

THE PAST: DRAWING A LINE?

AUSTEN MORGAN

Legacy Legislation Conference, Malone House, Belfast

3 March 2018

Austen Morgan is a barrister in London (at 33 Bedford Row) and Belfast. He is the author of: *Tony Blair and the IRA: the ‘on the runs’ scandal* (London 2016; available on Amazon and Kindle):

Introduction

The past in Northern Ireland (‘NI’) should not be in dispute, but it is. A new state was created, by Irish republicans, using political violence, in 1919-21, in about 30 months. In the 30 years from 1968 to 1998, Sinn Féin/the IRA, despite greater force, failed to annex its fourth green field¹ (the north): it, and Irish nationalism, secured the Belfast agreement (a name its ideologues cannot utter) and a secret so-called peace process.

It took far too long for the casualties of ‘the troubles’ to be recognized with the striking statistics (rounded up) on those killed over three decades: republicans being responsible for 60 per cent (including many catholics); loyalists for 30 per cent (including many protestants); and the state – police and soldiers – being responsible for approximately 10 per cent of all deaths, some 361.²

Any humanitarian would be concerned about the approximately 3,500 plus deaths, the very many more injured (often permanently), and of course the survivors and relatives. But there is a constitutional context, and in particular the distinction between being killed lawfully or unlawfully. That is where religion, and emotion, gives way to law, and to reason. The 90 per cent of paramilitary murders were unlawful: only some of the 10 per cent state killings – a handful – was unlawful.

This remains the position even when some attempt to argue, taking leave of the rule of law, that the principal perpetrator, the IRA, challenged a UK constitutional norm and created an Irish one, of greater legitimacy; thus, its idea of legitimate targets, the pursuit of which was mired in much blood and sectarianism.

¹ Tommy Makem, ‘Four green fields’ (1967).

² I first analyzed the statistics in ‘Jordan and After: the right to life in Northern Ireland’, published subsequently in my internet book, *The Hand of History?: legal essays on the Belfast Agreement* (London 2011), pp 144-87: available www.austenmorgan.com

So, why are we stuck in a post-troubles period (of now 20 years), characterized by: first, holding the state to account for its killings; and, secondly, effectively excusing republican, but not loyalist, paramilitaries for most of the illegality? The answer is culture, ideology and reasoning, fed by bad politics, and in particular the expediencies of the UK and Irish states.

We have ‘the past’ as an issue in NI, seemingly to be ‘solved’ by a set of more public bodies stuffed with quangocrats. And, on the other hand, we have ‘transitional justice’ well rooted in academic law in NI³, prosecuting the state ideologically while exonerating republicans (the loyalists, through ‘collusion’, being agents of the state!).

I stunned myself when I first wrote that the Saville bloody Sunday report⁴ would lead the rest of the world to have a somewhat distorted view of NI.⁵ It does. I now wonder whether any NI lawyers ever told the Strasbourg human rights court – when arguing their article 2 cases (which applied originally to all survivors and relatives) – about the numbers 60/30/10. I suspect not. Strasbourg now treats the UK state as the principal offender, effectively helping republicans reframe the troubles as propaganda in forums more congenial, and less dangerous, than the original ones: Loughgall (1987), Gibraltar (1988), Finucane (1989), Loughinisland (1994).

I recently had the opportunity to reflect upon this weird situation, when, following John Downey walking free from the Old Bailey in February 2014 (due to English justice!), I used the papers from the case to write: *Tony Blair and the IRA: the ‘on the runs’ scandal* (London 2016). This book has been well received generally: but those in NI’s two universities yet to comment upon the on the runs (‘OTRs’), have somehow failed to join in this constitutional critique of Tony Blair.

In the conclusion to the book, which I draw upon in this paper, I discussed, in chapter 13, prosecution or amnesty? Conscious that I might be seen to be agitating for the prosecution of John Downey (in NI for the Hyde Park bombing?), I actually – on balance – came out in favour of a statutory amnesty for all. This was not to forget the past: it was to ensure it could be recorded more accurately, by the writing of good history and the cultural drawing of proper lessons. The Downey papers are only a small proportion of official archives in London, Belfast and Dublin. There is much more in warehouses and other locations.

I was influenced strongly in my decision by the scandal of the OTRs, and the fact that Whitehall – between 2000 and 2014 – had run an administrative scheme, through which 187 IRA members (no loyalists were included) of 228 applicants had benefited from a secret amnesty, before its sudden collapse due to John Downey’s successful abuse of process application.

³ The transitional justice institute in Ulster university (2003) and the school of law/senator George J. Mitchell institute for global peace, security and justice in Queen’s University, Belfast.

⁴ *Report of the Bloody Sunday Inquiry*, HC 29 2010-11, 15 June 2010.

⁵ See n2 above, p 148.

The OTR scandal, I believe, has inspired an alternative movement, of supporters of soldiers and police, calling for a statute of limitation on the prosecution of those responsible for NI's state killings.⁶

The Future: Prosecution or Amnesty?

What is the future for NI: either the prosecution of republican terrorists and others or an amnesty for all troubles crimes, committed between 1968 and 1998?

Having written the Tony Blair book, and reflected on this general question substantively for the first time, I surprised myself in arguing against the prosecution of the OTRs. However, I am only interested in the idea of a statutory amnesty, if it applies equally to everyone. The lessons of the Northern Ireland (Offences) bill of 2005-06, which Tony Blair failed to put through parliament, need to be learned. This has implications, of course, for the more recent movement, calling for a statute of limitations, to reassure the many police and soldiers who may feel at risk of prosecution.

My view is based upon a complex of reasons for and against, to do with each of the alternatives: prosecution or amnesty. It is not an easy debate to initiate. First, I weigh the case for prosecution. Then, I look at amnesty. And finally, I balance prosecution against amnesty, coming down eventually on one side.

Prosecution

The following are seven important arguments, for or against prosecution:

one, the victims: 3,720 persons died violently, between 1966 and 2006 (and more since)⁷, and very many more were injured, creating a huge (and growing) sector of victims and survivors⁸. Each victim deserves justice without question, and varying groups of relatives and supporters have demanded variously, and increasingly, inquiries, inquests, investigations and prosecutions;

two, the perpetrators: the figures for who killed whom are clear. If all unlawful killings were to be pursued equally, the investigations etc. would be overwhelmingly against republican and loyalist paramilitaries, including those who have now abandoned violence for politics;

three, legacy litigation: this unfortunately goes with the grain of propaganda. The republicans divert attention from themselves as the principal culprits by focussing on state killings and construing loyalist murders incorrectly as collusion. The state has archives, and the government seeks to discharge its legal obligations by restricting disclosure. There are no such requirements imposed on republican and loyalist organizations.

⁶ Armed forces (statute of limitations) bill: HC Hansard, vol. 630, cols. 823-5, 1 November 2017. Second reading, 15 June 2018.

⁷ David McKittrick & Others, eds., *Lost Lives*, Edinburgh & London, 2007, p. 1553.

⁸ Victims and Survivors (Northern Ireland) Order 2006, SI 2006/2953; Commission for Victims and Survivors Act (Northern Ireland) 2008. According to the victims and survivors service, an average of ten new victims comes forward each day: *Belfast Telegraph*, 30 October 2014.

The impression is reinforced, by increasing calls for inquests, inquiries and investigations, that the troubles were really about a succession of direct and indirect state abuses which the IRA heroically resisted;

four, humanitarian concerns for victims and survivors: grieving is a necessary emotional response to death and injury, and there is a growing need for private and public provision of services, therapeutic, medical and social. Few appear to have asked the macro question in this context: would more people begin to feel better more quickly, with a continuation of sectarian polarization (as has happened) or with genuine reconciliation promoted by the state (as has happened in other societies)?;

five, the concept of criminal justice: is it necessary to have open-ended historic investigations (and reparations) or, as most constitutional states do, have a statute of limitation for criminal liability?;

six, the passage of time: given the standard of proof (beyond a reasonable doubt), it becomes increasingly difficult to convict years after a crime. Witnesses move, disappear and eventually die. Their evidence often deteriorates. They can be more successfully cross-examined. Forensic evidence (which may be enhanced by new techniques) is more likely to be lost or destroyed with years of storage;

and **seven**, resources: the lord chief justice of NI (Sir Declan Morgan)⁹, the local attorney general (John Larkin QC)¹⁰ and the chief constable (George Hamilton)¹¹ have variously indicated that concentrating upon the past means, the criminal justice system cannot deal properly with the present. It follows that NI may have a bleak future, which has been distorted by a bad past and has not been better prepared in a post-troubles present.

There has been little spontaneous reconciliation since 1998, even though violence has given way to politics. It is very striking that, for many, time has not healed. This is not helped by the perception that ‘bad guys’ – including the OTRs – do well in NI. But the instinctive response, to investigate and prosecute all perpetrators (even with only two years in prison), is extremely problematic. We only have the PSNI’s Operation Redfield at present, which is looking again at all the OTR cases. And the number of successful prosecutions, after further abuse of process applications, and various defences, is not likely to satisfy many people.

⁹ *Belfast Telegraph*, 17 November 2014; BBC, 18 January 2016 (referring to the 56 pending inquests).

¹⁰ Various media interviews & press reports, 19-20 November 2013.

¹¹ Speech to British-Irish association, 6 September 2014.

Amnesty

The following are important arguments, for or against amnesty:

one, precedent: the new Irish state legislated three times in 1923-24, to protect from civil and criminal liability: UK forces; republicans in the war of independence; and free state forces in the civil war. Early in the NI troubles, the Stormont government announced an executive amnesty, for the period 5 October 1968 to 6 May 1969¹²;

two, immunities: there has long been special treatment of republicans: between 1997 and 2010, regarding the decommissioning of terrorist weapons; between 1998 and 2013, regarding evidence to the Saville inquiry, and the four lesser ones (Robert Hamill, Rosemary Nelson, Billy Wright, and Breen and Buchanan); and from 1999 and continuing, regarding the recovery of the disappeared¹³;

three, the 1998 Belfast agreement: the NIO did not prepare in advance of the talks for the release of terrorist prisoners. Sinn Féin handled the issue badly, failing to look after a complex republican constituency.¹⁴ It did not even demand an amnesty. The text of the agreement was inadequate, and caused problems subsequently. By not signing up to the Belfast agreement, the republicans had no hope of political support for prisoner releases (OTRs did not even register). They certainly gave nothing positive in return for what the UK, and Irish, government gave them in 1998-2000;

four, statutory amnesty: it was Lord Williams of Mostyn, followed by Lord Goldsmith, who put the idea on the agenda after the Belfast agreement, albeit negatively in advice to Tony Blair;

five, officialdom: the NIO, and in particular Sir Quentin Thomas, came up with the idea of excluding the security forces from an amnesty, this idea prevailing between 2001 and 2005;

and **six**, legislation: the government's Northern Ireland (Offences) bill was opposed by all parties in 2005-06, but Sinn Féin pulled the plug when it could no longer deny that the security forces were to be included.

¹² Lord Trimble suggested there was early release of prisoners after the 1956-62 IRA campaign: NIAC, *Report*, Q807, 13 May 2014.

¹³ President Clinton may have had a hand in this: see his telephone calls to Tony Blair, on 8 and 23 May 1998, following a meeting with WAVE representatives (Clinton presidential library and museum, collection no. 2012-0600-M).

¹⁴ Its comprised the following prisoners: (i) those sentenced in NI before 1973; (ii) those sentenced in NI since 1973; (iii) transferees to NI; (iv) transferees to the Republic of Ireland; and (v) escaped prisoners from mainly NI. Sinn Féin went on to elide the following OTRs subsequently: (vi) those subject to extradition requests to the Republic of Ireland and other countries; (vii) volunteers who had not been arrested, and may or may not have been on the run; and (viii) political militants, not members of the IRA, who had helped criminally.

The story of the OTRs reveals missed opportunities. The UK (and Irish) government failed to include an amnesty (really two) in the Belfast agreement. Sinn Féin, of course, wanted special treatment, without signing up to the Belfast agreement or having to decommission. The failure of public policy was the subsequent appeasing of the republicans in a less than transparent peace process. The idea of excluding the security forces had been Sir Quentin Thomas's; ironically, this is the card Sinn Féin played to destroy the Northern Ireland (Offences) bill.

Prosecution versus Amnesty

Any discussion of prosecution versus amnesty will have to take account of the factors listed above, and no doubt others. The prediction regarding prosecution is most likely: whatever of the efforts of the legacy litigators (who are keen on state killings), there will be no general refighting of the troubles through the courts in coming years. The prospects of any amnesty are, of course, slight, given a continuation of the present political standoff. It would be going further than the Belfast agreement. When it was tried in 2005-06, only the labour government and Sinn Féin supported it (until it turned against).

We now know that Tony Blair's secret diplomacy led only to the Downey fiasco. The 228 OTRs are being reviewed, with a view to successful prosecution. This is the PSNI's operation Redfield. And it is associated with the replacement of the historical enquiries team by the so-called legacy investigation branch of the police service. Maybe circumstances will emerge, where the idea of properly drawing a line under the past, appeals to different groups, albeit for different reasons. Sinn Féin, out to get the security forces (not that there are likely to be many cases), would be opposed to the principle of equal treatment of all criminal suspects. But do the 228 OTRs want to continue running personal risks, on the slight chance that a member of the security forces – who acted unlawfully – will be prosecuted successfully?

The emergence of the statute of limitations lobby, with roots in the military and police communities, could be significant. On one view, it is OTRs mark 2, with republican terrorists replaced by members of the security forces. On another view, the perceived risks for the 228 IRA members (now privately pensioned presumably), and the articulated fears of many more soldiers and police (most of whom acted perfectly lawfully), could constitute two different reasons, in the right political context, for my drawing of a line under the past – a responsible act of statecraft, inspired not by amnesia but by desire to tell more truth based upon the huge archives in London, Belfast and Dublin.

This advocacy of an amnesty is not designed to lock relatives and survivors into their private worlds of grief, while the rest of NI gets on with its life. Yes, inquests, investigations and prosecutions would stop. But, and this is crucial to the idea I am advocating, there would then be an opening of the archives, subject to human rights concerns. The outstanding precedent is the 2012 *Report of the Hillsborough Independent Panel*¹⁵, into the 1989 Sheffield football tragedy which saw 96 Liverpool fans killed. Relatives and survivors would learn much more than might emerge in a criminal court. The perpetrators might have to confront their past deeds. And society generally could begin to see more clearly who killed whom in the NI troubles.

¹⁵ HC 581, 12 September 2012, 389 pp plus <http://hillsborough.independent.gov.uk>

Dealing with the Past

The Eames/Bradley report of 2009 did not survive for long.¹⁶ It was a case of suicide, not murder! If the recommendations – based upon a legacy commission - had been accepted then, it would have been implemented over five years. Thus, the origin of the idea of dealing with the past in a finite period.

The Haass/O’Sullivan talks in late 2013 had not even achieved agreement.¹⁷ But they left a list of new adopted institutions, with an alphabet soup of initials. On 23 December 2014, after eleven weeks of talks brokered by the NIO, the Stormont House agreement emerged in Belfast.¹⁸

The 2014 Stormont House Agreement

The Stormont House agreement was between principally the DUP and Sinn Féin: the alliance party supported it; but the Ulster unionist party and SDLP had reservations. It had the – mainly financial – support of the UK government, which makes a difference.

This agreement, under ‘the past’, provided for: one, an oral history archive; two, a historical investigations unit; three, a UK/Irish independent commission on information retrieval; and, four, an implementation and reconciliation group.¹⁹ The past, and legacy litigation, has become a major topic.

Strangely, OTRs was nowhere mentioned in the Stormont House agreement, after the official Hallett report (July 2014) on the administrative scheme but before the NI affairs committee of the house of commons reported, in March 2015.

A Fresh Start Agreement

Implementation of the Stormont House agreement was interrupted by two related IRA murders.²⁰ The UK government was forced to admit that the IRA still existed, but that it was committed to Sinn Féin’s political objectives.²¹ There followed ten weeks of talks in NI.

On 17 November 2015, the NIO published: *A Fresh Start: the Stormont agreement and implementation plan* (67 pp). This document, agreed again principally by the DUP and Sinn Féin, dealt with some issues, such as finance, reform of Stormont and ending paramilitarism. However, it failed to deal at all with the past²²: ‘Despite some significant progress’, the NIO stated, ‘a final agreement on the establishment of new bodies to deal with the past was not reached.

¹⁶ *Report of the Consultative Group on the Past*, 23 January 2009.

¹⁷ Proposed Agreement 31 December 2013, *An Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past*.

¹⁸ There is in fact: a principal agreement of 14 pages; and a 5-page financial annex.

¹⁹ Paras 21 to 55.

²⁰ Gerard ‘Jock’ Davison, 5 May 2015; Kevin McGuigan, 12 August 2015.

²¹ Lord Carlisle QC, Rosalie Flanagan & Stephen Shaw QC, *Paramilitary Groups in Northern Ireland*, 19 October 2015 (7 pp); HC, *Hansard*, vol. 600, cols. 829-42, 20 October 2015.

²² Pp. 34-5.

The Government continues to support these provisions of the Stormont House Agreement and to provide better outcomes for victims and survivors. We will now reflect with the other participants on how we can move forward and achieve broad consensus for legislation.’²³

Historical Investigations Unit

The historical investigations unit – if it ever goes ahead - requires legislation.²⁴ It is to run for five years. And it will come under the NI policing board. Essentially, it is to be a merger of the PSNI’s historical enquiries team (now the legacy investigation branch) and the historical investigations directorate of the police ombudsman. But the former has full police powers, while the latter has more limited ombudsman powers. The historical enquiries team’s work was addressed to victims. The police ombudsman’s work concerns retired political officers. OTRs are fugitive suspects. It may be assumed that Operation Redfield is to go to the historical investigations unit. The unit is to have a relationship – as part of the policing family – with the public prosecution service of NI.

The Stormont House agreement (as noted) envisaged three other institutions²⁵, as well as the historical investigations unit.

Perhaps the UK and NI governments (if ever restored) could try and advance those ideas separately. In advance of her appointment as first minister in January 2016, Arlene Foster (herself a troubles victim) showed the importance of information being disclosed.²⁶ And, despite the exclusion of the past, the NIO has unilaterally published the international agreement – with more special treatment of republicans - on the independent commission on information retrieval.²⁷

Political Stalemate

It is unclear whether the period begun in January 2017, with the resignation of Martin McGuinness, and the collapse of the assembly, was due to end in February 2018, with Gerry Adams handing the presidency of Sinn Féin to Mary Lou McDonald. Certainly, Arlene Foster, in refusing to sign up to whatever was on offer, with London and Dublin looking on, denied McDonald the credit for the restoration of devolution at the beginning of her leadership.

It is also unclear what the two leading parties might have agreed on the past, or not, though they are more likely to have added to, rather than, subtracted from the list of legacy bodies (with all those initials), and armies of bureaucrats and quangocrats ready to be deployed.

²³ Press release, 17 November 2015; *Irish News*, 17 November 2015 (article by Therese Villiers on historical investigations unit and national security).

²⁴ The queen’s speech, on 27 May 2015, referred to Westminster legislation. In September 2015, the NIO published a paper, *Northern Ireland (Stormont House Agreement) Bill 2015* (33 pp).

²⁵ An oral history archive; a UK/Irish independent commission on information retrieval; and an implementation and reconciliation group.

²⁶ *Belfast Telegraph*, 18 December 2015.

²⁷ HC, *Hansard*, vol. 604, cols. 43WS-44WS, 21 January 2016. This was signed on 15 October 2015. Article 9 is: inadmissibility of information received by the commission.

Conclusion

Back to Civil Society

It is my view that we should stop waiting for restoration, and the continuing process begun with the Belfast agreement. What better than to cherry pick the good bits from 1998, such as reconciliation, and start a long march on the road to a politically brokered, and legalized, amnesty. The troubles lasted thirty years. We are now twenty years beyond the Belfast agreement. Already, the generation entering adulthood in 1968, is passing. The changes are that: as more old soldiers pass away; the more the living will see the sense in freeing the criminal justice system of the present from the legacy of the past.