

Rights & Security International's Response to the JCHR Call for Evidence: 'Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill'

Rights & Security International (RSI) is a London-based NGO that has spent over 30 years advocating for compliance with human rights laws in response to the conflict in Northern Ireland. This submission rebuts the government's analysis of the Northern Ireland Troubles (Legacy and Reconciliation) Bill;¹ we argue that the Bill – if enacted in its current form – would not comply with the European Convention on Human Rights (ECHR).²

RSI has also published several briefings on issues it identifies below regarding the government's strategy for addressing the legacy of the conflict, which the JCHR may find helpful in its assessment of the Bill.³

Reviews of deaths

The procedural obligation under Articles 2 and 3 ECHR requires that investigations into deaths and serious injuries must: be independent, effective, reasonably prompt and expeditious, include a sufficient element of public scrutiny, adequately involve the next-of-kin, and be initiated by the State rather than solely dependent on being raised by the next-of-kin. Will the reviews of cases undertaken by the new ICRIR meet these requirements?

1. No, the Independent Commission for Reconciliation and Information Recovery (ICRIR) will lack sufficient scrutiny powers, and requires family members to instigate investigations that otherwise may not occur. It is therefore inconsistent with the ECHR.
2. The ICRIR system appears to lack sufficient scrutiny powers. Articles 2 and 3 ECHR require that the investigating authorities have sufficient powers to secure evidence,⁴ then undertake a thorough, objective analysis of the evidence.⁵
3. The primary issue is that the Bill refers to a 'review' instead of an 'investigation', suggesting a light-touch assessment. Although the ICRIR would have a mandate to review 'all the circumstances' surrounding a death or other serious conflict-related incident,⁶ the potential for immunity complicates this matter. When an alleged perpetrator applies for immunity, the immunity requests panel is not required to seek

¹ Northern Ireland Office, ['Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum'](#) (16 May 2022).

² We also believe that the measures proposed in the Bill will violate the Convention against Torture, for similar reasons: see [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), New York, 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85, in particular Articles 5 (jurisdiction over torture offences), 6-7 (obligations to prosecute or extradite), 12-13 (prompt and impartial investigations), 14 (right to a remedy) and 16 (application of these obligations to cruel, inhuman or degrading treatment or punishment). See also Committee against Torture, [General Comment No. 3, Implementation of Article 14 by States parties](#), U.N. Doc. CAT/C/GC/3 (2012), paras. 16-17. Further, see Moritz Burk, ['Art. 12: Ex Officio Investigations'](#), in Manfred Nowak, Moritz Burk and Giuliana Monina (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd edn, OUP, 2019).

³ Including a more detailed legal briefing that incorporates an analysis of European Court of Human Rights (ECtHR) jurisprudence on amnesties, a rebuttal of the narrative that service personnel have been subjected to 'vexatious claims', and a critique of the government's sustained reliance on the South African transitional justice process. See Rights & Security International, ['The Human Right to Effective Investigations and Northern Ireland 'Legacy' Cases: A Legal Explainer'](#) (16 September 2021). This legal analysis was drafted prior to the release of the Bill, and is based on the government's Command Paper: Northern Ireland Office, ['Addressing the Legacy of Northern Ireland's Past'](#), CP 498 (July 2021). As will be explained throughout this briefing, the legal analysis contained within our earlier commentary is still, for the most part, applicable. Rights & Security International, ['Briefing: Research Shows UK Government is Wrong about 'Vexatious Claims' from Northern Ireland Conflict'](#) (16 December 2021); Rights & Security International, ['Rights & Security International's Comparative Transitional Justice Briefing \(South Africa and Northern Ireland\)'](#) (23 September 2021).

⁴ See Application Number 5878/08, [Armani da Silva v. UK](#), Judgment, 30 March 2016, para. 233, addressing Article 2.

⁵ See Application Number 24014/15, [Tunc and Tunc v. Turkey](#), Judgment, 14 April 2015, para. 175, addressing Article 2. The Court recognises that the specific investigative steps will depend on the circumstances of the case, such that there is no universal 'checklist' of steps that must be taken. See also Application Number 41488/98, [Velikova v. Bulgaria](#), Judgment, 18 May 2000 para. 80, on the need for thoroughness, impartiality and care.

⁶ [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 13(3)(b).



information from anyone else.⁷ The European Court of Human Rights (ECtHR) has found investigations to be inadequate when investigating authorities have accepted the version of facts presented by the accused without hearing further witnesses.⁸ Since ICRIR is under an obligation to grant immunity if the individual's account meets the criteria discussed below,⁹ the process would therefore likely be inadequate under the ECHR.

4. Secondly, the Bill would create a review process that would be demand-based: for an investigation of a death, a request must usually be made to the ICRIR by close family members, the Secretary of State or an Attorney General.¹⁰
5. This reliance upon family members or government agents to instigate the process appears to ignore ECtHR jurisprudence requiring independent state action – acting of its own motion, rather than by a next of kin – to investigate potential violations of Articles 2 and 3.¹¹ Further, civil proceedings that are taken on the initiative of the next of kin, ‘and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State’s compliance with procedural obligations.’¹² The Bill’s over-reliance on family members or requests by specific officials to instigate reviews, coupled with the ‘conditional immunity’ scheme, could therefore also violate the ECHR.
6. Further, under the Bill, ICRIR reviews of cases involving ‘other harmful conduct’ – including torture – could only be instigated by a person who suffered a serious injury as a result of the conduct, or by the Secretary of State. There is no equivalent provision authorising a family member to instigate the review process if the victim is deceased.¹³ This means that many allegations of serious human rights violations may go uninvestigated, and that Article 3 will likely be violated.

Does the proposed regime for the retention of biometric material (clause 30) constitute a justified interference with Article 8 ECHR (the right to private and family life)?

7. First, we encourage the Committee to ask the government to disclose where and how biometric or other personal data concerning individuals suspected of historic offences in Northern Ireland has been shared and stored to date. Such disclosures would assist in understanding how the government proposes to utilise clause 30, and whether the Bill adequately addresses past or ongoing data collection or sharing practices.
8. Under Article 8, the retention of biometric data constitutes an interference with the right to respect for private life.¹⁴ Therefore, the data retention scheme in the Bill would need to meet the other requirements of Article 8 compliance that the Court has consistently set out:¹⁵ legality (including clear and specific legal authorisation), legitimate aim and necessity to achieving that aim.

⁷ [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 19(4).

⁸ Application Number 9049/06, [Özalp Ulusoy v. Turkey](#), Judgment, 4 June 2013, paras. 51-54.

⁹ [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 18(1).

¹⁰ In certain circumstances the coroner may be able to instigate a review, as may similar institutional actors in England and Wales, and Scotland: see [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 9. The definitions of ‘family member’ and ‘close family member’ are clarified in Schedule 3.

¹¹ Pertinently, the Court has stated regarding Article 2 that although ‘[w]hat form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances ... whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures...’: Application Number 24746/94, [Jordan v. the United Kingdom](#), Judgment, 4 May 2001, para. 105.

¹² Application Number 55721/07, [Al-Skeini and Others v. the United Kingdom](#), Judgment, 7 July 2011, para. 165.

¹³ [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 10.

¹⁴ See Application Numbers 30562/04 and 30566/04, [S and Marper v. the United Kingdom](#), Judgment, 4 December 2008, para. 86; Application Number 45325/15, [Gaughran v. the United Kingdom](#), Judgment, 13 February 2020.

¹⁵ Application Number 5029/71, [Klass and Others v. Germany](#), Judgment, 6 September 1978.



9. Regarding legality, we note the Court’s long line of judgments indicating that ‘a law which confers a discretion must indicate the scope of that discretion’.¹⁶ By contrast, the Bill would empower the Secretary of State to authorise – via regulations – the retention of biometric data for virtually any length of time, potentially indefinitely. Should the Secretary of State adopt regulations authorising the retention of this data, the Bill only mandates that the data be ‘destroyed by no later than the end of a reasonable period after the conclusion of the ICIR’s work’.¹⁷ We are concerned that this reference to ‘a reasonable period’ is so vague as to permit arbitrary or indefinite data retention, violating the ‘legality’ requirement.

10. We also believe that the government has not established that the retention of biometric data after the conclusion of ICIR’s mandate, in line with the ‘reasonable period’ referred to in clause 30, is necessary. The government argues that biometric material must be retained as this is essential for prosecutions;¹⁸ however, the Bill would foreclose civil criminal investigations, so there appears to be no clear justification for continuing retention.

Conditional immunity scheme

The UK is under a duty to investigate and punish serious crimes and grave breaches of fundamental human rights, such as unlawful killings and torture. Is the conditional immunity scheme compliant with this duty? If not, does it constitute a justified exception to this duty? For example, does the pursuit of truth and reconciliation provide a legal basis for the proposed conditional immunity scheme?

11. No, the conditional immunity scheme does not comply with international human rights law, as it would violate the obligation to effectively investigate potentially unlawful killings, torture, and cruel, inhuman or degrading treatment.

12. The government’s ECHR analysis articulates a speculative view that it may be lawful to create a ‘conditional immunity’ scheme, apparently based on a view that the ECtHR’s jurisprudence on this point is not yet clear or conclusive. At the same time, the government recognises that ‘[t]he ECtHR has articulated a general opposition to reconciliation-linked amnesties’.¹⁹ We note that for an action to be legal for the purposes of the ECHR (and, for that matter, the other international human rights treaties to which the UK is a party), what matters is the law as it currently stands – not the law as the government hopes it may someday be. In our view, the Court’s existing case-law on immunities precludes immunity from prosecution for alleged violations of Articles 2 and 3.

13. Although the government offers some *obiter dicta* to support its hopes of an evolution in the Court’s approach, the Court has previously stated in *Marguš* that offering immunity for violations of Articles 2 and 3 would ‘diminish the purpose’ of the protection afforded by the provisions, and ‘run contrary to the State’s obligations’ under the ECHR.²⁰ Additionally, the ECtHR has repeatedly held that sanctions cannot be disproportionately lenient, including when an individual is granted immunity.²¹ The ECtHR’s

¹⁶ Application Number 8691/79, *Malone v. the United Kingdom*, Judgment, 2 August 1984, para. 68, quoting Application Numbers 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, *Silber and Others v. the United Kingdom*, Judgment, 25 March 1983. See also *Leander v. Sweden*, Judgment, 26 March 1987, para. 51.

¹⁷ *Northern Ireland Troubles (Legacy and Reconciliation) Bill*, clause 30(2)(b).

¹⁸ Northern Ireland Office, ‘*Northern Ireland Troubles (Legacy and Reconciliation) Bill: European Convention on Human Rights Memorandum*’ (16 May 2022), para. 110.

¹⁹ Northern Ireland Office, ‘*Northern Ireland Troubles (Legacy and Reconciliation) Bill: European Convention on Human Rights Memorandum*’ (16 May 2022), para. 43.

²⁰ Application Number 4455/10, *Marguš v. Croatia*, Judgment, 27 May 2014, para. 127. The Court further explained that an amnesty for alleged violations of Articles 2 and 3 would additionally run contrary to the object and purpose of the Convention, as it would render the rights contained within Articles 2 and 3 as ‘[im]practical and [in]effective’; see also Application Number 18984/91, *McCann and Others v. the United Kingdom*, Judgment, 27 September 1995, para. 146.

²¹ Application Number 5878/08, *Armani da Silva v. UK*, Judgment, 30 March 2016, para. 285; Application Number 42942/02, *Duran v. Turkey*, Judgment, 8 April 2008, para. 69.



jurisprudence therefore indicates that the reconciliation-based immunity suggested in the Bill would be unlawful.

14. In addition to the pursuit of truth and reconciliation, the government's analysis refers to the idea that finding evidence to successfully mount a prosecution is becoming impossible due to the passage of time and other factors.²² Under the ECHR, just because prosecutions may be difficult does not mean that an amnesty is lawful.²³ Although practical circumstances are relevant to determining whether an investigation can be effective,²⁴ the obligation to effectively investigate nonetheless extends for as long as the authorities can 'reasonably be expected' to continue investigating.²⁵ Additionally, the ECtHR has held that a failure to implement effective investigations cannot subsequently be used as a justification for closing them off.²⁶ UK courts and the ECtHR have repeatedly found the UK to be in violation of the procedural obligations under Articles 2 and 3 in relation to conflict-related crimes in Northern Ireland,²⁷ and we have real doubts that the ECtHR would accept an immunity scheme as complying with Articles 2 or 3 where prosecutorial delays or difficulties are of the government's own making.

Cessation of proceedings

Do the prohibitions and restrictions which apply to police investigations, criminal proceedings, civil proceedings, and inquests (inquiries in Scotland) arising out of the Troubles comply with human rights law and, in particular, the requirements of Article 2, Article 3, and Article 6 ECHR?

Articles 2 and 3

15. Assessing compliance with the procedural obligations under Articles 2 and 3 requires a holistic approach.²⁸ For the reasons outlined above, we believe the government's analysis is incorrect, and the Bill would violate the ECHR.
16. The government's legal analysis correctly explains that the ECtHR prioritises the means of investigation rather than an outcome.²⁹ However, we disagree with the government's over-reliance on form, as this analysis omits one key norm: Articles 2 and 3 require that an investigation retains the possibility of a criminal prosecution.³⁰ Due to the low threshold for immunity under the Bill, it is likely that criminal prosecution will be practically unavailable in the majority of cases which will become subject to ICIR intervention.

²² See, for instance, Northern Ireland Office, ['Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum'](#) (16 May 2022), paras. 40, 50, 84, 145.

²³ Application Number 4871/16, [Hanan v. Germany](#), Judgment, 16 February 2021, para. 204; Application Number 38263/08, [Georgia v. Russia \(II\)](#), Merits, 21 January 2021, para. 326.

²⁴ Application Numbers 60441/13, 68206/13 and 68667/13, [Gürtekin and Others v. Cyprus](#), Decision, 11 March 2014, para. 21; Application Number 44301/13, [Harrison and Others v. the United Kingdom](#), Decision, 25 March 2014, para. 51.

²⁵ Application Number 71463/01, [Šilih v. Slovenia](#), Judgment, 9 April 2009, para. 157.

²⁶ Application Number 33810/07, [Association "21 December 1989" and Others v. Romania](#), Judgment, 24 May 2011, para. 144.

²⁷ For instance, see [Re Geraldine Finucane's Application for Judicial Review](#) [2019] UKSC 7; Council of Europe Committee of Ministers, ['Supervision of the execution of the European Court's judgments: H46-38 McKerr group v. the United Kingdom \(Application No. 28883/95\)'](#), CM/Del/Dec(2021)1398/H46-38, 11 March 2021; [Re Margaret McQuillan's Application for Judicial Review](#) [2021] UKSC 55, paras. 223-252.

²⁸ For a concise and holistic overview, see Rights & Security International, ['The Human Right to Effective Investigations and Northern Ireland 'Legacy' Cases: A Legal Explainer'](#) (16 September 2021).

²⁹ Northern Ireland Office, ['Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum'](#) (16 May 2022), para. 83.

³⁰ This appears to be the reason for the government stressing that prosecutions remain an option as immunity is only 'conditional': see Northern Ireland Office, ['Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum'](#) (16 May 2022), para. 63.

Article 6

17. Any limitation on the Article 6 right must be a necessary and proportionate restriction in pursuance of a legitimate aim. On the purported legitimate aim, the government relies on a misleading interpretation of the *Stubbings* judgment,³¹ using the case as authority for the legality of long limitation periods.³² In that case, however, there remained an underlying criminal action, which was essential to the Court's conclusion that the limitation period did not violate Article 6.³³ The right therefore was not infringed, as there was still some form of redress available to victims. Under this Bill, however, the foreclosure of all forms of criminal and civil justice, alongside the relaxed 'conditional immunity' scheme, will leave no option for redress. Upon further scrutiny, the *Stubbings* case does not support the government's claims.
18. The government also argues that the foreclosure of justice mechanisms would be a necessary and proportionate restriction of the Article 6 right.³⁴ However, this analysis ignores the role of the UK's prior failures in providing justice for victims and survivors (as outlined above).³⁵ In essence, the government is seeking to use its prior failures to create a legitimate aim for further restricting rights. It seems inevitable that the ECtHR will consider these repeated failures in its assessment; we submit that such an analysis would likely conclude that the foreclosure of justice mechanisms is unlawful.³⁶

³¹ Application Numbers 22083/93 and 22095/93, *Stubbings v. United Kingdom*, Judgment, 22 October 1996. The government have relied on a similar misleading analysis when explaining the legality of provisions in the Overseas Operations (Service Personnel and Veterans) Act 2021, which create limitation periods for civil claims arising out of the UK's overseas military conduct: see Ministry of Defence, '[Overseas Operations \(Service Personnel and Veterans\) Bill: European Convention on Human Rights](#)' (2020), para. 33; Rights & Security International, '[Rights and Security International's Briefing to the House of Lords: Overseas Operations \(Service Personnel and Veterans\) Bill 2019-2021](#)' (15 January 2021), paras. 8-9.

³² Northern Ireland Office, '[Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum](#)' (16 May 2022), para. 84.

³³ Application Numbers 22083/93 and 22095/93, *Stubbings v. United Kingdom*, Judgment, 22 October 1996, para. 52.

³⁴ Northern Ireland Office, '[Northern Ireland Troubles \(Legacy and Reconciliation\) Bill: European Convention on Human Rights Memorandum](#)' (16 May 2022), para. 88.

³⁵ The pertinent example is the investigation into the murder of defence lawyer, Pat Finucane, which has yet to be the subject of an Article 2-compliant investigation: see [Re Geraldine Finucane's Application for Judicial Review](#) [2019] UKSC 7; Council of Europe Committee of Ministers, '[Supervision of the execution of the European Court's judgments: H46-38 McKerr group v. the United Kingdom \(Application No. 28883/95\)](#)', CM/Del/Dec(2021)1398/H46-38, 11 March 2021, para. 4.

³⁶ The Court assesses the context of the complaint: see Application Number 8225/78, *Ashingdane v. the United Kingdom*, Judgment, 28 May 1985, para. 59.