

# REDRESS

Ending torture, seeking justice for survivors

## OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL Briefing note (September 2020)

### Introduction

1. REDRESS is a UK charity that brings legal claims to obtain justice on behalf of survivors of torture. We act for a number of British citizens who have been tortured abroad, and we also support survivors around the world. We have worked with the Metropolitan Police to instigate the prosecution of torturers found in the UK. We have also encouraged the British authorities to prosecute war crimes alleged to have been committed by British soldiers and commanders.
2. In our view, the introduction of a presumption against prosecution of current and former service personnel is not justified.
  - **The Bill breaches international law.** Under the Geneva Conventions (GCs) and the UN Convention against Torture (UNCAT) there is a presumption that the UK will prevent, investigate, prosecute, and punish violations of those Conventions. By establishing a triple locked presumption *against* accountability, the proposed legislation violates international law, and creates a *de facto* amnesty for breaches of International Humanitarian Law and for the offence of Torture.
  - **There have been very few prosecutions for breaches of the GCs or the UNCAT in the last 20 years.** This is despite the findings by the Baha Mousa inquiry of appalling ill-treatment of detainees through the prohibited “five techniques” in breach of the GCs, and the findings of the High Court in *Alseran* of systematic use of prohibited interrogation techniques, also breaching the GCs, as well as several judgments of the European Court of Human Rights relating to killings in Northern Ireland.
  - **There is no such thing as a “vexatious prosecution”.** This phrase mixes the idea of criminal prosecutions and civil claims, confusing the issues. Any prosecution for breaching the GCs or the UNCAT must have the consent of the Attorney General (s.53(3) ICC Act 2001 and s.135 Criminal Justice Act 1988) who would be required to take into account all of the factors proposed in the Bill. Any private prosecution can be taken over and discontinued by the DPP (s.6(2) and ss.23-24 Prosecution of Offences Act 1985). Any prosecution would also have to satisfy both the evidential and public interest stages of the CPS Full Code test. The prosecution of international crimes is therefore fully within the power of the legal authorities, who are fully capable of preventing any “vexatious” prosecutions.
  - **The Bill fails to address the real problem.** This is the poor quality of investigations, and the inordinate delays in such investigations. Earlier this month the Council of Europe criticised the UK for failing to properly investigate state collusion in the murder of Pat Finucane, despite judgments of the European Court of Human Rights and the Supreme Court ordering them to do so.<sup>1</sup>

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<sup>1</sup> BBC News, “Pat Finucane: UK government pressed over murder probe”, 4 September 2020, available at: <https://www.bbc.co.uk/news/uk-northern-ireland-54036345>

3. The UK is respected around the world for its adherence to the rule of law, and for its critical role in the development of international law. As such, Britain accepts that it is obliged to abide by customary international law, and the treaties which it has ratified.<sup>2</sup> The Bill risks undermining this reputation and the UK's influence on human rights in the global context. As far as we are aware, no other State has introduced such 'presumptions against prosecution' save in transitional justice situations or as part of post-conflict peace agreements. Even in these situations, amnesties are not permissible in relation to international crimes, including torture.
4. This Briefing Note sets out the ways in which the proposed Bill violates international law in three areas:
  - a) **The Absolute Prohibition of Torture.** International law requires that torture will be punished in all circumstances. But there will now be a presumption that British soldiers and commanders will not be punished for torture.
  - b) **The Duty to investigate and prosecute.** There are specific rules requiring that serious violations of international law are effectively investigated and prosecuted. This includes those with command responsibility. The Bill undermines these standards.
  - c) **De Facto Amnesties.** International law prohibits amnesties for grave breaches of the GCs, torture, genocide, and crimes against humanity. This includes *de facto* amnesties.

#### A. ABSOLUTE PROHIBITION OF TORTURE

*The Bill undermines the absolute prohibition against torture, by creating a presumption that torture will no longer be punished when committed by British soldiers and commanders. This position violates international law.*

5. The Geneva Conventions (GCs),<sup>3</sup> Articles 2 and 16 of the UN Convention against Torture (UNCAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and Article 3 of the European Convention on Human Rights (ECHR) prohibit the use of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) under any circumstance, including in times of war.<sup>4</sup> The UK has ratified all of these treaties.
6. Since UNCAT's entry into force, the absolute prohibition of torture and other CIDTP has become accepted as a *jus cogens* norm, that is, one which cannot be derogated

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<sup>2</sup> Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force, 27 January 1980), Article 18.

<sup>3</sup> The Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977. For example, torture is prohibited by Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75 (2 a & e) of Additional Protocol I and Article 4 (2 a & h) of Additional Protocol II. In international armed conflict, torture constitutes a grave breach under Articles 50, 51, 130 and 147 respectively of these Conventions. Under Article 85 of Additional Protocol I, these breaches constitute war crimes.

<sup>4</sup> See also Article 5 of the Universal Declaration of Human Rights.

from in any circumstances,<sup>5</sup> and which applies even to those States who have not ratified the relevant treaties.

7. The GCs were incorporated into UK law by way of the Geneva Conventions Act 1957, which makes it an offence for someone to commit (or aid, abet or procure someone else to commit) a “grave breach” of any of the Conventions.<sup>6</sup> A “grave breach” is defined as  

...wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>7</sup>
8. In the UK, torture had been contrary to the common law for several centuries, but the prohibition was codified following the UK’s ratification of UNCAT by way of section 134 of the Criminal Justice Act 1988. The UK courts have also accepted that “the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law” from which no derogation is permitted, and which may not be covered by a statute of limitations.<sup>8</sup> The House of Lords accepted the conclusion of a former UN Special Rapporteur against Torture that “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture”.<sup>9</sup>
9. The International Criminal Court Act 2001 makes it an offence “for a person to commit genocide, a crime against humanity or a war crime”,<sup>10</sup> (which includes torture as a crime against humanity), and the Armed Forces Act 2006 also makes it an offence for service personnel to commit acts which are prohibited by law,<sup>11</sup> or to commit certain “cruel or indecent” acts.<sup>12</sup>
10. The Bill intends all such offences to be covered by the presumption against prosecution, and the only “excluded offences” are certain offences of a sexual nature as set out in Schedule 1 Part 1 of the Bill. Some sexual offences (e.g. rape) will amount to torture, and so the fact that they will be prosecuted is to be welcomed. But it is contradictory that a soldier who commits a sexual assault will be prosecuted, but a soldier who commits torture will not be prosecuted, except in “exceptional” circumstances.

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<sup>5</sup> Vienna Convention on the Law of Treaties, *ibid.*, Article 53: “...a [*jus cogens* or] peremptory norm of general international law is 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.” See also: European Court of Human Rights (ECtHR), *Al-Adsani v UK*, Application, judgment of 21 November 2001, paras. 30, 60, 61, quoting International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundzija* (10 December 1998, case no. IT-95-17/I-T) at paras. 147, 153-154; *Prosecutor v Ieng Sary*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (Ne Bis In Idem, Amnesty and Pardon) ECCC Case File No. 002/19-09-2007-ECCC/TC (3 November 2011), §§38-39.

<sup>6</sup> Geneva Conventions Act 1957, section 1.

<sup>7</sup> *Ibid.*, section 1A, and First Geneva Convention, Article 50.

<sup>8</sup> *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, at §33, recently cited in *McGuigan & McKenna v Chief Constable of the PSNI* [2019] NICA 46, at §76.

<sup>9</sup> *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, at §33.

<sup>10</sup> In England and Wales (section 51) and Northern Ireland (section 58).

<sup>11</sup> Section 42.

<sup>12</sup> Section 23.

11. As set out above, UK law and international law is clear that the prohibition of torture is absolute in all circumstances, not just exceptional ones, and so must always be prosecuted. The Bill violates this standard, as it creates a presumption that torture will no longer be prosecuted when committed by British troops.

## **B. INVESTIGATION AND PROSECUTION**

*International law requires the UK to prevent, investigate and punish torture, and not to place time limits on these obligations.*

### **The duty to investigate and prosecute**

12. The Geneva Conventions (GCs),<sup>13</sup> the UNCAT, the ICCPR and the ECHR all include (or imply) a duty to investigate allegations, especially where they relate to serious crimes such as torture or other CIDTP. By way of example, the International Committee of the Red Cross (ICRC) in providing its authoritative commentary on the Grave Breaches regime under the GCs has made clear that such cases must be prosecuted:

The obligation to bring alleged offenders before national courts does mean, however, that if the competent authorities have collected sufficient evidence to bring a criminal charge, they cannot rely, for example, on national rules of prosecutorial discretion and decide not to press charges. In those circumstances, they must prosecute the case. Any other conclusion would be at odds with the obligations contained in Article 49(2), as well as those contained in common Article 1 to respect and ensure respect for the Convention.<sup>14</sup>

13. While the ICRC accepts that such prosecutions may sometimes be subject to approval by the Attorney-General, the exercise of that discretion must be limited:

These requirements or procedures are helpful in avoiding actions that are not founded in law, but should not be used by States Parties to bring political considerations into play, or as a way of evading their duties to search for and either prosecute or extradite an alleged offender.<sup>15</sup>

14. International tribunals have repeatedly concluded:

- a) The prohibition of torture is only effective if it is combined with a duty to investigate.<sup>16</sup>
- b) “Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”<sup>17</sup> Thus, where the State has exclusive knowledge of, or ability to obtain, the facts, the burden of proof is, in effect, reversed.

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<sup>13</sup> First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146.

<sup>14</sup> ICRC, Commentary to the First Geneva Convention, Art.49, paragraph 2862 (2016).

<sup>15</sup> ICRC, Commentary to the First Geneva Convention, Art.49, paragraph 2867 (2016).

<sup>16</sup> ECtHR, *Assenov and Others v Bulgaria*, judgement of 28 October 1998, §102.

<sup>17</sup> ECtHR, *Mammadov (Jalaloglu) v Azerbaijan*, judgement of 11 January 2007, §62.

- c) The duty to investigate arises as soon as State authorities become aware of allegations or grounds to believe that torture has occurred, and does not first require a complaint to be made by a victim.<sup>18</sup>
  - d) There must be investigations into alleged crimes, and such investigations must be prompt and effective.<sup>19</sup>
15. With regard to acts of torture, the UN Human Rights Committee (HRC) has long since established that failures “to investigate allegations of violations” or failures later to “bring to justice perpetrators of such violations”, could in either case give rise to separate breaches of the ICCPR, over and above the breach in relation to the torture itself.<sup>20</sup>

#### **Investigative deficiencies in the UK context**

16. High quality investigations undertaken promptly after the events in question are likely to obviate the need for the kind of changes proposed by this Bill:
- ...the best route for the Government to pursue would be to increase the capacity and commitment for efficient, transparent and effective investigations that comply with procedural obligations and which are capable of weeding out quickly any spurious or clearly unfounded claims, and strengthening the capacity for robust, timely and transparent investigations where credible allegations are raised. Naturally there will be a mixture of quality in allegations made as there is with all criminal complaints. Strengthening investigative capacity would be the best way to protect soldiers from legal uncertainty and ensure full compliance with the UK’s legal obligations.<sup>21</sup>
17. In his evidence before the Defence Committee, military law solicitor Lewis Cherry stated that “prosecutions [in relation to the Iraq conflict] should have been brought much nearer to the date”, and suggested that the fact that they were not was, notwithstanding the difficult conditions on the ground, due to a “lack of proper investigation”.<sup>22</sup> Indeed, it has been recognised that “the main bodies responsible for criminal investigations – IHAT and later SPLI – have faced serious obstacles conducting effective investigations, partly due to structural constraints and political opposition – and in some cases reported interference”, and that the resulting uncertainty and delays have impacted soldiers and victims alike.<sup>23</sup>
18. In this regard, we note that the recent Service Justice System Review (SJSR) made certain recommendations to improve investigations. For example, it recommended that Special Investigations Branch (service police) officers should be seconded into

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<sup>18</sup> Inter-American Court of Human Rights (IACtHR), *Servellón-García and Others v Honduras*, Series C No. 152, judgement of 21 September 2006, §119.

<sup>19</sup> For example, see ECtHR, *Armani Da Silva v United Kingdom* (Grand Chamber), Appl. no. 5878/08, 30 March 2016, §§232 – 239.

<sup>20</sup> HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §§15 and 18, available at: <https://www.refworld.org/docid/478b26ae2.html>

<sup>21</sup> Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, *The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations?* (October 1, 2018), p.42. Available at SSRN: <https://ssrn.com/abstract=3272347>. See also pp. 29 et seq.

<sup>22</sup> Defence Committee, Oral evidence: ‘MoD support for former and serving personnel subject to judicial processes’, HC 109, 8 June 2016, Q28.

<sup>23</sup> Ferstman et al. *ibid.*, p.50.

civilian police forces to gain experience; and that civilian police should deploy with service police when investigating serious crime overseas.<sup>24</sup>

19. On the Government's own justification as set out in the Foreword to the consultation paper which preceded this Bill, the reasons for the proposals in the Bill partially relate to issues related to investigations:<sup>25</sup>
  - The large number of allegations received;
  - The cost of the investigations;
  - The uncertainty created by the lengthy delays in the investigations.
20. But these issues (a) cannot override the UK's absolute obligation to investigate all allegations of (for example) torture, and (b) fail to recognise the rights and expectations of the alleged victims, at least some of whom we know to have suffered serious human rights violations at the hands of the UK armed forces.<sup>26</sup>

### **Command responsibility**

21. International law requires the UK to investigate and punish torture, and these obligations also extend to the investigation and punishment of those giving the orders.
22. It is crucial that the scope of such investigations is sufficient to ensure that it is not just those alleged to have carried out the abuses that are investigated, but also those whose commands may have led to the abuses being inflicted.<sup>27</sup>
23. The Bill is silent on the question of command responsibility. In its use of presumptions against prosecution, the Bill does not distinguish between service personnel and commanders. There is therefore a risk that impunity is also conferred on senior officials and commanders that give the orders.

### Legal framework

24. Command responsibility is based on a bifurcated system of responsibilities partly based on international law, and partly based on domestic law. While International law provides a general obligation on commanders to take 'necessary and reasonable' steps to prevent and punish the crimes of subordinates, domestic law provides for the specific duties and obligations of civilian and military superiors at the various levels of the hierarchy to which they belong.<sup>28</sup>
25. Customary international law establishes that commanders and other superiors are criminally responsible for war crimes committed or attempted by subordinates following their orders, or (even if subordinates were not following their orders) if the commanders "knew, or had reason to know, that the subordinates were about to

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<sup>24</sup> HH Shaun Lyons & Professor Sir Jon Murphy, *Service Justice System Review (Part 2)*, 29 March 2019 (published February 2020), §§77-94; see also: Professor Sir Jon Murphy, *Service Justice System Policing Review (Part 1)*; both available at <https://www.gov.uk/government/publications/service-justice-system-review>

<sup>25</sup> Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, July 2019, pp. 2-3.

<sup>26</sup> See, for example, *The Baha Mousa Public Inquiry Report* (2011) HC-1452-I, available at: <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>

<sup>27</sup> IACtHR, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 28 November 2018. Series C No. 371, §294.

<sup>28</sup> Guénaél Mettraux, *The Law of Command Responsibility*, (2009) OUP, p.58.

commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”<sup>29</sup>

26. There are various possible ways to prosecute a military or civilian commander in the UK. These include:
- a) The offence of ‘conspiracy’ contrary to section 1 of the Criminal Law Act 1997, and
  - b) The offence of aiding and abetting torture contrary to section 134 of the Criminal Justice Act 1988.
27. In addition, section 65 of the UK International Criminal Court Act 2001<sup>30</sup> embeds the concept of command responsibility within UK law, permitting military commanders (s.65(2)) or other superiors (s.65(3)) to be prosecuted domestically for relevant offences (i.e. genocide, crimes against humanity, and war crimes) committed by forces under their effective authority and control. These offences will also be charged as aiding, abetting, counselling, or procuring (s.65(4)).

#### The Bill’s provisions

28. The Bill’s proposed five-year time limit for bringing prosecutions will not apply to certain excluded offences. These offences are confined to certain sexual offences as set out in Schedule 1 Part 1 of the Bill. In relation to these excluded offences, the responsibility of “commanders and other superiors” is also excluded, if they are alleged to have aided, abetted, counselled or procured the offence.<sup>31</sup>
29. Regarding command responsibility for all other offences, the Bill is clear that the five-year limit applies. To give just two examples:
- a) The time limit would apply to the offence of aiding and abetting torture contrary to section 134 of the Criminal Justice Act 1988, and the separate offence of conspiracy contrary to section 1 of the Criminal Law Act 1977. Thus, if a commander or other senior official were to be charged with conspiracy to torture, or aiding and abetting torture, then they could benefit from the presumption against prosecution, because these offences are not excluded offences under the Bill.
  - b) The time limit would apply to the case of a commander alleged to have aided, abetted or procured the commission of an offence under the Geneva Conventions Act 1957 (i.e. a grave breach of the GCs), or under the International Criminal Court Act 2001. Such a commander could benefit from the presumption against prosecution, because these offences are also not excluded offences under the Bill.

#### State responsibility to investigate commanders

30. As set out above (paragraph 12 et seq), the GCs, the UNCAT, the ICCPR and the ECHR all include a duty to investigate allegations, especially where they relate to serious crimes such as torture or other CIDTP. No exception is made for commanders or other superiors. On the contrary, international law suggests that the relevant authorities would have an enhanced obligation to investigate the actions of commanders or other superiors.

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<sup>29</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law* (2005) CUP/ICRC, Rule 153: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule153](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule153)

<sup>30</sup> Available at: <http://www.legislation.gov.uk/ukpga/2001/17/contents>.

<sup>31</sup> Schedule 1, Part 2, para. 23.

31. For example, recent international jurisprudence suggests that State responsibility to investigate serious human rights violations is not fulfilled solely by the investigation of lower level personnel, especially where there is evidence of the involvement of more senior officials. In the *Atenco* case, the Inter-American Court of Human Rights (IACtHR) found that command responsibility had not been investigated, and therefore concluded that the State had “failed to investigate all the possible criminal responsibilities and did not follow all the logical lines of investigation, thus failing to comply with its duty to investigate with due diligence.”<sup>32</sup>

### C. AMNESTIES

*The proposals in the Bill will have the effect of preventing the investigation and prosecution of serious international crimes, and will eliminate liability. Consequently, they amount to a de facto amnesty.*

32. Amnesties and pardons for international crimes and gross human rights violations are prohibited in international humanitarian law, international human rights law, and in the decisions of international criminal tribunals. International treaties provide for an absolute prohibition of amnesties for grave breaches of the Geneva Conventions (GCs), genocide, and torture. There is an emerging international standard that prohibits amnesty and pardon in relation to other serious international crimes. “A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.”<sup>33</sup>
33. The proposed legislation will effectively prohibit prosecutions save for “exceptional” cases (clause 2). This is a “blanket” exception, as the Bill applies the prohibition to any international crimes committed by British troops abroad, no matter whether committed by soldiers or by commanders. Save for sexual offences, the proposal applies to all international crimes, regardless of their gravity: Genocide, breaches of the GCs, Crimes against Humanity, and Torture.

#### **International Humanitarian Law**

34. International humanitarian law (IHL) is underpinned by a strong obligation to prosecute and punish. While amnesties are permitted in some circumstances, as set out below they cannot be sought for international crimes. IHL also recognises the strong obligation in human rights law to prosecute offences such as torture.
35. Common Article 1 of the 1949 GCs provides: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. States must criminalise serious violations of international humanitarian law such as war crimes and grave breaches of the GCs. The GCs oblige High Contracting Parties (“HCPs”) to investigate grave breaches and prosecute or extradite offenders.<sup>34</sup> Rule

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<sup>32</sup> *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, *ibid.*, §304.

<sup>33</sup> *The Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E), (13 March 2004), para. 67 (hereinafter *Prosecutor v Kallon and Kamara*)

<sup>34</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 31, Articles 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 September 1950),

158 of the International Committee of the Red Cross (ICRC) customary international humanitarian law study concludes that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”<sup>35</sup> The ICRC commentary confirms that “State practice establishes this as a norm of customary international law applicable in both international and non-international conflicts”, and provides the basis for the rule.<sup>36</sup>

36. The ICRC Commentary to Article 51 of GC I confirms the obligation to prosecute grave breaches is absolute. The GCs prevent HCPs from absolving themselves or any other HCPs of any liability incurred in relation to grave breaches.<sup>37</sup> According to the ICRC Commentary to Article 51 GCI, “any liability” includes the responsibility contained in Article 49 to investigate and prosecute perpetrators of grave breaches. “Article 51 therefore aims to prevent a situation whereby States Parties, in future peace treaties or armistices, would absolve themselves or another State Party of this responsibility.”<sup>38</sup> The Commentary confirms that obligations under Article 49 are absolute and cannot be affected by agreements between HCPs. Article 51 was included as a means of ensuring the compulsory character of Article 49.<sup>39</sup>
37. Amnesties in the context of international armed conflicts are not explicitly mentioned in the GCs. However, the ICRC Commentary to Article 49 GCI makes it clear that “amnesties granted to persons who have participated in an armed conflict shall not extend to those who are suspected of having committed grave breaches or other serious violations of humanitarian law.”<sup>40</sup>

#### **International Human Rights Law**

38. Human rights treaties contain a strong obligation on States to prosecute gross violations of human rights. Regional Human Rights courts and the United Nations Treaty Bodies have consistently affirmed that amnesties and pardons may not be granted for genocide, crimes against humanity, torture, and other gross violations of human rights.<sup>41</sup>

#### **Treaty Obligations for International Crimes**

39. Several treaties provide an explicit duty to prosecute and punish those who have committed gross human rights violations. The use of amnesties and pardons is in contradiction with these obligations.<sup>42</sup> The Convention on the Prevention and Punishment of the Crime of Genocide requires States Parties to confirm that genocide is a crime under international law which they undertake to prevent and punish,<sup>43</sup> and

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75 UNTS 85, Articles 50; Convention (III) relative to the Treatment of Prisoners of War ) (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 135, Articles 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 September 1950), 75 UNTS 287, Articles 146.

<sup>35</sup> ICRC, Customary IHL Database, Rule 158.

<sup>36</sup> Ibid.

<sup>37</sup> Articles 51 GCI, 52 GCII, 131 GCIII, 148 GCIV.

<sup>38</sup> International Committee of the Red Cross, *Updated Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016, at 3020.

<sup>39</sup> Ibid.

<sup>40</sup> International Committee of the Red Cross, *Updated Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016, at 2845.

<sup>41</sup> *Marguš v. Croatia*, App no 4455/10, (27 May 2014) para 195.

<sup>42</sup> Freeman, *Necessary Evils*, 39.

<sup>43</sup> Article 1, Genocide Convention.

undertake to enact the necessary legislation to the provisions of the convention and, in particular, “to provide effective penalties for persons guilty of genocide and other acts enumerated in Article 3”.<sup>44</sup> Similarly, Article 7 of the UNCAT requires States Parties to prosecute or extradite persons alleged to have committed torture.<sup>45</sup>

#### United Nations Treaty Mechanisms

40. The Treaty Body mechanisms have prohibited the use of amnesties and pardons for international crimes and gross human rights violations as their use may prevent the appropriate investigation and punishment of perpetrators.<sup>46</sup>
41. The United Nations Human Rights Committee has reaffirmed that amnesty laws in regard to serious human rights violations are incompatible with the ICCPR,<sup>47</sup> reiterating that they contribute to the creation of an atmosphere of impunity and bring about other serious human rights violations.<sup>48</sup> The Human Rights Committee has found that States Parties are required by the ICCPR to provide the victims of a gross human rights violation with a thorough and effective remedy including prosecuting, trying and punishing those responsible and providing effective reparation.<sup>49</sup>
42. In its General Comment 31 on the General Legal Obligation Imposed on States Parties to the Covenant, the Human Rights Committee went on to state:

“... a failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law... When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity... Accordingly, where public officials or State agents have committed violations of the Covenant... the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities.”<sup>50</sup>
43. The United Nations Committee against Torture has also expressed its concerns over domestic laws which impede the “investigation and punishment” of human rights violations in breach of the UNCAT,<sup>51</sup> recommending that states should ensure that

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<sup>44</sup> Article 5, Genocide Convention.

<sup>45</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987), United Nations, Treaty Series, vol. 1465, p. 85.

<sup>46</sup> United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee – Lebanon* (1 April 1997) UN Doc. CCPR/C/79/Add.78, para 12.

<sup>47</sup> United Nations Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para.15.

<sup>48</sup> United Nations Human Rights Committee, *Rodriguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

<sup>49</sup> United Nations Human Rights Committee, *Purna Maya v Nepal*, Communication No. 2245/2013, U.N. Doc, CCPR/C/119/D/2245/2013 (2017), para. 13; *Yuba Kumari Katwal v. Nepal*, Communication No. 2000/2010, U.N. Doc. CCPR/C/113/D/2000/2010 (2015), para 15.

<sup>50</sup> United Nations Human Rights Committee, *CCPR General Comment No. 31: The General Legal Obligation Imposed on States Parties to the Covenant*, (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para.18.

<sup>51</sup> United Nations Committee against Torture, *Concluding Observations on the Initial Report of Lebanon* (2017), UN Doc. CAT/C/LBN/CO/1, paras. 46 and 47; United Nations Committee against

that pardon and any other similar measures leading to impunity for acts of torture are prohibited both in law and in practice.<sup>52</sup>

#### European Court of Human Rights

44. The European Court of Human Rights has stated that “[g]ranting amnesty in respect of ‘international crimes’ – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law” on the basis of their incompatibility with the unanimously recognised obligations of States to prosecute and punish grave breaches of fundamental human rights.<sup>53</sup>
45. The European Court has noted that where a state agent has been charged with *jus cogens* crimes, such as torture, 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 a pardon should not be permissible.<sup>54</sup> In such a situation, the granting of a pardon can “scarcely serve the purpose of an adequate punishment.”<sup>55</sup>

#### **International Criminal Tribunals**

46. International criminal tribunals have consistently held that there can be no blanket amnesties or pardons at the international level for international crimes and gross violations of human rights. There is a limited power to release those convicted of such offences before the end of their sentences, but any early release must respect the human rights standards that ensure that there has been justice for the victims through adequate punishment of the perpetrator.
47. Multiple sources of international law prohibit amnesties for crimes against humanity, despite the absence of a treaty-based absolute prohibition. The UN 2005 Darfur Commission noted that crimes against humanity are “particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings.”<sup>56</sup>
48. More recently the International Criminal Court (ICC) has considered whether Saif Gaddafi can take advantage of a law passed in Libya which provided him with an amnesty for crimes against humanity, a case in which REDRESS intervened before the Court. In 2019, the ICC decided that amnesties and pardons for serious acts constituting crimes against humanity are incompatible with international law, and that they deny the rights of victims.<sup>57</sup> The Court also found that the Libyan amnesty law

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Torture, *Concluding Observations on Cabo Verde in the absence of a report* (2017) CAT/C/CPV/CO/1, para. 12. See also: Committee against Torture, *Concluding Observations on Morocco* (2011), UN Doc. CAT/C/MAR/CO/4, para. 6.

<sup>52</sup> United Nations Committee against Torture, *Concluding Observations on the Initial Report of Armenia* (2017) UN Doc. CAT/C/ARM/CO/4, para. 8.

<sup>53</sup> *Marguš v Croatia*, App no. 4455/10 (27 May 2014,) para 139 (hereinafter *Marguš v. Croatia*)

<sup>54</sup> *Yeter v Turkey*, App no. 33750/03 (13 January 2009) para 70; *Abdülsamet Yaman v Turkey*, App no. 32446/96 (2 November 2004), para. 55. See also: *Tuna v Turkey*, App no. 22339/03 (19 January 2010), para. 71; *Eski v Turkey*, App no. 8354/04 (5 June 2012), para. 34; *Taylan Vs. Turkey*, App no. 32051/09 (3 July 2012) para. 45.

<sup>55</sup> *Ibid*, para. 274.

<sup>56</sup> Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 178.

<sup>57</sup> ICC Press Release, “Saif-Al-Islam Gaddafi case: ICC Pre-Trial Chamber I confirms case is admissible before the ICC”, 5 April 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=PR1446>

would not apply to Gaddafi considering the nature of the crimes he was charged with. The decision was subsequently upheld by the ICC Appeals Chamber.

#### Transitional Justice and Amnesties

49. While a transitional justice approach might allow for alternative mechanisms to formal prosecution in the pursuit of justice, this does not permit blanket amnesties or procedures that do not offer a serious alternatives to dealing with the past or which do not take into account the interest of victims.<sup>58</sup> “While it is clear that respect for the justice interest is indispensable to achieve a lasting peace, the hard question is how much justice can be sacrificed on the altar of peace negotiations without unduly restricting a state’s duty *vis-à-vis* international crimes”.<sup>59</sup>
50. However, international practice is clear that any limitation of responsibility will not be permitted where it is based on excluding specific crimes, or excluding those most responsible, or where there has been no fact-finding, confrontation, or admission of responsibility.<sup>60</sup> In practice, this means that blanket amnesties are not acceptable, as their goal is to conceal past crimes by preventing any investigation: “International law quite unequivocally prohibits this type of amnesty.<sup>61</sup>” Amnesties that are conditional, or which provide for some form of accountability, may be permissible in limited circumstances, where there has been full disclosure of the facts, acknowledgment of responsibility, and repentance.<sup>62</sup>
51. In its guidance on the rule of law in post-conflict states, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has recommended that:

Under various sources of international law and under United Nations policy, amnesties are impermissible if they [...] “prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, *crimes against humanity* or gross violations of human rights, including gender-specific violations.”<sup>63</sup>
52. The UN Secretary General noted that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, *crimes against humanity* or gross violations of human rights.”<sup>64</sup>
53. The expert-developed Belfast Guidelines on Amnesty and Accountability make a distinction between illegitimate amnesties, which ensure impunity for persons

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<sup>58</sup> Kai Ambos, ‘The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC’, in K. Ambos et al. (eds), *Building a Future on Peace and Justice*, (Springer, 2009).

<sup>59</sup> *Ibid*, at para.23.

<sup>60</sup> *Ibid*, para. 21; his sentiment is mirrored in the UN position on the use of amnesties for international crimes in endorsed peace agreements which is that agreements cannot utilise “amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights: Report of the Secretary-General, ‘The Rule of law and transitional justice in conflict and post-conflict societies’ (2004) S/2004/616, para 10; See also: Report of the Secretary-General, ‘The rule of law and transitional justice in conflict and post-conflict societies’ (2011) S/2011/634, paras. 12 and 32.

<sup>61</sup> *Ibid*, para. 55.

<sup>62</sup> *Ibid*, para 30.

<sup>63</sup> OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties, 2009, HR/PUB/09/1, p.11 (also referring to ICTY, *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-T, Trial Chamber, 10 December 1998, §155), available at: [https://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf) Emphasis added.

<sup>64</sup> Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, UN Doc S/2004/616 (2004), para. 10. Emphasis added.

responsible for serious crimes, and legitimate amnesties, which “create institutional and security conditions for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability, and reparations”.<sup>65</sup> The Guidelines set out in detail the conditions that must be fulfilled before an amnesty can be granted.

### **De Facto Amnesties**

54. International law prohibits not only formal amnesties, but also any measures which practically exempt perpetrators from accountability for international crimes as *de facto* measures that prevent or inhibit investigation and prosecution. These may include clemency, reductions of sentence, pardons, and the application of limitation periods or statutes.
55. The UN Human Rights Committee has repeatedly held that whether *de jure* or *de facto*, impunity for human rights violations is incompatible with States’ obligations under the ICCPR.<sup>66</sup>
56. The UN Committee against Torture concluded in relation to Colombian Law No. 975 of 2005 (the “Justice and Peace Act”), whereby paramilitary members could receive alternative imprisonment not exceeding eight years regardless of the gravity of the crimes committed, that such legislation is “a *de facto* amnesty in contravention of international human rights obligations”.<sup>67</sup>
57. In *Barrios Altos v. Peru* (2001),<sup>68</sup> the IACtHR considered an amnesty law which exonerated members of the army who had committed human rights abuses in Peru, including crimes against humanity, from 1980-1995. The Court held that the amnesty law violated the American Convention on Human Rights, and stated that:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>69</sup>
58. Similarly, in the *Gelman v. Uruguay* (2011) case, IACtHR held that “both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of [a] State that could be responsible for serious

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<sup>65</sup> The Belfast Guidelines on Amnesty and Accountability, Transitional Justice Institute, University of Ulster, 2013. Available at [https://www.ulster.ac.uk/data/assets/pdf\\_file/0005/57839/TheBelfastGuidelinesFINAL\\_000.pdf](https://www.ulster.ac.uk/data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf), at page 9.

<sup>66</sup> Concluding observations of the Human Rights Committee to: Lesotho, CCPR/C/79/Add. 106 of 8 April 1999, para. 17; and Brazil, CCPR/C/79/add. 66 of 24 July 1996, para. 8.

<sup>67</sup> Concluding observations of the Committee against Torture: Colombia, CAT/C/COL/CO/4, of 19 November 2009, para. 13.

<sup>68</sup> *Chumbipuma Aguirre et al. v. Peru* (Merits) (“Barrios Altos Case”), Judgment of 14 March 2001, Series C No. 75., available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf). See also *Barrios Altos* and *La Cantuta v. Peru*, Monitoring Compliance with Judgment, 30 May 2018, para. 226.

<sup>69</sup> *Ibid.*, para. 41.

violations of the [...] American Convention [on Human Rights], violate multiple provisions of said instruments".<sup>70</sup>

59. More recently, the African Commission on Human and Peoples' Rights in considering the duty to prosecute members of the Lord's Resistance Army in Uganda found that that States should "at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law."<sup>71</sup>
60. Thus, international human rights law does not only prohibit formal amnesty laws, but also any other measure that may lead to impunity for serious human rights violations. As set out in Part B above, for many years the UK has found it very difficult to effectively investigate allegations of torture and war crimes, and has had to re-investigate many incidents where earlier inquiries were flawed. This means that such investigations are rarely – if ever – concluded within the five-year time limit proposed in the Bill. As a result, in practice the presumption against prosecution will apply to virtually all cases, resulting in a *de facto* amnesty.

#### **Universal Jurisdiction and the ICC**

61. If the UK declines to prosecute breaches of the GCs and the UNCAT, then other States would be obliged to do so, under the principle of Universal Jurisdiction and under the jurisdiction of the ICC. This is on the basis that certain crimes – including torture – are so wrong as to require every nation to take responsibility to prosecute them. As the Special Court for Sierra Leone said, "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."<sup>42</sup>
62. An amnesty under domestic law cannot include crimes under international law that give rise to universal jurisdiction, as other states are still free to prosecute. As was established by the International Court of Justice in *Yerodia*,<sup>72</sup> international tribunals have jurisdiction over crimes under international law and there are no procedural bars, such as sovereign immunity, that can prevent such international prosecutions.
63. In *Prosecutor v Furundzija*, the ICTY Trial Chamber stated that amnesty laws should not be recognised by international tribunals.<sup>73</sup> While the issue of amnesty was under the Trial Chamber's immediate consideration, the Chamber was of the view that "taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law" would also be null and void and "would not be accorded international legal recognition" (at para.155). The Trial Chamber affirmed that "What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime."<sup>74</sup>

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<sup>70</sup> Merits and Reparations, Judgment of 24 February 2011, Series C No. 221, para. 239.

<sup>71</sup> *Kwoyelo v. Uganda*, para. 293. Emphasis added.

<sup>72</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment, Preliminary Objections and Merits, 14 February 2002, para 53. The decision established that acting heads of state and foreign ministries still benefit from serving immunity in third-county courts, however the judgment was not unanimous and there are still unresolved questions regarding this principle The Court has left the category open as to which other officials will be afforded such immunity.

<sup>73</sup> *Prosecutor v Furundzija*, Judgment, IT-95-17/1-T (10 December 1998)

<sup>74</sup> *Ibid.*

64. The Special Court for Sierra Leone (the “SCSL”) considered in detail the question of an amnesty granted to the RUF under the Lomé Peace Agreement.<sup>75</sup> In *Kallon and Kamara*, the Appeals Chamber held that the amnesty did not present a bar to prosecution of international crimes before the SCSL. The Appeals Chamber determined that an amnesty granted by one State cannot deprive another State of jurisdiction where that jurisdiction is universal as, “a State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.”<sup>76</sup>
65. Thus, the ICC would have jurisdiction where the UK is “unwilling or unable” to prosecute the crimes enumerated in the International Criminal Court Act 2001. As set out above, under international law there is a presumption that such crimes will be investigated and prosecuted. By reversing that presumption, the UK has demonstrated that it is not willing to prosecute British soldiers and commanders for offences committed overseas.

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<sup>75</sup> *Prosecutor v Kallon and Kamara*, paras. 66-80.

<sup>76</sup> *Ibid*, para.67.