Amnesties, Prosecution & the Public Interest

Investigations, Prosecutions, and Amnesties under Articles 2 & 3 of the European Convention on Human Rights

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Acknowledgements & Copyright

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About the Project

This report is produced as part of a project on *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* (AHRC AH/J013897 1). The project, funded by the Arts and Humanities Research Council is a partnership between Queen's University Belfast School of Law (Kieran McEvoy, Gordon Anthony, and Luke Moffett), the Transitional Justice Institute at Ulster University (Louise Mallinder), and Healing Through Remembering (HTR). HTR is an independent non-governmental organisation made up of a diverse membership with different political perspectives working on the common goal of how to deal with the legacy of the past in Northern Ireland.

The rationale for the project is to explore the inter-relationship between amnesties, amnesty like measures, historical prosecutions, and truth recovery in dealing with the past in Northern Ireland. The project has entailed an extensive programme of meetings and seminars, and the organisation of a number of conferences involving victims, former prisoners, former security force personnel, civil society activists, and policy makers, as well as all of the political parties involved in the negotiations on dealing with the past. In addition we have produced a range of blogs, briefings, and submissions on issues and themes requested by our interlocutors. The team has also been involved in an extensive programme of media engagement in both print and broadcast outlets, providing accurate information and well-founded ideas in an accessible fashion.

Readers will inevitably make up their own minds about what they consider to be the best way to 'deal with the past'. The purpose of this report and all of the other outputs produced from this project is to provide information on the international, historical and legal context on these issues in order to ensure that the public debate is as well informed as possible.

Executive Summary

This report is part of a series of final publications arising from the *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* project. It addresses the procedural legal obligations of states with regard to violations of the right to life (Article 2) and freedom from torture (Article 3) under the European Convention on Human Rights (ECHR), with particular reference to the permissibility of amnesties under the convention.

There is clear jurisprudence on the procedural obligations on states to investigate alleged violations of Article 2 and 3, developed in part from a series of cases on Northern Ireland. However, the European Court of Human Rights (the Court) has not yet been asked to rule directly on the status of an amnesty law under the Convention. It has, however, made some general comments on amnesties in a small number of cases. Drawing on this case law, together with the Court's judgments on the procedural obligations arising from Article 2 and 3, the report explores the circumstances in which amnesties could be permissible. The Court has not adopted a consistent position on amnesty relating to violations of Articles 2 and 3 of the ECHR. Instead, this report argues that it has developed a bifurcated approach, whereby amnesties that prevent prosecutions for violations that can also be considered international crimes are subject to greater scrutiny than amnesties that cover only Convention violations.

With respect to Article 2 violations, the European Court of Human Rights has established a framework with four key elements: independence, promptness, transparency, and effectiveness. The report looks at the relationship of effective investigations to prosecutions, and notes that an investigation may be considered compliant with Article 2, even where it does not result in the prosecution of those responsible for the violation, provided the requirements for effective investigations are fulfilled. It further notes that the Court has held that there is 'no absolute right' for victims 'to obtain a prosecution or conviction'. The report suggests that there is a strong presumption in the case law in favour of criminal justice responses to unlawful killings. However, it notes that the Court also expressed its view that an amnesty may be permissible for Article 2 violations in some exceptional and necessary instances.

Torture committed by state actors is both a human rights violation under Article 3 of the Convention that triggers state responsibility, and an international crime that triggers individual criminal responsibility, and this has implications for amnesties. The Court has emphasised the importance of effective criminal justice remedies for torture, and has indicated that in relation to Article 3, amnesties are generally not permissible. This contrasts strongly with the more flexible approach towards amnesties for Article 2 violations. In a series of recent judgments it has expressed its views on amnesties for 'massive' violations of human rights and war crimes, which where they are considered international crimes also prompted the court to call for greater scrutiny of amnesty laws.

In its judgments, the Court has noted a growing tendency for international, regional, and national Courts to overturn general amnesties enacted by Governments. However, it has left open the possibility that amnesties even for the most serious offences could be acceptable in some circumstances, such as a reconciliation process

and/or a form of compensation to the victims'. Drawing on the case law, this report suggests that the Court may take the following issues into account if asked to consider the legality of amnesties in the future:

- Whether the amnesty prevented investigations
- Whether the amnesty is enacted as part of a reconciliation
- Whether the amnesty was enacted many years ago
- Whether the amnesty measures are necessary and proportionate to the objectives being pursued
- Whether the amnesty is granted for state agents - the Court will look more restrictively on amnesties for torture or unlawful killings by state agents
- Whether the interests of individual members of the public are respected

Introduction

This report is part of a series of final publications arising from the *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* project. The other reports in this series are:

- The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland
- Investigations, Prosecutions, and the Public Interest

The focus and content of each report is designed to address some of issues and questions that were raised by the people we spoke to during the project.[1]

In this report, we address the procedural legal obligations of states with regard to violations of the right to life and freedom from torture under the European Convention on Human Rights (ECHR). We look in particular at the permissibility of amnesties under the convention - because the nature and legality of amnesties has been widely debated in Northern Ireland since the project began in 2012. For example, the public call for a 'legislative stay on prosecutions' for crimes related to the Troubles made by Northern Ireland's Attorney General, John Larkin, in November 2013 prompted widespread public controversy.[2] Similarly, the 2014 Downey case[3] created a political storm with claims that a secret amnesty had been granted as part of the 'On-the-Run' administrative scheme.[4] In this scheme, the files of former Republican paramilitaries claimed by Sinn Féin to be 'on-the-run' from the authorities were reviewed by the police and prosecution service. Where it was deemed appropriate, the individuals were then sent 'letters of assurance' informing them that they were not wanted for questioning or prosecution in Northern Ireland or the rest of the UK, but that they could face arrest in the future if new evidence came to light. In July 2014, the Hallett Review determined that this scheme did not constitute an amnesty.[5]

The European Convention on Human Rights imposes a number of obligations on the United Kingdom in relation to addressing the legacy of Troubles-related offences in Northern Ireland, particularly in respect of violations of the right to life (Article 2) and the freedom from torture and inhuman and degrading treatment or punishment (Article 3). These obligations will have to be met in tackling the shortfalls of the current mechanisms for dealing with the past as well as in establishing any new investigative processes. Given that discussions on amnesty or other forms of

[1] All project reports are available on the project website.
[2] See e.g., Vincent Kearney, 'NI attorney general John Larkin calls for an end to Troubles prosecutions' *BBC News* (20 November 2013).
[3] R v John Anthony Downey, Central Criminal Court (25 February 2014) available at http://www.judiciary.gov.uk/judgments/r-v-downey/
[4] E.g., 'Robinson: I will quit unless there is an inquiry into IRA "amnesty" letters' *The Newsletter* (26 February 2014); 'N Ireland row defused as PM announces amnesty probe' *The Times* (28 February 2014).
[5] Right Honourable Dame Heather Hallett OBE, The Report of the Hallett Review: An Independent Review into the On the Runs Administrative Scheme (July 2014) available at http://www.hallettreview.org/filestore/uploads/2014/07/HallettReviewPrintReady.pdf, 7.

leniency may form part of any future discussions on dealing with the past, this report aims to analyse the status of amnesty laws under the ECHR.

The ECHR is overseen and enforced by its Court (and formerly, until its abolition in 1998, by the European Commission of Human Rights).[6] These institutions have established a clear jurisprudence on the procedural obligations on states to investigate alleged violations of Article 2 and 3, provisions that together the Court has described as enshrining 'the basic values of the democratic societies making up the Council of Europe'.[7] This jurisprudence has developed in part from a series of cases on Northern Ireland.[8]

By contrast, the European Court of Human Rights has not yet been asked to rule directly on the status of an amnesty law under the Convention, and indeed, discussions of amnesties have only arisen in a comparatively small number of cases that were not related to Northern Ireland. However, in some of these cases, the Court chose to make general comments on amnesties. As pronouncements of the court, these statements are significant; but Harris et al. argue that with respect to the status of a general comment, 'inevitably the level of generality at which it is expressed or its centrality to the decision on the material facts of the case will affect the weight and influence of any pronouncement.'[9]

This report will analyse the procedural obligations to investigate alleged violations of Articles 2 and 3 of the ECHR. It will use this framework together with the extant case law on amnesties to explore the circumstances in which amnesties could be permissible under the existing framework. This analysis will argue that the Court has developed a bifurcated approach, whereby amnesties that prevent prosecutions for violations that can also be considered international crimes are subject to greater scrutiny than amnesties that cover only Convention violations. On the basis of the case law, it will further argue that the European Convention on Human Rights requires state parties to investigate violations of Articles 2 and 3, but that some discretion remains for states to use amnesties or other leniency measures, and this discretion is wider where the human rights violation is not also an international crime. As the first publication to incorporate the Court's recent pronouncements on amnesties for international crimes and 'massive' human rights violations, this report

[6] The commission was abolished by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, entry into force 1 November 1998.
[7] *McCann and Others v UK* App no 18984/91 (ECtHR, 27 September 1995) para. 147.
[8] *Hugh Jordan v UK* App no 24746/94 (ECtHR 4 May 2001); *Kelly and others v UK* App no. 30054/96 (ECtHR 4 May 2001); *McKerr v UK* App no. 28883/95 (ECtHR 4 May 2001); and *Shanaghan v UK* App no. 37715/97 (ECtHR 4 May 2001). See also *McShane v UK* App no 43290/98 (ECtHR 28 May 2002); *Finucane v UK* App no 29178/95 (ECtHR 1 July 2003); *Brecknell v UK* App no 32457/04 (ECtHR 27 November 2007); *O'Dowd v UK* App no 34622/04 (ECtHR 27 February 2008); *McGrath v UK*, App no 34651/04 (ECtHR 27 February 2008); *Reavey v UK* App no 34640/04 (ECtHR 27 February 2008); *McCaughey and others v UK* App no 43098/09 (ECtHR 26 July 2013); *Collette and Michael Hemsworth v UK* App no 58559/09 (ECtHR, 16 October 2013. There is also a body of Article 2 case law from the Courts in Northern Ireland and the United Kingdom, but this is beyond the scope of this report.
[9] D.J. Harris, et al., *Harris, O'Boyle and Warbrick Law of the European Convention on Human* Rights (3rd ed., Oxford University Press, Oxford, 2014) 20.

will be useful in Northern Ireland but will also have broader resonance for other societies grappling with a legacy of past crimes.

What Are Amnesty Laws?

Throughout Northern Ireland's transition, the term 'amnesty' has been used by political parties, community organisations, policymakers, and other actors to describe a wide range of measures and processes relating to the past. The views expressed vary from those implacably opposed to any form of amnesty or non-prosecution [10] to those who see some form of leniency from punishment as an essential requirement in order to achieve goals such as disarmament or truth recovery.[11] Where the term 'amnesty' has been used in Northern Ireland, arguably it has on occasion been conflated with different forms of immunity such as sentence reductions and limited immunity. Describing a process as an amnesty can, understandably, provoke heated debate, and indeed it may be used tactically by actors wishing to denounce particular proposals.

However, this conflation may also be the result of the absence of an accepted international definition of amnesty in relation to legislation. This absence arises for two reasons. First, the term amnesty may be defined differently by different nations.[12] Second, because amnesty laws have traditionally fallen within the domain of state sovereignty, states have not sought to adopt a consistent international definition. As a result of these conditions, the scope and legal effects of amnesty laws around the world can look very different, ranging from amnesty laws that aim to provide a form of reparations to persons arbitrarily detained by a repressive state, to self-amnesty laws enacted by dictatorial rulers or war criminals eager to shield their supporters from liability for serious human rights violations.

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[10] E.g. referring to the Early Release Scheme, 'We had one dose of amnesty in this country that sickened everyone to the pits of their stomachs. We saw prisoners who were given an amnesty walking out of prison in the most triumphalist way. Quite frankly, I do not believe that the community in Northern Ireland, no matter from which side of the spectrum, is up for another dose of that', Lord Morrow MLA, Democratic Unionist Party, *Official Report (Hansard)*, 10 March 2008. During the same debate, another Democratic Unionist Party representative declared 'it is despicable suggestion ... that there should be an amnesty for those who come forward to speak about the role that they played in the Troubles', David Simpson MLA, Democratic Unionist Party, *Official Report (Hansard)*, 10 March 2008.

[11] See e.g. former SDLP leader, Mark Durkan in response to the amnesty debates during the CGP consultations: 'In relation to whether we should have an amnesty or not, I would question what would be the purposes of such a proposed amnesty? If it was to give victims what they need a better chance of finding out the truth about what happened to them and their loved ones, and would remove any excuse or any inhibition from those who possess the truth from coming forward and sharing that to the comfort of victims then I would agree to that...' SDLP, 'Durkan - Legacy Proposals Must Be Victim-centred' (8 January 2008) available online at http://www.sdlp.ie/en/index.php/newsroom_media/newsArticle/durkan_legacy_proposals_must_be_victim-centred. The policy position of the SDLP on 'Victims and the Past' is online at http://www.sdlp.ie/index.php/the_issues/victims_and_the_past/. See also, Ulster Defence Association 'Brigadier', Jackie MacDonald, who has stated that 'Only a total amnesty will bring answers. You can't cherry pick an amnesty. It has to be all-inclusive', Brian Rowan, 'Only a total amnesty will bring answers: UDA boss', *Belfast Telegraph* (21 July 2010).

[12] See René Lévy, 'Pardons and Amnesties as Policy Instruments in Contemporary France' (2007) 36 Crime & Just 551, 551.

Strictly speaking, amnesties can be understood as legal tools deployed by governments to remove liability for criminal prosecutions, and/or civil suits for specific offences, or against specific groups of individuals.[13] As amnesty generally applies pre-conviction, it can be distinguished from pardons or sentence reductions that remit all or part of a sentence post-conviction.[14]

[13] Louise Mallinder and Kieran McEvoy, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies' (2011) 6(1) *Contemporary Social Science* 107, 115.
[14] See ECHR distinction between amnesty and pardon in *Lexa v Slovakia* App no. 54334/00 (ECtHR, 23 September 2008). Note that there are some hybrid approaches, where an amnesty law benefits persons who have been convicted as well as those who have not been subject to criminal investigations or prosecutions.

I. Amnesties and Article 2 of the European Convention on Human Rights

The Right to Life under Article 2 of the ECHR

Article 2 of the European Convention on Human Rights provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[15]

In the European Court's first judgment on Article 2 in 1994, it described this right as 'one of the most fundamental provisions in the Convention'.[16] Article 15 of the ECHR permits states to derogate - that is, to temporarily adjust or withdraw from enforcing some aspects of the convention in times of public emergency. However, the importance of the right is life is highlighted by the fact that no derogation from this provision is permitted, 'except in respect of deaths resulting from lawful acts of war'.[17] The scope of the right to life covered by Article 2 extends beyond violent deaths potentially to cover all deaths that are not from natural causes.[18] However, violations of the right to life that are the result of extrajudicial, summary, or arbitrary executions have a particular status under international law as they are recognised as violations of *jus cogens* norms.[19] This means that states have a binding obligation to refrain from committing such violations, which applies in all circumstances and is independent of treaty obligations.[20] As we will see below, this has meant that the ECHR has imposed more stringent procedural obligations with respect to such unlawful killings than, for example, deaths resulting from the

[15] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 2.
[16] *McCann and Others v UK* (n 7), para. 147.
[17] ECHR, art 15.
[18] Harris (n 9) 214-5.
[19] See e.g. UN Human Rights Committee, General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) para. 8.
[20] See e.g. Article 53 of the 1969 Vienna Convention on the Law of Treaties defines *jus cogens* or peremptory norms of international law as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

legitimate use of force by state agents including lawful acts of war, or accidental deaths.

The right to life enshrined in the convention creates multiple obligations for states. Firstly, although the right to life is non-derogable, Article 2 sets out and regulates when states may be permitted to use force that may result in the deprivation of life. In addition to a now redundant reference to the death penalty in paragraph 1, paragraph 2 lists circumstances in which states are permitted to use force, even if the loss of life may result as an unintended outcome.[21] However, it specifies that in all these instances, the force used must be no more than 'absolutely necessary' to achieve the purposes listed in the Article. This means that the use of force must be 'strictly proportionate to the achievement of the permitted aims'.[22]

Secondly, Article 2 imposes positive obligations on states to protect the lives of persons within their jurisdictions. This requires states to establish criminal justice mechanisms to prevent, suppress, and sanction violations of Article 2. In certain circumstances, it may also require states 'to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[23] However, the Court was careful to note that 'such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.[24] It further added that this obligation does not apply in all instances where life is threatened. Instead, it would only find that a state has violated its positive obligations to protect life where it can

> be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[25]

Therefore, Article 2 creates an obligation on states to do what is reasonable to protect threats to life from private individuals. Thirdly, Article 2 creates a duty to investigate violations of the right to life.

Duty to Investigate Violations of Article 2

The duty to investigate is not explicit in the European Convention on Human Rights; rather it was read into the convention by the Court in the *McCann* case. This was its first judgment on the use of lethal force by state agents. In this judgment, the Court held

> that 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 this provision (art 2) read in conjunction with the State's general duty under Article 1

[21] *McKerr v UK* (n 8).
[22] *McKerr v UK* (n 8).
[23] *Osman v UK* [GC] App no 23452/94 (ECtHR, 28 October 1998), para. 115.
[24] *Osman v UK* [GC] (n 23), para. 116.
[25] E.g., *Osman v UK* [GC] (n 23), para. 116.

> (art.2+1) of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the [the] Convention', requires by implication that *there should be some form of effective official investigation when individuals have been killed as result of the use of force by, inter alios, agents of the State*.[26]

It further argued that it was not sufficient for such investigations to consider only the actions of those individuals directly responsible for the violence in the relevant incident. Instead, an effective investigation must also consider 'all the surrounding circumstances including such matters as the planning and control of the actions under examination'.[27] This position has been reaffirmed in later judgments, for example in *Avsar v Turkey*, which concerned allegations of state collusion in a killing carried out by non-state actors. Here, the Court noted that although the non-state actors responsible had been investigated and prosecuted, complaints were also made alleging that a member of the security forces had instructed the non-state actors to carry out the killing. This required a wider examination

> to clarify to what extent the incident was premeditated and whether, as alleged, it formed part of the unlawful activities carried out with the connivance and acquiescence of the authorities at that time in the south-east of Turkey.[28]

Returning to Northern Ireland, in *McShane v UK*, the Court restated its position in the *McCann* case before noting that states have some discretion in how they fulfil their obligation to investigate the use of lethal force by state agents:

> The essential purpose of such 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. What form of investigation will achieve those purposes may vary in different circumstances.[29]

Despite acknowledging this discretion, the above language makes clear that the Court views properly conducted investigations as being capable of delivering accountability for state agents or institutions responsible for violations of the right to life.

The European Court of Human Rights has set out requirements for Article 2 compliant investigations relating to complaints against state actors. This framework was initially articulated in the *McKerr* group of cases, which have provided the impetus for much of the dealing with the past infrastructure in Northern Ireland, and then developed through subsequent case law. The framework contains four key elements: independence, promptness, transparency, and effectiveness.

Firstly, the Court has argued that to ensure effectiveness, 'the persons responsible for and carrying out' the investigation should 'be *independent* from those implicated

[26] *McCann and Others v UK* (n 7), para. 161, (emphasis added).
[27] *McCann and Others v UK* (n 7), para. 150.
[28] *Avsar v Turkey* App no 25657/94 (ECtHR, 10 July 2001), para.406.
[29] *McShane v UK* (n 8) para.94. See also *McKerr v UK* (n 8), para.111.

in the events'. [30] This requirement is particularly important with respect to investigations of the actions of state agents.

Secondly, it argued that investigations must be *prompt*.[31] The Court acknowledged that 'there may be obstacles or difficulties which prevent progress in an investigation in a particular situation'. It continued, however, that

> a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[32]

In *Finucane v UK*, despite finding that the UK had violated Article 2 by failing to provide a prompt and effective investigation, the Court noted that the passage of time can create substantial challenges for investigating historic cases:

> It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the wider public by ensuring transparency and accountability. The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched.[33]

It has nonetheless found violations of Article 2 in the recent *McCaughey v UK*[34] and *Hemsworth v UK*[35] judgments due to delays in the investigative process.

Thirdly, the Court found that *transparency* is necessary, to 'secure accountability in practice as well as in theory' and that this should include allowing the victims' next-of-kin to be involved in the procedure 'to the extent necessary to safeguard his or her legitimate interests'.[36]

Finally, drawing on its position noted above that investigations are necessary to hold state agents and institutions accountable, the Court has held that

> The investigation must also be *effective* in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances … and to the identification and

[30] *McKerr v UK* (n 8), para.112 (emphasis added).
[31] *McKerr v UK* (n 8), para.114.
[32] *McKerr v UK* (n 8), para.114.
[33] *Finucane v UK*, App. No. 29178/95 (1 July 2003) para. 89. See also *Brecknell v* UK (n 8), paras. 69-71.
[34] *McCaughey and others v UK* (n 8), para. 140 (finding that 'There has … been a violation of Article 2 under its procedural aspect by reason of excessive investigative delay').
[35] *Collette and Michael Hemsworth v UK* (n 8).
[36] *McKerr v UK* (n 8), para. 115.

> punishment of those responsible. *This is not an obligation of result, but of means*.[37]

This final element suggests that although the Court has imposed quite strict requirements on how an investigation should be conducted (its 'means'), the standards with respect to an investigation's 'results' are more open. In other words, where an investigation does not result in a prosecution, it would not necessarily violate the state's obligation to investigate provided that the investigation was conducted in an effective manner. This relationship of effective investigations to prosecutions is explored in more detail in the next section. With respect to investigations, the Court has provided details of the types of activities that should form part of an effective investigation:

> The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ...[38]

It continued that 'any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard'.[39] This formulation does specify how broadly responsibility should be understood. It seems apparent that it should apply to the direct actors who engaged in the violence, but the requirements outlined above that effective investigations should consider 'all the surrounding circumstances including such matters as the planning and control of the actions under examination', suggests that the investigation should also be directed at those who planned and gave orders for the violence.[40]

As human rights law regulates the actions of states, and the role of human rights courts is to determine state responsibility rather than individual criminal responsibility, it is unsurprising that much of the Article 2 case law focuses on violations of the right to life committed by state agents. However, the Court has on a few occasions considered the obligations incumbent on states from violations of the right to life committed by private persons. For example, in *Ergi v Turkey*, relating to an unlawful killing by state agents, the Court made a general comment on the obligation to investigate violations of Article 2, stating that it 'is not confined to cases where it has been established that the killing was caused by an agent of the State.'[41] This suggests that the state must not only investigate violations of the right to life where state agents are implicated, but that it must also investigate cases where actions of private persons, including non-state armed groups, resulted in death in suspicious circumstances. The Court stated this position more explicitly in the recent *Aliyeva and Aliyev v Azerbaijan* judgment, concerning a fatal stabbing of a man in the Ukraine allegedly by an Azerbaijani major general, in which it stated

> The obligation to protect the right to life under Article 2 of the Convention … requires by implication that there should be some form of

[37] *McKerr v UK* (n 8), para. 113 (emphasis added).
[38] *McKerr v UK* (n 8), para. 113.
[39] *McKerr v UK* (n 8), para. 113.
[40] *McCann and Others v UK* (n 7), para. 150.
[41] *Ergi v Turkey* App no 66/1997/850/1057 (ECtHR, 28 July 1998), para. 82.

> effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals.[42]

In an admissibility decision in *Menson v UK*, relating to the killing of a black man by a racist group in London, the Court noted even where there was no allegation that the respondent state was responsible for the death or even that the authorities knew or ought to have known about a threat to life, the duty to investigate under Article 2

> requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment.[43]

Once the Court had established the applicability of this duty to investigate violations of the right to life resulting from the actions of private persons, it referred to its case law described above that sets out the framework for effective investigations, before noting that[44]

> Although there was no State involvement in the death of Michael Menson, the Court considers that the above-mentioned basic procedural requirements *apply with equal force to the conduct of an investigation into a life-threatening attack on an individual regardless of whether or not death results*.[45]

In the recent judgment in *Aliyeva and Aliyev v Azerbaijan* the Court maintained this position, stating that 'a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[46] As with the cases relating to state actors, the duty to investigate violations of the right to life by private persons is an obligation of means, not results. This means that an investigation may be considered compliant with Article 2, even where it does not result in the prosecution of those responsible for the violation, provided the requirements for effective investigations noted above are fulfilled.

Prosecutions for Article 2 Violations?

As noted above, the procedural obligations triggered by Article 2 may depend on whether a death is the result of an unlawful killing.[47] Where unlawful killings been considered in the Article 2 case law, the European Court of Human Rights has expressed a requirement that an 'efficient and independent' criminal justice system is put in place that can investigate the killings and punish those responsible.[48] Its

[42] *Aliyeva and Aliyev v Azerbaijan* App no 35587/08 (ECtHR, 31 July 2014), para. 69.
[43] *Alex Menson and Others v UK* App no 47916/99 (ECtHR, 6 May 2003).
[44] *Menson and Others v UK* (n 44).
[45] *Menson and Others v UK* (n 44) (emphasis added).
[46] *Aliyeva and Aliyev v Azerbaijan* (n 42), para.71.
[47] Harris (n 9) 214-5.
[48] See e.g., *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009), para. 150.

rationale is partly that an effectively functioning criminal justice system can deter offenders and hence comply with a state's obligation to protect the rights enshrined in the convention. For example, in *Opuz v Turkey* the Court argued that such a system is necessary to 'secure the effective implementation of 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'.[49]

Nonetheless, where the European Court of Human Rights has been confronted with cases where criminal behaviour has resulted in Article 2 violations, the Court has not pronounced an obligation on states to prosecute.[50] For example, in the 1999 *Kaya v Turkey* case, relating to an alleged unlawful killing by security forces and the failure of the Turkish authorities to carry out an effective investigation, the Court found that the nature of violations of the right to life, when read in conjunction with the victim's right to a remedy under Article 13 of the ECHR,

> must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, *in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure*.[51]

As noted above, the phrase 'capable of leading to' relates to an obligation of means, not results. On this basis, the Court has repeatedly found that even for unlawful killings, Article 2's procedural obligations will not necessarily be violated by the absence of criminal prosecutions. For example, in *Avsar v Turkey*, the Court stated this interpretation and continued: 'the fact therefore that one suspect, amongst

[49] See e.g., *Opuz v Turkey* (n 48), para. 150. In this decision, the Court further stated that 'once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim', see *Opuz v Turkey* (n 48), para. 153.

[50] Unlike the Inter-American Court of Human Rights, other than declaring that rights have been violated and in some cases awarding compensation, the European Court of Human Rights generally does not order states parties to take particular measures to remedy violations, such as opening new investigations, conducting criminal prosecutions or repealing domestic legislation. However, where the Court is confronted by repetitive cases relating to a particular issue emanating from one member state, this may be indicative of a 'systemic or structural dysfunction in the country concerned'. To address such situations, the Court has developed a 'pilot judgment procedure'. Where this procedure is applied, the Court will in its judgment give the Government clear indications of the type of remedial measures needed to resolve the underlying root causes of the judgment. This could include making legislative changes to remove obstacles. See European Court of Human Rights, *Factsheet: Pilot Judgments* (September 2014), available at http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (accessed 4 November 2014). See also Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231-1260.

[51] *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998), para. 107.

several, has succeeded in escaping the process of criminal justice is not conclusive of a failing on the part of the authorities'.[52] In addition, in *McCann v UK*, the Court found it was not necessary for it 'to decide what form … an investigation should take and under what conditions it should be conducted, since public inquest proceedings' took place.[53] The obligation therefore appears to describe the quality of the investigation, rather than imposing a duty on the state to prosecute and punish those responsible. This interpretation has been articulated by Seibert-Fohr, who argues that

> Even in cases where the Court requests an investigation capable of leading to punishment, it is cautious not to pronounce a duty to prosecute, let alone an individual right to prosecution. The wording suggests that rather than punishment, it is an investigation which seeks to establish the guilt of those implicated that is owed to the individual victim.[54]

In other judgments, the Court has recognised the role that can be played by alternative sanctions even in response to violations of Article 2, particularly for actions that result in a loss of life but may not necessarily constitute a criminal offence under domestic law. For example, in the *Öneryildiz v Turkey* case, which relates to the death of 39 persons following an explosion caused by decomposing rubbish, the Court contended that

> Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, *an adequate response – judicial or otherwise* – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.[55]

It continued by distinguishing between unintentional and intentional harms, arguing that

> if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an 'effective judicial system' *does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims*.[56]

By contrast, where it is established that the state's responsibility goes beyond 'an error of judgment or carelessness', and that instead, state officials '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', then '*the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of*

[52] *Avsar v Turkey* App no 25657/94 (ECtHR, 10 July 2001), para. 404.
[53] *McCann v UK* (n 7) para. 162.
[54] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press, Oxford 2009) 125.
[55] *Oneryildiz v Turkey* [GC] App no. 48939/99, (ECtHR, 30 November 2004), para.91 (emphasis added).
[56] Ibid para. 92 (emphasis added).

Article 2'.[57] However, the judgment continued by emphasising that victims have no right to demand the prosecution of those responsible for harming them or their loved ones:

> 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.[58]

This position was restated in *Brecknell and others v UK,* which related to allegations of police collusion in an attack by loyalist paramilitaries on the persons in Donnelly's Bar in Silverbridge, Northern Ireland. Here, the Court emphasised that there is 'no absolute right' for victims 'to obtain a prosecution or conviction and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such'.[59] Arguably, this is recognition by the Court that creating such a right would impose unrealistic demands on national criminal justice systems as circumstances such as a lack of evidence may prevent fair trials being held.

This section suggests that there is a strong presumption in case law in favour of criminal justice responses to unlawful killings. However, although the Court has noted that failure to prosecute intentional killings by state forces *may* result in a violation of Article 2, it has refrained from articulating an obligation to prosecute intentional violations of the right to life. Furthermore, as the following section explores, the Court also expressed its view that an amnesty may be permissible for Article 2 violations in some instances.

Article 2 Case Law on Amnesties

Among the few cases in which amnesties for violations of Article 2 have been considered is the European Commission on Human Rights' admissibility decision in *Dujardin and others v France*. The case was taken by the families of some unarmed *gendarmes* (military personnel tasked with policing duties) who were killed in a politically-motivated attack by rebels on the island of New Caledonia, a French overseas territory. The rebels were subsequently granted an amnesty by the French government. The families were seeking a declaration that the amnesty was incompatible with their rights under Article 2 of the Convention. In declaring that the application was inadmissible the Commission stated:

> as with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention *unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes*…

[57] Ibid para. 93 (emphasis added).
[58] Ibid para. 96. Similar language was used in *Jelic v Croatia* App no 57856/11 (ECtHR, 12 June 2014): 'While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national Courts should not under any circumstances be prepared to allow offences concerning violent deaths to go unpunished'.
[59] *Brecknell v UK* (n 8), para. 66.

> The Commission considers … that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands.
>
> It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.[60]

The decision in the *Dujardin* case was issued in 1991, sometime before the Court developed its jurisprudence on the procedural obligations to investigate under Article 2. However, the reasoning of the Commission in *Dujardin* has been followed by the European Court of Human Rights in its 2012 *Tarbuk v Croatia* judgment.

In this case the applicant, Dušan Tarbuk, was arrested and placed in pre-trial detention in 1995 on suspicion of having committed espionage during the 1991-5 conflict in Croatia. With the passing of the General Amnesty Act 1996, the criminal proceedings against him were discontinued. Following his release, he launched civil proceedings for damages in relation to his detention. During the civil case, the amnesty was amended to prevent any compensation claims for detention in cases where the amnesty had been applied. In its judgment, the Court was not asked to rule on the legality of the amnesty itself. However, it chose to reiterate the position adopted by the Commission in the *Dujardin* case, stating:

> even in such fundamental areas of the protection of human rights as the right to life, *the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.*[61]

Although the Court has not yet been asked to address directly whether an amnesty for Article 2 violations is permissible under the Convention, the above rulings suggest that the Court may grant states broad discretion in this area. Nonetheless, the judgment does suggest some criteria that amnesties should meet in order to be permissible:

- The amnesty should be *exceptional* in character, meaning that it is designed to address particular events or a particular group of offenders and does not have wider application or is not reflective of a general practice of impunity within the state, which may undermine the rule of law or public confidence in legal institutions.
- The amnesty should be *necessary*, meaning that the state is enacting the amnesty in order to fulfil its legitimate aims. The example of the French

[60] App. No. 16734/90; 72 D.R. 236 (emphasis added).
[61] *Tarbuk v Croatia* App no. 31360/10 (ECtHR, 11 December 2012), para. 50 (emphasis added).

amnesty for New Caledonia suggests that amnesties enacted to contribute to the peaceful resolution of armed conflicts may fulfil this criterion.

- The *interests of individual members of the public are respected*. This can relate to their interests in having their right to life protected by the end of conflict or the application of criminal law. It may also relate to the interests of victims and society to know the truth about the violations.
- The amnesty must not impede the fulfilment of the state's duty to conduct effective investigations into Article 2 violations as outlined above. However, where amnesty coexists with or is used to support investigative processes, this may be compatible with Article 2, provided that the investigative processes are themselves compliant with the procedural obligations under Article 2.

However, as will be explored below, where widespread violations of Article 2 are committed as part of state repression or where, due to the context in which they were perpetrated, they may be considered war crimes, the Court may take a more restrictive approach.

II. Amnesties and Torture under the European Convention on Human Rights

The Prohibition of Torture and Inhuman or Degrading Treatment

Article 3 of the ECHR provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[62] Unlike Article 2 on the right to life, which identifies instances in which it may be legally permissible for the state to use force leading to the taking of life, Article 3 has no qualifications. This means that torture or inhuman or degrading treatment is never permitted for any asserted public interests, including fighting terrorism or to save someone's life. In keeping with the absolute nature of the prohibition on torture, Article 15 states that Article 3 is non-derogable, meaning that it cannot be suspended or limited in times of public emergency.[63] The ban on torture applies 'irrespective of the victim's conduct'.[64]

In the European Court of Human Rights' early case law in *Ireland v UK*, the Court distinguished between torture and inhuman and degrading treatment and punishment by noting that the term 'torture' attaches 'a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering', whereas inhuman treatment could be an unintended consequence of particular actions.[65] In addition, it held that 'this distinction derives principally from a difference in the intensity of the suffering inflicted.'[66] The Court further noted that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.[67] It continued that whether an act reached the necessary threshold of 'intensity of suffering inflicted' would depend on 'all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim'.[68] More recently, the 1999 judgment in the *Selmouni* case narrowed the distinction when it stated:

> the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[69]

Although the facts of the cases differ, the *Selmouni* judgment suggests that acts similar to those that had been characterised as inhuman treatment in the *Ireland v*

[62] *Tomasi v France* App no 12850/87 (ECtHR, 27 August 1992), para. 115.
[63] ECHR Article 15. See also *Selmouni v France* [GC] App no 25803/94 (ECtHR, 28 July 1999), para. 95.
[64] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), paras. 163 and 167.
[65] Ibid para. 167 (emphasis added).
[66] Ibid para. 167.
[67] Ibid para. 162.
[68] Ibid para. 162.
[69] *Selmouni v France* [GC] (n 63), para. 101.

UK may be deemed torture in the future due to the Court's progressive interpretation of the Convention.[70]

In a similar manner to the case law on Article 2, the European Court of Human Rights has found that Article 3 creates a number of obligations for states. States can be found to have breached their convention obligations where state agents have perpetrated acts of torture or ill treatment. In contrast, states are not directly liable for acts of torture committed by private individuals.[71] However, they may be liable for failing to prevent torture by state agents or private individuals[72] or where their legal framework does not provide adequate protection against torture or ill treatment. For example, in *Mahmut Kaya v Turkey*, relating to a complaint that the applicant's brother was kidnapped, tortured, and killed by or with the connivance of State agents and that there was no effective investigation, redress, or remedy. In its decision the Court noted 'that it has not found that any State agent was directly responsible' for the death.[73] It nonetheless proceeded to find that the suffering inflicted on the victim before his death constituted ill-treatment and that state is responsible for failing 'to protect his life through specific measures and through the general failings in the criminal law framework'.[74] McGlynn argues that

> The fact that the Court explicitly stated that a State agent was not responsible for the acts in question, but continued to consider whether the treatment amounted to torture, is a clear implication that for a finding of torture, there does not have to be direct acts by a State agent.[75]

Similarly, in *D v UK,* relating to person who may face ill treatment following deportation, the Court held that it could consider whether there was a risk of violations of Article 3 even where the risk of harm to the individual 'stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities' in the relevant State.[76] In addition, in *MC v Bulgaria*, relating to sexual violence, the Court noted that 'in a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation. Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents'.[77]

As with its comments on the obligations on states to prevent violations of Article 2, the Court has been cautious to avoid placing an unduly onerous or disproportionate burden on states with respect to taking preventive measures in relation to torture and ill-treatment.[78] In addition, as will be explored below, Article 3 also creates an obligation on states to investigate allegations of torture or inhuman and degrading treatment or punishment.

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[70] Harris et al (n 41), 240.
[71] *Beganovic v Croatia* App no 46423/06 (ECtHR, 26 June 2009), para. 69.
[72] See e.g., *Mahmut Kaya v Turkey* App no 22535/93 (ECtHR, 28 March 2000), para. 115; *A v UK* App no 25599/94 (ECtHR, 23 September 1998), para. 22.
[73] *Mahmut Kaya v Turkey* (n 72), para. 114.
[74] Ibid para. 116.
[75] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) *International and Comparative Law Quarterly* 565, 589.
[76] *D v United Kingdom* App no 30240/96 (ECtHR, 2 May 1997), para. 49.
[77] *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), para. 151.
[78] *Đorđević v Croatia* App no 41526/10 (ECtHR, 24 July 2012), para. 139.

In determining the nature of torture and obligations arising on states in relation to this violation, the European Court of Human Rights has been mindful that the prohibition on torture is a *jus cogens* norm, which states cannot derogate from under any circumstances, and that torture is also an international crime that triggers individual criminal responsibility. Torture has been defined in the 1984 UN Convention against Torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering *is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[79]

This definition relates only to torture committed by state actors. As a result, under the Convention against Torture, acts of torture committed by state actors may trigger individual criminal responsibility. It is this definition that the UN International Law Commission has found to have attained the status of *jus cogens*.[80] In contrast, as noted above, the European Court on Human Rights has found violations of Article 3 with respect to torture or inhuman or degrading treatment or punishment committed by private individuals where the state failed in its obligation to protect the victims and survivors. As such, torture committed by private individuals may be a human rights violation under the ECHR. However, it is not criminalised by the Convention against Torture.

This dual status of torture committed by state actors as both a human rights violation which triggers state responsibility and an international crime that triggers individual criminal responsibility distinguishes Article 3 from Article 2, which only creates state responsibility. As will be explored below, the European Court has been attentive to this distinction when approaching amnesties for torture.

Duty to Investigate Violations of Article 3

Like Article 2, Article 3 creates a procedural obligation on states to investigate allegations of torture or inhuman or degrading treatment. In articulating this obligation, the European Court of Human Rights has imposed similar standards for investigations as have been developed for Article 2. For example, in the 1996 *Aksoy v Turkey* case, relating to torture in police custody, the European Court of Human Rights stated that

> where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough

[79] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) 1465 UNTS 85, art 1(1) (emphasis added).
[80] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc A/56/10 (2001) 113.

> and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an 'effective remedy' under Article 13.[81]

Furthermore, in *Mikheyev v Russia*, the Court found that investigations into serious allegations of ill treatment must be thorough, expedient, and independent.[82] In referring back to its Article 2 case law, the Court also noted that the obligation to investigate is one of means, rather than ends.[83] In addition, the Court has found that this obligation arises if there are credible allegations that ill treatment has taken place, even if the torture survivor does not make a formal complaint.[84]

Duty to Prosecute Violations of Article 3

Article 4 of the Convention Against Torture requires states to criminalise torture committed by state actors within their domestic legal systems and Article 7 states that where a state has jurisdiction over a state agent alleged to have committed torture, if it does not extradite him, the state shall 'submit the case to its competent authorities for the purpose of prosecution'.[85] It continues that these authorities should 'take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State'.[86] Where prosecutors are able to exercise discretion and refrain from pursuing cases in the public interest for serious domestic offences, it seems that this is also permissible under the Convention Against Torture.

The European Court of Human Rights has emphasised the importance of effective criminal justice remedies for torture. For example, in its 2008 judgment in *Ali and Ayşe Duran v. Turkey* relating to a death from torture in police custody,[87] the Court noted that where a criminal investigation has led to proceedings being launched against the accused,

> the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill-treatment. *While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national Courts should not under any circumstances be prepared to*

[81] *Aksoy v Turkey*, App no. 21987/93 (ECtHR, 18 December 1996), para. 98. See also *Assenov and Others v Bulgaria* App no 24760/94 (ECtHR, 28 October 1998), para. 102.
[82] *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006), paras. 108-110.
[83] *Mikheyev v Russia* (n 82), para. 107.
[84] *Stanimirović v Serbia* App no. 26088/06 (ECtHR, 18 October 2011), para. 39.
[85] Torture Convention, art. 7.
[86] Ibid art. 7.
[87] *Ali and Ayşe Duran v Turkey* App no 42942/02 (ECtHR, 8 April 2008), para. 62.

> *allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished*.[88]

The importance of prosecution and punishment for torture by state officials was also emphasised by the Grand Chamber in *Gäfgen v Germany* (2010), which related to police officers extracting a confession by threatening torture:

> In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice.[89]

With respect to acts of torture committed by private individuals rather than state officials, the Court has also emphasised the importance of criminal justice remedies. For example, in the 2003 *M.C. v Bulgaria* judgment, relating to rape committed by private individuals as a violation of Article 3, the Court considered inter alia international criminal law standards on rape during armed conflicts before stating:

> In accordance with contemporary standards and trends in that area, *the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim*.[90]

However, in other cases relating to torture committed by private individuals, the Court has recognised a limited degree of flexibility in how states comply with their Article 3 obligations. For example, in the 2009 *Beganovic v Croatia* case, relating to an assault by private individuals in which the victim was severely injured, it found that states have a 'margin of appreciation' in deciding 'the choice of the means to secure compliance with Article 3 … provided that criminal-law mechanisms are available to the victim'.[91] In expressing a preference for criminal justice responses to torture, the Court asserted that

> it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that, if it is, criminal proceedings should necessarily lead to a particular sanction.[92]

It suggested that for offences carried out by minors, alternative sentences, such as community service, might be appropriate. It continued nonetheless that it

[88] *Ali and Ayşe Duran v Turkey* (n 87), para. 61 (emphasis added).
[89] *Gäfgen v Germany* [GC] App no 22978/05 (ECtHR, 1 June 2010), para. 119.
[90] *M.C. v Bulgaria* (n 77), para. 166 (emphasis added).
[91] *Beganovic v Croatia* (n 71), para. 80.
[92] Ibid para. 71.

> cannot accept that the purpose of effective protection against acts of ill-treatment is achieved in any manner where the criminal proceedings are discontinued owing to the fact that the prosecution has become time-barred and where this occurred … as a result of the inactivity of the relevant State authorities.[93]

These examples show that the European Court of Human Rights does not establish an absolute obligation for prosecutions to result in conviction, and it recognises that alternative sanctions may be appropriate in limited circumstances. However, where ill treatment is the result of willful action by state agents, the court may find a violation of the procedural obligations under Article 3 if prosecutions do not take place.

Article 3 Case Law on Amnesties

The Court has not been asked to rule directly on amnesties that have been granted for violations of Article 3. However, in a series of judgments the Court has opted to articulate its views. Firstly, in the 2004 *Abdülsamet Yaman v Turkey* case which involved allegations of torture against a 12-year old boy by the Turkish police, the Court stated in relation to a hypothetical amnesty that

> where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that *the granting of an amnesty or pardon should not be permissible*.[94]

This contrasts strongly with the more flexible approach towards amnesties for Article 2 violations that is articulated in the *Dujardin* and *Tarbuk* cases.

In the 2009 *Yeter v Turkey* case, the applicants complained that their relative had been tortured to death at the hands of the police and that the authorities had failed to carry out an effective investigation. They further maintained that no deterrent sanction had been imposed on those who were responsible for Mr Yeter's ill-treatment and death. In making its judgment, the Court referred to the application of Amnesty Law no. 4455,[95] which had terminated disciplinary proceedings against the accused police officers before any sanction was imposed against them. In its judgment, the Court reaffirmed its statement on the impermissibility of amnesties in *Abdülsamet Yaman v. Turkey*, before finding that there had been a procedural violation of Article 2.[96] Due to this finding, the Court did not also consider the complaint in relation to Article 3.

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[93] *Beganovic v Croatia* (n 71), para. 85.
[94] *Abdülsamet Yaman v Turkey* App no. 32446/96 (ECtHR, 2 November 2004), para. 55 (emphasis added). See also *Tuna v Turkey* App no. 22339/03 (ECtHR, 19 January 2010), para. 71; *Eski v Turkey* App No. 8354/04 (5 June 2012), para. 34.
[95] Law no. 4455 grants civil servants an amnesty in relation to disciplinary offences committed prior to 23 April 1999 and annuls any resulting penalties or restrictions. However, it does not provide the possibility to claim for any pecuniary loss incurred as a result of disciplinary sanctions.
[96] *Yeter v Turkey* App no. 33750/03 (ECtHR, 13 January 2009), para. 70.

A few months later, the Court again considered the issue of amnesty in the *Ould Dah* case. This related to a Mauritanian national, Ely Ould Dah, who was accused of committing acts of torture whilst being an intelligence officer in the Mauritanian army before benefiting from a 1993 amnesty law enacted by the country's transitional government. Mr Ould Dah travelled to France for military training in 1998, and he was arrested, charged with torture, and detained in 1999 following criminal complaints by civil society organisations. After being convicted by French Courts, Mr Ould Dah complained to the European Court of Human Rights that the conviction violated his rights under Article 7 of the ECHR (which prohibits 'punishment without law') as he could not have foreseen that French law would override the Mauritanian amnesty law and that provisions of the French law were applied to him retrospectively. As such, the case principally concerned the jurisdiction of the French Courts, rather than amnesty laws per se. However, in an admissibility decision, the Court decided to pronounce on the amnesty as follows:

> There is no doubt that were the law of the State exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed by the State of the place in which the offence was committed, in an effort to protect its own citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the United Nations Convention against Torture. Like the United Nations Human Rights Committee and the ICTY, *the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.* (emphasis added)

The Court continued by setting out several justifications of its position on the non-permissibility of amnesties for torture. Firstly, it noted that the Mauritanian amnesty law had been enacted for the purpose of preventing perpetrators from being prosecuted.[97] This can be contrasted with amnesties granted for other goals such as conflict resolution or hybrid approaches that grant both amnesty and pardon. Secondly, the Court accepted that tensions can arise between the need to prosecute criminals and the need for transitional societies to promote social reconciliation. However, it noted that 'no reconciliation process of this type has been put in place in Mauritania'.[98]

Thirdly, the Court grounded its approach by referring to the universal prohibition of torture in international human rights law and the obligation to prosecute torturers contained in the Convention Against Torture. It stated that 'The obligation to prosecute criminals should not … be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law'.[99] Finally, the Court noted that an amnesty law enacted in one state cannot prevent Courts in foreign states or international Courts from exercising jurisdiction. To support this approach, it noted that the existence of amnesty is not

[97] *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009).
[98] Ibid.
[99] Ibid.

included in the grounds for inadmissibility listed in the Rome Statute of the International Criminal Court.[100]

As the legality of the amnesty was not the subject of the complaint, and the Court's comments on amnesty were framed in a general manner, this reduces the weight that should be given to these comments. However, they may indicate the possible future interpretation of the Court on such issues. By relying on international criminal law to support its position, the Court is clearly reflecting the dual status of torture as both an international crime and a human rights violation, and it is using this to justify its position that amnesties that block prosecution for torture are impermissible. Furthermore, as in the case of Article 2 violations, Article 3 clearly requires prompt, effective, transparent, and independent investigations and where an amnesty blocks such investigations it is likely to be viewed as impermissible.

Some ambiguities remain in the Court's position, however. For example, as noted above, determinations of Article 3 violations may be made with respect to acts of torture or inhuman or degrading treatment or punishment committed by state actors or private individuals. However, the Convention Against Torture defines torture as only being committed by or at the instigation of state actors and the cases explored here only refer to state agents. It is therefore unclear whether the Court would impose such rigid standards when faced with complaints of torture or other forms of ill treatment that fall with Article 3 committed by private individuals.

Furthermore, the UN Convention Against Torture only entered into effect in 1987 and as noted above, in its early case law the Court took a narrower position on the nature of offences constituting torture, as opposed to inhuman and degrading treatment. As a result, the international legal standards applicable when ill treatment was committed, particularly if the crimes occurred decades ago, may not correspond to contemporary international legal obligations incumbent on states.

In addition, the Court's positions on amnesty have not considered amnesties that are introduced in order to promote conflict resolution or reconciliation. Given that the Court noted the absence of a social reconciliation process in Mauritania, it is possible to speculate that it may adopt a different approach if an amnesty is part of a reconciliation programme. The Court's case law firmly establishes that there are no exceptions to the obligations on states to refrain from substantive violations of Article 3. However, it is not clear that the procedural obligations to investigate or prosecute are similarly absolute. This distinction is significant because, as Seibert-Fohr, referring to the European Court's case law, notes, 'the call for criminal measures in ordinary cases should not be taken as evidence for an uncompromised formula which applies equally in exceptional circumstances. There is little case law in this respect.'[101]

The Court's evolving case law on the status of amnesties under Article 3 shows its willingness to draw on different legal regimes to support its interpretations. A similar tendency is evident in a series of recent judgments in which the Court has expressed its views on amnesties for 'massive' violations of human rights and war crimes.

[100] Ibid.
[101] Seibert-Fohr (n 54) 141.

III. Amnesties and 'Massive' Human Rights Violations and War Crimes

The protections for the right to life and freedom from torture are explicitly articulated in the European Convention on Human Rights. By contrast, although the ECHR's derogation regime refers to the convention's application during armed conflict, it does not explicitly address international crimes such as war crimes and disappearances (as distinct from human rights violations), nor what the Court has termed 'massive' human rights violations.[102] Nonetheless, in recent years, the Court has made pronouncements on the status of amnesties for these crimes and violations.

For example, the issue of amnesty for massive human rights violations arose in the 2012 *Case of Association '21 Decembre 1989' and Others v. Romania*, in which the applicants complained inter alia that a draft amnesty law intended to exempt members of the Armed Forces from criminal liability for acts committed at the time of the Romanian revolution in December 1989, resulting in over 1,000 deaths, would violate the state's obligations under Article 2. In its judgment, the Court emphasised

> The importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation.

On this basis, the Court relied on its previous case law to argue that amnesties that prevent investigations may be incompatible with the Convention:

> in the event of widespread use of lethal force against the civilian population during anti-Government demonstrations preceding the transition from a totalitarian regime to a more democratic system… as the Court has already indicated, an amnesty is generally incompatible with the duty incumbent on the States to investigate acts of torture and

[102] The only reference to international law is ECHR, Article 7(1) which states 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' There has, however, been substantial academic commentary on the relationship between the European Convention on Human Rights and International Humanitarian Law. See e.g., William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16(1) *European Journal of International Law* 741-767; Aisling Reidy, 'The approach of the European Commission and Court of Human Rights to international humanitarian law', 38(324) *International Review of the Red Cross* 513-529; Bill Bowring, 'Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 14(3) *Journal of Conflict and Security Law* 485-498.

> to combat impunity for international crimes. This is also true in respect of pardon.[103]

This articulation links back to the notion expressed in the *McKerr* case described above that investigations are necessary to provide accountability for crimes by state agents. This suggests that an amnesty that prohibits investigations is impermissible; but where criminal investigations are held before an amnesty is applied or where the amnesty complements an investigative process, there may be scope for some discretion in the Court's approach.

The Court's established Article 2 case law is also relevant to complaints relating to disappearances. Disappearances are increasingly recognised as an international crime, but the ECHR has also determined that they can violate Article 2 of the Convention and place a continuing obligation on the state to investigate the whereabouts and fate of the victim.[104] The Court has also found that the suffering caused to the victims' relatives by the disappearance of the victim and the uncertainty regarding their fate can amount to a violation of Article 3.[105] The Court has emphasised that

> The finding of a violation on this ground is not limited to cases where the respondent State is to be held responsible for the disappearance. It can also result from the failure of the authorities to respond to the quest for information by the relatives or from the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, where this attitude may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person.[106]

The issue of amnesties for disappearances arose in the 2012 admissibility decision in *Gutierrez Dorado and Dorado Ortiz v Spain*, which related to disappearances committed in 1936 during the Spanish civil war. The right to individual petition only became applicable to Spain in 1981, and as a result, the substantive violation, or actual act of disappearances, is outside the Court's temporal jurisdiction. However, in this case, the applicants alleged that Spain's 1977 Amnesty Law prevented them from having any prospect of requesting the authorities to open an investigation after 1977, and they therefore contended that the violations of the procedural steps required by Article 2 occurred after the entry into force of the Convention and hence fall within the Court's jurisdiction. In its decision, the Court did not pronounce on the

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[103] *Association '21 Decembre 1989' and Others v. Romania* App no 33810/07 (ECtHR, 25 May 2011), para. 106.

[104] See e.g., *Varnava and others v Turkey* Apps nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), para. 186.

[105] *Varanava and Others v Turkey* (n 104), para. 201. Whether a violation of Article 3 will arise depends on meeting: 'The relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person.' *Varanava and Others v Turkey* (n 104) para. 200.

[106] *Janowiec and Others v Russia* [GC] App nos 55508/07 and 29520/09 (ECtHR, 21 October 2013), para. 178.

permissibility of amnesties for disappearances. Instead, if found that the case was inadmissible due to the length of time it took the applicants to bring the case:

> the Court notes that the disappearance occurred during an internal conflict. Although the Court is aware of the difficulties for the applicants to bring their complaints before the domestic Courts even after the end of the Franco regime, having regard to the Amnesty Law of 1977, this did not discharge them from the duty to display due diligence and to bring their case before the Court without undue delay. … Having regard to the fact that in the following years there were no official investigations concerning the circumstances of the disappeared person, it must have been apparent to the applicants that there was not any realistic hope of progress in either finding the body or accounting for the fate of their missing relative in the near future. … the application to this Court has not been introduced until the 1st of June 2009, that is, almost twenty-eight years after that date and seventy-three years after the disappearance. Therefore, it must be concluded that the applicants did not display the diligence required to comply with the requisites derived from the Convention and the case-law of the Court concerning disappearances.[107]

This suggests that even for the most serious offences, the Court may be unwilling to review amnesties unless the victims complain promptly to the Court. The Court justifies this by noting that even assuming that disappearances are of a continuing nature,

> with the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness.[108]

This echoes some of the concerns expressed in *Finucane v UK* regarding investigating historic cases.

The most recent pronouncements of the European Court of Human Rights came in judgments in *Margus v Croatia*. This case relates in part to the Law on General Amnesty (1996) enacted in Croatia at the end of the conflict. This granted unconditional amnesty for criminal acts related to the armed conflict in Croatia, but it excluded war crimes, crimes against humanity and genocide. The applicant in this case, Fred Margus, was a Croatian army commander during the war. In 1993, he and five others were charged with murder and other serious offences against Croatian-Serb civilians relating to the Battle for Osijek in 1991. Following the enactment of the General Amnesty Act, the Osijek County Court found that Margus' actions 'were closely connected with the aggression, armed rebellion and armed conflicts in Croatia' and applied the amnesty to close the case.

In 2006, new charges were brought against Margus for the same events, but this later case differed from the earlier one in that he was charged with war crimes. As a

[107] *Gutierrez Dorado and Dorado Ortiz v Spain* App no 30141/09 (ECtHR, 27 March 2012), para. 39.
[108] Ibid para. 37.

result, a County Court found that the new case was significantly different to the previous one and did not violate Margus' right not to be tried twice for the same offence. As the amnesty does not apply to war crimes, the Court convicted Margus. This decision was upheld by the Supreme Court, which also in a separate decision, said that Margus' actions had not been conflict-related because they were committed when he was a member of the reserve forces after his tour of duty had terminated. Both these decisions found that the amnesty had been erroneously applied to Margus. Margus responded by taking his case to Strasbourg.

Although the Croatian amnesty's legality was not disputed before the ECHR, in its November 2012 judgment, the Court chose to make general comments on the legality of amnesties under international law, stating that

> The obligation of States to prosecute acts such as torture, all of which also apply to intentional killings has thus been well established in the Court's case-law. The Court is of the opinion that the same must hold true as regards war crimes.
>
> Granting amnesty in respect of 'international crimes' – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional Courts and developing State practice, as there has been a growing tendency for international, regional and national Courts to overturn general amnesties enacted by Governments.[109]

This contrasts markedly to the Court's position in *Tarbuk v Croatia* discussed above, which was delivered a few weeks later.

Following a request from Margus, the case was referred to the Grand Chamber, which in its May 2014 judgment also chose to consider the legality of amnesties. In doing so, the Grand Chamber reviewed an extensive range of international law texts relating to amnesties including judgments by the Inter-American Court of Human Rights.[110] In its judgment, it agreed with the Croatian Supreme Court that the amnesty had initially been granted erroneously to Margus, and that subsequently convicting him for offences that were excluded from the amnesty did not violate the principle of double jeopardy. The Court also made the following general comments on amnesty:

> A growing tendency in international law is to see ... amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.[111]

Here the Court did not specify what it understood to be breaches of fundamental human rights, but on the basis of the analysis above we can interpret this to mean international crimes, including genocide, war crimes, crimes against humanity and

[109] *Margus v Croatia* App no 4455/10 (ECtHR, 13 November 2012), para. 74.
[110] It also gave detailed consideration to an amicus brief on the legality of amnesty to which Mallinder and McEvoy were signatories. The lead authors of the brief were Josephina Close and Prof William A. Schabas.
[111] *Margus v Croatia* [GC] App no 4455/10 (ECtHR, 27 May 2014), para. 139.

torture, as well as unlawful killings. However, the Grand Chamber in a slightly unwieldy hypothetical manner, left open the possibility that amnesties even for the most serious offences could be acceptable in 'some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims'.[112] It noted, however, that no such circumstances had existed when Margus had been granted amnesty.

In separate opinions to the judgment, some of the Grand Chamber judges considered whether an amnesty could in any circumstances constitute a final decision, which would prevent the reopening of proceedings. These opinions sought to determine whether an amnesty was used to shield an individual from accountability, or whether it was granted following a full investigation of his or her guilt or innocence. In addition, the Joint Concurring Opinion of Judges Sîkuta, Wojtyczek and Vehabović highlighted the fact that international law on amnesties had evolved in the period from 1996 to 2014, and they cautioned against applying contemporary international law to crimes committed decades earlier when the standards were not the same. They further highlighted that 'The adoption of international rules imposing a blanket ban on amnesties in cases of grave violations of human rights is liable, in some circumstances, to reduce the effectiveness of human rights protection'.[113]

In summary, the *Margus* case suggests that international law has not yet evolved to prohibit amnesties for international crimes and gross human rights violations in all circumstances. However, it does indicate that amnesties should be accompanied by Article 2 compliant investigative processes, reparations for victims, and other reconciliation measures. In addition, it suggests that amnesties that are limited by the exclusion of particular offences may not offer permanent protection to perpetrators of these crimes. Instead, if new evidence comes to light or new charges are brought, previously amnestied individuals may still be liable for prosecution within domestic legal system with respect to excluded offences.

[112] Ibid para. 139.
[113] Joint Concurring Opinion of Judges Sîkuta, Wojtyczek and Vehabović, *Margus v Croatia* [GC] App no 4455/10 (ECtHR, 27 May 2014), para. 9.

Conclusion

This report has explored the legality of amnesties under the European Convention on Human Rights by reviewing the case law issued by the Strasbourg Court. It has not sought to critique the appropriateness of the standards of Article 2 or 3 with respect to the legacy of past crimes in transitional societies. Rather it has simply sought to determine the status of amnesties under the current legal framework. This jurisprudence on amnesties is not extensive, and the cases which have come before the Court have not required it to issue specific comments on the legality of amnesties. However, in a series of judgments, the Court has chosen to articulate its views on the issue.

The analysis in this report has found that the Court has not adopted a consistent position on amnesty relating to violations of Articles 2 and 3 of the ECHR. Instead, it seems to have developed a bifurcated approach in which amnesties which prevent prosecutions for violations which can also be considered as international crimes are subjected to greater scrutiny than amnesties which cover only violations in the Convention.

For all forms of violations, the case law suggests the Court may take the following issues into account when considering the legality of amnesty:

- Whether the amnesty prevented investigations – Articles 2 and 3 both create procedural obligations on states to conduct prompt, transparent, independent and effective investigations. This suggests that an amnesty that prohibits investigations is impermissible, but where criminal investigations are held before an amnesty is applied or where the amnesty complements an investigative process; there may be scope for some discretion in the Court's approach provided that the investigative procedures are compliant with the requirements of Articles 2 and 3
- Whether the amnesty is enacted as part of a reconciliation process – the Court gives very little guidance on what would constitute an appropriate reconciliation process and the extent to which it would need to be regulated by law. However, it seems that the Court may look more favourably on amnesties that are designed to bring a conflict to an end and encourage a society to reconcile, particularly where they are accompanied by appropriate investigative processes and reparations for victims
- Whether the amnesty was enacted many years ago – where considerable time has elapsed between the amnesty and the victim's complaint, the Court may be unwilling to exercise its jurisdiction due to the difficulties associated with investigating and prosecuting historical cases
- Whether the amnesty measures are necessary and proportionate to the objectives being pursued
- Whether the amnesty is granted for state agents - the Court will look more restrictively on amnesties for torture or unlawful killings by state agents
- Whether the interests of individual members of the public are respected. This can relate to their interests in having their right to life protected by the end of conflict or the application of criminal law

The experience of amnesties in other contexts suggests that other issues that may arise before the Court relating to the design of limited amnesty laws.[114] For example, where limited amnesties are designed to complement national or international prosecutions, where should the line be drawn between criminal accountability and amnesty and investigations? Is it permissible to prosecute those who are most responsible, but grant amnesty for lower-level offenders?

In addition, throughout its jurisprudence the court justifies the need for criminal justice responses to human rights violations in order to deter future crimes. As has been extensively explored in criminological literature, the evidence that trials and punishment effectively deter future crimes is uncertain even in peaceful, democratic societies.[115] Transitional justice scholars have suggested that it is even more dubious following widespread human rights violations.[116] Where amnesties are tied to measures to prevent recidivism, it is possible that they may challenge the court's preference for criminal justice responses.

[114] For a more detailed analysis of factors to be considering in amnesty design and implementation, see *The Belfast Guidelines on Amnesty and Accountability* (Transitional Justice Institute, 2013), available at http://www.transitionaljustice.ulster.ac.uk/TransitionalJusticeInstitute.htmAmnestyGuidelinesProject.htm (accessed 23 March 2015).

[115] See e.g., M. Tonry, 'Learning from the Limitations of Deterrence' (2008) 37 *Crime and Justice* 279-312; B. Jacobs, 'Deterrence and Deterrabilty' (2010) 48 *Criminology* 417-441.

[116] See e.g., Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harv Hum Rts J 39; Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge 2007); Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration and the Governance of Mercy' (2012) 39(3) Journal of Law and Society 410.

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