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Wednesday Eden

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Foreword

It is with immense pride that I present the Autumn Issue of Volume 9 of the Cambridge Law Review, which reflects a summer of intensive work by our Editorial Board. I would like to thank the authors and our student editors (both at the University of Cambridge and as part of our International Editor programme) whose contributions were invaluable to this Issue. I would also like to express my personal gratitude to Darren Lee, who recently completed his LLM at Wolfson College, Cambridge, for undertaking the role of a Managing Editor at such short notice. As with the previous Issue, I am indebted to the members of the Managing Board (Christopher Symes, Rashidah Abdul Hamid, and Darren Lee) whose meticulous and thoughtful work greatly assisted in finalising this Issue for publication.

This Issue comprises four articles, each of which provides critical and thought-provoking insights on certain contemporary legal developments. These articles have been selected for publication because we believe that they make an important contribution to the academic literature and will be of interest to both UK and international audiences.

We begin with Daniel Beech's article, '*Deliveroo* in the Supreme Court: The Right to Collective Bargaining and the Employment Status of Platform Workers', which centres on the UK Supreme Court's decision in *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43 ('*Deliveroo*'). Beech critically examines two features of *Deliveroo*. The first feature is the Court's determination that, for article 11 of the European Convention on Human Rights ('ECHR') to apply to 'platform' workers, they must be in an 'employment relationship', one essential requirement of which is that workers must perform their services 'personally'. And the second feature is the Court's view that the contractual substitution clauses in this case were 'totally inconsistent' with this requirement of personal service, with the result that the Deliveroo riders were not in an employment relationship. After examining these two features, Beech contemplates the potential implications of *Deliveroo* both for platform workers, whom he describes as being vulnerable to 'sham or false self-employment', and for the hitherto 'purposive' judicial trend in analysing working arrangements. In particular, he argues that, by focusing on the Deliveroo riders' contractual power to use a substitute, the Supreme Court pursued an 'unduly restrictive' assessment of the riders' working arrangements which primarily focused on the formal terms of their contracts with Deliveroo. Beech then concludes by considering how statutory reform could ensure that platform workers 'receive adequate legal protection'.

Turning to the issue of transitional justice in Northern Ireland following the Troubles period (1968–1998), Martha McKinney-Perry examines the controversial 'amnesty' provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('Troubles Legacy Act') in her article, 'Rethinking Amnesty: A Critical and Prescriptive Response to Amnesty in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023'. McKinney-Perry argues that amnesty (defined as 'the granting of exemptions from prosecution to a group or class of people') is a prima facie wrong that requires justification for two reasons: first, because of the 'risk of harm' (in the form of violations of 'the right to justice' and 'the right to truth') that amnesty presents to victims of human rights violations; and second, owing to the 'negative social meaning' of amnesty. However, she then argues that the amnesty provisions in the Troubles Legacy Act, being prima facie wrongful, cannot be justified in present-day Northern Ireland either as a necessary evil (to establish peace or to avoid a biased criminal justice system) or as a means of pursuing truth. From this, McKinney-Perry proposes two alternative revisions

to the Troubles Legacy Act that would preserve certain perceived 'benefits' of the Act, such as its establishment of a truth commission, while removing those provisions that she describes as rendering its amnesty an 'unjustified prima facie wrong'. Following a Northern Ireland Court of Appeal decision last month that made several declarations of incompatibility with the ECHR in respect of the Troubles Legacy Act, McKinney-Perry's article provides a nuanced take on this issue amid growing calls to repeal the Act.

In his article, 'Terms and Conditions Apply? Online Incorporation of Contract Terms in *Parker-Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185', Eden A Smith comments on a recent decision by the Court of Appeal of England and Wales that concerned the incorporation of contract terms in an online context. Through his analysis of how the Court approached the question of whether the relevant terms in this case were incorporated into the contract, Smith identifies two 'gaps' in the Court's reasoning, which he describes as necessitating further discussion by the Court. These gaps are the following: first, the Court's failure to provide 'general guidance' on whether the incorporation analysis should differ when a court is considering a physical contract or a digital contract; and second, the Court's failure to consider, in its incorporation analysis, whether the relevant terms were unusual. Smith then compares the *Parker-Grennan* decision with cases in the USA and Australia, which he argues reveal a similar 'tendency' by courts to apply to digital contracts 'the same principles' relating to the incorporation of terms that apply to physical contracts. From this, he draws attention to the Court of Appeal's apparent acknowledgement in *Parker-Grennan* that these principles may need to 'adapt' as we enter an increasingly digital age.

Lastly, Robin M Kelly's article, 'Bridging the Private-Public Divide in Investor-State Arbitration: Can Retrofitting *Amicus Curiae* Improve How Tribunals Consider Human Rights Issues?', investigates whether third-party submissions to Investor-State Dispute Settlement ('ISDS') tribunals (referred to as '*amici curiae*') can provide 'an effective remedy' for rightsholders whose interests have historically been excluded from consideration in ISDS arbitration. She focuses in particular on human rights, including Indigenous rights, and how Indigenous peoples who live near 'resource extraction projects' in certain regions of Latin America and Africa, amongst others, often face human rights abuses owing to systemic inequalities. Drawing upon the United Nations Guiding Principles on Business and Human Rights, Kelly argues that the 'privatised model' in ISDS currently prevents *amici curiae* from forming an effective remedy for rightsholders because it produces a lack of 'predictability', 'transparency', and 'accessibility' for *amicus curiae* applicants. However, she then proposes a number of the reforms to address these limitations of *amicus curiae* involvement, the overarching goal of which is to promote the consideration of human rights interests within ISDS proceedings.

This has been a very successful year for the Cambridge Law Review and I am honoured to have served as Editor-in-Chief for Volume 9. I look forward to continuing in this role for Volume 10, alongside Christopher Symes as Vice Editor-in-Chief.

Wednesday Eden
Editor-in-Chief
Darwin College
9 October 2024

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Deliveroo in the Supreme Court: The Right to Collective Bargaining and the Employment Status of Platform Workers

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ABSTRACT

This article examines the recent decision of the UK Supreme Court in *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43 ('*Deliveroo*') and considers its wider implications for the employment status of those working in the 'gig' or 'platform' economy more broadly. Before assessing the reasoning of the Court, this article suggests that the increasing prominence of platform work has challenged many aspects of the traditional law on employment status. It proceeds to analyse the approach of the Court to the interpretation of article 11 of the European Convention on Human Rights ('ECHR'), insofar as it establishes that states are under a positive obligation to secure workers' rights to collective bargaining only where the workers in question stand in an 'employment relationship'. It then explores the Court's interpretation of the weight to be attached to the contractual right to appoint a substitute in the inquiry into the existence of any such employment relationship. Finally, it contemplates options for reform of the present law on employment status. Ultimately, it is argued that the Supreme Court adopts an unduly restrictive approach with wider implications for the 'purposive' trend of modern employment law. In the light of that observation, this article briefly makes the case for statutory reform.

Keywords: employment law, platform work, collective bargaining, employment status, collective labour law

I. INTRODUCTION

The legal regulation of platform work in the context of a wider 'gig economy'—broadly, the 'buying and selling of labour via digital platforms'[1]—ranks amongst the major challenges to the protective capabilities of UK employment law in the twenty-first century. The prevalence of

* LLB candidate (London School of Economics and Political Science). I am very grateful to the anonymous reviewers for their helpful comments on earlier drafts. All remaining errors are my own.

[1] Matthew Taylor and others, 'Good Work: The Taylor Review of Modern Working Practices' (Department for Business and Trade and Department for Business, Energy and Industrial Strategy, July 2017) ('Taylor Review') 25 <https://assets.publishing.service.gov.uk/media/5a82dcdce5274a2e87dc35a4/good-work-taylor-review-modern-working-practices-rg.pdf> accessed 28 September 2024; Alex J Wood, Nick Martindale and Brendan Burchell, 'Gig Rights and Gig Wrongs. Initial Findings from the Gig Rights Project: Labour Rights, Co-Determination, Collectivism and Job Quality in the UK Gig Economy' (Gig Rights Project 2023) 3 <https://www.bristol.ac.uk/media-library/sites/business-school/documents/Gig%20Rights%20&%20Gig%20Wrongs%20Report.pdf> accessed 28 September 2024.

such work has notably accelerated the contemporary 'erosion of the "standard employment relationship"', traditionally characterised by an indefinite contract of employment and the attendant expectation of continuous, long-term service with a single employer.[2] Specifically, platform workers sit uncomfortably with the law's tripartite division of employment status which, for the purpose of allocating statutory rights, distinguishes not simply between employees and the genuinely self-employed (in respect of whom statutory employment protection is altogether excluded) but—in contrast with other jurisdictions—also provides for an intermediate category of 'worker'.

Platform companies depend for the flexibility that supports their business models on the deliberate negation of employment status. They engage recruits on standard-form contracts, with standard terms offered on a 'take it or leave it' basis. These contracts typically go to great lengths to characterise such individuals as self-employed 'independent contractors'. The reward for doing so is highly prized: they are under no obligation to provide even basic statutory employment rights, such as holiday pay or the minimum wage, of any kind. That platform workers lack contracts of employment and do display some of the ordinary features of self-employed work, such as greater flexibility in determining their working hours, indicates—at least under UK law—that they are not 'employees'.[3] Nevertheless, it is not uncommon that sham contractual terms, drafted by proverbial 'armies of lawyers',[4] operate to disguise the reality of a working relationship in which the putative worker is to a significant extent materially subordinate to, and in turn required to obey the detailed managerial instructions of, the putative employer. Platform workers, and those in the gig economy more generally, are for this reason thought to be particularly vulnerable to exploitation. It is perhaps little surprise, therefore, that in a number of recent cases[5] the courts and employment tribunals have been called upon to determine whether platform workers might in fact meet, and so gain access to the rights and entitlements attaching to, the statutory definition of 'worker'.[6] This has coincided with an increasing reliance on strategic employment status litigation, by which platform workers, often with the aid of independent trade unions, have sought to establish formal 'legal recognition as workers'.[7]

The focus of this article is the latest such case to reach final appellate level: the Supreme Court's recent judgment in *Independent Workers Union of Great Britain v Central Arbitration Committee* ('*Deliveroo*').[8] *Deliveroo* concerned the unsuccessful efforts of the Independent Workers' Union of Great Britain ('IWGB') to invoke article 11 of the ECHR so as to bring a group of Deliveroo riders—contractually designated as self-employed—within the UK's statutory framework for compulsory collective bargaining. A condition of access to this procedure is 'worker' status. The central issue here was the extent to which it could be said that the riders were workers insofar as they provided their services to Deliveroo *personally*—both a core element of the statutory definition and a relevant consideration in the context

[2] Alan Bogg and Ricardo Buendia, 'The Law and Worker Voice in the Gig Economy' in Valerio De Stefano and others (eds), *A Research Agenda for the Gig Economy and Society* (Edward Elgar Publishing 2022) 74. Other forms of increasingly common atypical work include that which is performed through agencies and on the basis of periodic fixed-term contracts.

[3] Guy Davidov, 'Who Is a Worker?' (2005) 34 Industrial Law Journal 57, 62–65.

[4] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [57] (Elias J P).

[5] See in particular *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] 4 All ER 641; *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209.

[6] The standard definition (on which see below), substantially mirrored in all other relevant employment statutes, is given in section 230(3)(b) of the Employment Rights Act 1996 ('ERA 1996').

[7] Bogg and Buendia (n 2) 80.

[8] [2023] UKSC 43, [2024] 2 All ER 1 ('*Deliveroo* (UKSC)').

of article 11. In that light, this contribution aims to provide a critical account of the decision and, more broadly, to demonstrate its significance for platform work.

In so doing, this article examines in particular detail two aspects of the Supreme Court's reasoning. First, after providing some background, it considers the Court's conclusions on the personal scope of article 11 and the notion that it is engaged only in the context of an 'employment relationship'. It then turns to the question of substitution clauses—contractual terms indicating that putative workers are free to allow others to undertake their work for them (conventionally understood to be inconsistent with the requirement of personal service)—and their relevance to the employment status inquiry. In both areas, though particularly the latter, it is suggested that the Court adopts an unduly restrictive approach with wider implications for the 'purposive' trend of modern employment law.[9] Ultimately, *Deliveroo* is an important case inasmuch as it reveals that the present law on employment status bears negatively on both the individual *and* collective dimensions of employment law. To the extent that platform workers, often amongst the most precarious, are thus denied the protections afforded thereunder, it accentuates the necessity of statutory reform. This article then concludes by offering suggestions in that vein, drawing partly on recent European developments.

II. Employment Status and Platform Work

Access to the spectrum of statutory employment rights under UK law, as noted above, is contingent on the designation of a given individual as either an 'employee' or 'worker'. Section 230(1) of the Employment Rights Act 1996 defines the former as 'an individual who has entered into or works under... a contract of employment'. The latter category, by contrast, bestows a more limited range of rights on individuals working under 'any other contract... whereby the individual undertakes to do or *perform personally* any work or services for another party to the contract'.[10] Thus, in addition to the basic entitlements of workers, employees—subject to relevant qualifying conditions—have, amongst other rights, the right not to be unfairly dismissed,[11] the right to receive statutory redundancy pay,[12] the right to request flexible working and the benefit of other work-life balance provisions,[13] and the right to minimum notice periods in the event of dismissal.[14] Workers, conversely, are afforded a comparatively narrow set of protections, principally embodied in the legislation on anti-discrimination,[15] working time,[16] and the National Minimum Wage.[17]

In the absence of a statutory definition of 'employee' beyond a circular reference to the requirement of a contract of employment, it has been left largely to the common law to develop the principles applicable to the determination of employment status, with its traditional distinction between contracts 'of service' (indicative of employment) and contracts 'for

[9] See for example Guy Davidov, *A Purposive Approach to Labour Law* (1st edn, OUP 2016); Joe Atkinson and Hitesh Dhorajiwala, 'After *Uber*: Purposive Interpretation and the Future of Contract' (*UK Labour Law Blog*, 1 April 2021) <https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/> accessed 19 March 2024.
[10] ERA 1996, s 230(3)(b) (emphasis added).
[11] ibid s 94(1).
[12] ibid s 135(1).
[13] ibid s 80F(1)(a); Children and Families Act 2014, pts 7–10.
[14] ERA 1996, s 86(1).
[15] Equality Act 2010, s 83(2)(a).
[16] Working Time Regulations 1998, SI 1998/1833.
[17] National Minimum Wage Act 1998, s 1(2)(a); National Minimum Wage Regulations 2015, SI 2015/621.

services' (suggestive of those in business on their own account or self-employment).[18] The present approach adopted by courts and tribunals to examining whether a given individual can be said to be an employee involves consideration of multiple factors and broadly follows the principles summarised by MacKenna J in the High Court in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.[19] There must first be an 'irreducible minimum' of 'mutuality of obligation', in the form of an ongoing reciprocal commitment to provide one's labour in return for the giving of wages or other remuneration.[20] The court or tribunal must then look to the degree of control exercised by the putative employer over the individual in question, the extent of their subordination and integration within the main business undertaking, and the allocation of financial risk as between the parties.[21] Finally, there can be no contractual terms that, in their material application, are inconsistent with the relationship of employer and employee. This requirement has, in practice, centred largely on whether the substance of the relationship commits the individual, and they alone, to render their services *personally*.[22] As such, broadly framed clauses that offer the ability to appoint a substitute—contractual terms denying the obligation of personal service in its entirety—have been held to be 'wholly inconsistent' with employee status.[23]

The modern realities of platform work are plainly incongruous with many of these orthodox principles. Platform workers enjoy, at least in theory, a greater level of autonomy than employees (for example, in selecting the time, location, and duration of work) and are thus less obviously subordinate to—and subject to the precise control of—putative employers. That they are generally under an obligation to provide work only when they are 'logged on' to the relevant app suggests a lack of 'mutuality of obligation'.[24] Moreover, these workers often bear the economic risks of failing to work—their income fluctuating in proportion to the number of 'gigs' performed—and may supply their own tools and equipment, underlining a lesser degree of integration than that which characterises more typical employment. Finally, the insertion of substitution clauses into the contracts under which they operate, increasingly a matter of standard practice,[25] raises complications in respect of the requirement of personal service. Platform workers thus occupy what might be described as a legal 'no man's land' regarding the exact nature of their employment status,[26] to which the 'employee' paradigm is manifestly unsuited.

On closer examination, however, the position of platform workers and employees in the orthodox sense may not be as distinct as is often suggested by the relevant written contractual documentation. Alan Bogg and Ricardo Buendia emphasise, for instance, the disparity between 'formal contractual appearances' and platform workers' particular 'vulnerability to contractual exploitation'.[27] Platform workers frequently operate through 'structures of extensive direct and indirect legal control', largely under the contractual guise of self-employment,

[18] Bob Hepple, 'Restructuring Employment Rights' (1986) 15 Industrial Law Journal 69, 70. See also ERA 1996, s 230(2).
[19] [1968] 2 QB 497 (QB).
[20] *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240 (CA) [22] (Stephenson LJ).
[21] Hugh Collins, KD Ewing and Aileen McColgan (eds), *Labour Law* (2nd edn, CUP 2019) 203–07.
[22] ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 88.
[23] *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA) [32] (Peter Gibson LJ).
[24] Bogg and Buendia (n 2).
[25] Collins, Ewing and McColgan (n 21) 212.
[26] Tony Dobbins, 'Why a "No Man's Land" Employment Status Fuels Gig Worker Unrest' (*Social Sciences Birmingham*, 16 February 2024) <https://blog.bham.ac.uk/socialsciencesbirmingham/2024/02/16/why-a-no-mans-land-employment-status-fuels-gig-worker-unrest/> accessed 2 June 2024.
[27] Bogg and Buendia (n 2) 75.

notwithstanding that many aspects of their work—ranging from payment to permissible delivery routes—are tightly circumscribed and enforced on pain of discipline.[28] Broadly stated, they are akin to 'dependent contractors': those 'substantively distinguishable' from employees but whose work is nevertheless often characterised by a degree of subordination and economic dependence on a single user of one's labour that is not reflective of genuine self-employment.[29] Many individuals in the platform economy may, therefore, qualify for more limited statutory protection as 'workers'. The judicial approach to the statutory worker concept has broadly been to apply the above principles albeit with a lower 'pass-mark',[30] reflective of the genuine differences between employees and workers though conscious of the importance of statutory regulation of precarious work relations. Therefore, many of the considerations relevant to the determination of 'employee' status at common law are also applicable to the question of worker status, with the important difference that personal service is a statutory *requirement* in respect of the latter.

In recent years, the worker status inquiry has been at the centre of a growing acceptance that statutory employment provisions should generally be applied with particular regard for the protective legislative purpose that underpins them.[31] This purposive approach mandates a highly contextual analysis of individual working arrangements, notwithstanding the terms of any contract, such that where their substance betrays the vulnerabilities inherent in the typical employment relation—chiefly, subordination and dependence—a putative worker should be regarded as falling within the ambit of the relevant protective legislation.[32] The decision of the Supreme Court in *Uber BV v Aslam* establishes that it is this perspective from which courts and employment tribunals should address the question of worker status; indeed, it is precisely these features of work that entail that it 'cannot safely be left to contractual regulation'.[33]

The significance of the purposive approach becomes especially clear when it is understood that worker status not only governs access to individual entitlements, such as the minimum wage, but is also the threshold for the enjoyment of most *collective* labour rights. The relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992') state that only workers are entitled to the Act's trade union-related protections and, importantly, the benefit of the statutory collective bargaining procedure.[34] In this respect, the state's positive obligation to secure individuals' freedom of association under article 11 of the ECHR, encompassing a specific trade union freedom which the European Court of Human Rights ('ECtHR') has recognised to include a right to collective bargaining,[35] may influence the scope and interpretation of domestic legislation. It is the reach of article 11 in relation to the right to bargain collectively, and its impact on the statutory requirement of personal service, with which *Deliveroo* was centrally concerned.

[28] ibid.
[29] Davidov, 'Who Is a Worker?' (n 3) 61–62.
[30] *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96 (EAT) [17] (Underhill QC).
[31] Davidov, *A Purposive Approach* (n 9) 4.
[32] Alan Bogg, 'For Whom the Bell Tolls: "Contract" in the Gig Economy' (*Oxford Human Rights Hub*, 7 March 2021) <https://ohrh.law.ox.ac.uk/for-whom-the-bell-tolls-contract-in-the-gig-economy/> accessed 2 June 2024.
[33] *Uber* (n 5) [75] (Lord Leggatt); Atkinson and Dhorajiwala, 'After *Uber*' (n 9).
[34] Section 296 of the TULRCA 1992 accordingly defines 'worker' in terms substantially similar to the definition given in the ERA 1996.
[35] *Demir and Baykara v Turkey* (2008) 48 EHRR 54.

III. BACKGROUND TO *DELIVEROO*

In November 2016, the IWGB formally approached Deliveroo to request that it be recognised on a voluntary basis for the purposes of collective bargaining in respect of a group of riders in London. Deliveroo rejected this request, and the union subsequently sought to invoke the statutory recognition procedure under schedule A1 of the TULRCA 1992. This scheme enables 'a trade union which is refused recognition by an employer to use the legal process to require the employer to enter into collective bargaining',[36] itself limited in scope to 'negotiations relating to pay, hours and holidays'.[37] Applications under schedule A1 are heard by the adjudicative body responsible for administering the recognition procedure, the Central Arbitration Committee ('CAC'), which must determine a number of preliminary matters in assessing the suitability of a request for recognition. Amongst these are the requirement that the union represents 'a group or groups of workers' within the meaning of section 296 of the TULRCA 1992.[38]

Following its preliminary assessment, the CAC concluded that the riders were not workers, with the result that the IWGB was not entitled to be recognised. The central obstacle to a finding that they enjoyed worker status was the existence of a broad substitution clause in their written contracts, introduced by Deliveroo shortly prior to the formal hearing. The CAC had found that the riders operated under an 'unfettered and genuine right of substitution' reflected 'both in the written contract and in practice'.[39] This was considered to militate against the requirement of personal service and so was 'fatal to the Union's claim'.[40] The CAC also relied on the substitution clause to dismiss an alternative argument based on the right to collective bargaining protected by article 11 of the ECHR. It thus rejected the submission that article 11, by virtue of the interpretative duty under section 3 of the Human Rights Act 1998 ('HRA 1998'), required a broad construction of section 296 of the TULRCA 1992 that minimised the significance of personal service in the worker status inquiry so as not to exclude the riders from the ambit of schedule A1.

Permission for judicial review of the CAC decision was granted by Simler J on the sole ground of article 11. The High Court dismissed this challenge, upholding the findings of the CAC.[41] The Court of Appeal rejected a further appeal, with Underhill LJ affirming that the CAC was entitled to regard the substitution clause as a 'decisive' 'contra-indicator of worker status' even under the somewhat looser test for determining when article 11 is engaged.[42] Both the High Court and the Court of Appeal found, crucially, that there had been no interference at all with article 11 because the riders were not, as ostensibly required by Strasbourg jurisprudence, in an 'employment relationship' with Deliveroo. The principal issues before the Supreme Court were, therefore, whether the riders fell within the scope of article 11 insofar as it protects a right to collective bargaining and, accordingly, whether the

[36] *R (Kwik-Fit Ltd) v Central Arbitration Committee* [2002] EWHC 277 (Admin) [6] (Elias J).
[37] TULRCA 1992, sch A1, para 3(3).
[38] ibid sch A1, para 1 (emphasis added).
[39] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2018] IRLR 84 (CAC) ('*Deliveroo* (CAC)') [104].
[40] ibid [101].
[41] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 (Admin), [2019] IRLR 249.
[42] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2021] EWCA Civ 952, [2022] 2 All ER 1105 ('*Deliveroo* (CA)') [77].

UK could be said to be under a positive obligation to legislate to prevent their exclusion from the statutory recognition procedure.[43] Given the Supreme Court's conclusions, it did not need to consider whether any restriction on article 11 was justified in accordance with the usual ECHR proportionality analysis, or the merits of issuing a declaration of incompatibility under section 4 of the HRA 1998 if section 296 of the TULRCA 1992 could not be read down. The primary focus of the following sections is the Court's interpretation of article 11 and its application to the particular working arrangements of the riders concerned. This article suggests that in neither area are the Court's conclusions entirely defensible.

IV. Collective Bargaining and the Personal Scope of Article 11

The unanimous judgment of the Supreme Court was given by Lord Lloyd-Jones and Lady Rose, with whom Lord Briggs, Lord Stephens, and Lord Richards agreed. After briefly reviewing the essential factual findings of the CAC,[44] the Court proceeded first to consider the proper coverage of article 11 of the ECHR. This section contends that the interpretation adopted by the Court is, ultimately, unjustifiably narrow, in that it both lacks the support of ECtHR jurisprudence and is normatively unsatisfactory in view of the features of modern platform work. The result is to deny platform workers the protection of the Convention in circumstances where they are arguably most in need of it.

Article 11 protects both a general right to freedom of association, enjoyed by '[e]veryone', and a more specific right to form and join trade unions for the protection of one's interests.[45] The content of this trade union freedom has been acknowledged by the ECtHR to import a number of other rights, including a right that trade unions 'should be heard' by employers,[46] a right to non-discrimination on the basis of trade union membership,[47] and—in a more recent development—the right to strike.[48] Significantly, despite its longstanding insistence to the contrary, the Strasbourg Court accepted in *Demir and Baykara v Turkey* that a distinct right to collective bargaining now also forms, in principle, one of the 'essential elements' of the trade union freedom.[49] The Supreme Court's task in *Deliveroo* was to determine whether this aspect of article 11 was engaged in view of the riders' working arrangements and, if so, what the consequence of this would be.

On one view, the trade union freedom should, as Mark Freedland and Nicola Kountouris maintain, be conceived as 'essentially part of or continuous with' the general right to freedom of association.[50] This suggests that the right to collective bargaining forms simply one element of a right enjoyed by 'everyone', irrespective of employment status, so that any interference with it will automatically engage article 11. A conflicting approach may be identified in a more 'discrete' interpretation of article 11 which understands the collective labour

[43] *Deliveroo* (UKSC) (n 8) [10] (Lord Lloyd-Jones and Lady Rose).
[44] ibid [21]–[36].
[45] Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') art 11(1).
[46] *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617 [40].
[47] *Wilson v United Kingdom* (2002) 35 EHRR 20.
[48] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10. It should be noted that the ECtHR recognised the right to strike to be 'clearly protected' by article 11 of the ECHR, though declined to hold that it was one of its core or essential aspects: [84].
[49] *Demir* (n 35) [154].
[50] Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46 Industrial Law Journal 52, 55.

rights that it protects to operate only in more limited circumstances.[51] On this latter view, the right to bargain collectively will not be engaged unless the individuals in question can be characterised as 'dependent employees', or at least where their working arrangements reveal them to be in a position other than one of self-employment.[52]

The reasoning of the Court in *Deliveroo* was ultimately governed by the discrete interpretation. The Court commenced its analysis with the assertion that the trade union freedom under article 11 represents merely a 'specific sub-set of the general freedom of association', applicable to a narrower class of individuals.[53] As such, the Court dismissed the argument of counsel for the IWGB that the reach of article 11 should be interpreted on the wider basis that the 'right to bargain collectively is enjoyed by every individual with an occupational interest to protect'.[54] In so doing, it rejected the significance of *Manole v Romania*,[55] a Strasbourg authority appearing to suggest that the right extends also to the genuinely self-employed. There, the ECtHR found that the inability of a group of self-employed farmers to establish a trade union under Romanian law constituted an interference with their right to collective bargaining, albeit one that was justified under article 11(2) of the ECHR. However, the Supreme Court indicated that the judgment could be adequately rationalised as an application not of the trade union freedom but of the more general right to freedom of association. On this basis, the Court determined that the decision did not detract from the necessity of the discrete approach.[56]

Central to the Court's interpretation of the scope of article 11 was the notion that the right to collective bargaining, and the trade union freedom more widely, is engaged in the exclusive context of an 'employment relationship'.[57] In reaching this conclusion it relied principally on the decision of the ECtHR in *Sindicatul 'Păstorul Cel Bun' v Romania* ('*The Good Shepherd*')[58] in which the ECtHR suggested that this is the 'only [material] question' in assessing whether members of the Romanian clergy enjoyed the right to form a recognised trade union.[59] There, the existence of an employment relationship was said to depend on the application of 'relevant international instruments', chief amongst which included the criteria set out in Recommendation 198 of the International Labour Organization ('ILO').[60]

Therefore, *Deliveroo* represents clear authority for the principle that platform workers must stand in an employment relationship as a fundamental precondition of access to the right to bargain collectively under article 11 of the ECHR. The Court's endorsement of the discrete approach to article 11 is, admittedly, not without some justification. As the Court of Appeal emphasised, a wider interpretation of the trade union freedom risks an overly artificial route for determining the reach of the right to collective bargaining, detached from a more focused inquiry into the presence of an employment relationship.[61] Moreover, obvious practical difficulties are likely to be faced if the right may be asserted by 'everyone' or even by

[51] Joe Atkinson, 'Employment Status and Human Rights: An Emerging Approach' (2023) 86 MLR 1166, 1181–82.
[52] Freedland and Kountouris (n 50); ibid 1182.
[53] *Deliveroo* (UKSC) (n 8) [37] (Lord Lloyd-Jones and Lady Rose).
[54] ibid [38].
[55] App no 46551/06 (ECtHR, 16 June 2015).
[56] *Deliveroo* (UKSC) (n 8) [45]–[46] (Lord Lloyd-Jones and Lady Rose).
[57] ibid [39]–[46].
[58] (2014) 58 EHRR 10.
[59] ibid [141].
[60] ibid [142]; ILO Recommendation R198: Employment Relationship Recommendation (Recommendation Concerning the Employment Relationship) (95th Conference Session Geneva 15 June 2006) ('ILO Employment Relationship Recommendation'). The content of the Recommendation is discussed in Section V below.
[61] *Deliveroo* (CA) (n 42) [52] (Underhill LJ).

those with an 'occupational interest to protect',[62] and the discrete interpretation aligns with the insistence in domestic law that only statutory workers are entitled to collective labour protection.[63] Indeed, the statutory worker concept, with its emphasis on a contract to perform work personally, is central to the 'legal structure of collective labour law in the UK'; a narrower construction of the trade union freedom represents a more 'modest', and perhaps therefore realistic, means of extending its coverage to platform workers.[64]

Nevertheless, this section contends that the Supreme Court in *Deliveroo* adopted an unduly restrictive understanding of the right to collective bargaining. Its interpretation ultimately lacks the definitive support of Strasbourg jurisprudence and is liable arbitrarily to exclude platform workers, for whom the right is especially significant, from its remit.

In considering the rulings of the ECtHR and the international materials on which it has relied in construing the personal scope of article 11, it is not obvious that the right to collective bargaining necessarily depends on the prior existence of an employment relationship. The decision in *Sigurjonsson v Iceland*,[65] for instance, appears to approve a broader, 'continuous' approach. The Supreme Court dismissed this as irrelevant to *Deliveroo* on the basis that it involved the application of the general right to freedom of association, as distinct from the trade union freedom.[66] However, it did not address the ECtHR's explicit remark in that case that the trade union freedom 'is an aspect of the wider right to freedom of association, rather than a separate right'.[67] The ILO itself, on whose instruments the Strasbourg Court so heavily relied in *The Good Shepherd*, has also indicated that collective labour rights, such as the right to collective bargaining, form aspects of freedom of association held by all 'without distinction'.[68] Finally, it is significant, and should not be understated, that the employment relationship test has not been applied by the ECtHR in a decision beyond the specific facts of *The Good Shepherd*.[69]

A more compelling objection, however, is normative in nature: the nature of platform work as an increasingly prevalent form of atypical working necessitates a broader conception of article 11. *Deliveroo* thus illustrates, more fundamentally, 'a failure of the law to keep pace with changing employment practices'.[70] It is in the particular context of platform work that the danger of sham or false self-employment—the tendency of putative employers to mischaracterise the nature of a given employment relation so as to contract out of statutory regulation—is most pronounced. Many platform workers, such as the Deliveroo riders, may be virtually indistinguishable from statutory workers (and thus, on a purposive view, worthy of collective labour protection) but for the stringent requirement of personal service in English law. If the domestic statutory definition of 'worker' serves to exclude those in material need of the right to bargain collectively, it seems inappropriate that a similarly restrictive barrier should exist at

[62] *Deliveroo* (UKSC) (n 8) [38] (Lord Lloyd-Jones and Lady Rose).
[63] Alan Bogg and Michael Ford, 'Employment Status and Trade Union Rights: Applying Occam's Razor' (2022) 51 Industrial Law Journal 717, 728–29.
[64] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) 135 LQR 219, 220–21.
[65] (1993) 16 EHRR 462.
[66] *Deliveroo* (UKSC) (n 8) [42] (Lord Lloyd-Jones and Lady Rose).
[67] *Sigurjonsson* (n 65) [32].
[68] ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st Conference Session 9 July 1948, entered into force 4 July 1950) 68 UNTS 17, art 2.
[69] Joe Atkinson and Hitesh Dhorajiwala, '*IWGB v RooFoods*: Status, Rights and Substitution' (2019) 48 Industrial Law Journal 278, 284.
[70] Keith Ewing, 'Judicial Backpedalling on Trade Union Rights in the Gig Economy: Deliveroo in the United Kingdom Supreme Court' (*Institute of Employment Rights*, 13 December 2023) <https://www.ier.org.uk/comments/judicial-backpedalling-on-trade-union-rights-in-the-gig-economy/> accessed 3 June 2024.

the level of the ECHR. This is not to suggest that these individuals should enjoy the automatic protection of the Convention; after all, there must still be an unjustified interference with the right to collective bargaining in a context in which states are recognised as possessing a particularly wide margin of appreciation.[71] The Supreme Court was not prepared in *Deliveroo*, for example, to accept the existence of a positive obligation to secure a general right to *compulsory* collective bargaining.[72] Therefore, the riders' exclusion from schedule A1 of the statutory recognition procedure would not have constituted an interference with article 11 even if they fell within its scope. However, the consequence of the discrete interpretation of article 11 is to deny individuals in a substantially similar position to statutory workers even *prima facie* access to the right to form and join trade unions itself. As Keith Ewing observes, the result is to leave the riders in a position where they are unable to promote their substantial occupational interests in *any* meaningful capacity by means of collective action.[73] The somewhat artificial quality of this reasoning is reflected in the Court of Appeal's 'awkward' suggestion that to prevent a group of self-employed individuals from forming a trade union might interfere with their *general* freedom of association, notwithstanding the absence of a right under article 11 to 'associate as a trade union'.[74]

The restriction of access to the trade union freedom under article 11 to those in an employment relationship also conflicts with what has been recognised to be a growing understanding of collective labour rights as distinctly *human* rights.[75] Ordinarily, the enjoyment of human rights, by their very nature, does not turn on the employment status of those whom they are minded to protect.[76] Valerio De Stefano further suggests that vulnerability to the managerial prerogatives that employers hold over employees is amplified in respect of non-standard work, due to its precarious nature, in view of which full access to the right to collective bargaining is 'essential to secure [the] protection of... human dignity at the workplace'.[77] The characteristics of platform work, as previously elaborated, only reinforce this perspective.

Ultimately, therefore, the formulation proposed and rejected in *Deliveroo*—that the right to collective bargaining ought to extend to those with occupational interests to protect—seems a more appropriate articulation of the personal scope of article 11. The Supreme Court's focus on the presence of an employment relationship sits somewhat uneasily with the general jurisprudence of the ECtHR and its recent acknowledgement, even in one of its more restrictive decisions, that article 11 of the ECHR 'safeguards a trade union's freedom to protect the occupational interests of its members by collective action'.[78] It is also arguably inconsistent with the nature of the right as a human right and denies its benefit to platform workers already excluded from its ambit by a restrictive domestic statutory definition.

[71] *Deliveroo* (UKSC) (n 8) [44] (Lord Lloyd-Jones and Lady Rose).
[72] ibid [139].
[73] Ewing (n 70).
[74] Atkinson (n 51) 1182, fn 126; *Deliveroo* (CA) (n 42) [51].
[75] Atkinson (n 51) 1181; Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights Based Approach' (2017) 46 Industrial Law Journal 185.
[76] De Stefano (n 75) 195.
[77] ibid 198.
[78] *Unite the Union v United Kingdom* (2016) 63 EHRR SE7 [53]. In *Unite the Union*, the ECtHR dismissed the trade union's application that the abolition of the Agricultural Wages Board of England and Wales, the primary avenue for collective bargaining in the agricultural sector, constituted an interference with article 11 of the ECHR. This was so, it suggested, because agricultural workers remained free to seek to bargain collectively with their employers on a voluntary basis, even in circumstances where this would be, in most practical respects, a virtual impossibility: [59]–[61]. In reaching this outcome, however, the Strasbourg Court attached significance to the fact that, in contrast to the riders in *Deliveroo*, these workers continued at least to enjoy the benefit of other aspects of article 11, such as the right of their unions to be heard by employers: [65].

V. Employment Status: Rights to Substitution and the Existence of an Employment Relationship

Having determined that the right to bargain collectively will be engaged only where there exists an employment relationship, the Supreme Court then directly applied this test to the working arrangements of the riders in *Deliveroo*. The principal argument of this section is that, even accepting this to be the appropriate test, it was nevertheless improperly applied. In placing undue emphasis on the riders' ostensible right of substitution, *Deliveroo* appears tacitly to endorse the retreat of a purposive approach to employment status of the kind considered and strongly approved by the Court in *Uber*.

The Court agreed with the ECtHR's assessment in *The Good Shepherd* that whether the individuals' working arrangements gave rise to an employment relationship for the purposes of article 11 was to be determined primarily by reference to the criteria set forth in the ILO Employment Relationship Recommendation.[79] Although the Recommendation is not binding as a matter of domestic law, the Court concluded that, as a result of the reliance placed on the Recommendation by the Strasbourg Court in *The Good Shepherd*, it had been expressly 'incorporated into the Convention test for the identification of an employment relationship under art 11'.[80] The language of this instrument is, in many respects, highly purposive. The Preamble to the Recommendation foregrounds 'the objectives of decent work', calls for vigilance for attempts to 'disguise the employment relationship', and accentuates the need to ensure sufficient protection of 'the most vulnerable workers' in national law and practice.[81] Its substantive content provides that the inquiry must be 'guided primarily by the *facts* relating to the performance of work and the remuneration of the worker', irrespective of the contractual terms under which the worker operates.[82] At paragraph 13, the Recommendation specifies a range of relevant indicators of an employment relationship, including the degree of control and subordination, the level of integration, and any obligation of personal service. Where 'one or more' of these indicators are present, an employment relationship should be presumed.[83]

Outwardly, therefore, even within the more restrictive interpretation of article 11 of the ECHR, the Supreme Court enjoyed sufficiently broad latitude to employ a highly contextual approach to assessing the employment status of the riders. As the Court itself noted, the notion of an employment relationship under article 11 is an 'autonomous concept' divorced from the strictures of the domestic statutory worker definition.[84] As the CAC, High Court, and Court of Appeal had done, the Supreme Court identified as the central difficulty for the riders the extent of their obligation to provide services to Deliveroo personally.

It is helpful at this stage, in that connection, to summarise the CAC's and Supreme Court's findings as to the nature and operation of the substitution clause present in the riders' written contracts. The thrust of the ILO Recommendation, and of analogous jurisprudence in domestic law,[85] is that the mere existence of an alleged contractual right to substitute is not

[79] *Deliveroo* (UKSC) (n 8) [41], [57]–[60] (Lord Lloyd-Jones and Lady Rose).
[80] ibid [61].
[81] ILO Employment Relationship Recommendation (n 60) (emphasis added).
[82] ibid para 9 (emphasis added).
[83] ibid para 11(b).
[84] *Deliveroo* (UKSC) (n 8) [61], [65] (Lord Lloyd-Jones and Lady Rose).
[85] ibid [50]–[56].

of itself fatal to a finding of an employment relationship or worker status. This is particularly so where such a right is either not genuine, in the sense of being a partial or complete sham, or where personal service remains the 'dominant feature' of individual working arrangements.[86] Therefore, the focus throughout the appellate history of *Deliveroo* has been on the degree to which the riders enjoyed a *genuine* right of substitution which materialised in practice.

Deliveroo emphasised in its contract with the riders that it was 'not prescriptive' about any decision to appoint a substitute.[87] The CAC observed that the substitution clause had indeed been utilised by some riders, albeit that only a 'few, if that', did so as most saw little need to.[88] Of the 100 riders who formed the bargaining unit proposed by the IWGB to the CAC, the Supreme Court was able concretely to identify only two such instances: one rider who 'regularly engaged a substitute' and another who had done so on an apparently isolated occasion.[89]

The riders' right to appoint a substitute was reflected, therefore, in the actual practice of their working arrangements in an extremely limited—almost statistically insignificant—manner. However, this did not preclude the Supreme Court from ultimately finding that '[s]uch a broad power of substitution is, on its face, *totally inconsistent* with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within art 11'.[90] The riders were not entitled to the right to collective bargaining under article 11, as they fell altogether beyond its scope.

It may be too early to conclude that this outcome, of itself, heralds a decisive retreat of the purposive approach mandated by *Uber* and mirrored in the terms of the ILO Recommendation.[91] However, what this apparent departure from that approach does suggest is that the observation of some commentators that *Uber* had sounded the 'death knell for the written contract' in the determination of employment status is perhaps premature.[92] The reasoning by which the Supreme Court judged that the riders were not in an employment relationship with Deliveroo is open to objection on two main grounds.

First, the Court appears to have paid insufficient regard to the 'primacy of facts' principle which forms the essence of any purposive employment status inquiry,[93] obliging courts and tribunals to assess the practical substance of any contractual provision as it applies on the ground. The Supreme Court suggests that it is adequate that a broad substitution clause exists, and that it has been used on at least one prior occasion, for it automatically to negate the

[86] *James v Redcats (Brands) Ltd* [2007] IRLR 296 (EAT) [67] (Elias J P); *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745; *Pimlico Plumbers* (n 5); *Uber* (n 5).
[87] *Deliveroo* (UKSC) (n 8) [25] (Lord Lloyd-Jones and Lady Rose).
[88] ibid [28].
[89] ibid [29].
[90] ibid [69] (emphasis added).
[91] While the focus in *Uber* was one of domestic statutory interpretation, it has also been read to endorse and inform a generally purposive approach to the determination of employment status in all relevant contexts: see for example Bogg and Ford, 'Employment Status and Trade Union Rights' (n 63) 740; *Deliveroo* (UKSC) (n 8) [56] (Lord Lloyd-Jones and Lady Rose).
[92] Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 LQR 392, 399; Bogg, 'For Whom the Bell Tolls' (n 32).
[93] Nicola Kountouris, 'Not Delivering: The UK "Worker" Concept before the UK Supreme Court in *Deliveroo – IWGB v CAC and Another* [2023] UKSC 43' (2024) 0(0) European Labour Law Journal <https://doi.org/10.1177/20319525241242796> accessed 28 September 2024; Alan Bogg, 'Taken for a Ride, Again: Deliveroo Riders in the Supreme Court' (*Oxford Human Rights Hub*, 5 December 2023) <https://ohrh.law.ox.ac.uk/taken-for-a-ride-again-deliveroo-riders-in-the-supreme-court/> accessed 4 June 2024.

presence of any employment relationship. Such 'contractual tunnel vision'[94] forgoes a more sensitive examination of the riders' working arrangements, viewed holistically and with regard to the statistically meagre nature of the exercise of the right.[95] The Court also fails to offer a convincing answer to what the CAC termed the 'substitution conundrum':[96] why would Deliveroo riders exercise their theoretical substitution right instead of simply declining to log onto the app? Conversely, why would Deliveroo afford its riders absolute discretion in appointing a substitute of their choosing, given the extensive nature of the training with which they were each individually provided?

Additionally, despite acknowledging the employment relationship test under article 11 to be a freestanding concept unconstrained by provisions of domestic law, the Court seems to have effectively equated it with the statutory worker status inquiry. This is evident insofar as the apparent absence of an obligation of personal service was treated, of itself, as conclusively fatal to the riders' claim. The ILO Recommendation criteria note, however, that it is but one relevant indicator to be considered alongside a range of other factors.[97] Whereas the Court identified a number of other factors pointing to the lack of an employment relationship in *Deliveroo*, such as the ability of riders to undertake work for competitors, limited mutuality of obligation, and a lack of integration,[98] it did not consider any factors favouring inclusion. It might reasonably have considered the fact, recognised by the CAC, that delivery times are monitored on pain of disciplinary action and dismissal.[99] It might also have examined the inability of prospective riders to negotiate contracts differing from Deliveroo's standard terms, as would be expected of genuinely independent contractors.[100] Indeed, in *National Union of Professional Foster Carers v Certification Officer*,[101] the Court of Appeal did not regard the absence of a contract—a requirement of section 296 of the TULRCA 1992—as fatal to the existence of an employment relationship in the context of article 11 of the ECHR when applying the same test. The simple presence of a substitution clause, even one that is not a complete sham, should not have denied such a finding in respect of the riders in *Deliveroo*.

Deliveroo ultimately illustrates the ease with which broadly framed substitution clauses may be permitted to deny platform workers access not only to individual entitlements but also to methods of collective redress, such as the right to collective bargaining. This is so notwithstanding the possibility that any such clause might be of practical irrelevance to the vast majority of a given workforce. To this extent, it marks the tentative retreat of purposivism and the resurgence of a worker status inquiry that is concerned principally with the written terms of the relevant contract. In so doing, it contributes to the further marginalisation of both the individual and collective aspects of non-standard work. The interpretation of personal service offered by the Supreme Court is in essence, as Bogg suggests, 'tantamount to permitting contracting-out of employment protection'.[102] Inasmuch as it is conceivable that Deliveroo's sole purpose in introducing the substitution clause was to deny the riders worker

[94] Kountouris (n 93).
[95] Atkinson and Dhorajiwala, 'Status, Rights and Substitution' (n 69) 294.
[96] *Deliveroo* (CAC) (n 39) [98].
[97] Ewing (n 70).
[98] *Deliveroo* (UKSC) (n 8) [71]–[72] (Lord Lloyd-Jones and Lady Rose).
[99] *Deliveroo* (CAC) (n 39) [84].
[100] Bogg, 'Taken for a Ride, Again' (n 93); Gwyneth Pitt, '"The Simple Things You See Are All Complicated": Thoughts on Deliveroo' (*UK Labour Law Blog*, 15 January 2024) <https://uklabourlawblog.com/2024/01/15/the-simple-things-you-see-are-all-complicated-thoughts-on-deliveroo-by-gwyneth-pitt/> accessed 5 June 2024.
[101] [2021] EWCA Civ 548, [2021] 4 All ER 826.
[102] Bogg, 'Taken for a Ride' (n 64) 221.

status,[103] it has, therefore, successfully achieved this aim. This state of affairs is not only something that the Court had been so keen to avoid in *Uber*, but which it had also identified as the very normative foundation of the purposive approach.[104]

VI. Reform and Future Directions: Platform Work and Personal Service

The final brief observation of this article is that *Deliveroo*, and its attachment to the requirement of personal service as an essential feature of both the statutory worker concept and the notion of an employment relationship within article 11 of the ECHR, plainly demonstrates the necessity of statutory reform. Indeed, it may now be that personal service has become so entrenched in the general employment status jurisprudence that, if platform workers are to receive adequate legal protection, statutory reform is the 'only possible solution'.[105] The fundamental message of *Deliveroo* is that platform workers may easily be denied the protection of the ECHR for lack of personal service, which offers little redress in view of a restrictively interpreted statutory definition to the same effect. In this sense, the judgment vividly accentuates an anxiety that the Taylor Review was minded to address: that the obligation of personal service often represents, particularly where platform work is concerned, an 'automatic barrier to accessing basic employment rights'.[106]

An obvious consequence of *Deliveroo*, in the absence of reform, is a likely increase in platform companies' reliance on substitution clauses as a straightforward means of evading the statutory obligations owed to potential workers.[107] The Supreme Court's rather limited interpretation of article 11 also permits such terms to obstruct efforts on the part of platform workers to organise and demand that these companies enter into structures of collective bargaining.

One solution to this dilemma might be to legislate to abolish the requirement of 'personality in work' entirely.[108] It is submitted that this is not a desirable outcome. As has been seen already, too great an adherence to the notion of personal service risks exclusionary effects; nevertheless, it should not be forgotten that it serves a useful purpose in distinguishing between different kinds of work relations[109] and in reconciling the competing demands of 'universalism' and 'selectivity' in establishing the coverage of employment law.[110]

What is required, therefore, is a reassessment of personal service that preserves its value as an indicator of worker status in the platform economy but which does not, in the presence of other factors favouring inclusion, serve to deny statutory employment protection altogether. Relevant insights may, in this respect, be drawn from the European Commission's recently proposed Platform Work Directive.[111] The Directive proposes a 'legal presumption that an employment relationship exists between the digital labour platform and a person performing platform work', based largely on the degree of control to which the platform subjects

[103] *Deliveroo* (CAC) (n 39) [99].
[104] *Uber* (n 5) [76] (Lord Leggatt).
[105] Pitt (n 100).
[106] Taylor Review (n 1) 36.
[107] Kountouris (n 93).
[108] ibid.
[109] ibid.
[110] Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 OJLS 543.
[111] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work' COM (2021) 762 final.

the putative worker.[112] Significantly, it suggests that a substitution clause will not negate worker status where 'the freedom... to use subcontractors or substitutes' is effectively restricted.[113] Perhaps the greatest strength of a test of this kind lies is its accommodation of a more explicitly purposive approach, circumventing the 'automatic incompatibility that is assumed between an unfettered right of substitution and an obligation of personal service'.[114]

Beyond a more limited role for personal service, and the level of control that platform companies exercise over putative workers, an employment relationship should generally be presumed where individuals lack the ability to resist the unilateral imposition of contractual terms. This, too, has its basis in a purposive conception of statutory regulation; Bogg and Buendia emphasise that 'gig employers leverage their structural dominance' in the design of 'take it or leave it' written contracts,[115] and the Supreme Court acknowledged in *Uber* that it is this fact that 'gives rise to the need for statutory protection in the first place'.[116]

More generally, reform must address the various features of platform work that often present as ostensible characteristics of genuine independence and entrepreneurship—such as flexibility in working time or in choosing whether to work at all—but which are in reality often highly 'fictitious' in nature.[117] A chasm typically exists between the formal aspects of the written contract and the informal practice of platform work, and it is for this reason that repeated reference has been made to the intrinsic value of a purposive approach. Statutory indicators of worker status should leave as little room as possible for courts and tribunals to engage in a formalistic employment status inquiry that prizes any one factor over the *substance* of a given individual's working arrangements.[118]

VII. Conclusion

In the light of the vulnerabilities inherent in modern platform work, *Deliveroo* offered a valuable opportunity for the Supreme Court to clarify the personal scope of collective labour law. Ultimately, this is an opportunity which it largely declined to undertake. The intention of this article has been to demonstrate that the Supreme Court advanced a more restrictive interpretation of article 11 than strictly necessary by limiting access to the right to bargain collectively to individuals in an 'employment relationship'. Even applying this test, however, in its emphasis on the riders' contractual right of substitution, the Court arguably misconstrued the relevant ILO criteria and signalled the at least temporary retreat of what has come to be understood as the necessity of a distinctly purposive approach to the worker status inquiry. More broadly, *Deliveroo* might be said to underscore the limits of employment status litigation as a means by which to bring platform workers within the protective fold of employment law.

The effect of *Deliveroo* is to enshrine the obligation of personal service as an essential precondition of access to both the individual and collective dimensions of employment law. However, the decision is of more general significance in that it demonstrates that the law on

[112] ibid art 4.
[113] ibid art 4(2)(d).
[114] Atkinson and Dhorajiwala, 'Status, Rights and Substitution' (n 69) 293.
[115] Bogg and Buendia (n 2) 75.
[116] *Uber* (n 5) [76] (Lord Leggatt).
[117] Annika Rosin, 'The Right of a Platform Worker to Decide Whether and When to Work: An Obstacle to their Employee Status?' (2022) 13(4) European Labour Law Journal <https://doi.org/10.1177/20319525221128887> accessed 28 September 2024.
[118] Ewing (n 70).

employment status has failed to keep pace with significant advances in the modern labour market and the dramatic growth in platform work. Reform that reduces the statutory relevance of personal service, and that reinstates a contextual approach centred on the substance of individual working arrangements, is urgently required.

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Rethinking Amnesty: A Critical and Prescriptive Response to Amnesty in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

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ABSTRACT

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('Troubles Legacy Act') is a recent piece of legislation intended to 'promote reconciliation' in Northern Ireland following the Troubles. However, its amnesty provisions have generated outrage from victims' families, political parties in Northern Ireland, and international actors alike. Following the recent Northern Ireland Court of Appeal decision in *Dillon and Others*, which largely endorsed the earlier determination of the Belfast High Court that the Act's conditional amnesty provisions violate the UK's obligations under the European Convention on Human Rights ('ECHR') and the Windsor Framework, it appears that the Troubles Legacy Act's days are increasingly numbered. Although this article agrees with the Act's many critics that these amnesty provisions are ill-suited to Northern Ireland today, it disagrees that the correct response is to repeal the Act entirely. Instead, the article outlines two possible replacements for the current amnesty provisions that would serve similar ends without incurring an unjustified prima facie wrong. Overall, its analysis shows that the amnesty of the Troubles Legacy Act is prima facie wrongful, and that this wrongfulness is not justified, but that alternative provisions that do not have the same problems would render the Act permissible.

Keywords: Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, human rights, jurisprudence, the Northern Ireland Troubles, transitional justice

I. INTRODUCTION

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('Troubles Legacy Act') is a recent piece of legislation intended to 'promote reconciliation'[1] in Northern Ireland following the Troubles.[2] The Troubles Legacy Act seeks to replace existing methods of

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[1] Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('Troubles Legacy Act'), s 2(4).

[2] The Troubles was a 30-year period of sectarian violence in Northern Ireland between the late 1960s and 1998. The end of the Troubles in 1998 was marked by the signing of the Good Friday Agreement: Secretary of State for Northern Ireland, *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland* (Cm 3883, 1998) ('Good Friday Agreement').

Troubles-centred truth recovery,[3] which primarily involved investigations through the courts, with a truth commission called the Independent Commission for Reconciliation and Information Recovery ('ICRIR').[4] The amnesty provisions that accompany this truth commission have generated outrage from victims' families, political parties in Northern Ireland, and international actors alike.[5]

These are troublesome times for the Troubles Legacy Act. On 20 September 2024, the Northern Ireland Court of Appeal delivered its judgment in *Dillon and Others*.[6] The appeal had been brought by the Secretary of State for Northern Ireland against the earlier determination by the Belfast High Court[7] that the Troubles Legacy Act's conditional amnesty provisions violate the UK's obligations under the European Convention on Human Rights ('ECHR') and the Windsor Framework.[8] Colton J in the High Court had found that certain provisions of the Troubles Legacy Act were incompatible with articles 2 and 3 of the ECHR.[9]

It is noteworthy that, during the proceedings, the Secretary of State announced that he would 'no longer... pursue' the appeal against these declarations of incompatibility, though he still intended to pursue the other grounds of appeal relating to Colton J's interpretation of the Windsor Framework.[10] The Court of Appeal's decision is significant for largely endorsing the trial judge's position and for making additional declarations of incompatibility in relation to sections of the Act.[11] Following the initial High Court decision, the Government announced that it would begin preparations for 'a draft remedial order... to remedy' the High Court's declarations of incompatibility; however, the Secretary of State has now stated that he will review these preparations in the light of 'the additional declarations of incompatibility made by the Court of Appeal'.[12] It thus appears that the Troubles Legacy Act's days are increasingly numbered.

Although this article agrees with the Act's many critics that these amnesty provisions are ill-suited to Northern Ireland today, it disagrees that the correct response is to repeal the Act entirely. However, in order to prescribe an appropriate solution, we must first diagnose the specific problem at hand. The purpose of this article is to identify exactly what is wrong about the amnesty provisions of the Troubles Legacy Act and to propose solutions to this that would preserve the remainder of the Act.

[3] Anna Bryson and Kieran McEvoy, 'Human Rights Activism and Transitional Justice Advocacy in Northern Ireland' (2023) 17 International Journal of Transitional Justice 453, 454.

[4] Troubles Legacy Act 2023, ss 2–37.

[5] See for example *Re Dillon and Others' Applications* [2024] NIKB 11 ('*Dillon* (NIKB)') [501] (Colton J); Freya McClements and Martin Wall, 'Controversial Northern Ireland Legacy Bill to Become Law after Final Westminster Vote' *The Irish Times* (Dublin, 6 September 2023) <https://www.irishtimes.com/world/uk/2023/09/06/northern-ireland-legacy-bill-to-become-law-after-final-westminster-vote/> accessed 7 October 2024.

[6] *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59 ('*Dillon* (NICA)').

[7] *Dillon* (NIKB) (n 5).

[8] See for example ibid [187], [518], [613], [710] (Colton J); Seanín Graham and Freya McClements, 'Legacy Act: Immunity for Troubles-Era Killings Breaches Human Rights Law – Judge' *The Irish Times* (Dublin, 28 February 2024) <https://www.irishtimes.com/crime-law/courts/2024/02/28/legacy-act-troubles-northern-ireland-international-human-rights-law-court-rules/> accessed 7 October 2024.

[9] *Dillon* (NIKB) (n 5) [710] (Colton J); see also *Dillon* (NICA) (n 6) [13] (Keegan LCJ).

[10] *Dillon* (NICA) (n 6) [15] (Keegan LCJ).

[11] See for example ibid [173]; Hilary Benn, 'Written Ministerial Statement - Legacy - Northern Ireland' (Northern Ireland Office, 7 October 2024) <https://www.gov.uk/government/speeches/written-ministerial-statement-legacy-northern-ireland> accessed 7 October 2024.

[12] Benn (n 11).

After outlining the amnesty provisions contained in the Troubles Legacy Act in Section II, Section III then presents an argument in the instrumentalist tradition,[13] arguing that amnesty is a prima facie wrong that stands in need of justification.[14] Section IV addresses the situations in which amnesty can be justified and explains that the Troubles Legacy Act is not one of them. Finally, Section V outlines two possible replacements for the current amnesty provisions that would serve similar ends without incurring an unjustified prima facie wrong. Taken together, the analysis shows that the amnesty of the Troubles Legacy Act is prima facie wrongful, and that this wrongfulness is not justified, but that alternative provisions could be put in place that would render the Act permissible.

II. AMNESTY IN THE TROUBLES LEGACY ACT

Amnesty refers to the granting of exemptions from prosecution to a group or class of people.[15] Blanket amnesties are those offered unconditionally to all perpetrators for all crimes committed.[16] Conditional amnesties require perpetrators to satisfy certain conditions, such as a full disclosure of wrongdoing, before being eligible for amnesty.[17]

The Troubles Legacy Act contains two amnesty provisions. The first provision is a conditional amnesty scheme offered in return for cooperation with the ICRIR.[18] The second provision is a blanket amnesty that is established by the elimination of current and future criminal proceedings,[19] civil proceedings,[20] and inquests[21] related to Troubles-era conduct.

The conditional amnesty provision is intended to induce the perpetrators of Troubles-related crimes to disclose information about their wrongdoing to the ICRIR. The conditions for this amnesty to be granted are as follows:

> (2) *Condition A*: P has requested the ICRIR to grant P immunity from prosecution.
> (3) *Condition B*: the immunity requests panel is satisfied that the ICRIR is in possession of an account ('P's account') that—
> (a) has been given by P,
> (b) describes conduct by P which is, or includes, conduct forming part of the Troubles ('P's disclosed conduct'), and
> (c) is true to the best of P's knowledge and belief...
> (5) *Condition C*: the immunity requests panel is satisfied that P's disclosed conduct would tend to expose P—

[13] Juan Espindola, 'The Case for the Moral Permissibility of Amnesties: An Argument from Social Moral Epistemology' (2014) 17 Ethical Theory and Moral Practice 971, 974.
[14] See Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 OJLS 467, 471–72.
[15] Kent Greenawalt, 'Amnesty's Justice' in Robert I Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 189; Gwen K Young, 'All the Truth and as Much Justice as Possible' (2003) 9 UC Davis Journal of International Law & Policy 209, 211.
[16] See for example Young (n 15) 218; Max Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 Ethics & Global Politics 1, 6; Espindola (n 13) 973.
[17] Kenneth Christie, *The South African Truth Commission* (Palgrave Macmillan 2000) 123–24; Patrick Lenta, 'Amnesties, Transitional Justice and the Rule of Law' (2023) 15 Hague Journal on the Rule of Law 441, 443.
[18] Troubles Legacy Act 2023, s 19.
[19] ibid s 38.
[20] ibid s 43.
[21] ibid s 44.

> (a) to a criminal investigation of, or
> (b) to prosecution for,
> one or more particular serious or connected Troubles-related offences identified by the panel...[22]

If a person meets these three conditions, the immunity requests panel may grant either specific amnesty ('immunity from prosecution for all of the *identified* possible offences'),[23] general amnesty ('immunity from prosecution for *all* serious or connected Troubles-related offences'),[24] or both. All Troubles-related crimes where the perpetrator meets these three conditions are eligible for amnesty. However, the attractiveness of this conditional amnesty as an incentive to disclose information is severely diminished by the Troubles Legacy Act's second amnesty provision, which provides a blanket amnesty.

The blanket amnesty provision was initially intended to protect British army veterans and ex-police officers in Northern Ireland from 'vexatious legal claims' about the events of the Troubles.[25] The elimination of current and future investigations into Troubles-related crimes protects all perpetrators of such crimes from prosecution. For this reason, the blanket amnesty provision applies to everyone unconditionally—including those who would also be eligible for the Act's conditional amnesty provision.

When referring to the Troubles Legacy Act's amnesty provisions in its analysis, this article will be referencing both the conditional amnesty and the blanket amnesty established by the Act. The combined effect of these provisions is to exempt all perpetrators of Troubles-related crimes from prosecution regardless of whether they cooperate with the ICRIR and, additionally, to exempt those who do cooperate and meet certain conditions.

III. The Case for Amnesty as a Prima Facie Wrong

This section will argue that amnesty in transitional justice contexts is prima facie wrongful. The implication of this argument for the Troubles Legacy Act is that, if amnesty is a prima facie wrong, then the blanket amnesty provision of the Troubles Legacy Act is prima facie wrongful. The next section will address the circumstances in which amnesty can be justified and will determine whether the amnesty of the Troubles Legacy Act falls under one of these circumstances.

A. Prima facie wrongfulness

An action that is prima facie wrong is an action that requires justification.[26] Prima facie wrongfulness is a preliminary assessment of an action's wrongfulness. Once other considerations and justifications are factored in, the action may be found to be either justified or

[22] ibid ss 19(2)–(3), 19(5).
[23] ibid s 19(8) (emphasis added).
[24] ibid s 19(9) (emphasis added).
[25] The Conservative and Unionist Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) 52 <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> accessed 7 October 2024. See also Bryson and McEvoy (n 3) 456; Laura McAtackney, 'Troubles Legacy Bill: "It's Almost as if the UK Is Writing Itself Out of the North's History"' (*The Journal*, 8 September 2023) <https://www.thejournal.ie/readme/northern-ireland-troubles-legacy-bill-6162581-Sep2023/> accessed 7 October 2024.
[26] Dempsey and Herring (n 14).

unjustified.[27] This is distinct from another sense in which an action can be wrong, which Michelle Madden Dempsey and Jonathan Herring refer to as 'all-things-considered' wrongs—these are actions that can never be justified regardless of other considerations.[28]

One further characteristic of prima facie wrongfulness is that, even when justified, these actions leave behind a 'moral residue of regret', whereas non-wrongful acts do not.[29] The effect of this is that we should prefer less wrongful alternatives to justified prima facie wrongs if those alternatives can achieve the same outcome.[30]

In arguing that amnesty is a prima facie wrong, this article is claiming that the provision of amnesty is an act that requires justification. While the wrong of amnesty could conceivably be outweighed by other considerations, and thus justified, our preliminary assessment of amnesty is still that it is morally wrong. Additionally, if alternative measures can achieve the same outcome as amnesty without incurring a wrong, those measures are preferable and states should pursue them where possible.

This article argues that amnesty is a prima facie wrong for two reasons: first, due to the risk of harm that amnesty poses to victims of human rights violations; and secondly, due to the 'negative social meaning' of amnesty.[31]

B. Risk of Harm

When an action poses a nontrivial risk of significant harm to another person or persons, that action is prima facie wrongful.[32] For the action to be considered a prima facie wrong, the risk posed must be sufficiently likely to occur and the harm risked must be sufficiently serious.[33] Harms that render an action prima facie wrongful include, but are not limited to, significant psychological harms.[34]

Amnesty poses a nontrivial risk of harm to the victims of human rights violations in two ways: first, through violations of the right to justice; and secondly, through violations of the right to truth. Rights violations are wrong in and of themselves,[35] but violations of these particular rights also cause significant psychological harm to victims and their families. For these reasons, amnesty constitutes a prima facie wrong based on the risk of harm to victims of human rights violations.

(i) The Right to Justice

This subsection will argue that amnesty violates the right to justice. The implication of this argument is that, insofar as amnesty violates the right to justice, amnesty constitutes a prima facie wrong based on the risk of harm it poses to victims.

The right to justice in the context of post-conflict amnesty encompasses several interconnected concepts, including the following: a victim's right to a remedy;[36] a victim's right to

[27] See for example Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 Ethics 21, 26; ibid.
[28] Dempsey and Herring (n 14).
[29] ibid 488.
[30] ibid 489.
[31] ibid 481.
[32] ibid 475.
[33] ibid 476.
[34] ibid 479.
[35] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 188.
[36] See for example UNCHR (Sub-Commission), 'Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Final Report Prepared by Mr Joinet Pursuant to Sub-Commission Decision 1996/119' (1997) UN

see their oppressor held accountable through the criminal justice system;[37] and a victim's right to reparations.[38] These rights create a correlative duty on the part of states to 'investigate, prosecute, and compensate' violations of human rights.[39]

Amnesty violates the right to justice by preventing the perpetrators of human rights violations from standing trial for their actions.[40] This violates victims' rights to a remedy, denies victims the opportunity to see their oppressor held accountable, and deprives victims of reparations for the harm that has occurred.

In its landmark decision of *Barrios Altos v Peru*,[41] the Inter-American Court of Human Rights ('IACtHR') found that Peru's amnesty laws:

> prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case.[42]

The two amnesty laws in question had granted amnesty to government officials who carried out human rights violations under the Fujimori regime.[43] The IACtHR explained that these amnesty laws violated the victims' rights to a fair trial, which are protected under article 8 of the American Convention on Human Rights ('ACHR'), and victims' rights to judicial protection, which are protected under article 25 of the ACHR.[44] The IACtHR upheld this decision in the later case of *Almonacid-Arellano v Chile*,[45] where it found that states had an obligation under the ACHR to 'prevent, investigate, and punish all violations of the rights recognized by the Convention'.[46]

The United Nations Human Rights Committee ('UNHRC') came to a similar decision in *Rodríguez v Uruguay*,[47] where it stated that amnesty laws are incompatible with state obligations to investigate past human rights abuses.[48] The UNHRC found that such amnesties

Doc E/CN.4/Sub.2/1997/20 ('Joinet Report'), para 26; Juan Pablo Perez-Leon-Acevedo, 'The Control of the Inter-American Court of Human Rights over Amnesty Laws and Other Exemption Measures: Legitimacy Assessment' (2020) 33 Leiden Journal of International Law 667, 673, 675; Lenta (n 17) 446–47.

[37] See for example Joinet Report (n 36); Perez-Leon-Acevedo (n 36) 671–73.

[38] See for example ibid; Young (n 15) 245.

[39] Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59 Law and Contemporary Problems 93, 95. See also Joinet Report (n 36) para 27; Perez-Leon-Acevedo (n 36) 671–73, 675.

[40] Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German Law Journal 1203, 1204.

[41] *Barrios Altos v Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001).

[42] ibid para 42.

[43] Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 The International and Comparative Law Quarterly 645, 655; Thomas M Antkowiak, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 434.

[44] *Barrios Altos* (n 41) para 42; see also Lisa J Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia Journal of International Law 915, 962.

[45] *Almonacid-Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006).

[46] ibid para 110.

[47] UNHRC, 'Communication No 322/1988' (9 August 1994) UN Doc CCPR/C/51/D/322/1988 ('*Rodríguez v Uruguay*').

[48] ibid para 12.4.

violate a victim's right to a remedy, which is protected under article 2, paragraph 3 of the International Covenant on Civil and Political Rights ('ICCPR').[49]

In *Marguš v Croatia*,[50] the ECtHR found that amnesties for killing and ill-treatment violated states' obligations to prosecute human rights violations.[51] Additionally, the ECtHR stated that such amnesties violated the right to life, which is protected under article 2 of the ECHR, and the right not to be subjected to ill-treatment, which is protected under the article 3 prohibition against torture.[52] The ECtHR argued that granting amnesty for such acts 'render[ed] illusory the guarantees in respect of' these rights.[53]

Overall, the IACtHR, the UNHRC, and the ECtHR have all found that amnesty violates the right to justice. When human rights abusers are not prosecuted for wrongdoing, this violates victims' rights to a remedy, their rights to see their oppressor held accountable, and their rights to reparations. Given that rights violations constitute harms in and of themselves and that amnesty violates the right to justice, amnesty therefore constitutes a prima facie wrong through its risk of harm to victims.

(ii) The Right to Truth

This subsection will argue that amnesty violates the right to truth. If amnesty is proven to violate the right to truth, then this is another way that amnesty constitutes a prima facie wrong due to the risk of harm posed to victims. While it is often argued that amnesty accompanied by a truth commission will not violate the right to truth, this subsection will suggest that very few truth commissions have avoided this rights violation, and the ICRIR is not one of them.

The right to truth refers to two different concepts. The first of these is a collective societal right to know the events surrounding human rights violations in order to prevent reoccurrence.[54] The second is the right of victim-survivors and the families of the deceased to know the truth surrounding instances of human rights violations that affected them.[55] Similarly to the right to justice, the correlative duty on states is to investigate human rights violations.[56] States must uncover information about the events of human rights violations in order to fulfil both the victims' and society's right to truth.

Amnesty violates the right to truth by preventing investigation into the events surrounding human rights violations, thus preventing information about those events from coming to light.[57] As a result, neither the collective right to truth nor the individual victim's right to truth is fulfilled.

In *Barrios Altos*, the IACtHR found that Peru's failure to investigate and clarify the events that took place in the Barrios Altos neighbourhood prevented surviving victims and the families of deceased victims from finding out the truth of what happened.[58] In this way, Peru's amnesty laws violated their right to truth.

[49] ibid paras 12.2, 12.4. See also Young (n 15) 216; Perez-Leon-Acevedo (n 36) 675.
[50] (2016) 62 EHRR 17.
[51] ibid [139].
[52] ibid [127].
[53] ibid.
[54] Joinet Report (n 36) para 17.
[55] ibid; Perez-Leon-Acevedo (n 36) 672. For the term 'victim-survivors', see Laplante (n 44).
[56] See for example *Barrios Altos* (n 41) para 48; Young (n 15) 236.
[57] Young (n 15) 243.
[58] *Barrios Altos* (n 41) paras 47–48.

In Argentina, families whose loved ones had disappeared argued that Argentina's amnesty laws violated their right to truth by preventing investigation into the fate of their loved ones.[59] When the Argentine Supreme Court upheld the amnesty laws, victims' families petitioned the Inter-American Commission on Human Rights.[60] The parties later reached a friendly settlement in which Argentina recognised the victims' families' right to truth and the accompanying obligation on the state to '[exhaust] all means to obtain information on the whereabouts of the disappeared persons'.[61]

Overall, by preventing investigations into human rights abuses and thus preventing the truth surrounding those human rights abuses from coming to light, amnesty violates the right to truth. This violation extends to the following: the collective societal right to know the events surrounding atrocities in order to prevent reoccurrence; surviving victims' rights to know the truth surrounding human rights abuses that they suffered; and the right of families of the deceased and disappeared to know the fate of their loved one(s).

The natural response to this claim, particularly in the context of the Troubles Legacy Act, is to say that amnesties that are accompanied by truth commissions may not violate the right to truth; in fact, such measures may better fulfil the right to truth than criminal investigations would. In some cases, it is conceivable that a successful truth commission could reveal the truth surrounding human rights violations better than criminal trials could. This view will be discussed in detail in the next two sections.

However, it is not certain that truth commissions do fulfil the right to truth better in all cases, and there is reason to think that truth commissions not accompanied by blanket amnesties are more successful at this than truth commissions that are so accompanied. Kenneth Christie, Priscilla B Hayner, and Naomi Roht-Arriaza each posit that the success of South Africa's Truth and Reconciliation Commission ('TRC') was due in part to the credible threat of prosecution for those who were not granted amnesty.[62] Perpetrators of human rights violations were therefore motivated to disclose information by both the 'carrot' of amnesty and the 'stick' of potential prosecution, leading to more information being disclosed.[63] A truth commission accompanied by a blanket amnesty, as in the Troubles Legacy Act, lacks this 'stick' and is less likely to induce confessions.[64] Thus, while it is possible for an amnesty to fulfil the right to truth if accompanied by a truth commission, it is not certain that a toothless truth commission will be able meaningfully to fulfil this right.

This subsection has argued that amnesty violates the right to truth. Insofar as it does, amnesty poses a risk of harm to surviving victims of human rights abuses, to the families of deceased victims, and to society as a whole. For this reason, amnesty constitutes a prima facie wrong due to the harm risked by its violation of the right to truth.

[59] Mallinder (n 43) 650; see also Joinet Report (n 36) 27.
[60] Mallinder (n 43) 651.
[61] Inter-American Commission on Human Rights, Report No 21/00, Case 12.059, *Carmen Aguiar de Lapacó v Argentina* (29 February 2000), para 17.
[62] Roht-Arriaza (n 39) 102; Christie (n 17) 126; Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 100.
[63] Christie (n 17) 126.
[64] ibid; see also John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 34, 36.

C. SOCIAL MEANING

The 'negative social meaning' of an action can render that action prima facie wrongful.[65] Dempsey and Herring use the example of a person waving a Confederate flag in the USA who commits a prima facie wrong because of the negative social meaning that American society attaches to this flag.[66] The prima facie wrongfulness of these actions is not dependent on the intentions of the perpetrator; even if the flag waver only intends to convey positive values, such as community pride, the action still has a negative social meaning due to the racist connotations of the Confederate flag.[67] As with any prima facie wrong, actions with negative social meanings could still be outweighed by other considerations. However, the 'moral residue of regret' that accompanies even justified prima facie wrongs means that any alternative action that could achieve the same ends without committing a wrong should be preferred.[68]

Actions can have multiple social meanings, some of which are positive and some of which are negative.[69] To prove that an action is a prima facie wrong, it is enough to show that one of these social meanings is sufficiently negative to render the action wrongful.[70] This section will argue that amnesty has at least two such negative social meanings: first, endorsing impunity; and secondly, granting forgiveness to human rights violators.

(i) Impunity

First, amnesty's endorsement of impunity renders it a prima facie wrong. The UN Commission on Human Rights defines impunity as 'the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account'.[71] One of the social meanings associated with amnesty is an endorsement of impunity, as amnesty prevents human rights violations from being investigated and thus prevents perpetrators of these violations from being brought to account.[72] Certain forms of amnesty appear to be granted for the sole purpose of providing impunity.[73] These include blanket amnesties, which apply to all crimes and all perpetrators, and self-amnesties, which apply to government officials and their allies.[74] Amnesty and impunity are considered so closely linked that the final report of the South African TRC recommended against general or blanket amnesties '[i]n order to avoid a culture of impunity'.[75]

The first problem with this social meaning of endorsing impunity is that impunity violates a core principle of the rule of law, which is that everyone is equal under the law.[76] Amnesty privileges certain groups by virtue of their position as ex-government officials and allies (in the case of self-amnesty) or by virtue of the time period in which they committed

[65] Dempsey and Herring (n 14) 481.
[66] ibid.
[67] ibid 483.
[68] ibid 482.
[69] ibid 485.
[70] ibid.
[71] Joinet Report (n 36) 17.
[72] See for example Young (n 15) 215; *Marguš* (n 50) [127]; Lenta (n 17) 444.
[73] Espindola (n 13) 973.
[74] ibid.
[75] Christie (n 17) 141.
[76] See for example Pensky (n 16) 9; Lenta (n 17) 444, 446.

human rights violations (in the case of blanket amnesties).[77] By allowing groups of people to be considered above the law and to escape prosecution for human rights violations, amnesty's endorsement of impunity indicates a disregard for the rule of law. As a result, amnesty constitutes a prima facie wrong.

An example of amnesty indicating a disregard for equality under the law took place during the South African TRC. The TRC granted a blanket amnesty to 37 senior African National Congress ('ANC') leaders in November 1999 and did not apply the strict conditions for amnesty that all other perpetrators were required to abide by.[78] This blanket amnesty was later overturned, but the perceived impartiality of the TRC was undermined as a result.[79] In this case, the provision of amnesty to these ANC leaders endorsed impunity and disregarded the principle of equality before the law, as the leaders were treated differently due to their position within the ANC.

The second problem with this social meaning is that impunity ignores the preferences of victims, who broadly tend to desire justice through the courts.[80] Even when criminal trials are unlikely to uncover information or to identify perpetrators successfully, the idea that justice can be reached through the courts is of immense 'symbolic value' to victims.[81] By ignoring victims' strong preference to see the perpetrators of human rights violations being held accountable, amnesty's endorsement of impunity indicates a disregard for the victims of human rights violations. This is especially harmful because a state that has experienced human rights violations owes a reparative obligation to victims, as the harm suffered was due in part to the state's failure to protect victims from harm.[82] As a result, amnesty's disregard for victims through this social meaning constitutes a prima facie wrong.

An example of this disregard for victims' preferences can be seen in Northern Ireland, where surviving victims and the families of deceased victims have opposed the Troubles Legacy Act since it was first proposed.[83] Despite protests against the amnesty provisions from the beginning, the UK Parliament passed the Act into law without considering victims' preferences.[84] In response, victims of Troubles-related crimes took to the courts to challenge the legality of these amnesty provisions.[85]

In conclusion, one of the social meanings of amnesty is that it endorses impunity. This endorsement is harmful because it disregards both the rule of law, in particular the principle of equality before the law, and victim's preferences, which are overwhelmingly in favour of perpetrators of human rights violations being made to stand trial. For these reasons, amnesty constitutes a prima facie wrong based on its social meaning as an endorsement of impunity.

[77] Lenta (n 17) 444, 446.
[78] Christie (n 17) 128–29.
[79] ibid 129.
[80] Laplante (n 44) 929, 931.
[81] Bryson and McEvoy (n 3) 456.
[82] Espindola (n 13) 975.
[83] McClements and Wall (n 5).
[84] Seanín Graham, '"It's as if My Whole Life Has Been this Waste of Time": Protest in Belfast over Troubles Legacy Bill' *The Irish Times* (Dublin, 13 September 2023) <https://www.irishtimes.com/ireland/2023/09/13/its-as-if-my-whole-life-has-been-this-waste-of-time-protest-in-belfast-over-troubles-legacy-bill/> accessed 7 October 2024.
[85] Graham and McClements (n 8).

(ii) Forgiveness

This subsection argues that amnesty's offer of forgiveness to perpetrators of human rights violations renders it a prima facie wrong. Forgiveness is 'a conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm'.[86] According to both Gwen K Young's and Christie's definitions, amnesty consists of an act of forgiveness towards perpetrators that is granted or sanctioned by the official state.[87] The idea of amnesty is inherently connected to the idea of forgiveness.

Martha Minow attempts to distinguish between forgiveness and amnesty by claiming that the former involves attitude and relationship shifts, while the latter involves 'merely relinquishing the authority to punish'.[88] However, this is a false distinction. Amnesty does involve changes in attitude, even if this attitude shift is on the part of the state rather than on the part of the victims. By rendering the prosecution of a perpetrator impossible, the state's attitude towards that person shifts away from viewing them as a criminal who needs to be held to account. This is a form of forgiveness.

Even if this were not the case, amnesty is still seen as an act of forgiveness. This is especially true when an amnesty is granted in pursuit of societal reconciliation, for which forgiveness and a reduction in hostilities are a prerequisite.[89] The Troubles Legacy Act is an example of this, as the Act states throughout that its purpose is to 'promote reconciliation'.[90] For these reasons, state forgiveness of wrongdoing is one of the social meanings associated with amnesty.

The problem with the idea that amnesty implies forgiveness of wrongdoing is that the state does not have the authority to forgive on behalf of victims.[91] This is true in cases where victims suffered due to a government failure to protect them from harm,[92] but this is especially true in cases where perpetrators were acting as agents of the state. When the state forgives, or is perceived to forgive, perpetrators, it robs victims of the opportunity either to forgo their grievances or to choose not to do so.[93] Additionally, victims are less likely to learn who the perpetrator was or to see that perpetrator show repentance.[94] The UN Commission on Human Rights stated on this matter that '[f]or forgiveness to be granted, it must first have been sought'.[95]

In summary, one of the social meanings of amnesty is that it is tantamount to an act of forgiveness. This forgiveness wrongs victims because the state has no authority to forgive on their behalf and this robs victims of the opportunity to choose whether or not to forgive perpetrators themselves; they are removed entirely from the equation. For this reason, amnesty constitutes a prima facie wrong through its perceived equivalence with forgiveness.

[86] Martha Minow, 'Forgiveness, Law, and Justice' (2015) 103 California Law Review 1615, 1618.
[87] Christie (n 17) 120; Young (n 15).
[88] Minow (n 86).
[89] See Young (n 15) 214.
[90] See for example Troubles Legacy Act 2023, preamble, ss 2(4), 50(4)(a).
[91] Minow (n 86) 1629.
[92] Espindola (n 13) 975.
[93] Minow (n 86) 1619, 1629.
[94] Joinet Report (n 36).
[95] ibid.

IV. When Can Amnesty Be Justified?

Having established that amnesty is prima facie wrongful, this section will now explain the circumstances in which amnesty can nevertheless be justified. Section IV.A explains how amnesty can be justified as a necessary evil in contexts where no alternative transitional justice mechanism is possible. Section IV.B then discusses forms of limited conditional amnesty that may be permissible when accompanied by a truth commission. Section IV.C compares its analysis up to this point to the amnesty of the Troubles Legacy Act to determine whether the Act's amnesty provisions are justified, ultimately finding that they are not. Overall, this article argues that, while there are conditions in which amnesty is justified, the amnesty of the Troubles Legacy Act is not one of these cases.

This article's analysis in this section will implicitly respond to the retributivist position on amnesty which argues that amnesty is never permissible.[96] Retributivists view amnesty as an 'all-things-considered' wrong, meaning that there is no context in which amnesty could ever be justified because crimes must be punished.[97] By outlining the circumstances in which amnesty is justified, this article counters this position and suggests that there are cases where amnesty is permissible.

A. Amnesty as a Necessary Evil

It is possible to identify contexts in which amnesty is prima facie wrongful, yet this wrongfulness is outweighed by other considerations. In these cases, amnesty is rendered a justified prima facie wrong by external circumstances.[98] This article will address two such cases: first, where amnesty is a necessary concession to guarantee a successful transition to peace; and secondly, cases where the criminal justice system is too biased to provide adequate access to justice, rendering amnesty the only viable alternative.

(i) Urgent Peace Negotiations

In states negotiating an end to conflict, amnesty has often been a necessary concession to secure a successful peace treaty.[99] This article argues that, in such cases, amnesty is permissible because the benefits of securing peace outweigh the prima facie wrongfulness of amnesty, thus rendering it a justified prima facie wrong.

Securing a stable peace outweighs the prima facie wrongfulness of amnesty for two reasons. First, conflict poses a threat to the right to life of citizens, which is protected under article 6 of the ICCPR.[100] The right to life is a prerequisite to accessing any other right. Therefore, states must prioritise fulfilling this right over the fulfilment of the rights to justice and to truth.[101] Secondly, ending the conflict prevents further human rights violations from taking

[96] Espindola (n 13).
[97] See for example Dempsey and Herring (n 14); Pensky (n 16) 8–9.
[98] See for example Dempsey and Herring (n 14); Lenta (n 17) 453.
[99] See for example Christie (n 17) 122; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002) 4; Laplante (n 44) 916; Lenta (n 17) 443, 453.
[100] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), art 6.
[101] UNHRC, 'General Comment No 36' (3 September 2019) UN Doc CCPR/C/GC/36, para 2.

place, thus fulfilling the state's duty to protect its citizens from harm.[102] As a result, despite the threat that amnesty poses to the rights to truth and to justice (as outlined in the previous section), amnesty is still permissible when it is necessary to negotiate an end to conflict.

An example of amnesty serving this role took place in South Africa in the early 1990s. One of the conditions of South Africa's peace negotiations was that amnesty would be granted for political acts during apartheid.[103] This amnesty served as an incentive for different actors to engage in these negotiations in good faith and to uphold their commitments;[104] the decision to condition amnesty on cooperation with a truth commission came later.[105] The success of these peace negotiations was crucial as South Africa was on the brink of a civil war at the time.[106] Given that the promise of amnesty encouraged different actors to engage in peace negotiations, thus preventing an outbreak of civil war in South Africa, amnesty in South Africa was permissible due to its necessity for guaranteeing peace.

Another example of amnesty incentivising key actors to engage in urgent peace negotiations was the accelerated release scheme of the Good Friday Agreement.[107] While this was not a full amnesty, the scheme guaranteed the early release of paramilitary prisoners who met certain conditions.[108] Additionally, the Good Friday Agreement committed to releasing all eligible prisoners within two years, which has since been interpreted as a maximum prison sentence of two years for Troubles-related offences.[109] In return for shorter prison sentences for their members, paramilitary groups in Northern Ireland were required to observe a ceasefire.[110] The early release policy, while controversial, incentivised paramilitary organisations to uphold their commitments to peace.[111] For this reason, the provision was critical for guaranteeing an end to the Troubles and a successful transition to peace.

(ii) Biased Criminal Justice System

In states that have recently transitioned from military dictatorships and other authoritarian regimes, criminal justice is often not an option because former leaders and human rights violators are still in positions of power.[112] This is particularly problematic when those individuals continue to wield influence within the judiciary or as prosecutors.[113] This article argues that, in these cases, amnesty may be permissible because the harms incurred by a biased or seemingly biased criminal justice system outweigh the prima facie wrongfulness of amnesty.

[102] See for example Espindola (n 13) 975; Mallinder (n 43).
[103] Christie (n 17) 122.
[104] ibid.
[105] Hayner (n 62).
[106] Christie (n 17) 133.
[107] See Northern Ireland (Sentences) Act 1998, s 3.
[108] Eligibility for accelerated release was determined by an independent commission. Prisoners were deemed eligible for early release if they were affiliated with a paramilitary organisation that had observed a ceasefire, if they did not support an organisation that was not observing a ceasefire, and if they were not considered a threat to society: see for example Kieran McEvoy, 'Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict' (1999) 22 Fordham International Law Journal 1539, 1559–60; Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 Fordham International Law Journal 1095, 1113–14.
[109] Kieran McEvoy and others, 'Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland' (April 2020) 11 <https://caj.org.uk/wp-content/uploads/2020/04/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf> accessed 7 October 2024.
[110] Good Friday Agreement (n 2).
[111] McEvoy (n 108) 1561–54.
[112] See for example Laplante (n 44) 924; Binder (n 40) 1207–08.
[113] See for example Minow (n 86) 1630; Lenta (n 17) 464.

Newly democratic regimes are particularly fragile and require a certain level of trust in the state in order to secure a stable democracy and entrench the rule of law.[114] The resources available to the criminal justice system may also be limited relative to the number of perpetrators of human rights violations.[115] In these circumstances, the risk—real or perceived—that the criminal justice system exhibits bias towards perpetrators of human rights violations will lead to less public trust in the impartiality of the courts.[116] This bias signals that impunity is granted to those who held power in the previous regime which, as argued in Section III, renders an action prima facie wrongful on the basis of its social meaning. Additionally, a failure to attempt to investigate all human rights violations without bias violates victims' rights to justice.[117]

Amnesty can be justified in these circumstances on the basis that the only alternative (namely, a biased or seemingly biased criminal justice system) is more wrongful than amnesty. If the right to justice is compromised by both amnesty and a biased criminal justice system, and both have a negative social meaning of sanctioning impunity, then amnesty may be combined with a truth commission to offer some fulfilment of the right to truth which otherwise would not be possible.[118]

When Chile transitioned from a military dictatorship to civilian rule in 1990, the previous military dictator, Augusto Pinochet, still had significant influence within the government and judiciary.[119] His successor inherited a blanket amnesty law passed in 1978 and a legislature and judiciary that were unwilling to overrule this law.[120] In this case, where the lingering influence of the previous regime protected all perpetrators of wrongdoing in the 1970s from prosecution, President Patricio Aylwin instead accepted the amnesty and established a truth commission.[121] He stated in his inaugural speech that he would prioritise '[f]ull disclosure of the truth, and justice to the extent possible'.[122] Where there is no meaningful access to criminal justice, even an imperfect amnesty can be combined with a truth commission to constitute a preferable alternative. Therefore, in these cases, amnesty can be permissible because the alternative is a worse violation of rights with comparably poor social meaning.

B. LIMITED AMNESTY IN PURSUIT OF TRUTH

There are certain formulations of conditional amnesty that may be justified when combined with a truth commission: first, amnesty of a limited scope that is proportionate to the information received in return; and secondly, amnesty with strict conditions where prosecution remains a meaningful alternative for perpetrators who do not meet these conditions. These amnesties fulfil victims' rights and are therefore not prima facie wrongful on the ground of the risk of harm to those rights.

[114] Lenta (n 17) 464.
[115] Jakob v H Holtermann, 'The End of "the End of Impunity"? The International Criminal Court and the Challenge from Truth Commissions' (2010) 16 Res Publica 209, 224.
[116] Lenta (n 17) 464.
[117] Joinet Report (n 36) paras 26–27.
[118] Laplante (n 44) 924.
[119] ibid.
[120] Young (n 15) 218; ibid.
[121] Young (n 15) 218–19; Laplante (n 44) 924.
[122] Laplante (n 44) 924 (citing Aylwin's speech on 12 March 1990); see also Jorge Correa Sutil, '"No Victorious Army Has Ever Been Prosecuted...": The Unsettled Story of Transnational Justice in Chile' in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997) 133.

While these forms of amnesty are still prima facie wrongful on the ground of their negative social meaning, the fulfilment of rights outweighs this social meaning, thereby rendering the amnesty permissible.

(i) Proportionate to Information

To begin with, amnesty of a limited scope that is linked to a commission of inquiry or truth commission may be effective at fulfilling the right to truth.[123] In cases where disclosure of specific information to a commission of inquiry will fulfil either society's collective right to truth or victims' individual rights to truth,[124] then amnesty that incentivises the disclosure of that information may be permissible. Amnesty is justified in such situations if it is limited to 'specific amnesty' in return for information,[125] meaning that the information provided cannot be used as evidence in criminal proceedings against the person who disclosed it.[126] This is distinct from 'general amnesty', which would protect the person disclosing information from prosecution entirely, which is not proportionate to the information provided.[127]

The right to truth is an incredibly important right. The collective right to know the truth about events surrounding human rights violations is required to prevent such violations from reoccurring in the future.[128] Surviving victims and the family members of deceased victims also have the right to know about the events surrounding the human rights violations that harmed them.[129] The absence of this information can be deeply upsetting for victims, which is why many victims have gone to great lengths to overturn amnesty laws that violated their right to truth.[130] For this reason, fulfilment of the right to truth is a very important benefit; limited amnesty provisions that fulfil the right to truth can be justified on the basis that this benefit outweighs the negative social meaning of amnesty. To examine such amnesty provisions, we can draw upon two examples from Northern Ireland: the Northern Ireland (Location of Victims' Remains) Act 1999 ('Location of Victims' Remains Act'); and the Saville Inquiry.[131]

First, the purpose of the Location of Victims' Remains Act was to locate the bodies of individuals who were 'disappeared' (i.e. murdered and secretly buried) by the Irish Republican Army ('IRA') during the Troubles.[132] In order to incentivise the IRA to share information that would otherwise have been incriminating, the Act contained a conditional immunity: no information provided or evidence gathered when locating victims' bodies was admissible in criminal proceedings.[133] Overall, the initiative was a success and 13 of the 16 'disappeared' victims' bodies were recovered.[134] For the families of these deceased victims who otherwise would have never learnt of their loved ones' fate, this was a hugely important fulfilment of their right to truth and allowed them to gain closure.[135]

[123] Espindola (n 13) 971.
[124] Joinet Report (n 36) para 17.
[125] Troubles Legacy Act 2023, s 19(8).
[126] See for example Bell (n 108) 1126; Lauren Dempster, *Transitional Justice and the 'Disappeared' of Northern Ireland: Silence, Memory, and the Construction of the Past* (Routledge 2019) 152.
[127] Troubles Legacy Act 2023, s 19(9).
[128] Joinet Report (n 36) para 17.
[129] *Barrios Altos* (n 41) para 47; Joinet Report (n 36) 27.
[130] Mallinder (n 43) 650–57; see also *Dillon* (NICA) (n 6) [6] (Keegan LCJ).
[131] See generally Lord Saville, William L Hoyt and John L Toohey, *Report of the Bloody Sunday Inquiry* (Stationery Office 2010).
[132] Bell (n 108) 1125–26; Dempster (n 126) 7–10.
[133] Bell (n 108) 1126; Dempster (n 126).
[134] Dempster (n 126) 9–10.
[135] Joinet Report (n 36) 27.

The second example of limited amnesty fulfilling the right to truth is the Saville Inquiry. The Saville Inquiry was a public inquiry into the events of Bloody Sunday, a 1972 civil rights protest which turned violent with the involvement of British Army paratroopers.[136] This inquiry offered a similar form of conditional immunity to the Location of Victims' Remains Act: information provided by a perpetrator to the Saville Inquiry was not admissible in criminal proceedings against them.[137] The Saville Inquiry, which was established in 1998 and published its findings in 2010, found that the 13 civilians shot dead by the British Army on Bloody Sunday were innocent of any wrongdoing.[138] This finding was crucial for the fulfilment of the following rights: the collective right to truth in Northern Ireland of the events surrounding violations of human rights; the right of surviving victims to knowledge of the human rights violations that harmed them; and the right of the families of deceased victims to the truth about their relatives' fate.

Taken together, the Location of Victims' Remains Act and the Saville Inquiry demonstrate why amnesty is permissible in cases where it is limited in scope and uniquely allows for the fulfilment of the right to truth.

(ii) Strict Conditions

This article argues that conditional amnesty with strict conditions and a credible threat of prosecution can be justified when accompanied by a truth commission. The best example of this is the conditional amnesty of the South African TRC, where anyone who disclosed information but did not meet the conditions for amnesty would face prosecution.[139] Additionally, anyone whose wrongdoing was revealed by another person's testimony but who had not applied for amnesty themselves would also face prosecution.[140] In this way, perpetrators were dually motivated to cooperate with the TRC by the 'carrot' of amnesty and the 'stick' of potential prosecution.[141]

To qualify for amnesty, a perpetrator's crime had to be politically motivated rather than personally motivated, the act had to be proportional to the political objective, and the perpetrator had to make a full disclosure to the TRC.[142] The TRC received over 7,000 applications for amnesty, but many were refused because the applicant did not meet one of these criteria.[143] For example, the TRC denied 4,500 applications for amnesty solely due to lack of political motive.[144] One disappointment of the TRC was that, although the TRC provided a list of 300 suspected perpetrators to the authorities in 1999 where there was strong evidence to believe that these individuals had committed human rights violations, only 21 were deemed worthy of investigation.[145] Nonetheless, the threat of prosecution alone motivated far more

[136] See for example Bell (n 108) 1103–05; Cheryl Lawther, 'Peace without the Past? Truth, Transition and the Northern Ireland Case' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi (eds), *Theorizing Transitional Justice* (Routledge 2015) 34.

[137] Kieran McEvoy and others, 'The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland' (March 2015) iv <https://cain.ulster.ac.uk/victims/docs/mbt/2015-03-24_MBT_Amnesties-NI.pdf> accessed 7 October 2024.

[138] See for example Lawther (n 136); Bryson and McEvoy (n 3) 457.

[139] Holtermann (n 115) 210; Hayner (n 62).

[140] See for example ibid; Roht-Arriaza (n 39) 102; Christie (n 17) 126.

[141] Christie (n 17) 126; Hayner (n 62); see also Braithwaite (n 64) 34.

[142] See for example Christie (n 17) 126; Hayner (n 62) 99–100; Holtermann (n 115) 210.

[143] Christie (n 17) 130; Hayner (n 62) 101.

[144] Hayner (n 62) 101.

[145] ibid 101–02.

perpetrators to testify to the TRC, leading to the successful accumulation of more information.[146]

The conditional amnesty of the South African TRC was not prima facie wrongful on as many grounds as other forms of amnesty. First, the TRC fulfilled victims' rights to justice because more information became available about apartheid-related crimes. Not everyone who applied for amnesty received it, but prosecutions were rendered possible by the increased information provided through increased testimonies—even though the prosecuting authorities ultimately chose not to pursue many of these cases.[147] Secondly, the fact that amnesty was not granted to everyone who applied meant that this amnesty provision was not closely tied with the idea of impunity in the way that amnesty usually is.[148] Thirdly, the increased information provided to the TRC due to the combined 'carrot' of amnesty and 'stick' of prosecution led the TRC to uncover and publish more of the truth surrounding human rights violations in apartheid South Africa.[149] Taken together, the TRC's conditional amnesty was not only prima facie wrongful on fewer grounds than other forms of amnesty, but the fulfilment of the rights to justice and the rights to truth as a result of this provision is a benefit that substantially outweighs the prima facie wrongfulness of the amnesty. For this reason, the conditional amnesty of the TRC was justified, and similarly strict conditional amnesties with similarly credible threats of prosecution are also justified.

C. THE TROUBLES LEGACY ACT

Having outlined the circumstances in which the prima facie wrong of amnesty can be justified, this article now turns to the Troubles Legacy Act to determine whether the Act's amnesty provisions can be justified. Overall, it concludes that the Troubles Legacy Act is not a case where the use of amnesty is justified. This means that the Act's amnesty provisions are unjustified prima facie wrongs and are therefore impermissible.

(i) Amnesty as a Necessary Evil

Section IV.A established that there are two cases in which amnesty is a necessary evil: when amnesty is a necessary concession to secure peace negotiations; and when the criminal justice system risks exhibiting too much bias. Section IV.C now argues that neither of these situations applies to the Troubles Legacy Act, meaning that the Act's amnesty provisions cannot be justified on the basis of amnesty being a necessary evil.

The first case does not apply to the Troubles Legacy Act as Northern Ireland is not currently experiencing conflict. The 1998 Good Friday Agreement formally ended the violence of the Troubles and Northern Ireland has been at peace ever since.[150] Additionally, the amnesty provisions of the Troubles Legacy Act are profoundly unpopular with both nationalist and unionist political parties in Northern Ireland; the Act's primary supporters are veterans' organisations and the UK Conservative Party.[151] It is therefore unclear who the amnesty provisions of the Troubles Legacy Act would be intended to appease even if Northern Ireland

[146] Christie (n 17) 130; ibid 126, 132.
[147] Hayner (n 62) 101–02.
[148] See for example Young (n 15) 209; Lenta (n 17) 444.
[149] Christie (n 17) 126; Hayner (n 62).
[150] Rory O'Connell, Fionnuala Ní Aoláin and Lina Malagón, 'The Belfast/Good Friday Agreement and Transformative Change: Promise, Power and Solidarity' (2024) 57 Israel Law Review 4, 5–7.
[151] McClements and Wall (n 5).

were currently experiencing conflict. For these reasons, the amnesty of the Troubles Legacy Act is not justified on the basis of necessity to secure peace.

The second case in which amnesty can be justified as a necessary evil is when the criminal justice system cannot be trusted to be impartial. However, there is a reduced risk of impartiality in Northern Ireland today. While the Northern Ireland justice system was seen as politically biased at the end of the Troubles, the Good Friday Agreement introduced a series of reforms that have significantly improved the state of the criminal justice system.[152] These reforms included the establishment of an independent commission on police reform, which led to the creation of a new police force in Northern Ireland.[153] 26 years after the end of the Troubles, there is far less risk of political bias within the criminal justice system. Consequently, the amnesty provisions of the Troubles Legacy Act are unlikely to be justified based on the real or perceived lack of impartiality of the criminal justice system.

Overall, the amnesty provisions of the Troubles Legacy Act cannot be justified on the basis of either necessity to secure peace or necessity to avoid real or perceived bias within the criminal justice system. For this reason, the Troubles Legacy Act's amnesty provisions are not justified on the basis that amnesty is a necessary evil, meaning that, unless otherwise justified, this amnesty constitutes an unjustified prima facie wrong.

(ii) Limited Amnesty in Pursuit of Truth

Section IV.B established that, when amnesty accompanies truth commissions or commissions of inquiry, there are forms of conditional amnesty that can be permissible. The first case is amnesty of a limited scope that is proportionate to specific, sought-after information. The second case is amnesty with strict conditions and a credible threat of prosecution. This article argues that the amnesty provisions of the Troubles Legacy Act do not match either of these descriptions and that therefore the provisions are not justified on this basis.

The first case does not apply to the Troubles Legacy Act because the ICRIR is not specifically tied to any particular information, but rather seeks information about 'harmful conduct forming part of the Troubles' more broadly.[154] This is a far broader scope than the narrower commissions of inquiry previously established in Northern Ireland. Additionally, the scope of the amnesty provisions is also broader than previous commissions of inquiry. The conditional amnesty of both the Location of Victims' Remains Act and the Saville Inquiry was limited to a guarantee that the information provided was not admissible as evidence in criminal proceedings.[155] By contrast, both amnesty provisions of the Troubles Legacy Act offer amnesty for more wrongdoing. The blanket amnesty provision protects perpetrators from all civil proceedings, criminal proceedings, and inquiries.[156] The conditional amnesty provision allows the immunity requests panel to grant general amnesty at the panel's discretion.[157] For these reasons, the Troubles Legacy Act is not a case where amnesty of a limited scope is offered in exchange for specific information.

The second case, which is amnesty with strict conditions and a credible threat of prosecution for those who do not meet these conditions, is also not applicable to the Troubles

[152] Linda Moore, 'Policing and Change in Northern Ireland: The Centrality of Human Rights' (1999) 22 Fordham International Law Journal 1577, 1580–81.
[153] Christian Mailhes, 'Northern Ireland in Transition: The Role of Justice' (2005) 0 Estudios Irlandeses 77, 84.
[154] Troubles Legacy Act 2023, s 2(5)(b).
[155] See for example Bell (n 108) 1126; McEvoy and others, 'The Historical Use of Amnesties' (n 137); Dempster (n 126).
[156] Troubles Legacy Act 2023, ss 38, 43–44.
[157] ibid s 19(9).

Legacy Act. The criteria for the conditional amnesty of the Troubles Legacy Act are far less strict than those of South Africa's TRC.[158] These conditions are that the perpetrator ('P') requests immunity, that they disclose Troubles-related conduct which is true to the best of their knowledge, and that the conduct would otherwise expose P to criminal investigation and prosecution.[159] The condition that this information is 'true to the best of P's knowledge and belief' is far more subjective than the requirement of full disclosure in South Africa's TRC.[160] Additionally, the blanket amnesty provision of the Troubles Legacy Act removes any truly credible threat of prosecution, meaning that there is no 'stick' to induce perpetrators to disclose information to the ICRIR.[161] For these reasons, the Troubles Legacy Act is also not a case of amnesty with strict conditions where those who do not comply will face prosecution.

Overall, while the amnesty provisions of the Troubles Legacy Act do accompany a truth commission, these provisions are neither proportionate to specific sought-after information nor accompanied by strict conditions with a credible threat of prosecution. For this reason, the amnesty of the Troubles Legacy Act is not a permissible form of conditional amnesty.

V. Next Steps for the Troubles Legacy Act

Having established that the amnesty of the Troubles Legacy Act is prima facie wrongful and that this wrongfulness is not justified by the context of Northern Ireland, this section will propose two alternative policies for the Troubles Legacy Act. Section V.A will address the removal of amnesty from the Act entirely, which is the option favoured by victims in Northern Ireland.[162] Section V.B will propose a version of the South Africa model, imposing stricter conditions on the provision of amnesty and removing the Act's blanket amnesty provision. Overall, Section V will provide two possible solutions to the wrongfulness of the Troubles Legacy Act's amnesty provisions which would render the Act justified.

The implication of this section on the Troubles Legacy Act is that pursuing one of these two alternative policies would preserve the remainder of the Act. The alternative (namely, repealing the Act entirely) would also mean abolishing the ICRIR and the memorialisation efforts that the Act contains. Preserving the Act is preferable as there are benefits to the ICRIR and its ability to empower the right to truth which can only be served by a truth commission.[163]

A. No amnesty

This sub-section will introduce the first proposal for the Troubles Legacy Act, which is to remove the amnesty provisions entirely but preserve the remainder of the Act. Given that amnesty is prima facie wrongful, as argued in Section III, this is a preferable alternative to the current amnesty provisions because it does not incur a prima facie wrong in the first place.

[158] See Bryson and McEvoy (n 3).
[159] Troubles Legacy Act 2023, ss 19(2)–(3), 19(5).
[160] See Bryson and McEvoy (n 3).
[161] Christie (n 17) 126; Hayner (n 62).
[162] McClements and Wall (n 5).
[163] Hayner (n 62) 4–6.

There are four reasons why this proposal is superior to the current amnesty provisions. First, absent amnesty provisions, there is no risk that the Troubles Legacy Act will violate the UK's obligations under the ECHR.[164] Secondly, the absence of the Act's blanket amnesty provision will allow victims to continue to seek justice through the courts. This better fulfils the right to justice.[165] Even if not many prosecutions are likely to take place, the 'symbolic value' of access to the courts is very important to victims in Northern Ireland.[166] Thirdly, the ICRIR would continue to exist under this option, the difference being that the ICRIR would lack the power to grant immunity. Therefore, the ICRIR could continue to seek out information to fulfil the collective and individual rights to truth through investigations and the collection of testimony from those who are not at risk of prosecution.[167] Fourthly, a version of the Troubles Legacy Act that does not contain amnesty provisions would not signal either forgiveness or impunity towards perpetrators, thus avoiding the negative social meaning of the current amnesty provisions.[168] For these reasons, this policy is preferable to the current amnesty provisions of the Troubles Legacy Act.

However, it is also noteworthy that this proposal would be unlikely to draw support from veterans' organisations who largely feel that the amnesty of the Troubles Legacy Act is necessary to protect veterans from politically motivated legal claims.[169] Consequently, Section V.B will propose a second solution which could serve as a compromise between both the pro-amnesty and anti-amnesty camps.

B. THE SOUTH AFRICA MODEL

The second proposal for the Troubles Legacy Act would implement similar amnesty provisions as the TRC in South Africa. This would involve removing the blanket amnesty provision and imposing stricter conditions to become eligible for amnesty. Such conditions could include a requirement that perpetrators make a full disclosure to the ICRIR as the South African TRC required,[170] rather than the Act's current weaker requirement that the information disclosed is 'true to the best of P's knowledge and belief'.[171]

There are three reasons why this policy is preferable to the current amnesty provisions in the Troubles Legacy Act. First, this policy creates a stronger incentive for perpetrators to cooperate with the ICRIR and to apply for amnesty because there is a credible threat that they could otherwise be incriminated by another person's testimony.[172] As a result, more information about Troubles-related conduct would be made available to the ICRIR, thus empowering the ICRIR to better fulfil both the societal and individual rights to truth.[173] Secondly, there would be a far greater capacity to prosecute perpetrators due to this increased information. Thirdly, there would still be some amnesty available which would likely appease

[164] *Marguš* (n 50) [127]; Rory Carroll, 'Amnesty Clause for Soldiers Breaches Human Rights Law, Belfast Court Rules' *The Guardian* (London, 28 February 2024) <https://www.theguardian.com/uk-news/2024/feb/28/amnesty-clause-for-soldiers-breaches-human-rights-law-belfast-court-rules> accessed 7 October 2024.
[165] See for example Joinet Report (n 36); Binder (n 40); Perez-Leon-Acevedo (n 36) 671–73.
[166] Laplante (n 44) 929, 931; Bryson and McEvoy (n 3) 456.
[167] Hayner (n 62) 218–23.
[168] See for example Christie (n 17) 120; Young (n 15) 211, 215; *Marguš* (n 50) [127]; Lenta (n 17) 444.
[169] See for example Bryson and McEvoy (n 3) 456–57; McAtackney (n 25).
[170] Christie (n 17) 126; Holtermann (n 115) 210; Hayner (n 62) 99–100.
[171] Troubles Legacy Act 2023, s 19(3)(c); Bryson and McEvoy (n 3).
[172] See for example Roht-Arriaza (n 39) 102; Christie (n 17) 126; Holtermann (n 115) 210; Hayner (n 62).
[173] Christie (n 17) 126; Hayner (n 62).

veterans' organisations.[174] However, as this amnesty is not unconditional and would not be granted to all who apply for it, this policy would be less likely to be associated with impunity than the current amnesty provisions.[175] For these reasons, this policy is preferable to the current amnesty provisions of the Troubles Legacy Act.

Implementing a version of the South Africa model would balance both victims' rights and the interests of certain veterans who want some form of immunity against prosecution for the events of the Troubles.[176] This would also be a justified prima facie wrong as this proposal's fulfilment of rights would outweigh the prima facie wrongfulness of amnesty on the grounds of negative social meaning.

VI. Conclusion

This article discussed the prima facie wrongfulness of the amnesty of the Troubles Legacy Act, explained why this wrongfulness is not justified by the context of today's Northern Ireland, and provided two alternative amnesty schemes that would render the act permissible. Taken together, this analysis explains the problem with the Act's amnesty provisions and offers an alternative solution to repealing the Act in its entirety.[177]

Section III argued that amnesty is a prima facie wrong that requires justification. This article showed that this wrongfulness can be grounded in both the risk of harm posed to victims and the negative social meaning associated with amnesty.

Section IV outlined the situations in which amnesty can be justified and explained why the Troubles Legacy Act is not one of them. These situations include cases where amnesty is a necessary evil to prevent against worse rights violations and those where limited conditional amnesty is offered in pursuit of truth. This article found that neither of these cases applied to the Troubles Legacy Act, thus rendering its amnesty provisions unjustified prima facie wrongs.

Section V then provided two solutions to the problem of unjustified amnesty provisions in the Troubles Legacy Act. The first proposal was to remove amnesty from the Act entirely. The second proposal was to introduce stricter criteria to the Act's conditional amnesty provision and to remove the blanket amnesty, thereby leading to an amnesty scheme similar to that of South Africa's TRC. This article argued that either of these options would be preferable to the current provisions.

Overall, this article suggests that critics of the Troubles Legacy Act's amnesty provisions have been too quick to reject the legislation as a whole. Truth-seeking in Northern Ireland has historically taken a piecemeal approach and few perpetrators of human rights violations are prosecuted as increasing amounts of evidence are lost to time.[178] In this context, the Act's ambitious memorialisation efforts and the establishment of the ICRIR could be the best way to fulfil the rights to truth and to justice in Northern Ireland going forward. By identifying the exact problem with the Act's amnesty provisions and proposing solutions, this article opens the possibility of considering the merits of the remainder of the Troubles Legacy Act, which could be the focus of future research.

[174] See for example Bryson and McEvoy (n 3) 456–57; McAtackney (n 25).
[175] Young (n 15) 209; Lenta (n 17) 444.
[176] Bryson and McEvoy (n 3) 456–57; McAtackney (n 25).
[177] McAtackney (n 25); Carroll (n 164).
[178] See for example Bell (n 108) 1097; Bryson and McEvoy (n 3) 455.

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Terms and Conditions Apply? Online Incorporation of Contract Terms in *Parker-Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185

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ABSTRACT

The Court of Appeal has for the first time considered the rules applicable to incorporation of contract terms for online contracts in *Parker-Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185. The Respondent gambling company successfully argued that a set of terms and conditions which the Appellant had accepted when opening an online account had been incorporated into the contract to play a particular game. As a result, the Appellant had in fact won only £10, as per the computer-generated outcome, rather than the £10 million that she believed she had won. The judgment explicitly recommends further consideration of the law's approach to contract terms in online contracts and thus highlights the open question of whether principles of contract law developed in a pre-internet age must continue to adapt to take account of shifting modes of contracting. This case note suggests that the case represents an orthodox application of the rules on incorporation of terms and that the Court's reasoning is consistent with previous lower court decisions. The note further argues, however, that the judgment proceeds on the basis of several assumptions which required further exploration, running the risk of deciding the case after insufficient assessment of the differences between online and physical contracts, as the judgment itself acknowledges.

Keywords: contract law, incorporation of terms, online contracts, differences between online and physical contracts, fairness of contract terms

I. INTRODUCTION

All students of contract law know that some contractual clauses 'would need to be printed in red ink on the face of the document with a red hand pointing to [them] before the notice could be held to be sufficient'.[1] In the modern world, however, contracts are more often presented for consideration in digital form rather than in ink, and it is those online contracts which *Parker-Grennan v Camelot UK Lotteries Ltd* [2] concerns. Private law has often had to

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[1] *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA) 466 (Denning LJ), repeated in similar terms in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA) 170D.

[2] [2024] EWCA Civ 185, [2024] ECC 11 ('*Parker-Grennan* (CA)').

adapt in the face of new technology, and the law of contract is no exception. Offer and acceptance, typified in judgments on the 'battle of the forms' and the postal rule, has been one area where contract law doctrines have had to accommodate shifts in the speed of communication.[3] The law on incorporation of terms may end up being another such area, and the judgment in *Parker-Grennan* is sensitive to the difficulties posed by online contracts to orthodox incorporation rules. Although by no means heralding a radical change, *Parker-Grennan* is a case as important for the questions that it asks as for the answers that it supplies.

The Appellant, Ms Parker-Grennan, alleged that she was owed £10 million by the Respondent gambling company, Camelot UK Lotteries Ltd ('Camelot'), as winnings from a gambling game on a website run by the Respondent. The Respondent argued that the Appellant had won only £10. The questions for the Court were, first, whether the contract was sufficiently clear on the basis of the terms commonly recognised by the parties as binding, such that the Appellant had only won £10; second, if not, whether terms and conditions relied on by the Respondent had been incorporated; and third, whether those terms and conditions were unfair. Andrews LJ, with whom Green and William Davis LJJ agreed, held that the Appellant had in any event only won £10 on the basis of the first question, but nonetheless discussed the incorporation and fairness questions and found for the Respondent on both points.

Whilst it is perhaps surprising that it has taken this long for a case concerning the incorporation of terms in the online context to reach an appellate court, the Court of Appeal declined to issue general interpretive guidance. However, the Court strongly suggested that the time was ripe for a more detailed and evidence-based review of the current law. This case note highlights some gaps that such a future review might need to address and briefly outlines the position in other common law jurisdictions.

II. Facts and Appeal

Notwithstanding many technical details, the facts are straightforward. The Respondent, Camelot, is the licensed operator of the National Lottery. The Appellant, Ms Parker-Grennan, opened a National Lottery account in 2009 and agreed to the Terms and Conditions of Use. She did this by clicking a 'click-wrap' button, that is, a button marked 'Confirm' beneath text which informed the user that by clicking the button they acknowledged that they had read and accepted 'the relevant Terms and Conditions and Rules of this website'.[4]

In 2015, the Appellant played a new game provided by Camelot. On purchasing a £5 ticket, she was able to play one of Camelot's 'Instant Win Games' ('IWGs'), with prizes ranging from £5 to £20 million. On clicking 'Play', the lower half of the screen would show a series of numbers labelled 'YOUR NUMBERS', and the upper half would show a series of 'WINNING NUMBERS'. A green box at the bottom of the screen contained the words, 'match any of the WINNING NUMBERS to any of "YOUR NUMBERS" to win PRIZE'. In the event of a match, the numbers would flash, and the player would have to click 'FINISH' to claim the prize.[5]

[3] See for example *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (CA); *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (CA); *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34 (CA).

[4] *Parker-Grennan* (CA) (n 2) [11].

[5] ibid [12]–[15].

As the Appellant suggested, the game was 'effectively a fruit machine',[6] but using a range of numbers which the player hoped would match. The results, however, were predetermined by the Camelot computer system at the moment when the player pressed the 'Play' button. At that moment, a random number generator would allocate to the player a number corresponding to a prize tier. That number would determine the result of the game; this number allocation happened a nanosecond before the animation files (that is, the images that the player would see on their screen) were selected and played by the computer.[7]

The game was governed by three relevant sets of terms: (a) the Account Terms and Conditions, which are accepted before creating an account; (b) the IWG Rules, applicable to all IWGs; and (c) the Game Procedures, applicable to the specific game played by the Appellant. The Account Terms specified that players are bound by the other two sets of Rules. The IWG Rules and the Game Procedures could be found by accessing a hyperlink next to the 'Play' button on the game instruction screen. It is not known whether the Appellant did in fact read these terms. The Game Procedures are stated to take priority in the event of conflict, and they provided that '[t]he outcome of a Play in the Game is pre-determined by Camelot's Computer System at the point of purchase.'

The Appellant's screen indicated that she had won £10, by matching the number 15 twice. However, the Appellant noted that the number 1 had also matched and that this was the number that was supposed to result in a £1 million win. She took a screenshot of the matched numbers and telephoned Camelot. Camelot informed the Appellant that there had been an animation software error and refused to pay out. Camelot claimed that whether or not the Appellant had won was determined by the system and that the animation effectively bore no relation to the outcome.

The Appellant's case was dismissed by Jay J at first instance.[8] The Appellant appealed to the Court of Appeal on three grounds: first, whether the terms contained in the IWG and Game Procedures were incorporated into the contract; second, whether they were excluded by reason of unfairness; and third, on the construction of such terms as both parties agreed had been accepted in any case, which sum the Appellant had won. Andrews LJ made it clear that, on the basis of the answer to the third question, the appeal should be dismissed, but nonetheless discussed the first incorporation question, the analysis of which deserves discussion.

III. JUDGMENT AND COMMENT

A. THE COURT'S INCORPORATION ANALYSIS

Andrews LJ quoted the position of the current law from *Chitty on Contracts*,[9] namely that, whilst the person receiving a contract need not have read the terms to be bound by them, there are three rules as to the notice requirements of terms to be incorporated:

> (1) If the person receiving the document did not know that there was writing or printing on it they are not bound (although the likelihood that a person will not know of the existence of writing or printing is now probably very low);

[6] ibid [43].
[7] ibid [17].
[8] *Parker-Grennan v Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB).
[9] Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2022) para 15-010.

> (2) If they knew that the writing or printing contained or referred to conditions, they are bound;
> (3) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document but did not know it contained conditions, then the conditions will become the terms of the contract between them.[10]

Item (2) in the above list must be read subject to the caveat that, broadly speaking, onerous or unusual conditions require explicit knowledge of the condition's content, rather than merely its existence.[11] In any case, Andrews LJ provided the correct test, namely 'whether Camelot did what was reasonably sufficient to bring the various Terms and Conditions to the notice of a player of the Game',[12] subject to the requirement that, in the case of 'onerous or unusual' terms, 'reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect'.[13]

In this case, 'nothing on the screen... highlighted or otherwise drew specific attention to particular terms'.[14] However, Andrews LJ considered that there was nothing particularly onerous about the terms in question; they simply constituted the rules of the game, and any reasonable player must have expected rules to be provided and articulated.[15] The judgment dismissed the Appellant's submission that, because 'there was nothing on the website to force an account holder to look at the Terms and Conditions before clicking the "I Accept" button', 'Camelot had not done enough to draw the Terms and Conditions to [the Appellant's] attention'.[16] Counsel for the Appellant further submitted that, in physical documents, the signature traditionally comes at the end of the terms and conditions, rather than at the beginning. Andrews LJ rejected this submission on two grounds. First, her Ladyship held that forcing a consumer to scroll through the terms and conditions would not increase the likelihood that they will be read. Second, her Ladyship explained that the relevant question is 'not whether the trader has done everything in its power to try to make the other contracting party read the terms', but whether the trader has done enough to bring the terms to the attention of the counterparty.[17]

There are two possible gaps in the above analysis, neither of which necessarily changes the conclusion to the incorporation ground of appeal, but each of which arguably required some discussion by the court. First, as noted above, the Court declined to issue general guidance on the incorporation of terms in online contracts. It seems, however, that the answer to the Appellant's submission as to whether a consumer must have to scroll through the terms and conditions before agreeing to them might require a consideration of what constitutes 'sufficient notice' in an *online* context. Andrews LJ stated that '[t]he trader only needs to take reasonable steps to bring the terms and conditions to their attention', which

[10] *Parker-Grennan* (CA) (n 2) [3].
[11] See for example *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] CTLC 265 [29] (Coulson LJ).
[12] *Parker-Grennan* (CA) (n 2) [31].
[13] *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] CLC 33 [23] (Hale LJ); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 437 (Dillon LJ).
[14] *Parker-Grennan* (CA) (n 2) [32] (Andrews LJ).
[15] ibid [35].
[16] ibid [43].
[17] ibid [45]–[46].

in her Ladyship's judgment 'necessarily involves giving them a sufficient opportunity to read them'.[18] Her Ladyship did not, however, discuss whether sufficiency in an online context is inherently different from that in a physical contract, but assumed that making the details *available* in some form still constituted sufficiency. The point may seem minor, but a key difference between a paper contract and a digital one is that, when a consumer clicks 'Accept' in an online context, without reading the terms and conditions, even though they may read the terms, they remain at all relevant times unaware of how much they are choosing to ignore. Conversely, when a consumer skips to the end of a paper contract without reading the contents, they are at least aware of the approximate amount that they are accepting without reading. The point as to how much the consumer believes they are choosing to accept without reading was considered relevant in the similar case, although on stronger facts for the consumer, by David Donaldson QC sitting as a Deputy High Court Judge in *Spreadex Ltd v Cochrane*.[19] In that case, a bookmaker sought to enforce a claim against a consumer whose online betting account had been interfered with by a child without his knowledge or consent. The claim was based on a 'click-wrap' agreement to a set of terms and conditions. Mr Donaldson QC observed that 'the potential customer was told that four documents, including the customer agreement, could be viewed elsewhere online by clicking "View"... [If the defendant had done so] he would have been faced in the customer agreement alone with 49 pages'. Mr Donaldson QC found that this discrepancy between the representation and the reality was '[a] further, and compounding factor'.[20]

The fact that online contracts may not reveal the length of terms and conditions that the consumer is going to ignore may not be a sufficiently persuasive consideration to mean that online contracts cannot incorporate terms located behind a hyperlink. Nonetheless, the Court of Appeal in *Parker-Grennan* arguably should not have dismissed the Appellant's argument on this ground without a greater analysis of the digital/physical contract distinction. Future cases or research might consider the bearing of the distinction between a physical signature and an online button, given how important a signature has been in English and Australian caselaw.[21] These questions show that whether the incorporation analysis is different in an online context remains unsettled. The judgment nonetheless proceeded to offer an answer to the third ground of appeal, based on assumptions as to the meaning of 'sufficiency'. Whilst the court, having decided the case on another ground, was under no duty to articulate general principles, its explicit refusal to consider whether the test for incorporation should be different in this context whilst nonetheless choosing to find that the test for incorporation was met perhaps opens the reasoning to some challenge.

Even if future courts uphold this analysis, the Court did open the door to future arguments based on the relative complexity of accessing hyperlinked terms. Andrews LJ acknowledged that, when 'the consumer is required to click onto so many different hyperlinks in order to find the relevant terms that it cannot truly be said that they are readily or easily accessible' or if a website was live for such a limited time that no consumer could ever read all the terms, then they could not be incorporated.[22] Although not explicitly stated, this raises the question of whether there is a certain number of pages of terms that would be too much

[18] ibid [46].
[19] [2012] EWHC 1290 (Comm), [2012] LLR 742.
[20] ibid [21].
[21] See for example *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (KB); *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582 [43] (Moore-Bick LJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 211 ALR 342 (HC Australia).
[22] *Parker-Grennan* (CA) (n 2) [47].

for a reasonable consumer to read without greater attention being drawn to the length of the online contract. One page of 'hidden' terms might be very different to 30,000 pages. A court articulating general principles applicable in the online context ought to acknowledge that both the length of that which is hidden, and the fact that the consumer may not know how much is hidden, are relevant factors in determining whether reasonable notice has been given to one receiving contract terms.

The second, perhaps similarly minor, potential gap in the Court's analysis concerns the onerousness of the IWG Rules and Game Procedures. Andrews LJ dismissed succinctly the argument that the terms were particularly onerous on the basis that games require rules, as players must expect, and the terms governing the outcome of the game imposed no obligation on the player. Andrews LJ explained that the rules do not 'deprive [players] of a prize to which they would otherwise be entitled'; instead, her Ladyship explained that '[t]hey are rules which ensure that money is only paid out for valid prize wins' and that '[t]here is nothing onerous, let alone unfair, about that'.[23] This is clearly true; however, the test is not merely whether the term is onerous, but whether it is *unusual*.[24] The game details screen on which the 'Play' button and the link to the Game Procedures were located contained instructional pictures for the game. They suggest an obvious and intuitive game format, which as the Appellant argued is analogous to an advanced fruit machine. Many reasonable consumers might assume that the outcome as shown on the screen would constitute the mechanism by which a win or loss would be determined, even if they considered the necessary fact that the outcome must be determined electronically at some point. That the Game Procedures fix the moment determining whether the Respondent is bound to pay out, or not, at an alternative point to that which the face of the game presents to the player is in some sense 'unusual' from the perspective of a reasonable consumer. Although a set of game rules must be particular to an individual game, and therefore not inherently unusual, the terms that the Respondent attempted to incorporate may have been unusual relative to the expectation created by the highly intuitive game format seen by the Appellant.

As with the sufficiency analysis, this might not change the answer to the incorporation question and, admittedly, it is a minor point. In *Parker-Grennan* the terms providing how the game outcome was determined were probably not so unusual that they required more on the part of the Respondent to bring them sufficiently to the notice of the Appellant, especially as they were merely rules rather than additional burdens on the player. They were not terms creating a wholly different set of rules which are incongruous with the game format; the Respondent was not trying to incorporate the rules of chess to govern a game which looked to a player like Cluedo. However, they are in any case purported terms which create a different winning system than that which a fruit machine player might expect, and a consideration of these factors and conclusion on this part of the incorporation analysis might have been appropriate.

[23] ibid [35].
[24] Beale (n 9).

B. REFUSAL TO PROVIDE GENERAL PRINCIPLES

The Court noted that the latest Law Commission and Scottish Law Commission report on this subject dates from 2013. The report is entitled 'Unfair Terms in Consumer Contracts: Advice to the Department for Business Innovation and Skills'.[25] The Court observed that, as a report, it 'reflected a digital environment far removed from that which operates today'.[26] Andrews LJ considered that Camelot was a company whose terms and conditions were at the more consumer-friendly end of a spectrum, given that they operate 'in a regulated environment, [and their] terms and conditions, standing back, are not unduly complex or controversial and are written in plain, comprehensible English'.[27] Undoubtedly this was a further factor contributing to the conclusion as to onerousness reached by the Court. However, Andrews LJ continued to observe that:

> [T]here are many companies, organisations and entities which operate at the other end of the spectrum from Camelot, and whose terms and conditions are complex and opaque and not, in truth, designed to be read or understood... The advice of the Law Commission could well be very different if tendered today.[28]

The Court further noted that, '[g]iven that a decade has passed since the last report of the Law Commission the time might be ripe for another, evidence based, review of this area of law'.[29] The Court implied that evidence as to how often consumers actually click on hyperlinked terms and conditions might be important, noting that Camelot does not keep such statistics.[30] The fact that the Court did not know the prevalence of consumers choosing to access the terms and conditions is at odds with Andrews LJ's assertion that forcing consumers to scroll through such terms—rather than hyperlinking them—would not *improve* the odds of consumers reading them, given that it remains uncertain how often they do in fact read them *currently*. Whether such data would be useful requires an answer to a prior question forming part of the analysis that the Court refused to undertake as discussed above. That question is whether the 'sufficiency' of drawing attention to a term can be influenced by the rate at which consumers choose to heed the notice, or whether sufficiency is to be assessed purely by reference to the options open to a hypothetical consumer. Put another way, does the simplicity of the step required to take an opportunity mean that, even if almost no consumer ever executes such a step and takes the opportunity, they have still *had* sufficient opportunity to read a term? Only through answering this question can the legitimacy of using empirical data as to consumer behaviour be determined. In any case, the Court's call for greater attention to this area should be taken seriously given, as Andrews LJ notes in her opening words, '[w]hether we like it or not, we are living in a digital era'.[31]

[25] Law Commission and Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (March 2013) <https://www.scotlawcom.gov.uk/files/3313/7095/4984/Unfair_Terms_in_Consumer_Contracts_Advice_Summary.pdf> accessed 29 September 2024.
[26] *Parker-Grennan* (CA) (n 2) [8] (Andrews LJ).
[27] ibid [9].
[28] ibid.
[29] ibid [68].
[30] ibid [10].
[31] ibid [1].

C. Relationship with other domestic and international caselaw

The Court made a brief comparison with a 2021 High Court case on similar facts, *Green v Petfre (Gibraltar) Ltd t/a Betfred*.[32] In that case, a software error led Mr Green to win £1.7 million via an online gambling website. The case differed from Ms Parker-Grennan's in that Mr Green 'was otherwise contractually entitled to payment and the win was recorded on the company's own computer system'.[33] Amongst other arguments, Betfred attempted to argue that an exclusion clause was incorporated into the contact. The following *dicta* from that case appear significant. First, the terms in that case were in an 'unhelpful, often iterative presentation in closely typed lower-case or numerous paragraphs of capital letters [which] meant that the relevant clauses were buried in other materials'.[34] Second, the terms relied upon were agreed several years before Mr Green played the game, which, whilst not sufficient to exclude them, rendered 'the commensurate burden upon the trader who wishes to exclude liability... all the greater'.[35] Third, the clause on which Betfred relied operated to the direct disadvantage of the consumer, rather than constituting neutral or descriptive game procedures as in this case. Fourth, Foster J noted that the context of the contract is relevant, and an online gambling scenario decreases the likelihood of a consumer 'trawling through documentation, particularly if it is repetitive and not clearly relevant'.[36]

Green was decided on different facts and involved an exclusion clause. Nonetheless, such general principles as to online incorporation as can be extracted are not in tension with the Court of Appeal's judgment in *Parker-Grennan*. In fact, *Parker-Grennan* reinforces the principle that incorporation of onerous or unusual terms must be clearly signposted and acts as a clear warning to companies. The distinctions between *Parker-Grennan* and *Green* serve to highlight the unambiguous principle that the more complex the terms and the more onerous they are for the consumer, the more a company must do to draw them sufficiently to the consumer's attention.

Future courts addressing this question may struggle to draw on the work of other jurisdictions. Most caselaw from the courts of Australia and the United States addresses the question of whether a contract is enforceable at all on the basis of accepting online terms and conditions that have been insufficiently drawn to the attention of the parties. In *Meyer v Kalanick*, the US District Court for the Southern District of New York held that the plaintiff 'did not have "[r]easonably conspicuous notice" of Uber's User Agreement', as the 'placement, color, size and other qualities' of the hyperlinked Terms of Service were inadequately distinctive 'relative to the [Uber app screen's] overall design'.[37] A similar analysis of the link relative to the rest of the contract was undertaken by the US District Court for the District of Nevada in *In re Zappos, Inc*.[38] The Federal Court of Australia in *eBay International AG v Creative Festival Entertainment Pty Ltd*[39] held that tickets bought online were not subject to an updated form of a non-resale condition that was not adequately brought to the attention of

[32] [2021] EWHC 842 (QB).
[33] *Parker-Grennan* (CA) (n 2) [37] (Andrews LJ).
[34] *Green* (n 32) [167] (Foster J).
[35] ibid [168].
[36] ibid [172].
[37] 200 F Supp 3d 408, 420 (SDNY 2016).
[38] 893 F Supp 2d 1058 (D Nev 2012).
[39] [2006] FCA 1768, (2006) 170 FCR 450.

the purchasers. Rares J in that case held that a 'vague and general reference... to terms being on tickets, cannot substitute for the necessity to draw specifically to someone's attention unusual or significant terms'.[40] Whilst not on all fours with *Parker-Grennan*, these cases point to a tendency to apply the same principles used to determine the effect of terms and conditions in paper contracts to online contracts. Whilst orthodox in the light of prevailing views as to the relative position of consumers and businesses, they suggest that the need for consideration of the distinctive context of online contracts highlighted by Andrews LJ in *Parker-Grennan* is not unique to England and Wales.

IV. Conclusion

In 2024, the internet continues to raise questions for legal rules developed in an age of paper. Whilst the continuing lack of certainty as to what precisely is required to bring online consumers' attention to new terms may pose problems for both said consumers and companies, *Parker-Grennan* is nonetheless important in several respects. First, as Andrews LJ notes, it highlights again 'the complexity of balancing the needs of traders to publicise their terms and conditions with the needs of consumers to access and understand those terms'[41] and thus provides companies that trade online with continued clarity as to what is required to enforce their terms. Second, it provides a further example of the application of the existing law to an online contract, whilst calling for greater research and consideration. Third, in drawing a distinction with *Green*, it reasserts the principles established in that case, and does so for the first time at the appellate level. Whilst attempting to refrain from engaging in overambitious interpretation, the assumptions on which the judgment rests highlight the need for continued analysis, as the judgment itself recognises.

[40] ibid [52].
[41] *Parker-Grennan* (CA) (n 2) [68].

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Bridging the Private-Public Divide in Investor-State Arbitration: Can Retrofitting *Amicus Curiae* Improve How Tribunals Consider Human Rights Issues?

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ABSTRACT

Investor-State Dispute Settlement ('ISDS') arbitration is undergoing a legitimacy crisis, with more states denouncing investment agreements than signing onto them. A major cause of this crisis is the increasing public critique of ISDS as a process that systemically excludes public and human rights considerations. In response to this exclusion, rightsholders who are consistently excluded from ISDS have increasingly filed third-party submissions to ISDS tribunals in the hopes that these submissions will force tribunals to consider their perspectives. This is a growing trend, especially amongst Indigenous peoples in remote or resource-rich areas of Latin America, Africa, and elsewhere because their input is often excluded from the dominant public rhetoric argued by the state in ISDS arbitration. This article seeks to address whether such third-party submissions, often called '*amici curiae*', can provide an effective remedy for rightsholders through comparing how *amici curiae* could fulfil the criteria outlined in the United Nations Guiding Principles on Business and Human Rights ('UNGPs'). It finds that *amici curiae* are currently too unpredictable to ensure an equitable remedy for rightsholders. However, if arbitral centres were to reform the *amicus curiae* application process and allow for greater transparency, the unique ability of *amici curiae* to link public and private interests in ISDS could make them a viable option for rightsholders to have their rights recognised in ISDS proceedings.

Keywords: investor-state arbitration, amicus curiae, human rights law, United Nations Guiding Principles on Business and Human Rights, remedies

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I. INTRODUCTION

Investor-State Dispute Settlement ('ISDS') arbitrations have long been considered to involve two parties: the investor and the state. This systemically leads tribunals to overlook the concerns of non-disputing parties, like Indigenous communities and other rightsholders. However, over the past two decades, rightsholders have increasingly written arguments to ISDS tribunals through non-disputing party submissions, often called '*amici curiae*', to address this gap in tribunals' considerations.[1] The watershed moment for these *amici curiae* came in 2001 when the tribunal in *Methanex Corporation v United States of America* accepted written submissions from non-disputing parties under the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules.[2] These Rules did not grant the tribunal any explicit jurisdiction to accept *amici curiae*. Still, the tribunal inferred this power as part of its broad procedural power granted by article 15(1) of the UNCITRAL Rules and used it to allow the two non-disputing parties to make written submissions.[3] However, the tribunal found that this procedural power did not allow it to grant the third parties any substantive rights, like the right to access documents produced in the arbitration or to attend the oral hearing.[4]

A decade and half later, the mixed success of *amici curiae* in ISDS proceedings continued in *Bear Creek Mining Corporation v Republic of Peru*. This case illustrates both the need for these submissions and the obstacles that non-disputing parties face in submitting them. In that case, the state had issued a mining concession without properly consulting the Indigenous communities.[5] A local civil society organisation submitted an *amicus curiae* brief to the ISDS tribunal explaining the defects in the investor's consultation and the impact on Indigenous rights, such as the company's failure to translate relevant information into the local language and the company's efforts to divide affected communities through unequal compensation.[6] In the final award, a dissenting arbitrator used the human rights arguments in the *amicus curiae* brief to reduce the investor's award.[7] This dissent demonstrates that *amici curiae* can give legitimacy to rightsholders' grievances. Still, the majority of the tribunal rejected the *amicus curiae*'s arguments. Because *amici curiae* are inherently discretionary, the majority did not have to grapple fully with the public law arguments raised in the *amicus* brief.

Despite increasing recognition of the role of *amici curiae* in bringing a human rights lens to ISDS,[8] there is a lack of research that focuses on whether *amici curiae* can form an

[1] Wei-Chung Lin, 'Safeguarding the Environment? The Effectiveness of *Amicus Curiae* Submissions in Investor-State Arbitration' (2017) 19 International Community Law Review 270, 275.

[2] *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001).

[3] ibid [47].

[4] ibid [30], [47].

[5] *Bear Creek Mining Corporation v Republic of Perú*, ICSID Case No ARB/14/21, Award (30 November 2017) ('*Bear Creek* Award') [409].

[6] See for example *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Procedural Order No 5 (21 July 2016) ('PO5'); Nicolás M Perrone, 'Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities' (2023) 24 The Journal of World Investment & Trade 437, 451–52.

[7] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017) ('Sands QC Dissent') [37].

[8] Nicolette Butler, 'Non-Disputing Party Participation in ICSID Disputes: *Faux Amici*?' (2019) 66 Netherlands International Law Review 143, 172.

effective remedy for rightsholders.[9] This article helps to assess the possible barriers and opportunities that *amici curiae* provide by comparing them to the criteria for effective remedies under the United Nations Guiding Principles on Business and Human Rights ('UNGPs').

Section II details the need for tools to incorporate public considerations, such as human rights, including Indigenous rights, into investor-state arbitrations. It specifies how the private interests of investors have become artificially detached from their public context. Section III brings this divide into focus through discussing how the division between public and private considerations in ISDS disproportionately affects Indigenous communities that live near resource extraction projects.

Section IV outlines the UNGPs criteria for an effective remedy in the context of *amici curiae* and Section V compares the UNGPs criteria to *amici curiae*, revealing that the privatised model in ISDS restricts transparency, predictability, and accessibility for *amici curiae*, preventing them from becoming effective remedies. Finally, Section VI offers methods of retrofitting *amici curiae* to enhance the state's and investor's awareness of rightsholders' views. Consequently, *amici curiae* could form part of UNGPs-compliant remedies if arbitral centres and international investment agreements ('IIAs') undertook short- and medium-term revisions to their procedures that increased the effectiveness of *amici curiae* for rightsholders.

II. (DIS)INTEGRATION OF PUBLIC AND PRIVATE LAW IN ISDS

Despite its private-law framing,[10] ISDS derives from a state-centric system that balances the political interests of home states against private rights in the host state. In other words, home states can maintain their public policies in areas that affect their jurisdiction, like foreign affairs and investment regulations, while simultaneously representing individual investor's private, financial interests. Although awards often ignore these competing interests, reforms to ISDS and new IIAs are beginning to incorporate human rights and environmental considerations, as is discussed in this section. *Amici curiae* form part of this increasing trend to recognise the public interests at stake.

A. CONCEPTUALISING PUBLIC AND PRIVATE INTERACTIONS IN ISDS

ISDS began by recognising the joint interests in the public and private spheres. The origins of investor-state disputes are found in states taking on private legal cases to defend economic rights abroad.[11] This form of dispute settlement was famously demonstrated in the Great Britain and Costa Rica arbitration of 1923, which included claims from Aguilar-Amory

[9] See Valentine Olusola Kumuji, 'Access to Remedy for Indigenous Right Holders in Relation to Investment-Related Human Rights Abuses – A Critical Search for an Effective Legal Framework' (PhD thesis, University of East Anglia 2022).

[10] Eloïse Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration' (2007) 22 ICSID Review – Foreign Investment Law Journal 349, 351.

[11] Wasiq Dar and Gautam Mohanty, 'NGOs as *Amicus* in Investor-State Arbitration: Addressing Public Interest and Human Rights Issues' in Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023) 233; Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties' (2018) 59 Boston College Law Review 2791, 2804; Lin (n 1) 273.

and Royal Bank of Canada against Costa Rica.[12] The British investors claimed that Costa Rica's de facto Government, run by Federico Tinoco Granados, expropriated their property by unilaterally terminating a contract with them. Because the investors did not have the right to take direct action against the Tinoco Government in an arbitration, Great Britain represented its investors' claims. At the time, Great Britain had not recognised the Tinoco Government.[13] However, as part of its argument in the arbitration, Great Britain admitted that the Tinoco Government exerted control over the investment property, effectively treating the Tinoco administration as the government.[14] In this sense, by representing private nationals' interests, Great Britain had to balance incongruent stances towards the Tinoco Government. This balancing between public foreign affairs policy and private financial interests meant that states taking on investment claims had to consider how this representation would risk their ability to maintain established public policies, like the stance towards a de facto government.

These public law origins still underpin the foundations of modern investor-state dispute settlement proceedings. However, ISDS arbitration has been inserted into the international commercial arbitration framework.[15] This version of dispute resolution is not designed for the diversity of stakeholders within a state; rather, it is designed for purely private disputes. It fails to account for the public interest within investor-state proceedings that derives from the investment's impact on human rights, the control over public policy, and the distribution of public funds.[16]

Several authors have highlighted the dissonance between this highly privatised view of investor-state arbitration and the public interests at stake.[17] Lorenzo Cotula adequately captures these intersecting and sometimes conflicting interests in ISDS when he describes how '[c]ommon threads run through' public human rights and private investor rights, 'but different normative projects are at play'.[18] Like in the Tinoco case, the state's normative projects to support democracy may run contrary to those of the investor for property rights, yet they coexist within ISDS. By isolating the private elements within ISDS, these arbitrations sustain an asymmetrical framework with strong enforcement measures for private interests and no corresponding mechanism for public interests.[19] This effectively creates a hierarchy in international law.[20]

Moshe Hirsch proposes that the origin of this hierarchy is the *inter-partes* model in ISDS proceedings.[21] *Inter-partes* proceedings frame the dispute as being exclusively between two parties: the investor and the state.[22] This sets up a structure within investor-state

[12] *Tinoco Arbitration (GB v Costa Rica)* (1923) 1 RIAA 369. See also John H Currie and others, *International Law: Doctrine, Practice, and Theory* (2nd edn, Irwin Law Inc 2014) 226.
[13] Currie and others (n 12).
[14] ibid 227.
[15] Dar and Mohanty (n 11).
[16] ibid 233–34.
[17] See for example ibid 233; Lin (n 1) 271; Lorenzo Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 Journal of International Economic Law 431; Arcuri and Montanaro (n 11).
[18] Cotula (n 17) 442.
[19] Arcuri and Montanaro (n 11) 2807.
[20] John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 1.
[21] Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law' (2021) 34 Leiden Journal of International Law 127.
[22] ibid 138.

arbitrations that obscures the multiplicity of views that are within the state and explains why private legal culture resists including public law considerations.[23] The idea of a private legal culture in ISDS arbitration is further explained by Alessandra Arcuri and Francesco Montanaro.[24] They argue that arbitrators tend to ignore public interests because they come from a predominantly Western, business background.[25] These ingrained individual epistemologies result in interpretations of international investment agreements that prioritise private interests.[26]

Nicolás M Perrone also noted that the tendency of tribunals to interpret human rights through an investment lens enables them to prioritise private interests.[27] For example, in *Bernhard von Pezold and Others v Republic of Zimbabwe*, the tribunal did not consider Indigenous land rights to be relevant to its decision when it rejected an *amicus* brief from those claiming the land where the investment in dispute was located.[28] However, when considering the investors' property rights, the tribunal included public international law considerations, like the International Convention on the Elimination of All Forms of Racial Discrimination.[29] In this sense, even though ISDS is not binding on third parties, its focus on enforcing private interests reinforces the narrative that financial interests outweigh human rights, environmental considerations, or other public law interests.

This narrative also defines the parameters of what the tribunal views as relevant.[30] Wasiq Dar and Gautam Mohanty critique ISDS arbitration for prioritising the role of investors over human rights.[31] They show that, even when IIAs explicitly include international law, tribunals only apply principles relating to investors rather than considering public international human rights laws.[32] Therefore, the pervasive perception of ISDS as isolated from public affairs restricts its deliberations.

As the preceding authors note, the reoccurring narrative in ISDS arbitration that private interests can be separated from their public context and given enforceable rights has a tangible impact on how a tribunal assesses its jurisdiction and the merits of the claim. In this context, evaluating *amici curiae* as a means to incorporate public considerations in ISDS supports establishing a more holistic model for adjudicating investor claims within ISDS arbitration.

B. PRIORITISATION OF PRIVATE INTERESTS IN ISDS ARCHITECTURE

The distancing between investors' rights and human rights has resulted in features within ISDS that grant investors additional privileges. The most obvious example of this is

[23] ibid 144.
[24] Arcuri and Montanaro (n 11) 2795.
[25] ibid 2796.
[26] Hirsch (n 21) 144.
[27] Nicolás M Perrone, 'Local Communities, Extractivism and International Investment Law: The Case of Five Colombian Communities' (2022) 19 Globalizations 837, 838.
[28] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2 (26 June 2012) ('*Pezold* PO2') [50]–[56], [62].
[29] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX).
[30] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27).
[31] Dar and Mohanty (n 11).
[32] ibid 229–30.

that only investors are able to make claims and assert their rights against the state.[33] While states may launch counterclaims, these are on limited grounds in IIAs. This also means that local communities that are directly impacted by investments cannot launch any independent ISDS allegations relating to these investments.

Investor allegations against the state also result in large public expenses. This can be the case even where the state successfully defends itself against the claims and where the case is discontinued or settled. In 2021, investors claimed on average US $1.16 billion, and tribunals ordered states to pay an average of US $437 million plus costs.[34] These awards and the cost of arbitration can leave states at a loss even if they defeat the investors' allegations. For instance, in *Pac Rim Cayman LLC v Republic of El Salvador*, the investor claimed that the state violated its right when the state denied the company a mining concession.[35] Although the tribunal dismissed the claim, stating that the investor had no right to the mining concession, the state had already spent US $12 million on legal fees.[36] The investor was ordered to pay US $8 million of these fees plus interest;[37] however, this was still insufficient to cover the full legal expense and delayed the state's ability to make policy decisions based on a predictable budget. The exorbitant costs of defending against ISDS claims can mean that states limit regulations that would otherwise favour local communities. The budgetary restraints caused by ISDS claims limit a state's ability freely to regulate areas of public interest whether or not such actions would actually violate the state's investment commitments. This is often referred to as regulatory chill.[38]

ISDS further favours investors through the strong global enforcement of awards. The vast majority of known investor-state arbitrations take place under the ICSID Arbitration Rules.[39] The International Centre for Settlement of Investment Disputes ('ICSID') specifically mandates member states to enforce these awards, without exceptions for public policy grounds.[40] This offers significant advantages to ISDS proceedings over civil remedies or administrative proceedings, which are typically the only option for individuals affected by investment projects.[41]

Advocates of ISDS argue that the structure does not unfairly favour investors because investors' protections within IIAs simply act to counterbalance the advantage that a state receives by negotiating and drafting an IIA. Chen Yu describes how the ISDS system gives states

[33] Arcuri and Montanaro (n 11) 2799.
[34] Columbia Center on Sustainable Investment, 'Primer on International Investment Treaties and Investor-State Dispute Settlement' (*Columbia University*) <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> accessed 2 October 2024.
[35] Dar and Mohanty (n 11) 242.
[36] Shin Imai, Leah Gardner and Sarah Weinberger, 'The "Canada Brand": Violence and Canadian Mining Companies in Latin America' (2017) Osgoode Legal Studies Research Paper No 17/2017, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584> accessed 2 October 2024.
[37] Butler (n 8) 168.
[38] Penelope Simons and J Anthony VanDuzer, 'Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction' in Oonagh E Fitzgerald (ed), *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (McGill-Queen's University Press 2020) 291; Yoram Z Haftel, Morr Link and Tomer Broude, 'Last Year's Model? Investment Arbitration, Negotiation, and the Gap Between Model BITs and IIAs' (2023) 26 Journal of International Economic Law 483, 485.
[39] ICSID Rules of Procedure for Arbitration Proceedings (April 2006) ('ICSID Arbitration Rules'); UNCTAD, *World Investment Report 2024: Investment Facilitation and Digital Government* (United Nations 2024) 73.
[40] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention'), art 52(1).
[41] Simons and VanDuzer (n 38) 287–90.

an advantage over investors because only states can influence the interpretation of IIAs through subsequent practice and interpretive notes.[42] However, this treats states as fully independent actors without additional interests. In practice, academics have shown that investors have influence at both the negotiation phase and amendment phase of IIAs. Wolfgang Alschner and Dmitriy Skougarevskiy show that power asymmetries, calculated on the basis of gross domestic product ('GDP'), account for the ability of wealthier countries to create cohesive IIA networks, essentially becoming the rule setters for international investment arbitration in favour of their domestic interests,[43] namely securing their investors' capital.

After an IIA is implemented, investors continue to play a role in how a state reacts and updates its IIAs. Another empirical study that examines when states are motivated to change their model Bilateral Investment Treaties ('BITs') found that this change is more likely to occur when the state negotiates with a country that has had extensive experience with ISDS claims and is eager to safeguard more regulatory space.[44] In this sense, the actions of investors within ISDS disputes can change whether a state moves to amend or change the interpretation of an IIA. Investors have further protection against amendments that negatively impact their interests because, when a state wants to amend a BIT, that state's power is also restricted by the Vienna Convention on the Law of Treaties;[45] it must follow the formalities within the IIA itself in order to amend it, which may include consent from all member states or specific waiting periods.[46] These restrictions on states' power would have been negotiated when the IIA was drafted and included stakeholders like investors.

Others argue that the outcomes within international investment arbitration do not support the conclusion that ISDS disadvantages states. They cite that the portion of ISDS awards favouring investors compared to states oscillates and is relatively equal (38 per cent of awards favour the state compared to 28 per cent in favour of the investor).[47] However, this excludes the numerous awards that are settled or discontinued for undisclosed costs, totalling 31 per cent of all known claims.[48] It further fails to account for the greater risk that developing countries face when challenged under ISDS, with 70 per cent of all claims being brought against developing countries in 2023.[49] Considering these results in the light of the structure of ISDS shows that prioritising investment interests is not a fluke but rather a design feature in ISDS.

C. THE GROWTH OF PUBLIC LAW CONSIDERATIONS WITHIN ISDS

Despite the private architecture of the system, tribunals and IIAs have increasingly recognised the public aspects of ISDS. Investor-state arbitration implicates public funds and

[42] Chen Yu, '*Amicus Curiae* Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation' (2020) 35 ICSID Review – Foreign Investment Law Journal 223.
[43] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561.
[44] Haftel, Link and Broude (n 38).
[45] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[46] August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' (2022) 37 ICSID Review – Foreign Investment Law Journal 101, 102–03.
[47] UNCTAD (n 39) 31.
[48] ibid.
[49] ibid 31–32.

rules directly on state actions. Some cases even interpret a state's laws and can discredit national judgments.[50]

Arbitral tribunals have started to accept that investor-state arbitration is not isolated from public international law.[51] Using the Vienna Convention on the Law of Treaties to interpret IIAs, tribunals have recognised their mandate to consider 'any relevant rules of international law applicable in the relations between the parties'.[52] Authorities, including the International Law Commission, consider that this provision endorses a systemic approach to international law.[53] This approach integrates the distinct bodies of international law and reads them as a cohesive whole.

An ISDS tribunal adopted this systemic approach in *South American Silver Ltd v Bolivia*. In that case, the investor, through numerous subsidiaries, held mining concessions constituting the Malku Khota Project in Potosí, Bolivia.[54] The Malku Khota Project is located in the traditional territories of five Indigenous communities in Northern Potosí that are organised into sub-central unions, called '*ayllus*': Takahuani, Sullka Jilatikani, Urinsaya, Jatun Urinsaya, and Samca.[55] These Indigenous communities are part of the Quechua and Aymara ethnic groups.[56] In 2010, the investor was forced to suspend operations after several of these communities issued resolutions against the mining project for its contamination of sacred sites and the division amongst community members that had been caused by the investor's unequal compensation and consultation.[57] Tensions mounted between the surrounding communities, the mining officials, and the police until June 2012 when clashes between the police and the groups opposing the mine resulted in the death of a Malku Khota community member, José Mamani.[58] This incident set off negotiations between the opposing groups and local governments that led to the national government revoking the mining concession from the investor. The investor soon filed and won an ISDS claim against the Bolivian Government for expropriation. However, Bolivia argued that the tribunal should reduce the damages it owed because the investor negatively impacted Indigenous peoples' rights to free, prior and informed consent ('FPIC').[59] The tribunal disagreed and found that FPIC was not recognised as customary international law and so the tribunal did not apply these rights in rendering its award on damages.[60] However, the tribunal acknowledged that treaty interpretation required systemic integration.[61] Thus, it accepted that international investment law is not isolated from international human rights; rather, bodies of international law work within a system that harmonises how these obligations interact.

[50] *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award (15 March 2016).
[51] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016); *Bear Creek* Award (n 5).
[52] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') art 31(3)(c).
[53] See for example Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International & Comparative Law Quarterly 573, 584.
[54] *South American Silver Ltd (Bermuda) v The Plurinational State of Bolivia*, PCA Case No 2013-15, Award (22 November 2018) ('*South American Silver* Award') [87]–[89].
[55] *South American Silver Ltd v Plurinational State of Bolivia*, PCA Case No 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits (31 March 2015) ('Respondent Counter-Memorial') [67]–[69].
[56] ibid [34].
[57] *South American Silver* Award (n 54) [117].
[58] Respondent Counter-Memorial (n 55) [173].
[59] ibid [219].
[60] *South American Silver* Award (n 54) [217].
[61] ibid.

Today, some IIAs attempt to integrate private and public aspects in ISDS. However, these provisions remain vague, unenforceable, or ingrained in the same asymmetrical structure of ISDS that limits arbitration to considering private international law. For example, the Canada-Peru Free Trade Agreement ('FTA'), along with many other Canadian FTAs, includes a provision on corporate social responsibility. It tells states to 'encourage' investors to 'voluntarily incorporate' corporate social responsibility practices.[62] Although the provision seems to strengthen public considerations, it acts to reinforce the voluntary nature of business responsibilities towards human rights.[63]

India's Model BIT[64] and the Morrocco–Nigeria BIT[65] make significant headway in accounting for public interests in investment. India's Model BIT was spurred by the reaction of civil society against a particularly damaging investor-state arbitration where the investor did not have to comply with domestic law.[66] In reaction, the Model BIT states that '[i]nvestors and their [i]nvestments *shall* be subject to and comply' with the law in the host state, including minimum wages, environmental protections, and human rights.[67] Both BITs also maintain the states' right to regulate for legitimate objectives.[68] Such provisions are designed to mitigate regulatory chill from ISDS by reserving the state's right to regulate in areas that may cause indirect harm to the investor if this is justified for the greater good of the public.

However, the strong right to regulate contrasts sharply with vague obligations for corporate social responsibility. Both BITs say only that investors '*should strive*' either for 'high levels of socially responsible practices'[69] or to 'recognise the rights, traditions and customs of local communities and indigenous peoples'.[70] The use of 'should strive' instead of 'shall' does not set a benchmark for enforcement of these obligations. This signals weaker levels of enforcement for human rights than for other rights and perpetuates investment-first narratives.

Because of these weak enforcement measures for mandating corporate responsibility towards human rights, these IIAs do not address the core private structure of ISDS. They leave in place the asymmetrical ability to make claims, the long history of incentivising pro-investor policies, and the culture within arbitration that promotes market approaches. Still, recognition of public aspects in ISDS signals acceptance that investors' rights must be balanced against states' obligations to protect, respect, and remedy human rights.

[62] Free Trade Agreement between Canada and the Republic of Peru (adopted 29 May 2008, entered into force 1 August 2009) CAN TS 2009 No 15, art 810.

[63] Laurence Dubin, 'Corporate Social Responsibility Clauses in Investment Treaties' (*IISD*, 21 December 2018) <https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/> accessed 3 October 2024.

[64] Model Text for the Indian Bilateral Investment Treaty (2016) ('India's Model BIT') <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf> accessed 4 October 2024.

[65] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) ('Morocco–Nigeria BIT').

[66] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 Northwestern Journal of International Law & Business 1, 15.

[67] India's Model BIT (n 64) art 12.1.

[68] See Morocco–Nigeria BIT (n 65) art 23; Ranjan and Anand (n 66) 8.

[69] Morocco–Nigeria BIT (n 65) art 24 (emphasis added).

[70] India's Model BIT (n 64) art 12.2.

III. THE PRIVATE-PUBLIC CROSSROADS OF ISDS: INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES

Extractivism is typically understood as the system of exploiting raw materials, like mining, oil, or forestry.[71] Industries that operate in these spheres are overrepresented within the ISDS system, representing the largest share of ICSID proceedings (24 per cent).[72] Powerful national actors, who traditionally formed ISDS agreements, typically have interests that diverge from the local communities affected by extraction. [73] This leads to a state implementing contradictory policies at the local and international levels, where they may protect a local environment but breach obligations in an ISDS provision.[74] The state's divergent interests make extraction disputes a microcosm of the public-private tensions that arise in ISDS.

The combination of conflicting local policies and a high interest from extractive industries increases the risk both to and from long-term investments. The risk of extraction projects, like mining, is that they require long lead times until they start to make significant profits.[75] This makes investors especially reliant on ISDS guarantees to provide security for riskier investments.

At the same time, the risk from extraction projects is that they are linked to some of the worst human rights violations in the world.[76] One of the most infamous instances of human rights violations was when public officials in Nigeria conducted land grabbing in the 1990s on the Ogoni people's territory to provide the land to oil companies.[77] This forced eviction led to assaults, summary executions, and other human rights violations against the local community.[78] Structural legal inequalities mean that marginalised communities, especially Indigenous peoples, are particularly vulnerable to human rights violations.[79] Although the Indigenous peoples affected by resource extraction have diverse perspectives, Indigenous peoples generally have an especially close connection with the land and resources affected by these projects, often deriving their law, cosmology, and culture from land-based practices.[80] As many of these

[71] Hans-Jürgen Burchardt and Kristina Dietz, '(Neo-)Extractivism – A New Challenge for Development Theory from Latin America' (2014) 35 Third World Quarterly 468, 469.
[72] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 842.
[73] ibid 838; Cotula (n 17).
[74] Cotula (n 17) 447–48.
[75] Harrison Bontje and Don Duval, 'Critical Minerals Supply and Demand Challenges Mining Companies Face' (*EY*, 20 April 2022) <https://www.ey.com/en_ca/mining-metals/critical-minerals-supply-and-demand-challenges> accessed 3 October 2024.
[76] See for example Simons and VanDuzer (n 38); Indra de Soysa, Nicole Janz and Krishna Chaitanya Vadlamannati, 'US Multinationals and Human Rights: A Theoretical and Empirical Assessment of Extractive vs. Non-Extractive Sectors' (2019) UCD Working Papers in Law, Criminology & Socio-Legal Studies 9/2019, 8 <https://ssrn.com/abstract=3349247> accessed 3 October 2024.
[77] UN Committee on the Elimination of Racial Discrimination (67th Session) 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention' (27 March 2007) UN Doc CERD/C/NGA/Co/18, para 19.
[78] UNHRC, 'Visit to Nigeria: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context' (3 January 2020) UN Doc A/HRC/43/43/Add.1, para 66.
[79] See for example Claire Wright, 'Expanding Extractive Industries, Contracting Indigenous Rights? Gains, Setbacks, and Missed Opportunities in Latin America' in Alison Brysk and Michael Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar Publishing 2018) 39; James Thuo Gathii, 'Incorporating the Third Party Beneficiary Principle in Natural Resource Contracts' (2014) 43 Georgia Journal of International & Comparative Law 93.
[80] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) 35.

projects take place on the traditional territories of Indigenous communities, it is especially important to consider how extraction projects may impact the rights of Indigenous peoples.

Yet, the negotiating history of IIAs has excluded Indigenous communities and those directly affected by investment projects.[81] This has maintained a distance between private investment interests and the public interests that are affected.[82] Although states' initial claims over resource extraction have been viewed as an exercise of assertion apart from colonial powers, the subsuming of local and Indigenous interests within states has rendered Indigenous perspectives invisible in ISDS negotiations.[83]

The *inter-partes* model in ISDS proceedings reinforces this 'invisibility' of Indigenous peoples because it fails to consider Indigenous peoples' rights to FPIC along with other rights to land and decision-making.[84] For example, the legitimate expectations of investors may be set by state officials without first consulting Indigenous communities.[85] The exclusive investor-state relationship effectively treats the investment area as *terra nullius* to be completely controlled by the state.[86]

Despite the private-public separation within the ISDS system, some arbitrations have started to acknowledge a tenuous obligation for businesses to respect Indigenous peoples' internationally recognised human rights.[87] In *Urbaser v The Argentine Republic*, the tribunal acknowledged that investors are no longer 'immune from becoming subjects of international law', but their obligations towards human rights depend on their activities' relationship to human rights.[88] At a minimum, this means that companies have an obligation not to engage in an activity that is 'aimed at the destruction of any of the rights and freedoms' set out in the Universal Declaration of Human Rights.[89]

Even with the progress that has been made in investor responsibility, ISDS proceedings still reinforce the state as the sole party responsible for upholding Indigenous peoples' rights to FPIC. In *Bear Creek Mining Corporation*, the investor consulted the Indigenous communities that would have been affected by a silver mine in their territory, but the investor excluded key information about the mine's long-term impacts and did not translate the information to Aymara, the local language.[90] The state also argued that the company divided the communities through supporting only certain individuals.[91] One of the arbitrators supported reducing damages owed to the company because this consultation failed to meet the requirements of FPIC, but the majority held that only the state had obligations under FPIC.[92]

[81] Nicolás M Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment' (2022) 7 Business and Human Rights Journal 375, 390.
[82] ibid 393; Wright (n 79).
[83] See for example Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 841; Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (OUP 2021) 173.
[84] Brenda L Gunn, 'International Investment Agreements and Indigenous Peoples' Rights' in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (CUP 2020) 195.
[85] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 847.
[86] ibid 847; Perrone, *Investment Treaties and the Legal Imagination* (n 83) 175.
[87] See for example *Urbaser* (n 51); *Bear Creek* Award (n 5); *South American Silver* Award (n 54).
[88] *Urbaser* (n 51) [1195].
[89] ibid [1196].
[90] Perrone, 'Investment Treaty Law' (n 6) 452.
[91] PO5 (n 6) [19]; ibid 451.
[92] Sands QC Dissent (n 7).

Because extractive investments typically affect Indigenous communities in disproportionate and unique ways, the failure to involve Indigenous communities in an *inter-partes* ISDS arbitration is particularly damaging. Local communities are unable to show how a particular investment contributes to, or deteriorates, their lived experiences in terms of a healthy environment, human rights, or social conditions. Even when a state raises their concerns, the state must frame these concerns as part of the state's own position. Thus, Indigenous peoples' rights remain largely invisible in ISDS proceedings.

IV. EFFECTIVE REMEDIES UNDER THE UNGPS

The UNGPs are considered to be an authoritative, soft law framework that governs states' duties and companies' responsibilities to prevent human rights violations caused by, or connected to, business activity.[93] They were designed as part of John Ruggie's mandate as the United Nations ('UN') Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011.[94] Although the UNGPs are not binding laws, they are designed to reflect the current expectations that are directed towards both states and companies as regards their relationship with human rights.[95] They have been widely cited as a benchmark in business and human rights law and are used by international courts like the Inter-American Court of Human Rights.[96]

The UNGPs were meant to operationalise the three-pillar framework of 'Protect, Respect and Remedy',[97] which had been developed to unify corporate accountability efforts since the 2008 Resolution 8/7 from the UN Human Rights Council.[98] These three pillars represent the following: first, the state's duty to protect against human rights violations by third parties; second, corporate responsibility to respect human rights by acting with due diligence; and third, the need to create more effective remedies for those affected by human rights violations.[99]

A UNGPs-compliant remedy is flexible and rightsholders should have access to a 'bouquet of remedies', meaning a variety of options that are accessible for various needs.[100] Guiding Principle ('GP') 25 outlines that states have a positive duty to ensure that rightsholders have access to an effective remedy when their rights are violated.[101] Companies also have a role in creating and participating in effective remedies; companies must seek to prevent or mitigate human rights infringements through both due diligence to prevent human rights violations and effective remedies.[102] Remedies under the UNGPs do not have to be judicial

[93] Simons and VanDuzer (n 38) 287.
[94] UNHRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31 ('UNGPs').
[95] ibid.
[96] Núria Reguart-Segarra, 'Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights' (2019) 4 Business and Human Rights Journal 109, 113.
[97] UNGPs (n 94) para 9.
[98] ibid para 5.
[99] ibid para 6.
[100] Note by the Secretary-General, 'Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162, para 38.
[101] UNGPs (n 94) GP 25.
[102] See for example Note by the Secretary-General (n 100) para 14; Mariëtte van Huijstee and Joseph Wilde-Ramsing, 'Remedy Is the Reason: Non-Judicial Grievance Mechanisms and Access to Remedy' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 471.

remedies; rather, non-judicial mechanisms can address areas where judicial remedies would be impractical.[103] Examples of state-driven public remedies can include judicial remedies or administrative remedies, like National Contact Points for Responsible Business Conduct, which serve to promote human rights due diligence, and the OECD Guidelines for Multinational Enterprises.[104] Corporate remedies, often considered private remedies, normally refer to internal grievance mechanisms. Many remedies also straddle both the public and private spheres, where states and corporations cooperate to provide some type of hybrid remedy, like 'certification program[s]' for decent labour conditions.[105]

Hybrid remedies can cause a particular challenge because power dynamics are often deeply ingrained in the remedy's structure. For example, some authors critique state-investor remedies because they can lead to corporate capture of the remedy.[106] Others recognise that non-state actors are necessary to regulate transnational spaces that are not clearly within a given state's jurisdiction and argue that hybrid mechanisms can be effective where there are synergies between the private and public sector, strong oversight, and consistency.[107]

The dynamics of hybrid remedies are an especially important feature in *amici curiae* because both parties in an ISDS dispute have an equal say as to whether to admit an *amicus* into a proceeding. The levelling out between states and private parties means that the incentives at stake for both the investor and the state can drastically impact the effectiveness of the *amicus* submission. For example, incentivising investors and states to support *amici curiae* could strengthen coordination and predictability within *amicus curiae* submissions, allowing for greater remedial flexibility. However, misalignment in incentives between the state and investor could leave rightsholders uncertain of whether their perspective will be included within an investor-state arbitration. Framing *amici curiae* in the debate that already exists around hybrid remedies allows for a deeper understanding of the contextual dynamics at play and their impact on the criteria detailed in the UNGPs.

By understanding *amicus curiae* as a hybrid between state and corporate action, its compliance with the UNGPs for becoming an effective remedy can be evaluated by comparing it to the general criteria set out as a minimum standard in GP 31.[108] The states and private actors share responsibility to uphold the inter-dependent criteria of GP 31 procedurally and substantively.[109] The components most relevant for evaluating *amici curiae* as remedies are the following:

[103] See for example Note by the Secretary-General (n 100) para 16; Liliana Lizarazo-Rodríguez, 'The UN "Guiding Principles on Business and Human Rights": Methodological Challenges to Assessing the Third Pillar: Access to Effective Remedy' (2018) 36 Nordic Journal of Human Rights 353, 362.

[104] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) 56.

[105] Justine Nolan, 'Closing Gaps in the Chain: Regulating Respect for Human Rights in Global Supply Chains and the Role of Multi-Stakeholder Initiatives' in Daniel Brinks and others (eds), *Power, Participation, and Private Regulatory Initiatives: Human Rights under Supply Chain Capitalism* (University of Pennsylvania Press 2021) 49.

[106] See for example Lise Smit and others, 'Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard' (2021) 25 The International Journal of Human Rights 945; Galit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 Harvard International Law Journal 419, 435–36.

[107] Nolan (n 105) 47–48.

[108] UNGPs (n 94) GP 31.

[109] See for example Note by the Secretary-General (n 100) para 14; van Huijstee and Wilde-Ramsing (n 102) 482; Stefan Zagelmeyer, 'PRC 9: Non-Judicial Grievance Mechanisms' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar Publishing 2023) para 40.06.

Legitimacy: This concept includes the ideas of accountability and rightsholders' trust in the mechanism.[110] Corporate remedies should contribute to the greater societal goals that should come from effective remedies and may include guarantees of non-repetition or public apologies.[111] Rightsholders' trust in a remedy generally derives from its perceived independence and impartiality.[112] The remedy will garner more trust from working with rightsholders on continued improvement and ensuring fairness.[113]

Accessibility: This criterion mandates that the remedy be affordable to the rightsholders, timely, and communicated to rightsholders in their own language.[114] It also substantively mandates that remedies be adequate, meaning that the remedies account for rightsholders' needs.[115] It includes considerations like timing, compensation quality, form, and future needs.[116]

Predictability: Although this element typically focuses on procedures that are 'clear and known', it also includes substantive elements, like a predictable range of outcomes based on similar facts.[117]

Transparency: The right to information is a gateway right: it enables rightsholders to know about remedies and possible human rights violations on a macro scale.[118] It applies both to rightsholders that are directly affected and to civil society organisations that monitor human rights affected by business activity.[119]

Equity: Remedies that account for power imbalances with proactive state and company action are more likely to be equitable for rightsholders.[120] Thus, specific accommodations should be made for those who face particular obstacles to obtaining a remedy. For example, the Working Group on the issue of human rights and transnational corporations and other business enterprises highlighted that women, people in rural areas, and rightsholders who are racialised, have a disability, and/or lack economic means may face different obstacles to receiving an effective remedy and require additional consideration.[121]

Rights-Compliance: Remedies that focus on rights are built in dialogue with those affected by business activity.[122] This includes accounting for varied experiences and perspectives and prohibits states from victimising or criminalising rightsholders. States should take steps to protect individuals seeking remedies against business activity.[123]

[110] van Huijstee and Wilde-Ramsing (n 102) 482.
[111] Note by the Secretary-General (n 100) para 17.
[112] Anna Triponel, 'Guiding Principle 31: Effectiveness Criteria for Non-Judicial Grievance Mechanisms' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Edward Elgar Publishing 2023) para 31.14.
[113] ibid para 31.12.
[114] van Huijstee and Wilde-Ramsing (n 102) 482.
[115] Note by the Secretary-General (n 100) para 33.
[116] ibid.
[117] UNGPs (n 94) GP 31(c).
[118] See for example Nicola Jägers, 'Access to Effective Remedy: The Role of Information' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 404; Triponel (n 112) paras 31.22–31.23.
[119] Triponel (n 112) paras 31.22–31.23.
[120] Note by the Secretary-General (n 100) para 23.
[121] ibid paras 23–31.
[122] ibid para 21.
[123] ibid para 20.

> Ultimately, whether a remedy is effective is judged from the perspective of an empowered rightsholder.[124]
>
> *Source of Continuous Learning and Dialogue*: Effective remedies lead to even more effective remedies if businesses facilitate and implement feedback from rightsholders about grievance mechanisms.[125] Businesses should engage rightsholders in open and safe dialogue to understand how to prevent and mitigate human rights infringements through their business activity or relationships.[126]

While these criteria are broadly supported, in the context of non-judicial remedies, some authors have found that the minimum criteria required in GP 31 are insufficient to assess a remedy's effectiveness accurately if they are isolated from the broader context.[127] Instead, these authors argue that a remedy's effectiveness also depends on addressing power imbalances in relationships, developing strategic relationship among stakeholders, providing sufficient resources, processing and verifying evidence, and engaging across local, national, and international levels.[128] A synthesis of nine studies on evaluating effective human rights remedies found that the key criterion impacting a remedy's effectiveness is the leverage that the proposed remedy has against the perpetrator of a human rights violation.[129] While GP 31 sets an important threshold for human rights remedies to meet, it does not fully develop the contextual elements that are more likely to make a remedy produce meaningful outcomes. The following analysis of *amici curiae* attempts to incorporate some of these contextual elements into the minimum criteria in GP 31.

V. Deficiencies in Making *Amicus Curiae* Remedies in ISDS

A comparison of *amici curiae* against the criteria in the UNGPs shows that they fail to meet the minimum standards for effective non-judicial remedies. Still, it is important to examine the roles that *amici curiae* currently fill and the barriers that currently block them from becoming part of the 'bouquet of remedies'. Overcoming these barriers through reform to the *amici curiae* process could help to mitigate exclusion in ISDS.

A. The Impact of *Amici Curiae* on Legitimacy

Amici curiae have the potential not only to enhance the legitimacy of ISDS proceedings but also to push arbitral outcomes to recognise a greater societal goal.[130] *Amici curiae* bring in perspectives from the wider community on facts and law that are not offered by the disputing parties.[131] Given the disincentives for states to bring up human rights violations

[124] ibid para 22.
[125] Zagelmeyer (n 109) para 40.17.
[126] Triponel (n 112) paras 31.28–31.30.
[127] May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 'Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms' (Corporate Accountability Research 2016) 7 <https://ssrn.com/abstract=2865356> accessed 3 October 2024.
[128] ibid 6–7.
[129] van Huijstee and Wilde-Ramsing (n 102).
[130] Cotula (n 17) 448–49.
[131] Dar and Mohanty (n 11) 235.

during ISDS arbitration,[132] *amici curiae* play an important role in highlighting the impact of investments on rightsholders. In the first ICSID case that accepted an *amicus curiae*, *Vivendi v Argentina*,[133] the tribunal stated that *amici curiae* 'have the potential to improve public acceptance of the international arbitral process'.[134] Elaborating on this sentiment, the tribunal in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* found that the submitted *amicus* brief helped to raise the concerns within the wider community in Tanzania that the ISDS impacted.[135] Indeed, the ICSID Arbitration Rules for accepting *amici curiae* acknowledge that their acceptance is based on the public interests at stake in the proceeding.[136] The recognition by ISDS tribunals of the human rights arguments submitted by *amici curiae* means that rightsholders have some representation within ISDS without being subsumed in the state. This shift in accepting the role of *amici curiae* in ISDS arbitration signals greater acceptance of the dynamic public interests at stake in ISDS proceedings.[137]

B. LIMITED *AMICUS CURIAE* ACCESSIBILITY

The legitimacy of *amici* submissions as a remedy is limited because its accessibility is restricted. The majority of *amici curiae* in ISDS proceedings are submitted by large NGOs or Western intergovernmental institutions.[138] *Amici* submissions are required to be written along technical guidelines, often specified by the tribunal or in the IIA.[139] They are further required to be submitted in the language of the proceedings, which could be highly impractical for rightsholders to access.[140] The diversity in perspectives that *amici curiae* purport to offer to tribunals is limited to only those organisations that are able to gain the technical assistance to form legal arguments that fit into an international investment law framework.

Further, it is rare for *amici curiae* to lead directly to adequate remedies. The remedies mentioned in the UNGPs for corporate accountability, like compensation, apologies, and guarantees of non-repetition, are outside of the scope of remedies that arbitral tribunals can provide to an *amicus curiae*. Still, the impact of *amici curiae* on ISDS awards can lead to indirect remedies through the state winning on counterclaims or reducing investors' damages, or bringing more awareness of human rights claims to both the state and the investor. One study that looks at ICSID awards from 2005 until 2018 found that, out of the 16 cases that had received *amici curiae* applications, 11 had accepted these submissions.[141] Seven of these awards made explicit reference to these *amici curiae* in their final awards and gave reasons to

[132] Perrone, 'Local Communities, Extractivism and International Investment Law' (n 27) 841.
[133] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005).
[134] Lukas Brunner, 'Can Amicus Curiae Lead Investor-State Arbitration Out of Its Legitimacy Crisis and Towards More Efficient Dispute Resolution?' (*Kluwer Arbitration Blog*, 15 July 2022) <https://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/> accessed 3 October 2024.
[135] Dar and Mohanty (n 11) 236; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Petition for *Amicus Curiae* Status (27 November 2006) 7.
[136] ICSID Arbitration Rules (n 39) r 37(2).
[137] Lin (n 1) 227; Butler (n 8) 146.
[138] Butler (n 8) 149.
[139] See for example *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Procedural Order No 6 (21 July 2016) ('PO6'), citing annex 836.1.
[140] ICSID Arbitration Rules (n 39) r 22.
[141] Butler (n 8).

agree or disagree with the submissions.[142] While the study is too small a sample size to extrapolate to general patterns, it shows that, even though tribunals are not required to make explicit reference to *amici curiae*, they will frequently account for *amici curiae* in their decisions. Even where *amici curiae* are not explicitly mentioned in the tribunal's decision, they can help to inform investors of the human rights impact and thus to form the basis of continual learning. Including opinions from non-disputing parties shifts the narratives within ISDS from prioritising investment, to narratives that recognise the human rights implications involved.

C. UNPREDICTABLE CRITERIA FOR ADMITTING *AMICI CURIAE*

Amici curiae applicants must meet shifting criteria for tribunals to accept their submissions. Historically, tribunals considered *amici curiae* as a procedural question that the disputing parties would have full control over.[143] However, ISDS arbitration rules have begun to make *amici curiae* more predictable through identifying criteria for accepting these submissions. For example, rule 37(2) of the ICSID Arbitration Rules, in place since 2006, explicitly allows tribunals to accept submissions from non-disputing parties that are 'within the scope of the dispute' and 'would assist the [t]ribunal' on questions of law or fact.[144] The tribunal will also consider whether the non-disputing party has significant interest in the dispute and will ensure that the submission does not unduly burden the parties or prejudice one of the parties.[145] Other arbitral rules have similar provisions, and admitting *amici curiae* generally depends on the fairness to the parties and legitimacy of the *amicus curiae*'s interest.[146]

Still, *amici curiae* are inherently discretionary, and tribunals have varied interpretations of the criteria in different arbitration rules.[147] In fact, the non-exhaustive nature of rule 37 of the ICSID Arbitration Rules encourages this broad tribunal discretion.[148] Tribunals may also give different weight to the criteria that could make it more difficult for rightsholders to submit an *amicus curiae*. For example, when deciding whether to admit two *amici curiae* applications, the tribunal in *Bear Creek Mining Corporation* indicated that the determinative factor for admission was whether the *amici* would assist the tribunal.[149] However, one commentator noted that the real deciding factor was the closeness of the relationship between the *amicus curiae* and the local area affected by the investment.[150] This was reflected in the tribunal's ultimate decision to accept the *amicus* application from the local non-government organisation while rejecting a specialised NGO in sustainable investment from the United States.[151] Relying on the question of whether an *amicus* applicant was directly impacted by investment activities, which is not listed in the ICSID Arbitration Rules, could lead to tribunals accepting fewer *amici curiae* even when they have legitimate interests in the dispute. Considering that the minimum requirements for UNGPs-compliant remedies, like transparency,

[142] ibid 151–52.
[143] *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Letter by David D Caron to J Martin Wagner (29 January 2003).
[144] ICSID Arbitration Rules (n 39) r 37(2).
[145] ibid.
[146] Dar and Mohanty (n 11) 237.
[147] Ranjan and Anand (n 66) 4.
[148] Obadia (n 10) 368.
[149] PO6 (n 139) [38].
[150] Butler (n 8) 163.
[151] See *Bear Creek* Award (n 5).

often apply to NGOs and civil society organisations, this limit may restrict the ability of *amici curiae* to address systemic concerns.

D. UNPREDICTABLE JURISDICTION FOR *AMICI CURIAE*

A major barrier to determining whether to admit *amici curiae* depends on how the tribunal defines its jurisdiction. Where *amici curiae* focus on human rights concerns, the issues are often adjacent to the financial claims identified in the IIA. Because tribunals have no inherent jurisdiction, the jurisdictional provisions in IIAs determine whether a tribunal considers human rights concerns.[152]

Most IIAs will include international law as a source of law for the tribunal. However, some tribunals have taken a 'parochial' interpretation of international law to rely only on international investment law, not international public law.[153] Other tribunals have found that such provisions naturally include both international investment law and international human rights law and have based portions of their decisions on human rights treaties.[154] The systemic approach to interpreting IIAs, which is growing in acceptance, is more widely accepted when the jurisdictional provision of IIAs includes a broader range of areas.[155]

Even still, arbitral tribunals do not include all human rights in their jurisdiction even if they take on a systemic interpretation of international law. The tribunal in *von Pezold* decided not to permit the *amicus curiae* submission from a European human rights organisation and four Indigenous communities in Zimbabwe.[156] The ISDS proceedings originated from Zimbabwe's constitutional reform and its Fast Track Land Reform Programme, which together aimed at redistributing the land that was given during the colonial period to white commercial farmers.[157] The reform allowed compensation to the farmers from the colonial power only for improvements on the property.[158] The *amicus curiae* dealt primarily with international human rights law and the impact of commercial farms on Indigenous peoples' connection to their ancestral lands.[159] In rejecting the application, the tribunal stated that the BITs did not incorporate the 'universe of international law' and did not reference international instruments that protected Indigenous peoples' identities.[160] Thus, these considerations were outside the scope of the tribunal's jurisdiction. Interestingly, the tribunal, in its final award, explicitly referenced international human rights law and the prohibition against racial discrimination when it awarded US $1 million in moral damages to the investor who had claimed that Zimbabwe's land reform discriminated on the basis of race.[161] In other words, the tribunal included human

[152] Dar and Mohanty (n 11) 235.
[153] ibid 229.
[154] See for example *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) [521]; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) [116]; Dar and Mohanty (n 11) 232.
[155] Dar and Mohanty (n 11) 230; *Urbaser* (n 51).
[156] *Pezold* PO2 (n 28).
[157] See generally Thomas Leary, 'Non-Disputing Parties and Human Rights in Investor-State Arbitration: *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Final Award, 28 July 2015' (2017) 18 Journal of World Investment & Trade 1062.
[158] Ntina Tzouvala, 'Invested in Whiteness: Zimbabwe, the *von Pezold* Arbitration, and the Question of Race in International Law' (2022) 2 Journal of Law and Political Economy 226, 229.
[159] *Pezold* PO2 (n 28) [21].
[160] Leary (n 157) 1071; ibid [57].
[161] Leary (n 157) 1070; Tzouvala (n 158) 230.

rights law when faced with a matter involving racial discrimination, but excluded human rights law when considering the interests of Indigenous peoples. This shows the highly unpredictable and discretionary nature of ISDS tribunals.

E. LACK OF TRANSPARENCY FOR *AMICI CURIAE*

Parties to ISDS proceedings have equal access to all communication and progress in the arbitral proceedings, subject only to urgent interim orders. However, *amici curiae* applicants are not parties and are thus not necessarily privy to the progress, the precise arguments of the parties, or the issues raised in the dispute. In *Pac Rim Cayman LLC*, the tribunal dismissed the *amicus curiae* submission from a local organisation that focused on international human rights and environmental law.[162] In its reasons, the tribunal stated that it was inappropriate to address the *amicus curiae*'s argument in part because the *amicus* was not privy to the confidential information that had emerged in later stages of the proceedings.[163] Because the parties had blocked access to pivotal information, the *amicus curiae* failed to convince the tribunal meaningfully to consider human rights in the dispute.

However, with greater acceptance of the state's duty of transparency,[164] more arbitral rules are emphasising transparency in ISDS proceedings.[165] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[166] outline how to increase transparency in ISDS proceedings. The current UNCITRAL Working Group III on ISDS Reform has proposed that these rules are, by default, incorporated into ISDS proceedings.[167] Several IIAs already incorporate the UNCITRAL Transparency Rules.[168] ICSID has also presumptively mandated that arbitral awards are published, subject to party redaction for confidential information.[169] This headway towards greater transparency has the potential to give *amici curiae* the ability to gauge the parties' arguments and to ensure that they bring a nuanced perspective on the issues raised.[170]

F. LACK OF EQUITY AND RIGHTS-CENTRIC APPROACHES

Furthermore, *amici curiae* are not framed as a human rights-centric remedy. Instead, they must conform to international investment law to assist the tribunal in matters within the

[162] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Submission of *Amicus Curiae* Brief by the Center for International Environmental Law (20 May 2011).
[163] *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) [3.30].
[164] Jägers (n 118).
[165] Arcuri and Montanaro (n 11) 2793.
[166] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) UN Doc A/RES/69/116 ('UNCITRAL Transparency Rules').
[167] UNCITRAL Working Group III on ISDS Reform, 'Compilation of IIA Provisions and Arbitration Rules Related to Procedural and Cross-Cutting Issues' (*UNCITRAL*) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_iia_provisions_and_arbitration_rules_related_to_procedural_and_crioss-cutting_issues_1.pdf> accessed 4 October 2024.
[168] See for example Comprehensive Economic and Trade Agreement ('CETA') between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally entered into force 21 September 2017), art 8.36; Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') (signed 8 March 2018, entered into force 30 December 2018), art 28.13.
[169] ICSID Arbitration Rules (n 39) r 62.
[170] Dar and Mohanty (n 11) 247.

scope of the dispute. Consequently, they exclude public perspectives on whether to include *amici curiae*. Indigenous or ancestral laws play no role in determining whether an *amicus* submission is accepted, and cultural frameworks and laws discussed within *amici curiae* must fit into international or Western legal concepts.

That said, several well-known remedies do not have the sole purpose of providing remedies for human rights violations. The National Contact Points under the OECD Guidelines for Multinational Enterprises in Canada and Denmark specifically avoid stating that their purpose is to provide a remedy.[171] Thus, *amici curiae* are not required to have the sole focus of providing a remedy; however, remedial measures should be possible either directly or indirectly from their submissions.

This lack of a rights-centric approach means that the rules of procedural fairness do not apply to *amici curiae*. A core tenet of international arbitration is equality between the parties, a violation of which can result in an unenforceable award.[172] However, equitable treatment applies only to parties, not to *amici curiae*. *Amici* normally have length and subject-matter restrictions on their written submissions and do not have the right to oral hearings.[173] These provisions ensure that *amici curiae* are not unduly burdensome on the parties;[174] however, they contribute to how ISDS sidelines the human rights concerns in the dispute and instead prioritises the commercial interests.[175] Thus, by their design, *amici curiae* are ill-suited to provide a UNGPs-compliant remedy. While they change the narrative in ISDS arbitrations, from one in which human rights concerns are largely irrelevant, to one in which human rights are a core feature of ISDS proceedings, the limits placed on *amici curiae* still reinforce a narrative that prioritises investment interests over human rights.

VI. RETROFITTING *AMICUS CURIAE* TO ENHANCE EFFECTIVENESS

Reforms of *amicus curiae* would likely maintain the basic structure of ISDS, including the divisions between private and public international law, but could also help to increase human rights considerations within ISDS. Understanding where *amici curiae* fail to fulfil the UNGPs effective remedy criteria allows for proposals to modify the process and content of *amici curiae* to bring them closer to the minimum criteria. This section proposes that arbitral centres and any states drafting IIAs should promote *amicus curiae* submissions from a broader range of applicants, increase transparency for *amicus curiae* applicants, and normalise interpretations of tribunals' jurisdiction that include public international law.

A. PROACTIVELY PROMOTING *AMICUS CURIAE* ACCESSIBILITY

Currently, the rightsholders that are affected by investment face practical barriers to having tribunals consider their views. These barriers vary depending on the community, but include language barriers, legal and technical expertise, and the location of the proceedings.[176]

[171] van Huijstee and Wilde-Ramsing (n 102) 478–79.
[172] See for example Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art V; ICSID Arbitration Rules (n 39) r 52(1).
[173] Kunuji (n 9) 42.
[174] ICSID Arbitration Rules (n 39) r 37(2).
[175] Simons and VanDuzer (n 38) 281.
[176] Triponel (n 112) para 31.17.

GP 25 outlines that a fundamental principle for effective remedies is that the state takes appropriate steps to ensure access to a remedy.[177] Thus, states should take on a more proactive role in providing the necessary tools for rightsholders to write and submit *amici curiae*. The Commentary for GP 31 further details that these proactive steps include facilitating public awareness, increasing access to information and financial resources, and connecting expert resources to the community.[178]

Given that the host state is party to the ISDS dispute, these funding initiatives must be carefully tailored so as to avoid infringing on the independence of *amici curiae*.[179] One option is for IIAs to contemplate joint Home and Host state mechanisms to fund *amici curiae*. For example, upon signing an agreement that includes an ISDS clause, states could agree to create a joint fund for rightsholders to prepare and submit *amici curiae*. The fund would require applicants to meet objective criteria with sufficient flexibility to allow rightsholders to receive funding without dependence on the state and to avoid accusations of bias in their submissions.

Similar multi-sourced funding has been implemented to support dispute settlement procedures internationally. For example, the Roundtable on Sustainable Palm Oil collects money from annual membership fees and contributes them to a trust fund that supports those who use its Dispute Settlement Facility for mediation.[180] Parties that wish to use the Facility but lack the funds to participate may submit a request to the Secretariat to cover the costs of experts or mediators.[181] Implementing a joint or multilateral system like this to fund *amici curiae* in ISDS would help states to fulfil their obligation to create accessible remedies.

A parallel can also be drawn here to the procedures in some domestic courts for mandatory joinder of necessary parties to civil proceedings. For example, in several Canadian jurisdictions, parties to a civil proceeding must include parties that 'are likely to be affected or prejudiced by the order being sought'.[182] If the party is necessary to the proceeding because their interests are affected in this way, and such participation causes them undue burden, the court may award compensation for their attendance.[183] Sharing the financial burden of those whose opinions are needed for the fair adjudication of a dispute is part of making a hearing more efficient by including all views at once instead of splitting them into multiple actions. Thus, although some may argue that *amici curiae* slow the ISDS arbitration process, including the necessary perspectives from the start will help the tribunal get a full understanding of the dispute and could lead to a more effective arbitration.

[177] UNGPs (n 94) GP 25.
[178] ibid GP 31.
[179] Obadia (n 10) 368.
[180] Columbia Center on Sustainable Investment, 'Innovative Financing Solutions: For Community Support in the Context of Land Investments' (March 2019) 20 <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/CCSI-Innovative-Financing-report-Mar-2019.pdf> accessed 3 October 2024.
[181] 'RSPO Complaints System' (*Roundtable on Sustainable Palm Oil*) <https://rspo.org/who-we-are/complaints/dispute-settlement-facility/> accessed 3 October 2024.
[182] *Abrahamovitz v Berens*, 2018 ONCA 252 [44], citing Molloy J in *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7969 [10]–[11]. See also Manitoba, *Court of King's Bench Rules*, MR 553/88 ('MN Civ Pro'), r 5.03(1).
[183] See for example *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 5.05(c); *Rules of Court of New Brunswick*, NB Reg 82–73, r 5.05(c); MN Civ Pro, r 5.05(c).

B. PREDICTABLE CRITERIA FOR ADMITTING *AMICUS CURIAE*

The rules of arbitral centres that elaborate on the criteria for admitting *amici curiae* have helped to increase the number of *amici curiae* in recent years.[184] Still, not all rules provide these criteria and the interpretations of tribunals can vary. To compensate, arbitral centres should mandate that tribunals publish their reasons for rejecting an *amicus* submission.[185] Although, as mentioned previously, it is common practice for tribunals to publish reasons for accepting or denying *amici curiae*,[186] creating an explicit requirement for published reasoning would allow all parties and *amici* applicants to understand the scope of the *amicus* submissions' acceptance and limits. If the *amicus* submission is rejected, reasons would ensure that applicants can better anticipate whether they could make a viable submission and would build persuasive reasoning for future tribunals.[187]

Additionally, arbitral centres could issue interpretive notes that outline a principled approach to the criteria for admitting *amici curiae*. For example, general principles could list specific factors that would make a submission more likely to assist a tribunal. This would encourage arbitrators to focus on harmonising criteria for admitting *amici curiae* and allow non-disputing parties a greater ability to gauge when to participate as *amici curiae* in an ISDS dispute.

C. PREDICTABLE JURISDICTION

As part of the measures to make *amici curiae* more predictable, states implementing IIAs should provide more guidance on how arbitral tribunals define their jurisdiction.[188] Treaties outlining their jurisdiction must provide enough flexibility to include considerations submitted by *amici curiae*. Given the perception in ISDS of separate private and public international law spheres, IIAs should proactively promote tribunals to consider human rights laws.

In *Urbaser*, the tribunal found that the applicable law included international human rights law because article X(5) in the applicable BIT specified that the tribunal shall decide the dispute based on the BIT *and* other treaties between the parties and the general principles of international law.[189] To render this clause effective, the tribunal found that it must be able to decide disputes based on international human rights law where the core issue in the investment dispute was directly related to these rights.[190] To ensure that interpretations like this are possible, IIAs should specify that the applicable law to the disputes includes human rights law.

Still, interpretations like *Urbaser* are rare despite the reforms to IIAs noted in Section II of this article. Authors like Alschner conclude that even new IIAs that include broader regulatory freedom for the state are interpreted in the light of old ISDS arbitration and apply

[184] Obadia (n 10) 370.
[185] Butler (n 8) 170–71.
[186] ibid.
[187] ibid.
[188] Dar and Mohanty (n 11) 245.
[189] *Urbaser* (n 51) [548].
[190] ibid [1180]–[1181].

the same limiting patterns.[191] Alschner proposes that ISDS tribunals begin to interpret both old and new IIAs in the light of subsequent agreements and practice to fill gaps and update obligations.[192] Implementing such a practice would take a multilateral effort and buy in from a panoply of stakeholders. But, ultimately, such efforts would help both to maintain the relevance of ISDS to modern issues by analysing the full public and private scope of disputes and to create more predictability for rightsholders seeking to voice their concerns in this arena.

D. INCREASING TRANSPARENCY

Access to information can make *amici curiae* more effective for both the rightsholders and the arbitral tribunal's decision process. Because transparency allows rightsholders to become aware of human rights violations that may otherwise be obscured (for example, upstream pollution or bribery that undermines self-determination), increasing what documents are publicly available would give rightsholders an opportunity to make more informed submissions. For tribunals, releasing key documents ensures that *amici curiae* provide a different perspective from the disputing parties and frame their argument within the scope of the dispute.[193]

While current arbitration rules are expanding transparency requirements, states should capitalise on this momentum and enhance their disclosure commitments. The UNGPs allow states to mandate companies to disclose information 'where appropriate'.[194] Although 'appropriateness' is vague, the purpose of the UNGPs supports that it includes information related to business activities that pose a significant impact on human rights.[195] While a hard line approach to disclosing information could ignore possible legitimate reasons for company confidentiality, such as competitive advantages, IIAs could begin to mandate disclosure of key arguments and facts in order to gain access to the tribunal process.[196] Where confidential information is key to understanding the parties' arguments, the tribunal may ask parties to release a redacted version or to summarise their arguments for the *amicus curiae*.[197]

These reforms to *amici curiae* submissions are the first building blocks to bringing *amici* closer to an effective remedy under the UNGPs. ISDS proceedings would help to make *amici curiae* more effective in forming one possible remedy required for those negatively affected by international investment.

VII. CONCLUSION

ISDS is not isolated from international human rights law; rather, *amici curiae* can shed light on its long-ignored public aspects. *Amici curiae*, in this sense, can form a bridge between the private and public law considerations in ISDS. These submissions should not just assist the tribunal but, because of states' human rights obligations, they should also help rightsholders achieve effective redress for investor violations of human rights. Reforming the *amici curiae*

[191] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022) 39.
[192] ibid 232.
[193] Obadia (n 10) 373.
[194] UNGPs (n 94) GP 3; Jägers (n 118) 406.
[195] Jägers (n 118) 406.
[196] Dar and Mohanty (n 11) 247.
[197] Obadia (n 10) 373.

process is especially important for Indigenous communities affected by extraction projects to allow ISDS tribunals properly to consider Indigenous perspectives apart from the state that claims to represent them.

This article has proposed various reforms to make *amici curiae* more accessible, predictable, and transparent for rightsholders. In the context of UNCITRAL's Working Group III on ISDS Reform, these proposals can increase the legitimacy of ISDS to make it a more inclusive system. These reforms aim to mitigate the imbalance of power that silences Indigenous and marginalised voices in ISDS. Still, they are meant to be short-term solutions that can be implemented relatively quickly in arbitration rules. They do not replace the need for long-term solutions that are built from Indigenous and rightsholders' perspectives to create a more inclusive system of dispute resolution.[198]

The division between investment and human rights within ISDS arbitration can seem too ingrained to change. However, those advocating for greater respect for human rights by the business community will remember the enormous impact that non-governmental organisations and civil society had on stopping the Transatlantic Trade and Investment Partnership Agreement.[199] This agreement would have re-ingrained ISDS as the go-to system for investor protection in Europe. Thousands of opposition-led events across Europe led to a massive overhaul of the proposed ISDS agreement, effectively reversing the typical power imbalance seen in IIAs.[200] While the upheaval did not ultimately conclude with a revised or inclusive version of ISDS arbitration, it allowed for greater exploration of what a potential investment protection scheme could look like beyond older generation IIAs through proposals like the 'Investment Court'. This on-going initiative hopes to create a new version of investor protection that would bring it away from private arbitral centres and into a more publicly visible court-like system.[201] Fully developing initiatives like this may take many more years, but creative reforms from all levels are what is necessary to lead eventually to more inclusive and context-sensitive ISDS processes.

[198] Arcuri and Montanaro (n 11) 2807–08.
[199] See European Commission, 'Transatlantic Trade and Investment Partnership (TTIP) – Documents' (*European Commission*) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en> accessed 6 October 2024.
[200] Hirsch (n 21) 138.
[201] ibid 148.