about Troubles-related conduct would be made available to the ICRIR, thus empowering the ICRIR to better fulfil both the societal and individual rights to truth.<sup>173</sup> Secondly, there would be a far greater capacity to prosecute perpetrators due to this increased information. Thirdly, there would still be some amnesty available which would likely appease

<sup>164</sup> *Margus* (n 50) [127]; Rory Carroll, 'Amnesty Clause for Soldiers Breaches Human Rights Law, Belfast Court Rules' *The Guardian* (London, 28 February 2024) <<https://www.theguardian.com/uk-news/2024/feb/28/amnesty-clause-for-soldiers-breaches-human-rights-law-belfast-court-rules>> accessed 7 October 2024.

<sup>165</sup> See for example Joinet Report (n 36); Binder (n 40); Perez-Leon-Acevedo (n 36) 671-73.

<sup>166</sup> Laplante (n 44) 929, 931; Bryson and McEvoy (n 3) 456.

<sup>167</sup> Hayner (n 62) 218-23.

<sup>168</sup> See for example Christie (n 17) 120; Young (n 15) 211, 215; *Margus* (n 50) [127]; Lenta (n 17) 444.

<sup>169</sup> See for example Bryson and McEvoy (n 3) 456-57; McAtackney (n 25).

<sup>170</sup> Christie (n 17) 126; Holtermann (n 115) 210; Hayner (n 62) 99-100.

<sup>171</sup> Troubles Legacy Act 2023, s 19(3)(c); Bryson and McEvoy (n 3).

<sup>172</sup> See for example Roht-Arriaza (n 39) 102; Christie (n 17) 126; Holtermann (n 115) 210; Hayner (n 62).

<sup>173</sup> Christie (n 17) 126; Hayner (n 62).

veterans' organisations.<sup>174</sup> However, as this amnesty is not unconditional and would not be granted to all who apply for it, this policy would be less likely to be associated with impunity than the current amnesty provisions.<sup>175</sup> For these reasons, this policy is preferable to the current amnesty provisions of the Troubles Legacy Act.

Implementing a version of the South Africa model would balance both victims' rights and the interests of certain veterans who want some form of immunity against prosecution for the events of the Troubles.<sup>176</sup> This would also be a justified *prima facie* wrong as this proposal's fulfilment of rights would outweigh the *prima facie* wrongfulness of amnesty on the grounds of negative social meaning.

## VI. CONCLUSION

This article discussed the *prima facie* wrongfulness of the amnesty of the Troubles Legacy Act, explained why this wrongfulness is not justified by the context of today's Northern Ireland, and provided two alternative amnesty schemes that would render the act permissible. Taken together, this analysis explains the problem with the Act's amnesty provisions and offers an alternative solution to repealing the Act in its entirety.<sup>177</sup>

Section III argued that amnesty is a *prima facie* wrong that requires justification. This article showed that this wrongfulness can be grounded in both the risk of harm posed to victims and the negative social meaning associated with amnesty.

Section IV outlined the situations in which amnesty can be justified and explained why the Troubles Legacy Act is not one of them. These situations include cases where amnesty is a necessary evil to prevent against worse rights violations and those where limited conditional amnesty is offered in pursuit of truth. This article found that neither of these cases applied to the Troubles Legacy Act, thus rendering its amnesty provisions unjustified *prima facie* wrongs.

Section V then provided two solutions to the problem of unjustified amnesty provisions in the Troubles Legacy Act. The first proposal was to remove amnesty from the Act entirely. The second proposal was to introduce stricter criteria to the Act's conditional amnesty provision and to remove the blanket amnesty, thereby leading to an amnesty scheme similar to that of South Africa's TRC. This article argued that either of these options would be preferable to the current provisions.

Overall, this article suggests that critics of the Troubles Legacy Act's amnesty provisions have been too quick to reject the legislation as a whole. Truth-seeking in Northern Ireland has historically taken a piecemeal approach and few perpetrators of human rights violations are prosecuted as increasing amounts of evidence are lost to time.<sup>178</sup> In this context, the Act's ambitious memorialisation efforts and the establishment of the ICRIR could be the best way to fulfil the rights to truth and to justice in Northern Ireland going forward. By identifying the exact problem with the Act's amnesty provisions and proposing solutions, this article opens the possibility of considering the merits of the remainder of the Troubles Legacy Act, which could be the focus of future research.

<sup>174</sup> See for example Bryson and McEvoy (n 3) 456–57; McAttackney (n 25).

<sup>175</sup> Young (n 15) 209; Lenta (n 17) 444.

<sup>176</sup> Bryson and McEvoy (n 3) 456–57; McAttackney (n 25).

<sup>177</sup> McAttackney (n 25); Carroll (n 164).

<sup>178</sup> See for example Bell (n 108) 1097; Bryson and McEvoy (n 3) 455.