**When Warfare Turns to Lawfare**

**Legacy: The Future of Northern Ireland’s Past**

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**[Pre-edit]**

Legacy is as complex as our history. Indeed it is our history and likely to be our future politics.

Since 1921, we have been obliged by London to concentrate on one issue, the ethnic problem of divided loyalties in Northern Ireland. And ethnic disputes are never settled. They can go off the boil and be left to simmer. But they are only soluble by elimination of a people or culture, as with the Anglo-Saxons or European Jewry, population removal and exchanges as happened in the 1920s in the Aegean or after 1945 in Poland and Czechoslovakia, or over time by intermarriage. Economic change also plays its part, as has empire and now globalisation

The history of legacy, particularly since the Belfast Agreement of 1998, would require a book in itself. I can only deal here with some political outcomes of the last 25 years of governmental proposals, and the current state of play in what is a rapidly changing elongated process.

Given deaths from fifty years ago are being excavated, it seems we have at least another fifty years to go. Simon Hoare MP, the chairman of the Northern Ireland Affairs Committee at Westminster (NIAC), spoke recently of two more decades. At the first meeting of the Malone House Group in 2018, I suggested 500 years. The European Court of Human Rights (ECtHR) at Strasbourg has however drawn the line at 75 years when it rejected an application for breach of Article 2, the right to life, in relation to the Katyn Forest massacre of May 1940. This concerned the murder of 22,000 Polish army officers and intelligentsia by the Soviet Union’s successor state Russia.

Some legacy questions are almost unanswerable, or appear unaddressable, given the incredibly tortuous nature of the path we have gone down since 1998. UK Governments are trammelled by a mound of commitments and obligations that they have in many cases brought upon themselves. External forces, not least the Dublin Government and Strasbourg have gone unchallenged by the Foreign Office at the Council of Europe. Ambassadors instead favour the globalist option of cosying up to our neighbours and bien pensant opinion. They revel in accepting the liberal consensus that makes an independent British foreign policy impossible.

Gordian knots therefore abound, but Brexit has proved they can be cut. Ireland however has a peculiar relationship, particularly with the English, who, being unhistorical, cannot grasp the Irish Free State ever left the UK and who thus believe the Irish are still British. They may be thought tiresome but they do speak English.

What is true is that by virtue of the many millions of Irish people (and their descendants) who have left for Britain over two centuries, England has been distinctly hibernicised. But that fact is silent politically for the simple reason that the Irish, and even more so the Ulster migrants, have integrated, and mostly prospered. You do not have an Irish British minority. Perhaps you could not without a serious internal conflict, something present in Scotland but no longer in Liverpool.

This is exemplified in the current crop of Labour MPs (and trade union bosses), but also with Conservative MPs, whose names suggest Irish origins. It remains amazing, if unremarked, that the Troops Out Movement previously, and current efforts by Dublin intellectuals and commentators to drive a wedge between Northern Ireland and the mainland have come to nothing.

Britain has expended a vast amount of blood and treasure on the Union since 1969, including 700 murdered soldiers, many from the north of England. That willingness shows no sign of abating despite oft-repeated remarks in the media about patience being exhausted, not least from little Englanders. Countries however rarely delight in their own dismemberment.

In 1998, the Belfast Agreement did away with the RUC and released all paramilitary prisoners who had served two years in jail. This was a police force that experienced 300 dead (the equivalent in GB terms of 10,000 officers killed). Otherwise the Agreement kept away from the past, something many now regret and some are trying to correct. The prisoner releases did constitute a significant element of amnesty, one that did not disturb the ECtHR despite the degree of impunity involved.

It was effectively two thirds of an amnesty while later concessions have brought that figure up to 90%. These included the On-the-Run (OTR) letters of comfort for hundreds in the IRA, an ‘amnesty’, as described in the legislation, in relation to the use of forensic evidence on decommissioned weapons and the bodies of the disappeared (if discovered), the Royal Prerogative of Mercy pardons like that for Gerry Kelly, the prosecution indemnities for witnesses giving evidence at tribunals such as the Bloody Sunday enquiry, and the lack of investigation into the colossal numbers of people involved in the 16,000 bombings and the 37,000 shootings of the Troubles which did not involve deaths. For some 50,000 people who were only injured there is to be no justice. Given the oft-predicted paucity of future prosecutions, outside of army veterans, we are close, to a full amnesty, in all but name.

But few dare to speak that name - or its variants of drawing a line, a statute of limitations, putting the past behind us, as happened in both parts of Ireland in the 1920s. Notably, Amnesty International is vigorously opposed to an amnesty but, in private, numbers of politicians admit to wanting, if not accepting, one.

There are many public figures in Northern Ireland who have spoken of that need. Some notable Catholic and or nationalist individuals who favour drawing a line on the past are John Larkin who when Attorney General offered the practical proposition of a stay on prosecutions, former Assistant Chief Constable Peter Sheridan, Dennis Bradley of the Consultative Group on the Past, even at one time the Lord Chief Justice Sir Declan Morgan and the former DPP, Barra McGrory. Another notable advocate is Sir Desmond Rea, a prominent Methodist and first chairman of the Northern Ireland Policing Board. None however have advanced proposals on how to address, let alone eliminate, lawfare which has surely to be a concomitant policy.

In 2005, Peter Hain, as Secretary of State, introduced the Northern Ireland (Offences) Bill which provided for an amnesty, albeit 'judicially based', for OTRs and others[[1]](#footnote-1). He said then it was European Convention on Human Rights (ECHR) Article 2 compliant. The deal in the Bill was argued for and agreed with Sinn Fein. However when it transpired that it might end up applying to members of the security forces it foundered. The OTRs had to await another, more secret operation put together by the IRA and Tony Blair, involving letters of comfort.

In the same year, following critical judgments at Strasbourg in Northern Ireland Article 2 legacy cases, the enforcing Committee of Ministers endorsed the Historic Enquiries Team (HET) proposal put together by the Chief Constable of the PSNI, Sir Hugh Orde. Despite considerable success, and popularity amongst victims’ families, it was to be taken out and abandoned after a critical academic assessment by Patricia Lundy and the subsequent Otter report of Her Majesty's Inspectorate of Constabulary (HMIC).

The HMIC report, published in July 2013, found that HET investigated cases where the state was involved with “less rigour” than others while it appeared its policy was based on a “misrepresentation of the law”. It said its approach was inconsistent and had serious shortcomings. The way HET addressed security force killings was the major thrust of criticism. However it was essentially destroyed for failing to be what it was not, nor was ever intended to be. It was not so much a crime reinvestigation process as an information recovery operation.

As a result of the criticism, and after closing it down, the PSNI uniquely extracted and prioritised all security force killings, legal or not, and handed some 300 army cases over to its new Legacy Investigation Branch (LIB) for reinvestigation. For fear of more academic criticism, LIB moved very slowly, some said ponderously.

The great failure has been the present PSNI Chief Constable, Simon Byrne, and his predecessor, George Hamilton, trying desperately to keep away from their responsibility to address historic crime (that is actually all crime). Hamilton was adamant that this is not police work and must instead be victim-focused that is controlled by essentially one wing of victims’ organisations. He proposed instead following the example of Kenova.

Operation Kenova, under former Bedfordshire Chief Constable Jon Boutcher, was a very specific operation with a limited remit of commissions (including Stakeknife – Kenova – and the Glenanne Gang with other names like ‘Mizzenmast’ and ‘Turma’). The commissions came from the police following court rulings, often concerning PSNI independence or lack of same.

Boutcher has some eighty staff, as does LIB, and a budget of about £5 million a year. He has said at NIAC and elsewhere he is very willing to take on investigating all 3,500 historic death cases and had wide support from many key players not least NIAC, Peter Hain and Wave but also in the media. His views have gone largely unchallenged as indeed are most legacy reinvestigation views.

Jon Boutcher’s Kenova, if writ very large, would necessitate at least a 25 year operation and a budget of several billion pounds. Indeed if one was to follow the hard version of the ‘Article 2 compliance’ demand, every death requires nothing short of a Saville-type, Bloody Sunday inquiry. (It cost £200 million.)

99% of Troubles deaths have had inquests and were investigated by the police, as best as could be in the often perilous circumstances. But without context, the investigations look minor or inadequate compared to what would happen, say, in Bedford today. I have asked why a murder case in 1970s Belfast should be re-opened without credible and compelling new evidence if the same would never happen in Bedford? The answer was Belfast is different. Only here do the families lead within the new unwritten law of ‘victim-centred justice’.

The related problem that is not recognised, perhaps even by Jon Boutcher, is that Kenova is dealing with a very limited subset of victims’ families. He famously told NIAC “Every family wants to be a Kenova family.” That is particularly understandable in relation to the families of deceased agents or informants, most involving the activities of Stakeknife himself, Freddie Scappaticci. For obvious reasons the state does not reveal whether a murdered individual was on their books although NCND, the ‘neither confirm nor deny’ policy, might be subject to challenge. Indeed The National Archives at Kew is still withholding the names of those who provided MI5 with information about Roger Casement in 1916. The relatives of those informants who were killed in the Troubles were thus neglected or ignored for decades and denied definitive information. It could probably not have been done differently in the middle of a terrorist war and many probably wanted no such information, certainly none that might be made public.

The other subgroup of families predominating are of those killed by the Glenanne gang of Loyalist terrorists operating in border areas (and across it) in the early 1970s. Those relatives are largely convinced of the collusion allegations against the army and the RUC and may never be satisfied.

Boutcher has put a dozen or more files before the PPS who chose in October 2020 in four cases not to prosecute. Those cases concerned an individual’s alleged perjury, two related to former members of the security services and the fourth to a former PPS prosecutor. The latter three’s alleged offence was misconduct in public office around the decision not to prosecute that first individual in 2007. Others from Kenova are still being considered on both military and IRA personnel and yet more are to be submitted. Boutcher has recently extended his investigations to various deaths in the Republic, also linked to Loyalists. Jon Boutcher, very much the English policeman, is political in that he sees his mission as completing that part of the GFA that was omitted in 1998 – legacy. He is also assiduous in tracking alleged state forces’ misconduct.

After Peter Hain’s Bill in 2005, we had the 2008 report by Archbishop Robin Eames and Dennis Bradley’s ‘Consultative Group on the Past’ which foundered over its proposal to offer a £12,000 ‘recognition payment’ to victims of the Troubles; the Haass/O’Sullivan report of 31 December 2013 entitled ‘A Proposed Agreement’; the Stormont House Agreement (SHA) of 23 December 2014; Teresa Villiers’s ‘Fresh Start’ Agreement of 17 November 2015; and then Karen Bradley’s NIO draft Legacy Bill published for consultation on 11 May 2018 under the title ‘Addressing the Legacy of Northern Ireland's Past’. It advanced in July 2019 to a summary of consultation responses.

Some important points need to be noted about the various efforts by successive Secretaries of State. A significant political problem after Eames Bradley in relation to victims’ pensions, was what constitutes a ‘victim’, and can a terrorist be one. The definition in legislation came to vary. The Victims and Survivors (Northern Ireland) Order 2006 equated injured perpetrators with their innocent victims, something the Victims Commissioner, Judith Thompson, stood over. The piece of legislation introducing pensions finally reached the statute book in January 2020. To qualify however, you have to have an injury which is severe and permanent, and caused by no fault of your own.

Victims’ pensions’ costs, as with all money schemes, will inevitably balloon. It has been officially suggested the costs will rise to over one billion pounds when psychological damage, down the generations is included. Who ends up paying the bill (Westminster or Stormont) was of course a unresolved question which the courts eventually decided, forcing the Sinn Fein Minister of Finance to agree to underwrite the funding. The scheme opened for registration in June 2020. The Secretary of State, Brandon Lewis, did offer to divert some announced but unspent millions of legacy money to the pensions, as a one-off act of Treasury generosity. This was a straw in the wind as to the NIO’s changing mindset on spending limitless future amounts on legacy re-investigation.

It has to be said that that under the mandatory power sharing coalition in Northern Ireland which gave us again legislative devolution there are two iron laws:

* Nothing contentious can be legislated at Stormont, hence welfare reform, abortion decriminalisation, gay marriage and, significantly, legacy have been passed to Westminster for it to do the needful.
* All new projects require money from the Treasury in London as no extra funds can ever be raised locally by taxation.

Stormont is not about normal government but about dividing up the cash Westminster provides, something the two governing parties can usually come to agree on.

The report by former State Department staffer Richard Haass and his colleague Megan O’Sullivan in late 2013 for the ‘Panel of Parties in the Northern Ireland Executive’ was rejected by the Alliance Party, the DUP and the Ulster Unionist Party (UUP). I was one of the two UUP representatives on the Panel and saw how the parties operated. The key role of the SDLP is worth noting. They had limited aims and pressed them home doggedly, seeking, successfully, to get ‘patterns and themes’, in other words collusion, into the new history structures. Haass proposed four new institutions the Historical Investigations Unit (HIU), the Oral History Archive (OHA), the grandly named Independent Commission on Information Retrieval (ICIR), and the Implementation and Reconciliation Group (IRG).

As a biographer of Roger Casement, I am dubious of the value of an OHA knowing just how memories differ from the documented facts. It may often be innocent but oral history or family stories can easily become a vehicle for deceit and obfuscation, not to mention unwarranted assertions about third parties. The UUP long favoured the past being examined by historians but not in the distorted form eventually proposed where patterns and themes would have become the major ancillary purpose of OHA researchers. This was likely despite, or perhaps because of, the proposed supervising IRG. Richard Haass returned to the US and his Council on Foreign Relations job, undoubtedly angered at how his reputation had not been enhanced by a success.

The DUP had no visible aims at Haass and over the years has agreed many of the dangerous proposals currently under review, either through carelessness or in deals to enable it to get back into coalition government. Its only legacy achievement in twenty years - under serious pressure from grassroots activists, was to block the re-appointment of Judith Thompson as Victims Commissioner (as a face saving compromise her 2nd term was limited to a year). The then DUP leader Arlene Foster did eventually stand aside from the proposal to create the unique, retrospective, disciplinary offence of historic police misconduct which was to be investigated by the HIU, a parallel police force for the past.

The HIU promised to both investigate and judge past crimes, a travesty of our human rights commitment to ECHR Articles 6 (fair trial) and Article 8 (right to a reputation). The justice system precludes police from adjudicating on criminal responsibility. Rather they investigate and pass their findings to the Public Prosecution Service (PPS) for a decision. HIU would have combined the two functions, especially when it came to the promised truth reports to victims’ families. They would have apportioned guilt, in the most part regarding the conduct of the security forces, criminal or otherwise, and on ‘collusion’. There is no such crime as collusion and as many definitions of it as there are letters in the word. Its use however has become a finding of guilt since it cannot be disproved.

The UUP majored in Haass on the rule of law and the role of history. In a dynamic process where law was side-lined (Haass seemingly had no legal advice), nationalism inevitably prospered within the alphabet soup of proposed new institutions. A year from the collapse of Haass, the DUP, still under Peter Robinson, mysteriously shifted and agreed Stormont House, despite it being son of Haass, but too late to salve Richard Haass’s wounds.

SHA had been agreed by four of the political parties but the UUP dissented. It is not an international agreement like the GFA, despite the belief of some and frequent deceitful statements from nationalist and other parties.

The Fresh Start Agreement of 17 November 2015 was put together under Teresa Villiers. It endorsed the SHA but, alone, significantly stated, “Despite some significant progress a final agreement on the establishment of new bodies to deal with the past was not reached”.

The 2018 NIO draft Legacy Bill silently added the iniquitous historic police misconduct aspect to the SHA at the behest of the Police Ombudsman for Northern Ireland (PONI) and the Alliance Party. PONI in justified fear of this aspect of the SHA been abandoned by the NIO switched to demanding in its ‘five year review’ of late 2020 that the Justice Minister includes such misconduct investigation in new powers.

The July 2019 summary of responses to the NIO draft Bill was not taken forward with a consequent amended draft Bill or indeed any NIO assessment. A figure of 18,000 responses was quoted but it was not stated how many were original submissions and how many were pro forma copies.

Then there was the ‘New Decade New Approach’ of January 2020 which was a deal to return Sinn Fein and the DUP to power, put together by Irish Foreign Minister, Simon Coveney, and Julian Smith, the Northern Ireland Secretary of State. This was the nearest we have yet come to joint authority. Smith was the journalists’ darling in Belfast as he showed a human side, they said. He is a possible Prince across the Water with key Tory friends, not least Simon Hoare, chair of NIAC.

And yet almost silently Julian Smith was swept aside shortly following his much lauded achievement of bringing devolution back after a three year absence. It would appear that Boris Johnson, emboldened by his December 2019 election victory, decided to exert the power he realised he had, as opposed to what the civil service wanted him to have. The Tory manifesto had stated, “We will continue to seek better ways of dealing with legacy issues that provide better outcomes for victims and survivors and do more to give veterans the protections they deserve.” Of course his triumph should have been expected given the 2016 Brexit referendum result.

Part of Johnson’s power indeed his need to act came from the emergence of the military veterans’ lobby who were wielding increasing influence in parliament and in Conservative constituencies. No longer could veterans’ concerns be channelled into the British Legion and remembrance events or charitable matters. Social media had given them an unprecedented means to organise, putting them on a par with the many hostile victims’ groups.

In some ways, the veterans, who are often unpolitical or anti-political are a force led by NCOs. That was until the appointment of Johnny Mercer to be the veterans’ minister responsible for advancing legislation to address the problem of constant Iraq and Afghanistan war re-investigations. They had become something of a lawyers industry in Britain with, the later disgraced solicitor, Phil Shiner, as its exemplar. The cost of the inquiries ran into hundreds of millions of pounds while many ex-soldiers were left in a legal limbo becoming long term victims.

The next development was the 18 March 2020 Written Ministerial Statement by the new Secretary of State, Brandon Lewis. It told of an abandonment of the draft NIO Bill with all its fraudulent promises. Little detail was provided but it did presage a narrowing of the ludicrously overblown SHA arrangements on criminal re-investigation, if not on ‘truth recovery’. Cost alone may have been a significant factor given unprecedented government borrowing during the Covid pandemic.

These were the NIO headlines:

“A new independent body focused on providing information to families and swift examinations of all unresolved deaths from the Troubles.

End to the cycle of reinvestigations that has failed victims and veterans for too long.

Ensuring that Northern Ireland veterans receive equal treatment to their counterparts who served overseas.”[[2]](#footnote-2)

The NIO tacked-on a reconciliation aspect to that regarding information. But nobody will be reconciled by inevitably, one-sided, victim-focused justice. Truth recovery if it ever was seriously considered was seriously damaged following the Soldier A & C case, the Joe McCann murder trial in April 2020. It collapsed when the judge, inevitably, ruled as inadmissible statements made to the military police in 1972 which were innocently repeated to HET in 2010 for the family who said it wanted “truth not retribution”. In the event, it didn’t, and is now seeking a re-opened inquest. The advice is already out from retired generals to squaddies: ‘Have nothing to do with anyone knocking your door wanting to talk about truth recovery and reconciliation’.

The paramilitaries (and it was only those governed by resentment over the ‘peace process’ who spoke) have learnt their lesson after being recorded on the Boston Tapes and subsequent debacle. That ended in police investigations and prosecutions. Nobody can risk believing that a no-prosecution policy today would not be followed by the opposite tomorrow. Nobody can surely believe that those involved in the 3,500 killings will record their actions for the sake of the families, even if no prosecution could ensue, as occurred in South Africa. And it has often been pointed out there were probably an average of half a dozen people involved in every murder so we are talking 20,000 accounts of truth.

The mantra of truth, justice and reconciliation is a false god. Historians alone can bring you toward what constitutes the truth while lack of evidence for prosecutions means justice for the 3,500 families is impossible.

The March 2020 statement was published alongside proposals which turned into the Overseas Operations (Service Personnel and Veterans) Act 2021, designed to limit prosecutions and to a degree re-investigation of alleged crimes by army veterans. (Strasbourg had extended its reach to the acts of soldiers in wars outside the UK).

That Act was no amnesty, rather it put in place extra hurdles before a prosecution can start. They involve time limits, new evidence, the military context (stress and threat), the public interest in finality and the level of previous investigation. It also allowed for a current prosecution to be discontinued. It had vestigial elements of a statute of limitations. Its coming into existence was again due to the veterans becoming an independent force in the land. But when the government failed to introduce promised Operation Banner equivalence, Johnny Mercer, having successfully piloted the Bill on to the statute book, walked out of his Ministerial job. Accusing his bosses of a failure to bring about equivalence, he became the hero and perhaps leader of the veterans.

The view emanating from the NIO and elsewhere is that if the promised Northern Ireland equivalence for the hundreds of thousands of veterans of Banner (1969-2007) did materialise, it would have to be applied across the board, that is to terrorists. Whether this argument is a cover to stave off criticism from nearly all quarters about an ‘amnesty’ or a genuine concern about consequent litigation in the UK and at Strasbourg is unclear. However the ECHR jurisprudence may be now thought sufficiently open for the NIO to go ahead with equivalence and then attempt to face down the wall of rage and the undoubted lawfare that would ensue.

Increasingly, throughout the two decades of legacy and the various reports and proposed legislation there has been a concomitant and accelerating use of the courts to advance one particular point of view, ably assisted by free legal aid which is not available to the reasonably well off, such as former police officers. (The association for retired police, NIRPOA, having won key sections of their case against the Police Ombudsman, Michael Maguire, over his Loughinisland report were amazingly denied their six figure costs.)

This development came to be termed lawfare and is essentially limitless. It must be said that lawfare is a considerable improvement on warfare but it is also politically debilitating for Northern Ireland. One wing of government however is not wedded to normal constitutional stability.

We are told the Belfast Agreement (GFA) in 1998 brought peace which is a myth that needs examined. The GFA itself did not bring peace. The war ended, not because negotiations took place and political compromises were decided. It ended because the IRA chose to end its 30-year war and the two governments moved to fill the vacuum with new and complex arrangements, sometimes driving Republicans along avenues they had not intended to travel.

The real question is why the IRA which had built up a huge amount of political capital by a relentless and militarily effective war (much aided by Libyan arms), had chosen to spend so little of it for so many years. Their demand for ‘all-party talks now’ within ‘a peace process’ proved however to be remarkably perceptive and effective. Few if any have noted that a process is a continuous operation ending with the only political victory being sought – the demise of Northern Ireland. Unionism, in contrast, is about maintaining the status quo, minimising the giving of ground, indeed often just about hanging on in. This is conservative territory which can never be attractive, especially to the young or woke. Northern Ireland can only lose once. Republicanism for a century has lost over and over but remains vibrant.

Northern Ireland was the longest and most bloody conflict in Europe since 1945 until that in former Yugoslavia in 1991. However it was treated by London not as a war but as an internal civil dispute, meaning military options were severely limited and the courts came to predominate in conduct control or in forcing change.

A minority of victims’ families are in victims groups, as the Presbyterian Church has pointed out. It may be that most families have accepted the fact of the death in question, have a good idea of who killed them and why there were killed and accept there is no extra truth or justice available. This applies more to the 2,000 killed by the IRA, as state and loyalist deaths can be constantly re-examined for culpability and suggestions of ‘collusion’. In the case of security force deaths in the early 1970s when the army was facing an insurrection, and the police had been disarmed, discredited and disbanded (e.g. the Ulster Special Constabulary), there was little strategic policy available. Foolish and inaccurate PR statements instead came to the fore as soldier casualties mounted. It has to be said that nothing like the military and police action in the 1920s in the south of Ireland with the government policy of reprisals and assassination ever came to pass.

The families of those killed by Republicans and to a lesser degree by Loyalists are often motivated not by concepts of truth, justice and reconciliation but simply by an anger that their loved one died for no purpose and now their memory is discarded and unrecognised as all focus is elsewhere.

The courts, especially in Belfast, remain open to judicial reviews, demands for the re-opening of inquests, civil suits for damages, challenges on convictions, requests for new public inquiries, all alongside PONI investigations and Strasbourg cases. The value and cost of this activity needs questioned but it would take a brave government to put in place legislation to curb, let alone stop this industry. It could however abandon the myriad of institutions promised in Stormont House which will only compound the problem and provide infinite employment opportunities for new law graduates.

Re-opened inquests alone whose numbers are mounting took over the role of public inquiries, going beyond their limited powers in statute. The Kingsmill massacre aside, most involve state killings or those where collusion is alleged. Haass refused to even consider incorporating inquests in his new bodies because of ‘Article 2 compliance’ assertions, something that went unchallenged by the DUP. And it is ECHR Article 2 which is the motor for most of the reinvestigation. Indeed a case can be made for almost every one of the Troubles deaths having a re-opened inquest. And they may yet.

It is worth quoting both parts of Article 2 in full, especially the second which seems rarely to be argued in aid:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Legal opinion on Article 2 (procedural) differs although that would be hard to notice in the discussions, especially in the broadcast media. The Malone House Group (MHG) which is a recognised NGO at Strasbourg has taken issue with the conventional wisdom in several submissions to be found on the Council of Europe website[[3]](#footnote-3). As yet they remain a minority view (see below).

‘Article 2 compliance’ can be and has been achieved in a dozen different ways if the Committee of Ministers can be brought diplomatically to a better understanding of what is needed in Northern Ireland cases. There is no sign however that our diplomats at Strasbourg are working on the other 46 member states, many of which would be pleased to avoid the Court’s lash. Ireland can however be excluded as it has the whip hand being one of the six countries on ‘the Bureau’ that controls the Committee agenda.

It is worth noting that the Supreme Court says on its website, “UK courts are not required, however, always to follow the decisions of the Strasbourg Court. Indeed, they can decline to do so, particularly if they consider that that Court has not sufficiently appreciated or accommodated particular aspects of our domestic constitutional position.”

That however has not prevented judgments in a series of cases going against that position. There have four hugely important judgments in relation to the Troubles made recently in the Belfast courts and in two instances on appeal to the Supreme Court. They all require close analysis but suggest a new balance in how the local judiciary since the 1998 agreement views the past and indeed the future.

They are firstly the hooded men case where two consecutive Strasbourg judgments about torture as opposed to inhuman treatment of detainees in August 1971 were actually overturned in the Court of Appeal in Belfast in 2019 in a unique decision by the Lord Chief Justice, Sir Declan Morgan, and Sir Ben Stephens (Northern Ireland’s new judge on the Supreme Court), with Sir Donnell Deeny valiantly dissenting[[4]](#footnote-4). By a majority of two to one, the Belfast Court “was satisfied that the treatment to which Hooded Men had been subjected to would if it occurred today properly be characterised as torture, bearing in mind that the European Convention on Human Rights is a living instrument, but that the test had not been met to enable an Article 2 or 3 procedural investigation to take place given the passage of time.” Overturning Strasbourg was a new departure for a UK court if hardly noticed.

Secondly, the judgment of 13 May 2020[[5]](#footnote-5) in the Gerry Adams custody order case at the Supreme Court which was written by the late Lord Brian Kerr. It was one where the context of the violent time in 1973 was ignored and the order overturned. It is reflective of a new legal, political understanding in the land especially on precedent[[6]](#footnote-6). Several articles by Malone House Group personnel about the reasoning have been published[[7]](#footnote-7) while the think tank Policy Exchange has sought legislative action to restore the Carltona principle which the late Lord Kerr dispensed with. It concerns junior ministers and civil servants being able to take decisions on behalf of Secretaries of State.

And thirdly, the Finucane case at the Supreme Court also on Article 2 and also written, in the most part, by Brian Kerr although the final paragraph was inserted by the others judges: “I would therefore make a declaration that there has not been an article 2 compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva’s review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.”

A general point about retrospectivity in all Article 2 cases is the Supreme Court view that it does not apply to deaths before 2 October 2000 when the Human Rights Act 1998 came into force. This Act wrote much of the ECHR into domestic law. The authority for non-retrospectivity, in the common law, is McKerr’s Application for Judicial Review, Re [2004] UKHL (decided on 11 March 2004). Despite this no governmental attempts to effect or enforce that position have been noted.

The fourth key case, a coronial court judgment, was that by Mrs Justice Keegan[[8]](#footnote-8) in her May 2021 findings relating to the ten Ballymurphy deaths after internment in August 1971. It will be the template for the future with inquests becoming effectively tribunals of inquiry albeit exceeding the limited powers and duties of a coroner when interpreting the four basic factual questions required by Rule 15 and 22 (1) of the Coroners (Practice and Procedure) Rules. The fourth question - how the deceased came about their deaths is being used to broaden an inquest into an investigation on culpability.

A civil war was averted in the 30 years from 1969. No credit is given for that, certainly not to the security forces and their 1,000 dead. Sadly, but inevitably, young people for the most part have no empathy for those families. Solidarity when shown is largely within the Republican community who use law to achieve the ends once reserved to war.

The government proposal of an amnesty or a statute of limitations on police investigations may appease the veterans in the short term at the expense of a great deal of outrage from all sides. However without a serious attempt to limit lawfare, not least in relation to reopened inquests, the basic problems will remain.

Without closing down new inquests, civil suits, private prosecutions, free legal aid for legacy cases in judicial reviews etc, such a no-prosecutions policy will do little or nothing to reduce the hurt over unfairness or the enormous cost. It could be done but the NIO would have to steel itself.

The proposed alternative ‘truth recovery’ bodies may subsume the HIU but have the potential to be as toxic as continued criminal investigations if there are no cost caps or time limits. The notion of reconciliation is a dead letter even if regularly touted by the NIO. What is possible is a narrowing process. It appears under way and has to be supported so far as it goes.

From August, now that Italy is no longer holding out on ratification, the new Protocol 15 (engineered by Ken Clarke when Lord Chancellor) will be attached to the ECHR. It encourages subsidiarity and gives states a heightened margin of appreciation. This surely can be called in aid in future Strasbourg cases at least.

Without a grand settlement which is unlikely given the political nature of the process, legacy will grind on. Nationalist lawfare cannot lose as the legal variants still remain limitless. Non-nationalist lawfare, in so far as it exists, can call into question conventional legal wisdom on Article 2 but London has to listen to its friends and take the risk of new legal challenges at Strasbourg. The new player, the veterans, have for the first time created a balancing role to the human rights industry and they are not going away.

Agreement to differ however, putting the past behind us, is a better policy than well-funded archival archaeological work with industrial levels of lawfare.

*Jeffrey Dudgeon is convenor of the Malone House Group a Belfast-based, non-governmental organisation (NGO) composed of lawyers, academics and historians dealing with Legacy issues arising from the Northern Ireland conflict. Its object is to find the best means to address the Past while preventing a re-occurrence of violence between the two Northern Ireland communities. The book of our March 2018 conference, ‘Legacy: What to do about the Past in Northern Ireland?’ (Belfast Press) is available on Amazon.*

**MALONE HOUSE GROUP PRINCIPLES AND AN ECHR LEGAL BRIEF**

The Malone House Group Principles are:

* Adherence to the rule of law;
* No diminution of the principle of innocence until guilt is proven beyond reasonable doubt;
* Any process must adhere to fair trial principles and procedures in accordance with Article 6 of ECHR (see below);
* Any process must adhere to protection of reputation and privacy in accordance with Article 8 of ECHR (see below);
* Where police powers are conferred, these are to be exercised only for the purpose of criminal investigations and thereafter reporting to the Public Prosecution Service;
* In particular, police (or others exercising police powers) have no role to adjudicate and issue public reports critical of any individual, as that is the function of a court or duly constituted tribunal.

These principles may be largely negative in stating what must not be included in future legacy arrangements but leave the way open to discuss other realistic options that should not poison our law and politics for decades to come.

Misunderstandings over Article 2 has been considered on many occasions by the ECtHR where there is an allegation of the involvement of any officer or agent of the state in an individual’s death. The Court has simply established that there must be an effective independent official investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure [Kaya v Turkey 1998].

But there appears to be a prevalent view that this imports no limitation is to be imposed on the ambit of and resources to be made available for such investigations. There is no reason why a properly independent review process as outlined in the NIO’s March 2020 Statement necessarily involves any departure from the requirements of Article 2. Any assumption that such investigations must be given untrammelled powers and unlimited resources by way of SHA or amended SHA style proposals has to be resisted but is never allowed to be said in the broadcasting media.

To the contrary, an independent investigation can properly, in discharge of its Article 2 function, carry out the sort of initial review (as envisaged in the Statement) and only carry out a more intensive investigation where there is anything of genuine substance in terms of credible new evidence to investigate as opposed to assertions of ‘collusion’.

Article 6 requires that ‘fair trial’ procedures must be followed. This includes the right to silence and the privilege against self-incrimination. Thus, anyone who is subject to investigation and questioning in an ‘Article 2’ enquiry is entitled to such right to silence and privilege against self-incrimination as these are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Thus, the right of the ‘suspect’ to silence under Article 6 is not overridden by the state’s investigative duty under Article 2.

Article 8 protects every individual’s right to privacy and reputation. This means that it is not open to any investigation under Article 2 to report in critical terms on the actions on individuals (such as police officers) without adequate safeguards for the person subject to such criticism.

The Court has held that where publication compromises the integrity of the reputation of the person concerned there is a breach of Article 8 of the Convention. In the case of Pfeifer v Austria (15 November 2007) it declared that “a person’s right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life.”

Equally, the individual’s right to reputation under Article 8 is not overridden by the state’s investigative duty under Article 2. In all the debate about finding the ‘truth’ for victims these proper constraints on investigators in the due interests of individuals are insufficiently appreciated and rarely mentioned in academic circles.

1. See House of Commons Research Paper 05/78 for background and details into the 2005 proposal <https://publications.parliament.uk/.../081/2006081.htm> [↑](#footnote-ref-1)
2. Written ministerial statement of 18 March 2020 <https://questions-statements.parliament.uk/written-statements/detail/2020-03-18/HLWS163> [↑](#footnote-ref-2)
3. Malone House Group submissions on the Council of Europe website: Article 2 legal opinion by Austen Morgan DH-DD(2020)500 and SHA legal opinion by Peter Smith and Neil Faris DH-DD(2020)705 [↑](#footnote-ref-3)
4. Hooded men judgment in Belfast Court of Appeal on 20 September 2019: <https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Francis%20McGuigan%20and%20Mary%20McKenna%20(The%20Hooded%20Men).pdf> [↑](#footnote-ref-4)
5. Adams custody judgment <https://www.supremecourt.uk/cases/uksc-2018-0104.html> [↑](#footnote-ref-5)
6. Adams custody judgment article by Jeffrey Dudgeon in News Letter on 21 May 2020: <https://www.newsletter.co.uk/news/crime/jeffrey-dudgeon-supreme-court-ruling-gerry-adams-ruling-didnt-reflect-violent-context-times-when-civil-war-was-imminent-2860821> [↑](#footnote-ref-6)
7. Adams judgment custody judgment by Austen Morgan in Conservative Home on 21 May 2021: <https://www.conservativehome.com/platform/2021/04/austen-morgan-as-gerry-adams-seeks-compensation-for-his-unlawful-detention-a-legal-conundrum-could-get-in-the-way.html> [↑](#footnote-ref-7)
8. ‘Introduction’ by Keegan J to Ballymurphy inquest findings on 11 May 2021: <https://www.judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20a%20series%20of%20deaths%20that%20occurred%20in%20August%201971%20at%20Ballymurphy%2C%20West%20Belfast%20-%20Introduction.pdf> [↑](#footnote-ref-8)