## Chapter 14

## The limitations of a criminal law approach in a transitional justice context

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### Abstract

*When states or sub-states emerge from serious violent conflict it is common for radical measures to be taken to make recurrence of the conflict unlikely. Some such measures are retributive, being designed to hold people and institutions to account for the wrongs they committed prior to or during the conflict. Criminal prosecutions epitomise this category. Other measures are rehabilitative or restorative, being intended to facilitate people and institutions to play a positive role in the reconciliation and reconstruction of society. This category often operates in ways that seem at odds with criminal measures because, for example, it may grant certain perpetrators immunity from prosecution or allow some convicted criminals to be released from prison earlier than expected. In this chapter the focus is on how far the normal processes of the criminal law on homicide should be allowed to be subverted in a transitional justice context in order to ensure that interests which are deemed to be more important than enforcement of the criminal law are protected. It looks in particular at whether some killings are so far in the past, and/or so enveloped in a political context, that no human rights purpose would be served by prosecuting and/or punishing the alleged killers. In doing so it draws upon the experience of Northern Ireland and examines in detail the jurisprudence of the European Court of Human Rights on whether the right to life necessarily entails that persons responsible for deaths should be prosecuted and/or punished.*

### Introduction

To say that something is illegal is, of course, to speak ambiguously. It could mean that the conduct in question is criminal, that it is a civil wrong, that it is an administrative or regulatory wrong or that it is a breach of human rights. Lawyers see these distinctions as self-evident, but most non-lawyers do not. Students of law probably spend less than 10 per cent of their time on criminal law before acquiring a law degree, yet when non-lawyers speak of the need for justice to be done, and to be seen to be done, they are usually implying that those who have done wrong should be brought to book in a criminal setting, where victims of their actions can have 'their day in court'.[1]

In a transitional justice situation – where a society has been bedevilled by systematic violent conflict, whatever the basis for it – the temptation to resort to the criminal justice system when trying to cement a solution to the conflict is even greater. 'Identify and punish the wrongdoers' is often the mantra. But it quickly becomes apparent that resort to the criminal justice system might not be enough, or might even be counter-

[1] On the various meanings of 'lawful' and 'unlawful' see Phil Harris, *An Introduction to Law*, Cambridge University Press, 8th ed, 2016, Chaps 2 and 9–12.

productive.[2] For a start, the criminal justice system might itself be one of the reasons why conflict broke out in the first place or why it continued longer than it needed to. Additionally, convicting people of crimes might be too difficult, perhaps because there were so many crimes committed, the alleged perpetrators are dead or it is very unlikely that sufficient evidence can be gathered to convince a court that a particular person committed a particular crime. Besides, criminal law is an especially individualistic species of law: it tends to hold people rather than groups or organisations to account for their involvement in crimes and usually requires that involvement to have been intentional, or at least reckless or very careless, and to have been a direct cause of the harm suffered. In terms of holding to account those who may be indirectly responsible for the harm suffered – the leaders of illegal paramilitary organisations, the elected representatives of political parties, the clerics who are supportive of an extreme religious ideology, for example – the criminal law is a notoriously blunt instrument.

Criminologists continue to argue over what causes crime and how those who commit crimes can best be deterred from repeating their actions. A few radicals believe that people should not be sent to prison for their crimes unless they are a very clear danger to a specific person or to the public at large.[3] Some hold that it is not even appropriate to talk of 'punishing' a criminal because what he or she most needs is education, a job, a relationship, a purpose in life. In the context of transitional justice situations, these arguments are magnified. Greater creativity is called for in such scenarios because the harm that has been suffered is usually much more significant and has usually been caused not for personal gain or as a result of a loss of temper but in the name of some larger goal, such as a political manifesto, a religious creed or an errant hate-based philosophy. At the same time, the likelihood of recidivism is likely to be less if the grievances in whose name the unlawful actions were taken have since been addressed. 'Freedom fighting', many would argue, should not be considered a crime at all and the law should be adapted to recognise that point.[4]

This chapter reflects on when it may be inappropriate to deploy the criminal law in a context where a society is moving out of serious conflict towards peaceful co-existence. It looks first at international principles concerning transitional justice before considering what aspects of criminal law may need to be tampered with in order to maintain the rule of law in a troubled society. It will draw on the experience of Northern Ireland in these respects and will use the jurisprudence of the European

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[2] See, generally, Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice*, Routledge, 2016; Colleen Murphy, *The Conceptual Foundations of Transitional Justice*, Cambridge University Press, 2017, esp Chap 2 ('The Problem of Transitional Justice'), where the author argues that the problems addressed by transitional justice are not the same as those addressed by criminal or retributive justice.

[3] See e.g. The CRIO Publications Collective, *Abolition Now! Ten Years of Strategy and Struggle Against the Prison Industrial Complex*, AK Press, 2008.

[4] See, generally, Terence Halliday, Lucien Karpik and Malcolm Feeley, *Fighting for Political Freedom: Comparative Studies of the Liberal Complex and Political Liberalism*, Hart Publishing, 2007. This examines 16 case studies from around the world. The first national declaration of human rights – proclaimed in France in 1789 – included 'resistance against oppression' as one of the four natural and imprescriptible rights of man, the others being liberty, property and safety (Art 2).

Court of Human Rights as a guide to when it is consistent with international human rights standards to *not* pursue a criminal justice agenda when seeking to hold people to account for killings.

**International principles on counter-terrorism and transitional justice**

According to the United Nations, 'the international community has elaborated 19 international legal instruments to prevent terrorist acts'.[5] An important turning point was the passing of Security Council Resolution 1373 on 28 September 2001.[6] Amongst other things this called on UN Member States to ensure that terrorist acts are dealt with as serious criminal offences in domestic law. It was supplemented by three further Resolutions.[7] Importantly, the UN set up a Counter Terrorism Committee to monitor the compliance of States with these Resolutions. The Committee has produced a number of global surveys of the implementation of Resolution 1373, the most recent dating from 2015.[8]

Terrorism is a global phenomenon and it is therefore right and proper that the UN takes a keen interest in persuading States to deal with it effectively. However, serious internal conflicts are also a global phenomenon and almost always overlap with terrorism. The UN has not yet produced any Declarations or Conventions on how to manage internal conflict-resolution processes, even in situations where the violence involved has greatly diminished or been temporarily suspended because of political talks or a mutually agreed ceasefire. The main document it has come up with is a Guidance Note issued in 2010 by then Secretary-General, Ban Ki-Moon.[9] Entitled *United Nations Approach to Transitional Justice*, the Note sets out 10 Guiding Principles on how the UN intends to approach transitional justice processes and mechanisms.

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[5] See the wording preceding the list of instruments at https://www.un.org/en/counterterrorism/legal-instruments.shtml.

[6] See https://undocs.org/S/RES/1373(2001).

[7] Resolution 1456 (2003) required States to ensure that their counter-terrorism measures complied with their obligations under international law, in particular, international human rights law, refugee law and humanitarian law': see https://undocs.org/S/RES/1456(2003). Resolution 1566 (2004) defined for the first time what the UN means by terrorism, namely 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act': see https://undocs.org/S/RES/1566(2004), para 3. Resolution 1624 (2005) required States to adopt measures prohibiting incitement to terrorist action and denying safe haven to persons credibly suspected of being involved in such conduct: see https://undocs.org/S/RES/1624(2005).

[8] *Global survey of the implementation of Security Council Resolution 1373 (2001) by Member States*, available at https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Global-Implementation-Survey-1373_EN.pdf.

[9] Available at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf. It builds upon the Report by Secretary-General Kofi Annan in 2004 entitled *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616.

While the document says that the centrality of victims in the design and implementation of transitional justice processes and mechanisms is essential,[10] it adds that transitional justice measures, such as prosecution initiatives and institutional reform, should be interdependent with broader efforts aimed at strengthening the administration of justice and security within national systems while paying due regard to any indigenous and informal traditions concerning administering justice or settling disputes which exist there.[11] The Guidance Note does not otherwise suggest particular ways in which national criminal justice systems should be altered in order to provide transitional justice. Nor does it specify exactly how the centrality of victims in the design of transitional justice mechanisms is to be realised in practice. It leaves open the possibility that victims' wishes, after having been expressed and considered, can be overridden because there are even more important considerations to take into account.

**Tampering with the criminal law in a conflicted society**

Tampering with the criminal law, broadly defined, is almost always essential if conflict resolution processes, of which transitional justice is usually a part, are to succeed. If we take Northern Ireland as an example of a jurisdiction still going through a conflict resolution process, we can see many instances of how the 'normal' criminal justice system has been tampered with in order to support and develop the conflict resolution agenda. Alterations have occurred alongside more general reforms that would in any event have been deemed essential to keep pace with modern thinking on matters such as forensic science, human rights and penal policy. The general reforms have been wide-ranging and intended to be long-term. The parallel tampering has been narrowly focused and intended to be temporary. This is a common pattern discernible in other transitional justice programmes playing out in conflict resolution processes around the world, South Africa and Colombia being just two examples.[12]

Even at the very start of the so-called 'troubles' in Northern Ireland, in the late 1960s, steps were taken to try to end the violence by creating 'exceptions' to the normal criminal law. In May 1969 the government of Northern Ireland announced that there would be an amnesty concerning all offences connected with demonstrations occurring since 5 October 1968. A scheme was put in place to allow for unlawfully held weapons to be handed in without fear of prosecutions being initiated, but 'the results were very discouraging'.[13] For a short period the police in Northern Ireland,

[10] Guiding Principle 6, ibid, p 6.
[11] Guiding Principle 7, ibid.
[12] Space does not permit development of this point. For recent contributions to the vast literature on the South African and Colombian conflict resolution processes see Francois Venter, 'The limits of transformation in South Africa's constitutional democracy' (2018) 34 *South African Journal on Human Rights* 143; Gerhard Anders and Olaf Zenker (eds), *Transition and Justice: Negotiating the Terms of New Beginnings in Africa* (Wiley Blackwell, 2015), Chaps 4, 5 and 6 (on police violence, 'toilet wars' and land restitution); Astrid Liliana and Sánchez-Mejía, *Victims' Rights in Flux: Criminal Justice Reform in Colombia* (Springer, 2017); Raymond Suttner, *Recovering Democracy in South Africa* (Sunnyside, 2015).
[13] 'Freeland warns of arms possession', *Irish Times*, 23 October 1969, p 4.

who unlike officers in Great Britain had always carried guns, were disarmed,[14] but this policy was quickly reversed because the threat against police officers was still very real. From 1971 to 1975 a system of internment was deployed, whereby people could be arrested and detained without trial merely because they were considered to be security risks. In the early 1970s a huge exception was made to the rule that all serious crimes had to be tried by a judge and jury: instead, judge-only courts were established, nicknamed 'Diplock courts' after the senior British judge who had recommended their creation, to try people accused of 'scheduled offences', i.e. those connected with the troubles. As a quid pro quo defendants in such cases were, unlike their counterparts in jury trials, given the right to a reasoned judgment from the trial judge as well as an appeal to a higher court without first needing to seek permission for the appeal. For some offences, especially possession offences, the burden and standard of proof were altered so that, for example, defendants had to show on the balance of probabilities that their possession of weapons was innocent, rather than the prosecution having to show beyond reasonable doubt that it was for a criminal purpose. The right of defendants to rely on their silence in the face of police questioning was also qualified. On the other hand, statements made by defendants were admissible as evidence only if the police could show beyond reasonable doubt that they were not the product of ill-treatment. Persons suspected of terrorist offences were, for a while, given more rights while in custody than persons suspected of other offences: in 1987 they acquired the right to have someone informed of their detention and the right of access to legal advice,[15] rights which were not conferred on non-terrorist suspects until 1990.[16]

The literature on whether these various changes to the criminal justice system were justified and effective is vast.[17] The point being stressed here is simply that adjustments were made because of the need to reduce the serious violence that was occurring all over Northern Ireland. To this day opinions vary as to which of the adjustments worked and which did not. Regular reviews of the need for the adjustments were conducted by independent reviewers and parliamentarians, but some reviews were not as thorough and sincere as they should have been and very few adjustments were removed.

When a peace settlement was eventually agreed in 1998, in the form of the Belfast (Good Friday) Agreement, there were further compromises with an orthodox approach to the criminal law. Most significant of all was the agreement between the British and Irish governments to allow for the accelerated release of prisoners convicted of scheduled offences, provided the prisoners were affiliated to

[14] This was in line with recommendation 16 in the Report of the Advisory Committee on Police in Northern Ireland, 1969, Cmd 535, chaired by Lord Hunt.
[15] Northern Ireland (Emergency Provisions) Act 1987, ss 14 and 15.
[16] Police and Criminal Evidence (NI) Order 1989, arts 57 and 59.
[17] See e.g. A Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press; 1988); JD Jackson and S Doran, *Judge Without Jury: Diplock Courts in the Adversary System* (Clarendon Press; 1995) B Dickson, 'Miscarriages of Justice in Northern Ireland' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, 1999) 287–303.

organisations that were maintaining 'a complete and unequivocal ceasefire'.[18] Under this scheme any qualifying prisoners who remained in custody two years after its commencement were released at that point, and anyone subsequently convicted of a troubles-related offence committed prior to the Good Friday Agreement was to serve no more than two years in prison.[19] While technically not an 'amnesty', as it applied to people already convicted of crimes, [20] this early release scheme was difficult for many voters to swallow when they were asked to endorse the 1998 Agreement in a referendum. Some people baulked at the fact that just because the motivation of these prisoners had been political rather than, say, sexual, financial or personal, they were being released back into the community years before their due release date despite having committed horrific crimes. Moreover, these prisoners were promised support prior to and after release, including assistance with employment opportunities, re-skilling and further education. Such support was not always as readily available to so-called 'ordinary decent criminals' upon their release. Despite reservations about the prisoner release scheme, 71.1% of voters in Northern Ireland endorsed the package in a referendum and in a simultaneous referendum in the Republic of Ireland 94.4% endorsed it.[21]

The Belfast (Good Friday) Agreement also led to changes to policing structures, the prosecution system, the Prison Service and services for victims.[22] A Police Ombudsman – to conduct completely independent investigations of complaints against the police – was appointed in 2000 as a result of a report compiled in 1997.[23] A particularly controversial 'exception' was made to the criminal law in 2005 when, in place of enacting legislation granting immunity from prosecution to members of unlawful paramilitary organisations who were 'on the run' for crimes allegedly committed during the conflict, the UK government issued 'letters of comfort' to suspects assuring them that they were no longer wanted by the police anywhere in the United Kingdom. Although the scheme was not secret, it did not hit the headlines

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[18] Belfast (Good Friday) Agreement, section on 'Prisoners', para 2.

[19] Northern Ireland (Sentences) Act 1998, ss 3–16. See too 'Maze emptied as terrorist prisoners walk free', *The Guardian*, 28 July 2000, available at: https://www.theguardian.com/uk/2000/jul/28/northernireland, which reveals that within 22 months of the Good Friday Agreement, 428 terrorists, including 143 serving life sentences, had been released.

[20] For a conspectus on what amnesty laws reveal about the struggle against impunity for crimes, see Louise Mallinder, 'Atrocity, Accountability, and Amnesty in a "Post-Human Rights World', Political Settlements Research Programme Working Paper Series, 09/2017, available also at *https://ssrn.com/abstract=3051142*.

[21] These referendums occurred on 22 May 1998.

[22] See *A New Beginning: Policing in Northern Ireland* (September 1999), the report of the Independent Commission on Policing for Northern Ireland, chaired by Chris Patten; the press release accompanying publication of the Criminal Justice Review in March 2000: https://cain.ulster.ac.uk/issues/law/cjr/press30300.htm; Michelle Butler, The Northern Ireland Prison Reform Programme: Progress Made and Challenges Remaining' (2017), available at: https://pure.qub.ac.uk/portal/files/122986874/KESS_Policy_Briefing_NI_Penal_Reform_Programme.pdf; and the Victims and Survivors Services (http://www.victimsservice.org/about-us/what-we-do) and the Commission for Victims and Survivors (https://www.cvsni.org).

[23] Maurice Hayes, *A Police Ombudsman for Northern Ireland? A Review of the Police Complaints System in Northern Ireland*. See too the Police (NI) Act 1998, ss 50–65 and the Police (NI) Act 2000, ss 62–66.

until 2014, when the trial of an alleged ex-member of the IRA, John Downey, was stopped because the judge deemed it an abuse of process given that Mr Downey had previously received one of the letters of comfort.[24] A subsequent inquiry concluded that while the scheme had been legal it had been allowed to evolve without any reference to a proper structure or policy, leading to considerable scope for error.[25] The British government later announced that recipients of the letters should no longer rely upon them.[26] Mr Downey himself has since been extradited from the Republic of Ireland to Northern Ireland to face charges relating to the murder of two British soldiers in 1972.[27]

Notwithstanding the reforms already adopted,[28] there remain features of Northern Ireland's criminal justice system which apply specifically to the still-simmering conflict.[29] The police retain a small number of special powers based on fortnightly authorisations issued by a senior officer.[30] There are still juryless courts to try people for offences relating to the conflict.[31] In recent months suggestions have been made that British soldiers who may have killed people during the conflict should be granted immunity from prosecution unless there are exceptional circumstances.[32]

**Respect for human rights and for the principle of legality**

When exceptions are made to the ordinary criminal law in an attempt to deal with a particularly challenging problem such as terrorism or internal conflicts, efforts must be made to ensure that in doing so human rights are not abused. The Security Council's Resolution 1456 (2003), already mentioned, reaffirmed that point. Throughout the conflict in Northern Ireland the standards against which alleged

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[24] *R v Downey*, available at www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-downey-abuse-judgment.pdf.
[25] *The (Hallett) Independent Review into the On the Runs Administrative Scheme*, HC 380 (2014). In some other cases the prerogative of mercy was used to 'exonerate' convicted terrorists.
[26] See https://www.gov.uk/government/speeches/government-implementation-of-the-hallett-report.
[27] See https://www.bbc.co.uk/news/uk-northern-ireland-50022543.
[28] These are comprehensively analysed in A-M McAlinden and C Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context*, Hart Publishing, 2015.
[29] Since the announcement of the Belfast (Good Friday) Agreement on 10 April 1998 there have been 160 deaths in Northern Ireland connected to the conflict that was supposedly ended. See Paul Nolan, Belfast Telegraph, 2 May 2019, available at: https://www.belfasttelegraph.co.uk/opinion/news-analysis/paul-nolan-lyra-mckee-became-160th-person-murdered-since-good-friday-agreement-they-all-deserve-to-be-remembered-38070512.html.
[30] Justice and Security (NI) Act 2007, ss 21–42.
[31] Ibid, ss 1–9. Today even British soldiers accused of troubles-related crimes are tried in such juryless courts: *In the matter of an application by Dennis Hutchings for Judicial Review* [2019] UKSC 26.
[32] See the debate amongst UK MPs held on 20 May 2019, available at: https://hansard.parliament.uk/commons/2019-05-20/debates/06752875-A995-4952-A1C8-89E342B72FA6/ImmunityForSoldiers. A video of the debate is also available at: https://www.youtube.com/watch?v=jNV5MWbkMoQ. See too 'Investigations into fatalities in Northern Ireland involving British military personnel', 7th Report of the House of Commons Select Committee on Defence, 2016–17, HC 1064, and the government's response to that report: 3rd Special Report of the Committee, 2017–19, HC 549.

assessments of human rights could be measured were not just those applicable within domestic law but also those applicable under the European Convention on Human Rights (the ECHR). Although the United Kingdom was prominent in the drafting of that treaty and was the first country to ratify it in 1952, it did not accept the right of individual petition to the European Court of Human Rights until 1966 and it did not allow Convention rights to be pleaded in domestic courts until the Human Rights Act 1998 came into force on 2 October 2000. Elsewhere I have attempted to evaluate the role played by the ECHR during the conflict in Northern Ireland, concluding that it had little impact either on the levels of violence manifested by illegal paramilitary organisations or on the nature of the responses to that violence by State bodies.[33] By the time the European Court began to issue judgments condemning some of the State's actions as violations of Convention rights the violence was largely over and the peace process under way.

Some 'exceptions' to the criminal justice system in Northern Ireland got very little attention from the European Court of Human Rights – the juryless 'Diplock' courts is a good example – and most of those which were examined were not condemned by the Court as violations of human rights. These included the use of internment,[34] the use of special police and army powers to stop, question, arrest and detain,[35] and the use of force against alleged terrorist suspects.[36] Many changes to the criminal justice system were protected against challenge because they were introduced in line with the ECHR's provision permitting derogation from the Convention.[37] Remarkably, in no case did the Court (or the European Commission of Human Rights, which functioned until 1998) find that the United Kingdom had violated the substantive right to life by allowing more force to be used than was necessary. Substantive violations were found only as regards the planning and control of operations.[38] Violations of the procedural rights which the Court has said are guaranteed by those Articles were also established, but only late in the day.[39]

Today problems persist regarding how best to deal with what occurred during the conflict in Northern Ireland. There are 1,425 deaths for which no-one has yet been held

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[33] See B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010), *passim*.
[34] *Ireland v UK* (1979–80) 2 EHRR 25.
[35] e.g. *O'Hara v UK* (2002) 34 EHRR 812 (on arrest powers); *Brannigan and McBride v UK* (1994) 17 EHRR 539 (on detention powers),
[36] *Stewart v UK* (1985) 7 EHRR 453; *Kelly (John) v UK* (1993) 16 EHRR CD 20 (a decision by the European Commission of Human Rights that an application was inadmissible).
[37] Art 15.
[38] Most notably in *McCann v UK* (1996) 21 EHRR 97, where in 1995 the Court found by 10 to 9 that the UK's security services had violated Art 2 by not properly planning an arrest operation targeting IRA operatives in Gibraltar in 1988.
[39] The seminal case is *McKerr v UK* (2002) 34 EHRR 20, where in 2001 the Court ruled by 7 v 0 that a death caused by police officers had not been properly investigated for the purposes of Art 2. The Court came to the same conclusion in several concurrent and subsequent cases, most recently in *Hemsworth v UK*, App No 58559/09, judgment of 16 July 2013. See too *McDonnell v UK*, App No 19563/11, judgment of 9 December 2014, a case about the death of a prisoner in Northern Ireland.

to account.[40] The central issue is to what extent the normal operation of the criminal justice system should be put to one side for the sake of a greater good, namely the reconciliation of the divided communities. It is the same issue which faced the Constitutional Court of South Africa in 1996, when relatives of Steve Biko, founder of the Black Consciousness movement, together with other victims of security force brutality, challenged the legislative provision[41] which permitted a Committee to grant an amnesty to perpetrators of unlawful acts (in Biko's case, his murder).[42] They argued that an amnesty would be a violation of their constitutional right to have disputes settled by a court of law or another independent forum. The Constitutional Court accepted that the amnesty breached that right but then ruled that the breach was justifiable because it was permitted by the country's new Interim Constitution, which stressed the need for national unity and reconciliation. Amnesties, the Court said, were a crucial component of the negotiated peace settlement in South Africa, without which the Interim Constitution itself would not have come into being.[43]

No exactly comparable case has come before the courts of Northern Ireland or the United Kingdom concerning provisions in the Belfast (Good Friday) Agreement. The closest is perhaps *Re Williamson's Application*, where a woman whose parents had been killed by a bomb planted by the IRA in 1993 applied for judicial review of the decision taken in 2000 by the then Secretary of State for Northern Ireland, Mo Mowlam, to release one of the bombers under the statutory early release scheme. The applicant argued that the IRA was not maintaining 'a complete and unequivocal ceasefire' and therefore its prisoners should no longer qualify for release under the scheme.[44] She pointed to the fact that in 1999 the IRA had allegedly been involved in a murder and the importation of weapons from the United States. Both the first instance judge and the Court of Appeal held that their role was not to second-guess the correctness of the Secretary of State's decision but merely to rule on whether she had gone through the correct process in considering what decision to make. They acknowledged the political dimension to the decision in question, with Carswell LCJ saying:

> It is part of the democratic process that such decisions should be taken by a minister responsible to Parliament, and so long as the manner in which they are taken is in accordance with the proper principles the courts should not and will not step outside their proper function of review.[45]

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[40] Report of the PSNI Chief Constable to the NI Policing Board, 7 February 2019, available at: https://www.psni.police.uk/news/Latest-News/07022019-chief-constables-report-northern-ireland-policing-board/.

[41] s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[42] *AZAPO v President of the Republic of South Africa* 1996 (4) SALR 671 (CC). See the impressive student thesis on this case by Kaley L Martin, 'Tackling the Question of Legitimacy in Transitional Justice: Steve Biko and the Post-Apartheid Reconciliation Process in South Africa' (2015), available at: https://repository.upenn.edu/cgi/viewcontent.cgi?article=1225&context=curej.

[43] Ibid, at 698.

[44] See the Northern Ireland (Sentences) Act 1998, s 3(4), (8) and (9).

[45] [2007] NICA 7, p 16.

It was therefore lawful for the Secretary of State 'to assess whether there had been a "systemic", or root and branch, breakdown in the ceasefire and to take into account whether the events [in 1999] were evidence of a co-ordinated return to violence or represented something less than that'.[46] This approach can be seen as an example of 'the principle of legality' at work: an action, or inaction, is lawful provided it is supportable by existing legal rules and standards. This means that, once it is within the parameters of the lawful, a judgement as to what to prioritise can appropriately assess political expediency as being more important than victims' interests.

The long and the short of it is that if societies which have suffered a long bout of conflict are to move forward in a harmonious and progressive fashion they need to have mechanisms in place for putting the past behind them. This does not mean that they must strive to forget the past. Rather it entails trying to learn from the past so that the violence which occurred is unlikely to break out again. In the application of human rights standards some compromises may have to be made to allow the society to move on. Thankfully this is not as difficult to square with international human rights law as might be imagined, partly because human rights treaties tend to permit rights to be qualified but also because, while most treaties are clear on what rights need to be protected, they are not prescriptive about the remedies that should be available if that protection fails.[47] It is worth exploring that last point in more detail. Do relatives of persons unlawfully killed have a right to see people prosecuted for those killings?

**Human rights and the criminal law**

The purpose of criminal law is to allow the State to punish someone for breaking its rules. The process is not victim-driven, since that is the purpose of civil law. Standard textbooks on criminal law have little if anything to say about human rights standards. It is only in textbooks on the processing of alleged criminals – their arrest, detention, trial and punishment – that we find mention of human rights standards. The principal reason for this is that in all countries the main categories of criminal offences were agreed long before human rights standards were developed. Moreover, criminal law serves purposes beyond just protecting human rights. Criminal law is society's compact with itself whereby punishment is meted out when society deems it appropriate. A lot is done to ensure that the punishment processes are based on society's interests. In the United Kingdom, for example, one of the two tests for whether a person should be prosecuted for a crime is whether doing so would be in the public interest, the other being whether there is 'a realistic prospect of conviction', although the standard required for eventual conviction is proof 'beyond reasonable doubt'.[48] The Sentencing Guidelines in England and Wales usually require a judge to take into account the accused's degree of culpability (high, medium or lesser), the level of harm he or she has caused (greater or lesser), aggravating factors (such as trying to

[46] Ibid, p 14.
[47] Art 13 of the ECHR simply provides everyone whose rights are violated must have 'an effective remedy before a national authority'.
[48] See the Code for Crown Prosecutors, available at https://www.cps.gov.uk/publication/code-crown-prosecutors.

blame others for the crime) and factors reflecting personal mitigation (such as steps already taken to address the offending behaviour).[49] Where the offence has led to loss or damage the judge must also consider whether to require the convicted person to pay compensation.[50]

When a court is determining not how someone should be punished for a crime but how a violation of human rights should be remedied, the questions it asks itself are very different. It pays much less attention to retribution and much more to compensation and the prevention of recurrences. The primary purpose of human rights law is to vindicate acknowledged rights through effective remedies, not to ensure that those who violated those rights are dealt with through the criminal justice system.[51] The crucial question in the context of transitional justice is then, does the victim ever have the right to have someone held to account under the criminal law for the violation in question? To date, as we shall see, the European Court of Human Rights has been reluctant to recognise such a right, even if the right violated was the right to life. This is despite the fact that the Court has greatly expanded the category of situations in which States can be held to have violated the right to life. We will briefly consider that expansion before examining situations in which the Court has not insisted on criminal prosecutions for such violations.

**Expanding accountability for violations of the right to life**

It is now more than 20 years since the European Court of Human Rights read into Article 2 three State duties which are not immediately apparent on the face of the provision. These are (1) the duty to take reasonable and proportionate measures to avert loss of life occurring through criminal conduct,[52] (2) the duty to properly plan and control operations where State forces may need to use lethal force[53] and (3) the duty to thoroughly investigate a killing after it has occurred.[54] There are two instances of the European Court recently embellishing the first and third of these duties.

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[49] See e.g. the 185 sets of guidelines relating to specific crimes tried in the Crown Court, available at https://www.sentencingcouncil.org.uk/crown-court/.

[50] Powers of Criminal Courts (Sentencing) Act 2000, s 130, as amended.

[51] 'The Court does not act as a court of appeal in relation to national courts; it does not rehear cases, it cannot quash, vary or revise their decisions': European Court of Human Rights, *Questions and Answers*, available athttps://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf, p 12.

[52] *Osman v UK* (2000) 29 EHRR 245, judgment of 28 October 1998. The case involved the police's alleged failure to prevent a stalker from murdering two people.

[53] *McCann v UK*, note 38 above, paras 150 and 201–14. See too B Dickson, 'The planning and control of operations involving the use of lethal force' in L Early et al (eds), *The Right to Life under Article 2 of the European Convention on Human Rights* (Wolf Legal Publishers, 2016) 47–59.

[54] Ibid, para 161; see too *McKerr v UK*, note 39 above, discussed below. For the European Court's own summary of the current state of the relevant law (as of 31 August 2019) see its *Guide on Article 2 of the European Convention on Human Rights*, available at https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf; the procedural obligations are dealt with at 29-42.

The first instance is *Tagayeva v Russia*,[55] where the Court held for the first time that a State had violated Article 2 because it had not properly averted a foreseeable terrorist attack which resulted in many fatalities. The case involved large-scale hostage-taking by Chechen terrorists in a school in Beslan, North Ossetia, over a three-day period in 2004. To rescue the hostages Russian forces stormed the school, leading to hundreds of children being killed or injured. Citing what it had previously said in *Osman v UK*[56] and *Mastromatteo v Italy*,[57] but applying those statements to the particular context of counter-terrorist activities, the Court found that the intelligence available to the Russian authorities prior to the attack was very specific and that adequate measures ought therefore to have been taken to minimise the known risk. Instead, a large group of illegally armed rebels had been able to access and occupy the school without confronting any preventative security arrangements.[58] The Court also found that the investigation into the events had failed to examine adequately the use of lethal force by the State agents involved and that in Russia there appeared to be widespread immunity in respect of harm caused during counter-terrorist operations, thereby leaving a dangerous gap in the regulatory framework for such situations.[59]

The second example is *Šilih v Slovenia*,[60] where the Court's Grand Chamber confirmed that the procedural obligation to carry out an effective investigation under Article 2 'has evolved into a separate and autonomous duty' and can now be considered as 'a detachable obligation' even if the death took place before the date when the State in question became bound by the ECHR (the so-called 'critical date').[61] One of two conditions needs to be satisfied before such a detachable duty arises: either (a) the death must have occurred no longer than 10 years before the critical date and much of the investigation must have taken place, or ought to have taken place, after the critical date, or (b) the need to ensure the real and effective protection of the guarantees and underlying values of the ECHR must be sufficient to give rise to a connection between the death and the critical date.[62] The second of these alternative conditions is very vague and, despite the Grand Chamber's amplification of it in *Janowiec v Russia*,[63] the vagueness continues to this day. In *R (Keyu) v Secretary of State for Foreign Affairs* the UK Supreme Court held that the 'underlying values' test could not apply if the deaths in question occurred before the ECHR itself was adopted on 4 November 1950.[64] One

[55] App Nos 26562/07 and 6 others, judgment of 13 April 2017. The report of this case runs to almost 90,000 words.
[56] Note 60 above, para 116.
[57] App No 37703/97, judgment of 24 October 2002 (GC), para 69. The case involved a man killed by prisoners who robbed a bank while they were out of prison on leave.
[58] Note 63 above, paras 481–493.
[59] Ibid, paras 592–9.
[60] (2009) 49 EHRR 37, judgment of 9 April 2009.
[61] Ibid, para 159.
[62] Ibid, paras 161–3.
[63] (2014) 58 EHRR 30, judgment of 21 October 2013. The case involved the massacre of more than 4,000 Polish soldiers in Katyn forest in 1943. By 13 v 4 the Court found no violation by Russia of Art 2 and by 12 v 5 no violation of Art 3.
[64] [2015] UKSC 69, [2016] AC 1355, [88] per Lord Neuberger, [256–8] per Lord Kerr, [301] per Lady Hale. The case involved multiple deaths caused by British soldiers in Malaya in 1948. Four of the judges took the 'critical date' in this case to be 1966 (when the UK first allowed the right of individual

of the judges, Lady Hale, held that the investigative duty did not apply at all in the case before her because the claimants were seeking historical truth rather than civil or criminal liability.[65] This point is important because it reminds us that 'truth' processes are different from 'justice' processes: many relatives would rather be told exactly what happened to their loved-one rather than seek legal remedies through long-drawn out processes that tend to be confrontational as well as aleatory.[66]

The expansion of the scope of Article 2 has required many States to develop their law – but not necessarily their criminal law – to ensure that lethal incidents are prevented and investigated in ways that should reassure the public that the chances of such incidents occurring again are small. The expansion does not mean that States are under a duty to prosecute all those who may be criminally liable under domestic law for the incidents in question.

**Investigations not followed by prosecutions**

When the European Court first asserted in *McCann v UK* that investigations of alleged violations of Article 2 had to take place, it was in the context of undercover British soldiers having shot dead three members of the IRA in Gibraltar in 1988.[67] The Grand Chamber put it thus:

> …a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under [Article 2]… requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.[68]

Earlier the Court had cited Article 9 of the UN's Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989),[69] which provides that:

> There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances....

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petition to Strasbourg), while Lady Hale took it to be 1953, when the UK's ratification of the ECHR meant that other Council of Europe States could lodge complaints against it to the European Commission of Human Rights.

[65] [2015] UKSC 69, [2016] AC 1355. Lady Hale, alone amongst the judges, did however hold that the government's decision to refuse a new inquiry into the deaths was irrational or disproportionate.

[66] See too Murphy, note 2 above.

[67] Note 38 above.

[68] Ibid, para 161. On the facts of this case the Court found that there *had* been an adequate investigation into the killings.

[69] Adopted on 24 May 1989 by Economic and Social Council Resolution 1989/65.

As is its normal practice regarding international law, whether hard or soft, the Court did not directly apply the UN Principles, but it clearly borrowed from them and effectively read Article 9 into the ECHR.

The UN Principles provide a lot more detail about investigating extra-judicial executions. They do not specify that a State is under a duty to prosecute persons suspected of such killings, but they do say that:

> Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are *brought to justice*.[70]

The UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, issued a year later (1990), are more specific:

> Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials *is punished as a criminal offence under their law*.[71]

This was cited by the Grand Chamber of the European Court in *Nachova v Bulgaria*,[72] where there was a ruling that Article 2 had been violated because of the lack of an effective investigation into the fatal shooting of two Roma men by military police in 1996.

The European Court has so far stopped short of explicitly stating that if an investigation discloses evidence that a particular person may have killed someone in violation of Article 2 of the ECHR the person must *in all cases* be prosecuted. But it has come extremely close to doing so. In *Öneryildiz v Turkey*,[73] a case where 39 people had been killed in an explosion and landslide at a former rubbish tip in Istanbul, the Grand Chamber said:

> …when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents [and]… [w]here it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity…, *the fact that those responsible for endangering life have not been charged with a criminal offence or*

[70] Art 18 (emphasis added).
[71] Para 7 (emphasis added).
[72] (2006) 42 EHRR 43, judgment of 6 July 2005.
[73] App No 48939/99, judgment of 30 November 2004.

> *prosecuted may amount to a violation of Article 2*, irrespective of any other types of remedy which individuals may exercise on their own initiative.[74]

The Grand Chamber added, however, that:

> It should in no way be inferred from the foregoing that Article 2 may entail the *right for an applicant to have third parties prosecuted or sentenced for a criminal offence*… or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence… On the other hand, the national courts should not *under any circumstances* be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.[75]

Here the Grand Chamber appears to want to have its cake and eat it. On the one hand it requires all life-endangering offences to be punished, while on the other it affirms that applicants have no right to have anyone prosecuted or sentenced for those offences. It does not say how punishment is to occur without such prosecutions and sentences.

In the later case of *Aydan v Turkey* the Court ruled that if a member of the security forces carelessly discharges his or her weapon it is a violation of Article 2 if that person is prosecuted and found to have behaved in that fashion but is then not punished in any way.[76] It has also ruled, in *Jelić v Croatia*, a case concerning the killing of a Serbian man by armed and masked Croatians in 1991, that there is a violation of the investigative duty in Article 2 if the authorities fail to follow up credible leads relating to the identities of the alleged killers and as a result do not initiate any prosecution.[77] Moreover the Court said it was no excuse for Croatia to argue that at the time in question its authorities were faced with the duty to investigate multiple killings arising from the war in their country.[78] Nor, importantly, was it an excuse that a senior police officer had already been convicted of war crimes against civilians in Croatia. On that point, referring to provisions in the Statutes creating various international criminal courts,[79] the European Court said:

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[74] Ibid, para 93 (emphasis added and references omitted).
[75] Ibid, para 96 (emphases added and references omitted). By 'third parties' the Grand Chamber presumably means persons other than representatives of the State.
[76] App No 16281/10, judgment of 12 March 2013 (available only in French).
[77] App No 57856/11, judgment of 12 June 2014.
[78] According to the Annual Report of the European Court of Human Rights for 2014 (p 96) Croatia had by then 'opened investigations into 3,436 alleged perpetrators of war crimes against a background of 13,749 reported victims of war'.
[79] Statute of the International Criminal Court, Art 25; Statute of the International Criminal Tribunal for Rwanda, Art 6; Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 7.

> The punishment of superiors for the failure to take necessary and reasonable measures to prevent or punish war crimes committed by their subordinates cannot exonerate the latter from their own criminal responsibility.[80]

The Court repeated that the essential purpose of an Article 2-compliant investigation is 'to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.[81]

In two other cases concerning deaths occurring during major conflicts the European Court has found that the investigations undertaken following the death were adequate to comply with Article 2's stringent standards, even though no-one was brought to justice as a result. In *Palić v Bosnia and Herzegovina* the Court was faced with an application from a widow who claimed that there had not been a proper investigation into the disappearance and death of her husband at the hands of Serbian forces during the war in Bosnia and Herzegovina in 1995. On the facts, the Court held that there had been no violation of Article 2.[82] It noted that the investigation had finally led, after 14 years, to the identification of the remains of Mr Palić and to the issuing of international arrest warrants against two suspects in Serbia, whom Serbia could not extradite because they were Serbian nationals. The Court again asserted that:

> In these circumstances… the domestic criminal investigation was effective in the sense that it was capable of leading to the identification and punishment of those responsible for the disappearance and death of Mr Palić, notwithstanding the fact that there have not yet been any convictions in this connection. The procedural obligation under Article 2 is indeed not an obligation of result, but of means.[83]

Similarly, in *Gürtekin v Cyprus* the European Court declared inadmissible applications from the relatives of three men who had disappeared during intercommunal conflicts in Cyprus in 1963-1964 and whose bodies were unearthed between 2006 and 2009 during exhumation activities conducted by the UN's Committee on Missing Persons.[84] Again the relatives complained of a lack of effective investigation but the Court concluded as follows:

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[80] Note 77 above, para 88, cross-referring to, amongst others, the Statute of the International Criminal Court, Art 25.

[81] Ibid, para 73, citing, amongst other cases, *Jordan v UK* (2003) 37 EHRR 2, paras 105–9 (a case decided alongside *McKerr v UK*, note 39 above). It is unclear why the Court in this instance is limiting accountability for deaths to cases involving State agents or bodies. In relation to the investigative duty under Art 3 of the ECHR it is abundantly clear that the duty to investigate effectively applies to all allegations of torture or inhuman or degrading treatment, no matter who the alleged perpetrator is. This is the interpretation placed on ECHR law by the UK Supreme Court in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196, e.g. at [16]-[43] and [59]-[62] per Lord Kerr (with whom Lord Neuberger and Lady Hale agreed).

[82] App No 4704/04, judgment of 15 February 2011.

[83] Ibid, para 65, citing in support of the last statement *Jordan v UK* (2003) 37 EHRR 2, judgment of 4 May 2001, para 107.

[84] App Nos 60441/13, 68206/13 and 68667/13, decision of 11 March 2014.

> The Court can understand that it must be frustrating for the applicants that potential suspects have been named and, in two instances, located and questioned but that no further steps apparently were going to be taken. However, Article 2 cannot be interpreted so as to impose a requirement on the authorities to launch a prosecution irrespective of the evidence which is available…
>
> Insofar as the applicants argued that, at the very least, the decision that the evidence was insufficient to justify a prosecution should have been submitted for decision by a court, the Court does not consider that the procedural obligation in Article 2 necessarily requires that there should be judicial review of investigative decisions as such…. [I]t is not for the Court to micro-manage the functioning of, and procedures applied in, criminal investigative and justice systems in Contracting States which may well vary in their approach and policies. No one model can be imposed.[85]

In this context one could also cite *Armani Da Silva v UK*, where the Grand Chamber was faced with an applicant who claimed that there had been a violation of Article 2 in that no police officer had been prosecuted in relation to the fatal shooting of her cousin on the London Underground in 2005.[86] The killing had been a case of mistaken identity and the only 'penalty' suffered by the police was a fine for breaching health and safety laws. The Court nevertheless held that Article 2 had not been violated. In doing so it explained that its previous position, which was that an investigation should be capable of leading to the identification and punishment of those responsible, needed to be attenuated: the obligation to punish applies only if this is 'appropriate'.[87] It pointed out that to date the Court had never found a violation of Article 2 in a situation where there had been a decision not to prosecute in the wake of an investigation that was compliant with Article 2. Only 'institutional deficiencies' in criminal justice or prosecution systems had led to a finding of violation. It went on to rule that one of the prosecution tests used in England and Wales (that the evidence showed there was a 'realistic prospect of conviction') fell within the State's margin of appreciation and so there was no 'institutional deficiency' amounting to a violation of Article 2. Institutional changes recommended by the Independent Police Complaints Commission had been implemented, the fine levied for the breach of health and safety laws was not manifestly too low, the victim's family had been adequately involved in the investigation and *ex gratia* sums had been paid promptly to them. It is worth noting that the second prosecution test used in England and Wales (that prosecution must be in the public interest) was not scrutinised by the European Court in *Da Silva* because it comes into play only if the 'realistic prospect of conviction' test is satisfied. One imagines that it too, *prima facie*, would fall within the margin of appreciation doctrine, though that does not mean that in particular cases the European Court could not

[85] Ibid, paras 27 and 28, citing, in support of the last statement, *McKerr v UK*, note 39 above, para 143.
[86] (2016) 63 EHRR 12, judgment of 30 March 2016.
[87] Here the GC cited its own previous judgment in *Giuliani and Gaggio v Italy* App No 23458/02.

conclude that an assessment that a prosecution would not be in the public interest was a violation of Article 2.

**Maintaining effectiveness, independence, co-operation and respect**

Notwithstanding the three examples just given of *Palić*, *Gürtekin* and *Da Silva*, where the lack of prosecution was held to be justifiable, the European Court continues to stress that effective independent investigations must always still occur. Thus, even though under *Šilih v Slovenia*[88] the lapse of a long period of time between the occurrence of a death and the State in which it occurred becoming bound by the ECHR might exonerate a State from having to comply with its investigative duty, it is still the case that the duty can be 'revived' if new information comes to light suggesting that an earlier investigation was not effective. This much is clear from the European Court's judgment in another case from Northern Ireland, *Brecknell v UK*.[89] The same point was stressed in *Harrison v UK*, where the European Court was considering an application from relatives of the 96 people who died in a crush at Hillsborough football stadium in England in 1989.[90] The Court ruled that the UK government was responding satisfactorily to the new information which had emerged and that the relatives' application alleging a breach of Article 2 was premature because the State's new investigation was still incomplete.

Whether an investigation into a death is sufficiently independent in a post-conflict situation can also be problematic, given that some of the investigators may have links to parties allegedly involved in the death in question. The Grand Chamber of the European Court has confirmed, in *Tunç v Turkey*,[91] that the sufficiency of an investigation in this regard is highly fact-sensitive:

> The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case… Where an issue arises concerning the independence and impartiality of an investigation, the correct approach consists in examining whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible… In this regard, the Court considers it appropriate to specify that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in

[88] Note 60 above.
[89] (2008) 46 EHRR 42, judgment of 27 November 2007, para 66. The investigative duty did revive in that case but the Court held that it had been fulfilled except in relation to an early part of the investigation conducted by the Royal Ulster Constabulary (see too the text at n 94 below).
[90] *Harrison v UK* App Nos 44301/13, 44379/13 and 44384/13, decision of 25 March 2014.
[91] App No 24014/05, judgment of 14 April 2015.

itself… They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed.[92]

The Court went on to cite a series of cases which fell on either side of the line[93] and then held that in the case before it the investigation *was* sufficiently independent.

The question of institutional independence has been the subject of considerable attention in cases arising within Northern Ireland, mostly in relation to whether the Police Service of Northern Ireland, which was formed in 2001, is sufficiently independent of its predecessor body, the Royal Ulster Constabulary. Everyone who was in the RUC on the day the PSNI was formed automatically became a member of the PSNI provided they had sworn a new oath of allegiance. In *Brecknell v UK* the European Court therefore suggested that the PSNI was independent of the RUC,[94] but in later cases in the domestic courts the generality of that suggestion has been successfully challenged.[95] In its first decision on the matter the Court of Appeal declared that the PSNI's Legacy Investigations Branch had not yet demonstrated the *practical independence* required for it to be able to carry out an Article 2-compliant investigation into the death in question,[96] while in its second decision the Court of Appeal held that the brother of the deceased had a procedural legitimate expectation under the common law that an overarching report would be compiled by an independent police team into the activities of the gang which committed the killing but that there was no enforceable duty in that regard under Article 2 because of the passage of time since the death in 1976. *Tunc v Turkey*[97] was not cited in either of those cases, but the same fact-sensitive approach was adopted. The Court of Appeal in *McQuillan* did cite *Hackett v UK*, an application to the European Court which was declared inadmissible as manifestly ill-founded given that there was no appearance of a violation of Article 2 in the appointment of a PSNI officer alongside an officer from outside Northern Ireland to produce an independent report on whether new allegations of police collusion justified the reopening of an earlier investigation into a death.[98]

There are other decisions by the European Court which suggest that it still retains a keenness to facilitate prosecutions in order to allow the loved-ones of a deceased to have the people responsible for the killing brought to justice. A startling example is the recent decision in *Romeo Castaño v Belgium*, where a Chamber ruled unanimously that Belgium had violated Article 2 by not extraditing to Spain a suspected ETA terrorist who was wanted for the murder of a senior army officer there 38 years

[92] Ibid, para 223–5.
[93] Ibid, paras 227–31, citing five separate cases against Romania and two against Turkey.
[94] See note 89 above.
[95] See e.g. *McQuillan's (Margaret) Application* [2019] NICA 13 (the Court of Appeal's 7-point summary of its conclusions as to the legal principles governing the requirement of 'independence' is at para 176); *Barnard's (Edward) Application* [2019] NICA 38.
[96] *McQuillan's (Margaret) Application*, ibid, para 213 (emphasis in the original).
[97] See note 91 above.
[98] App No 34698/04, decision of 10 May 2005.

earlier.[99] The violation flowed from the fact that in the Court's eyes Belgium had not adequately cooperated with Spain in its attempt to prosecute someone for the murder. Earlier in 2019 the existence of such a duty had been confirmed by the Grand Chamber of the European Court in *Güzelyurtlu v Cyprus and Turkey*,[100] where Turkey was found to have violated Article 2 by not adequately cooperating with Cyprus in relation to the investigation of three murders committed in Cyprus by suspects now living in the 'Turkish Republic of Northern Cyprus'. In *Romeo Castaño* the Court extended the duty to cooperate to a situation where what was alleged was not a failure by the respondent state to investigate a crime committed in another state but a failure to extradite someone to that other state to stand trial there for the crime.[101] The Court was at pains to point out that the finding of a violation of Article 2 on Belgium's part did not necessarily imply that Belgium had an obligation to extradite the suspect to Spain: the violation was based on the inadequate factual basis relied upon by Belgium when refusing to extradite the suspect, but that that did not replace Belgium's obligation to ensure that, if extradited, the suspect would not run the risk of being treated in a way that violates Article 3 of the ECHR.[102]

In a similar vein, the Grand Chamber of the European Court has been reluctant to accept that a State can grant an amnesty to persons who have committed 'grave breaches of human rights'. In *Marguš v Croatia*,[103] another case arising out of the Balkan wars in the early 1990s, a former commander of the Croatian army had been convicted in 2007 of war crimes committed against civilians in 1991. He argued that he was being tried twice for the same crimes because in 1997 proceedings against him had been withdrawn in compliance with a General Amnesty Act 1996. But the European Court held that the *ne bis in idem* principle did not apply here and that, more generally:

> A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[104]

[99] App No 8351/17, judgment of 9 July 2019 (available in French but not yet in English). See the comment published on 10 September 2019 by Mattia Pinto at https://strasbourgobservers.com/2019/09/10/romeo-castano-meticulously-elaborated-interpretations-for-the-sake-of-prosecution/. One of Pinto's conclusions is that, by finding Belgium in breach of the Art 2 rights of the family of the deceased, the ECtHR may have lessened the Art 3 rights of the accused person (because of the way she might be treated when sent back to Spain).
[100] App No 36925/07, judgment of 29 January 2019, para 178.
[101] Note 99 above, para 80.
[102] Ibid, para 92.
[103] (2016) 62 EHRR 17, judgment of 27 May 2014.
[104] Ibid, para 130.

The Grand Chamber issued this opinion having cited a wide range of international law sources on amnesties.[105] Its statement strongly implies that if, for the purpose of promoting reconciliation and the ongoing peace process in Northern Ireland, a law were to be passed in the United Kingdom granting an amnesty for all killings carried out in connection with the troubles in Northern Ireland before (say) 1998, the European Court might hold that law to be a sufficient justification for the State's refusal to prosecute and/or punish someone for a killing even though there had not been a thorough and effective investigation of that killing. It might not so hold, however, in a situation where the killing was part of 'a grave breach of fundamental rights', a term which the European Court has chosen not to define. The four Geneva Conventions of 1949, dealing with war-time situations, all include 'wilful killing' within the definition of grave breaches of those Conventions,[106] but that may not be the stance preferred in international human rights law.

As regards the obligation to *punish* a killer once he or she has been found guilty of homicide, the European Court of Human Rights is usually content to leave the degree of punishment to the discretion of the State in question, but it will intervene if the punishment is disproportionate to the crime committed. Thus, in *Enukidze and Girgvliani v Georgia*[107] the Court found a violation of Article 2 when four senior officials from the Ministry of the Interior were released from prison after serving just three-and-a-half years for the brutal murder of a young man. This 'unreasonable leniency deprived the criminal prosecution of the four officers of any remedial effect under Article 2 of the Convention'.[108]

Judgment is currently awaited in the equally shocking case of Gurgen Margaryan, a lieutenant in the Armenian army who in 2004 was brutally murdered by Ramil Safarov, a lieutenant in the Azerbaijani army, while both were attending an English-language course in Hungary. In 2006 Safarov was sentenced to life imprisonment in Hungary, with no prospect of parole until 2036, and in 2007 an appeal court confirmed that sentence. But in 2012, Hungary sent Safarov back to Azerbaijan so that he could serve the rest of his sentence there, supposedly acting in accordance with the Council of Europe's 1983 Convention on the Transfer of Sentenced Persons, but as soon as he arrived in Azerbaijan Safarov was granted a presidential pardon and released back into the army, where he was later promoted. Mr Margaryan's family lodged an application in Strasbourg alleging that Article 2 had been violated both by Hungary, in sending Safarov to Azerbaijan without getting firmer assurances that he would remain in prison there, and by Azerbaijan, in refusing to enforce the rest of his sentence.[109] It is to be hoped that the European Court will in due course condemn both States under Article 2.

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[105] The citations fill 26 pages of the pdf version of the Court's judgment.

[106] Geneva Convention No 1, Art 50; Geneva Convention No 2, Art 51; Geneva Convention No 3, Art 130; Geneva Convention No 4, Art 147.

[107] App No 25091/07, judgment of 26 April 2001.

[108] Ibid, para 275.

[109] *Makuchyan and Minasyan v Azerbaijan and Hungary*, App No 17247/13, communicated to the two respondent States on 12 January 2016 and available on the 'hudoc' database.

**Conclusion**

Summing up, it is clear that in a transitional justice context the European Court of Human Rights does not require prosecutions to ensue in all cases where there has been an Article 2-compliant investigation into a death. Even a very thorough investigation may not produce enough evidence to justify the launching of criminal proceedings against one or more alleged perpetrators, and in cases where such evidence does arguably exist there may be other public interest reasons for not going down the prosecution channel. A limitation period may apply, even in relation to charges of murder.[110] In a transitional justice context those public interest considerations could include factors which do not arise in an 'ordinary' criminal justice context.[111] Societal reconciliation and healing may be greater priorities than pursuing prosecutions. I would suggest that if this is true for the conflict in Northern Ireland it is also true for other extant conflicts within the Council of Europe area, such as those in Turkey, Georgia, Ukraine and Nagorno-Karabakh. Whether there has been an adequate attempt to bring people to justice will largely depend on the particular circumstances of each case.

Apart from deaths occurring as a result of 'grave breaches of fundamental rights' the State will be able to dispense with a prosecution so long as it takes all reasonable steps to identify the perpetrators and does not in some way collude in covering up what happened. As time goes on the likelihood of a successful prosecution will in any event diminish, what with the decreasing accuracy of witnesses' memories and the degrading of forensic evidence. In addition, if the country as whole might be held back from implementing an agreed peace process if it were to spend a large amount of time and money on planning for prosecutions that are rarely if ever going to succeed, the European Court might well hold that it is within a State's margin of appreciation to limit by law the initiation of prosecutions. It appears to be within that margin for States to reduce the punishments awarded to persons found guilty after such prosecutions, so it is a small step from there to allowing States not to prosecute in the first place. As pointed out by Alina Balta in Chapter 0, even in situations where there have been 'gross human rights violations', victims may be more appreciative of an award of reparations for their suffering than of a ruling that someone must be prosecuted for what was done to so badly harm them.[112]

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[110] E.g. in Poland Art 101§1(1) of the Penal Code prevents the crime of murder from being punishable after 30 years. I am grateful to Dr Marek Martyniszyn for this reference.

[111] Within 'ordinary' criminal justice contexts there may be particularly strong reasons for State prosecutions to be initiated even if the victim of a crime – such as domestic violence – does not support that course of action; see e.g. *Volodina v Russia*, App No 41261/17, judgment of 9 July 2019, paras 92–111.

[112] See e.g. Luke Moffett, 'Transitional justice and reparations: Remedying the past?' in Cheryl Lawther, Luke Moffett and Dov Jabobs (eds), *Research Handbook on Transitional Justice, Edward Elgar*, 2017, Chap 19. It is also possible for criminal trials themselves to have beneficial reparative effects on victims; see e.g. Rosario Figari Leyus, *The Reparative Effects of Human Rights Trials: Lessons from Argentina*, Routledge, 2017.