

# Sacrificing Accountability to Save the Official Narrative: The UK's Legacy Act of 2023 and Parallels in Sri Lanka

*Daniel Holder*



**I**n September 2023, the UK Parliament passed *The Northern Ireland Troubles (Reconciliation and Legacy) Act* entrenching immunity for crimes committed by the British army during the Northern Ireland conflict (1966–1998). Human rights organisations and activists in Northern Ireland are challenging the Act both in domestic courts and in the European Court of Human Rights. Despite its own past and present history

of human rights violations, the UK (together with the USA and several EU countries), plays a critical role in the global governance of human rights because of its diplomatic and economic clout. Sri Lanka's trajectory within the UN Human Rights Council (UNHRC) is a case in point. UK has had a significant role in placing Sri Lanka on the agenda of the UN Human Rights Council (UNHRC) and passing several UNHRC resolutions on Sri Lanka. This is

*in a context where the regime responsible for ending the war denied all atrocities and constructed the military as national heroes. Local and international human rights activists and Tamil victim-survivors including hundreds of family members of the disappeared continue to have expectations on the international community including the UK to put pressure on the Sri Lankan State through the UNHRC to address their demands for truth and justice for atrocities committed by the military during the final phase of Sri Lanka's civil war. However, in the context of the Reconciliation and Legacy Act and the UK's refusal to call for a ceasefire in Palestine, can it wield the same influence in international human rights fora?*

**Chulani Kodikara (CK)** spoke with **Daniel Holder (DH)**, Director of the Committee on the Administration of Justice (CAJ) in Belfast, Northern Ireland in January 2024 on the history and circumstances in which the Legacy Act came to be passed, some resonances with the proposed Truth, Unity, and Reconciliation Commission in Sri Lanka, and the importance of connecting multiple struggles relating to State atrocity and challenging impunity at this moment in time, including the United Kingdom's (UK) unconditional support for Israel's war in Gaza.

**CK: What is the Northern Ireland Trouble (Reconciliation and Legacy) Act of 2023? What does it do?**

**DH:** The Northern Ireland conflict (the most recent one) ran from around 1966 to 1998 and ended with the Good Friday Agreement (GFA). The armed conflict was between Irish Republican armed groups, British loyalist paramilitary groups, and the security forces of the State. There were many human rights violations and abuses during the conflict and lots of members of armed groups and paramilitary groups did go to prison during the conflict for these violations. However, very few State actors were held accountable, and there were very few investigations. Since the signing of the GFA and particularly in more recent years, a series of mechanisms have been looking at historical cases of State and non-State violence committed during this period.

The British government in 2022 introduced the *Northern Ireland Troubles (Reconciliation and Legacy) Act* ('Legacy Act'). This legislation essentially seeks to achieve three things: firstly, it closes all the current mechanisms that are dealing with historic violations, even though most of these are not even criminal justice investigations. These proceedings include civil proceedings or an inquest system which is essentially a truth trial into the cause of a death. They also include independent reports from institutions such as the Police

Ombudsman that was set up because of the peace settlement that are looking at historic human rights violations by the police.

Secondly, it introduces an amnesty. Originally when the British government set out its parliamentary policy paper on this Act, it proposed a blanket amnesty for absolutely all conflict-related violations by all actors. In fact, we assessed this amnesty to be worse than the most notorious amnesties ever—that introduced by General Pinochet in Chile in the 1970s. It was broader in scope than even that. However, in the face of intense criticism, the blanket amnesty was replaced with a 'conditional immunity scheme' which requires an application to be made for an amnesty. However, the threshold for this amnesty is suspiciously low. All an individual must do is to apply for the amnesty, give some information that they themselves believe to be true about their role in a conflict-related incident and then they are entitled to an amnesty even if that information is already in the public domain or is already known. If the intention is to design a truth recovery mechanism, this amnesty threshold would make no sense. If you are designing a mechanism to give as many amnesties for as many soldiers as possible, then this makes perfect sense.

The third and final thing that this Act will do is to establish a new legacy body called the Independent Commission for Reconciliation and Information Recovery. Our criticisms of this body are three-fold. Despite its name, we do not think it is independent. There are ministerial powers of intervention at practically every single level. Secondly, it will not lead to reconciliation. All the people that are supposed to be reconciled through this Commission are firmly opposed to it. And finally, it will not lead to significant amounts of information recovery. It is not designed to conduct proper human rights investigations, but rather is subject to high levels of ministerial intervention. Indeed, this Commission does not have the final say over the content of the report or reports that it will produce. Ministers will have powers to redact the reports. Moreover, it will only sit for five years. If there is no review of a particular case – a perpetrator can just sit this process out, and such person will be entitled to a blanket amnesty. So, this Act is really an attempt to close all current accountability processes down and entrench impunity.

**CK: Can you explain the history of this Act, the absence of transitional justice mechanisms in the Good Friday Agreement, and 'piece-meal efforts' or 'package of measures' that were put in place to address demands of victim-survivors relating to truth, justice, and reparations?**

*DH:* The Good Friday Agreement of 1998 was an agreement between the British and Irish governments. It was approved by a referendum, in Ireland North and South, and endorsed by most parties within Northern Ireland. It contained several elements that are typical of conflict resolution processes including mechanisms for paramilitary disarmament and the disarmament of armed groups. It contained provisions for early prisoner release; so those with conflict-related convictions were released after two years. It also contained measures for policing, justice reform, and demilitarisation. But it did not have any sort of truth-seeking process or transitional justice mechanism. Essentially from the perspective of all the key participants in the GFA, drawing a line under the past had a great emphasis placed on it. However, you cannot do that under European human rights law.

In the wake of the agreement, CAJ and a few other organisations, families, and lawyers filed a series of cases in the European Court of Human Rights complaining that the right to life under Article 2 of the European Convention on Human Rights had been breached by the failure to investigate State involvement in killings during the troubles—whether killings by the security forces or killings by Loyalist paramilitary groups with suspected involvement of the security forces. As a result, the European Court of Human Rights found in a series of judgments running up to around 2003/2004, that the UK had breached the provision relating to right to life and the procedural requirement to conduct independent and effective investigations into these killings. The response of the UK government was ultimately to present and agree what they called ‘the package of measures’—a series of ad-hoc mechanisms, changes to criminal justice mechanisms, and changes to peace process bodies to investigate conflict related cases.

For example, the European Court of Human Rights in Strasbourg commented on deficiencies in the inquest system which could not summon soldiers that had fired the fatal shots for example that had resulted in a killing. That had to be changed so that inquests could deal with historical killings. The Police Ombudsman’s office which was set up for independent investigations could not deal with historic investigations. Its remit was changed. Prosecutors could make decisions not to prosecute a member of the military without giving any reasons, but the reforms meant that prosecutors would have to give reasons and were required to follow criteria in making their decisions.

Once the package of measures was in place, the British government and its agencies spent a long time trying to limit or thwart and obstruct investigation

of conflict related cases that involved the State. Many of them of course were also investigating unresolved cases that involved non-State actors. However, because the GFA incorporated the European Convention on Human Rights into Northern Ireland law, families and their lawyers could challenge every limited or sham investigation. Consequently, we ultimately reached a stage in the last few years with this package of measures really delivering for families. It is at this point that the door is being closed because these measures have been delivering uncomfortable truths. It is not delivering many prosecutions; given the passage of time that was always unlikely.

Whilst there is a huge hysteria amongst sections of the UK media and sections of the governing Conservative Party about what they call a witch hunt against soldiers—what is happening is essentially the application of the justice system and the rule of law to soldiers somewhat belatedly. But this is predominantly resulting in information recovery not prosecutions. In fact, the numbers speak for themselves. There has only been about half a dozen prosecutions of soldiers, only one conviction, and zero jail time. So, the witch hunt narrative is quite significantly exaggerated. What is notable is that the inquest system is increasingly contradicting the ‘official truth’. According to the State, most killings by the security forces were lawful. Yet civil inquests that judges are looking at are finding that killings were not justified in most cases.

Through a series of negotiations and struggles during the period after the GFA, several transitional justice mechanisms were implemented, but they were piecemeal. Finally in 2014, almost ten years ago, there was a bilateral agreement between the British and Irish governments called the Stormont House Agreement. It was also endorsed by the largest Irish nationalist party, the largest British unionist Party, and by most political parties in Northern Ireland. This agreement would have established a new series of transitional justice mechanisms including one overarching mechanism to oversee independent police investigations into unresolved conflict-related cases whether by State actors or non-State actors (the Historical Investigations Unit). There was a second institution to be established by way of a treaty agreement between the UK and Ireland in 2015. It was called the Independent Commission for Information Retrieval. This was somewhat like a body we had here to investigate disappearances. It would have allowed armed groups to approach it through interlocutors and give information in confidence, which could not be used in criminal investigations or judicial proceedings. But it was not an amnesty. So, we had this

suite of mechanisms and they would have provided a much broader set of tools to ensure truth recovery and to ensure proper investigations.

Even though this agreement was in place, the British government at the time delayed and delayed and delayed implementing it until the election of the government of Boris Johnson. The Johnson government then unilaterally tore up this 2014 peace process agreement and the treaty of 2015 for all intents and purposes. It then unilaterally introduced this Legacy Act with ministers quite openly stating that this was about ending investigations into the military and into soldiers. We think there is a much broader agenda. We think this is much more about trying to preserve the official narrative of the conflict. This is not about sparing the frontline soldiers from jail, because very few are under such a threat. This is about retaining an official truth and not getting to the reality of some of the security practices that were run outside of the law, which any human rights compliant process would need to ensure truth, justice, and above all non-recurrence.

*CK: The international human rights regime has always been plagued by hypocrisy, double standards, and selectivity. In the context of what is happening in Gaza, all of those shortcomings are being exposed in real time and in a really glaring and stark way for all the world to see. It seems that what The Legacy Act is showing is that there is no political will to uphold accountability even domestically. This Act and the UK's unconditional support for Israel now appear to be two sides of the same coin. What do you think are the broader implications of both for victim survivors in other contexts who have relied on the leadership of the international community, including countries like the UK to put pressure on their States for truth and justice in the wake of war?*

*DH:* It is difficult to even know where to start. The UK has long articulated itself as a global champion for human rights and it has long been clear that that they have been selective in this role. As you say, the UK's response to international law compliance in relation to Gaza lays it bare possibly as never before, but this selectivity has always been there.

For instance, think of the Chagos Islands and the UK's actions towards the forced displacement of an entire population and the failure to abide by international law in relation to that population. Another example that brings it back to the local but also the global is Ireland. Ireland has now taken an inter-State case against the

UK in relation to the Legacy Act. It is the second inter-State case it has taken in relation to the 'Troubles'. The first one was in the 1970s—Ireland versus UK. What does it relate to? It relates to torture. It is related to the use of very particular techniques of torture—the five techniques as they were called—although we now know that there were far more than five. But the use of those torture techniques in Northern Ireland was not new. They have been used before in Kenya, Malaya, Aden, and various other places. It is reasonably well documented now and in relatively recent times within living memory. There has been litigation recently in the UK courts from Kenyans in relation to that. So even as the UK has pushed human rights and human rights frameworks strongly in relation to other countries, its legitimacy to do so has not just been undermined by double standards at the international level, but very much undermined by what it has done in other countries and here [in Northern Ireland].

Another example is the UN Security Council Resolution 1325 on Women, Peace, and Security. The UK signed up to it and was a global champion of it. But they would not apply it to Northern Ireland based on all sorts of entirely incorrect arguments that somehow it would imply that there was a war here in legal terms, even though there were specific provisions within the GFA that map onto Res. 1325 on the right of women to full and equal political participation.

But the Legacy Act really does take us to a new level. It is well established under international law for some time now that you cannot have an amnesty for torture. But the Legacy Act includes an amnesty for torture. How is the UK going to argue with a straight face in relation to Sri Lanka or Russia or numerous other States around the world that they must respect human rights and conduct investigations into a post-conflict or post-regime context after the Legacy Act? I recall that Pablo de Greiff, the former UN Special Rapporteur on Truth, Justice, and Guarantees of Non-Recurrence submitted a report to the UNHRC back in 2016 on the Northern Ireland legacy situation. The report emphasised very much the need to implement the Stormont House Agreement and the provisions that were in it but to go well beyond that. His response to the policy proposal that led to the Legacy Act was to say every dictator on the planet will be licking their lips at this and it is a blueprint on how to entrench impunity. It is the opposite of a human rights-based approach.

I think the power of the UK on the global stage has greatly diminished over the years but it is still a permanent member of the Security Council, and

its Legacy Act will be cited as a precedent to swap transitional justice for what is essentially an approach grounded in impunity.

*CK: There are some uncanny parallels between the Legacy Act and what is happening in Sri Lanka right now. The current government is proposing to establish a Truth and Reconciliation Commission, primarily to shut down the UNHRC process. The difference is that families in Northern Ireland have more options to challenge the State both through domestic courts and the European Court of Human Rights. There is no Asian Charter or Convention on Human Rights and no Asian Human Rights Court. So, families are dependent on generating pressure through UN mechanisms and resolutions, which means relying on powerful nations to do so.*

*DH:* It is the case that having the European Convention on Human Rights (ECHR), being able to go to the Strasbourg court, and then because of the GFA peace agreement having both the ECHR brought into Northern Ireland law but also having a reform process applied to the justice system so that the law will be applied, has been transformational.

At one level, families, NGOs, and their lawyers have had a measure of success in Northern Ireland in achieving some sort of historical clarification and truth recovery with the existing mechanisms. There was a promise of more under the Stormont House Agreement. However, the British government is in such a state of alarm it has moved to unilaterally shut everything down and replace it with something it thinks it can control. That does sound like a parallel.

We have been fortunate here to have the ECHR but for many years there were few avenues for families; and seeking to internationalise our issues through the UN mechanisms has long been a strategy. The diaspora has also played a role in this regard.

*CK: Thank you for your time and for a really interesting interview.*

*Chulani Kodikara is a postdoctoral fellow at the School of Law, Queen's University, Belfast.*

**Editors' Note:** This interview in a slightly longer version was first published on the 'Gender Justice and Security Hub' on 25 March 2024.

