

Summary

This submission starts with the troubles killings – 60, 30 and ten per cent - , the unlawful nature of the 90 per cent terrorist deaths, and the more likely lawful ten per cent state killings. ... The submission concentrates upon long-term government policy, on the related issues of ‘legacy’ and ‘veterans’. It discusses some of the legal difficulties, The conclusion on government policy is that; the 100 days promise of 4 December 2019 regarding veterans has eclipsed the 100 days promise of *New Decade: New Approach* of 9 January 2020. This is evident from the written ministerial statement of 18 March 2020, which promises a new and welcome focus on reconciliation, delivery for victims, and an end to the cycle of reinvestigations that has failed victims and veterans.

Introduction

1. My name is Austen Morgan. I am a barrister in London and Belfast, in private practice. I have published a great deal of legal writing. I have written on legacy since the 1998 Belfast agreement was reached.
2. I am in particular: the author of *Tony Blair and the IRA: the ‘on the runs’ scandal*, London 2016; and a contributor to Jeffrey Dudgeon, ed., *Legacy: what to do about the past in Northern Ireland?*, Belfast 2018.

3. I refer to NIAC's inquiry, 'addressing the legacy of Northern Ireland's past: the UK government's new proposals', announced on 29 April 2020 (which complements the 'new decade, new approach agreement' inquiry opened earlier). I submit this evidence.
4. I adopt a rule of law approach, and a historical method, distinguishing these from the radical social science on the past promoted exclusively in Northern Ireland's two universities (the transitional justice institute at Ulster university and the senator George J. Mitchell institute for global peace, security and justice at Queen's university, Belfast).¹

The Northern Ireland Troubles

5. The Northern Ireland ('NI') troubles – a significant period in United Kingdom ('UK')/Irish relations – are dated from 1968 to 1998. The army's operation banner (the longest in its history) was from: 14 August 1969 to 31 July 2007.

Who killed Whom?

6. One may ask: who killed whom in those approximately three decades? It might be thought that Lord Saville's report, following his £200m inquiry in 1998 to 2010, into bloody Sunday in Derry/Londonderry on 30 January 1972 – when soldiers killed 13 demonstrators - , would be prototypical of the conflict. That is not so.

¹ Kieran McEvoy & Others, *Prosecutions, Imprisonment and the Stormont House Agreement: a critical analysis of proposals on dealing with the past in Northern Ireland*, Belfast April 2020. These academics have rigorously ignored the work of the Malone House group and others.

7. There are inadequate official statistics, and the best source is a private venture by journalists: **David McKittrick & Others, eds., *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles, Edinburgh & London 2007.*** The authorities now use this volume of nearly seventeen hundred pages.
8. The *Lost Lives* statistics reveal a quite different picture (from the historical imagery and propaganda), between 1966 and 2006 (though deaths continue) for principally NI.² A total of 3,720 persons was killed (and very many more seriously injured). Republicans were responsible for 2,152 killings (57.85 per cent). Loyalists killed 1,112, a lower attrition rate (29.89 per cent). And the state – soldiers more than police – killed 361 persons (9.7 per cent).³
9. These statistics are the basis for the popular rounding up of recent years: 60 per cent republican, 30 per cent loyalist and ten per cent state killings – 60/30/10.
10. It is incontrovertibly the position that the 90 per cent terrorist killings were unlawful. There were no justifications, and no available defences. Only a handful of the ten per cent state killings was unlawful: one being: *R v Clegg [1995] 1 AC 482*. So, in an ideal situation of fairness and equality, with post-troubles prosecutions of historic cases proceeding slowly, one would expect prosecutions in NI (if not convictions), to be running, from 1998, at very roughly a 60, 30, ten proportion over such a long period.
11. The relatives of many soldiers and police killed⁴, who are too readily ignored, have had to cope with non-prosecutions, and limited investigations, while many republican

² The figures include: Great Britain; and the rest of Europe.

³ Table 2 on p 1553. There are 95 others making up the 3,720 total.

and loyalists terrorists have escaped prosecution (and no investigations of their crimes): the figure of 229 IRA prisoners released after 1998 contrasts with the additional 228 IRA members who applied for letters from the Northern Ireland Office ('NIO') between 2000 and 2014 (see further below).

12. Prosecution for all deaths assumes of course that the Public Prosecution Service ('PPS'), applying its test for prosecution – comprising the evidential test and the public interest test - , presumes that all state killings are potentially unlawful; but that would be to ignore the defence of reasonable force while defending oneself or others available to soldiers on duty (but not to terrorists): **Da Silva v UK, ECtHR (grand chamber), 30 March 2016** (the John Charles de Menezes case).

Prosecutions ...

13. ...
14. There have been prosecutions of republicans and loyalists – for pre-10 April 1998 crimes – in the past two decades, but there are no comparable lists of pending terrorist prosecutions. That is why it is being said that a former soldier is 54 times – 6 multiplied by 90 divided by ten - more likely to be prosecuted than a republican or loyalist terrorist. One adds to that: the legal uncertainty regarding re-opened soldier investigations; and the absolute certainty of terrorist crimes having been committed.
15. The last prominent IRA member before the courts was Ivor Bell in 2014. Reportedly a former chief of staff, he was dismissed from the IRA in 1985 (and was unsupported

⁴ The figures are respectively 709 and 303 killed, though there are alternatives of 722 and 312.

by republicans). Accused of soliciting the murder of Jean McConville in 1972, he was found unfit to stand trial (having claimed he was suffering from dementia). In a trial of the facts, he was acquitted in October 2019, when the judge ruled that the Boston College tapes were inadmissible.

16. ...

Policy and Law: Treatment of Terrorists

17. One refers to the key instrument, at once legal in international law (before incorporation), but also political: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Belfast 10 April 1998, UNTS vol 2114, pp 487-559, 11 July 2000.
18. Thus, the 1998 Belfast agreement, the name also given the political face (and arguably the legal face) of the agreement by domestic law: **Northern Ireland Act 1998 section 98(1)**.
19. The Northern Ireland Office ('NIO') did not go into the talks with a plan for amnesty. However, it came out of them with a secret political agreement, between Tony Blair (after Mo Mowlam) and Gerry Adams, for the early release of republican and loyalist prisoners after one year.⁵

⁵ Tony Blair, *A Journey*, London 2010, pp 172-3.

20. This became a two-year statutory right shortly afterwards: **Northern Ireland (Sentences) Act 1998**, which also applies to the security forces (not that there were any soldier or police prisoners).
21. The following concessions were also made by the UK, mainly after the Belfast agreement, which aided principally, but not exclusively, the IRA:
- immunities regarding terrorist weapons, from 1997 to 2010;
 - immunities regarding the Saville inquiry, 1998 and 2010;
 - immunities regarding the Hamill, Nelson, Wright and Breen/Buchanan inquiries, to 2013;
 - immunities regarding the recovery of the disappeared, 1999 to present.

This was during, what is called a peace process, namely secret negotiations between the UK government and republicans, which took place in a more open context of political discussions between parties. Some of this foreground, and background, is revealed in my book on Tony Blair. Democratic politicians stood around the stage, while the real drama went on between the principals of the peace process.⁶

22. Between 2001 and 2005, the NIO had a plan – formulated by Sir Quentin Thomas, a retired official – for a NI amnesty, which would exclude the security forces. I believe

⁶ Sir John Chilcot, of the NIO, had said in early 1995: 'We had a choice between good government and peace – and we chose peace': Dean Godson, *Himself Alone*, London 2004, p 548.

I was the first person to reveal this.⁷ This was put before parliament, in 2005-06, as the Northern Ireland (Offences) bill, but now including the security forces: this became the reason why Sinn Féin stopped supporting the Blair government on the legislation, which was then dropped.

23. Unbeknown to all but number 10 (Tony Blair and Jonathan Powell), some in the NIO and the IRA leadership, there was a secret administrative scheme, regarding so-called ‘on the runs’ (‘OTRs’), which was run – contrary to the advice of attorneys general – in Whitehall between 2000 and 2014. Under it, at least 187 of 228 republican applicants were granted OTR letters.
24. The OTR story broke in February 2014 (when John Downey appeared in the Old Bailey), and was the subject of three reports in 2014-15, including one from NIAC.⁸
25. Looking at the above, any intention to continue prosecuting all round has, as regards Irish republicans, been interrupted considerably since 1997, with prisoner releases, immunities and OTR letters. Moreover, given UK strategy in NI from the early 1990s, to establish peace, and the means pursued – a succession of involuntary coalitions at Stormont – , London has been preoccupied with turning terrorists into politicians. Prosecution does not help that process.⁹

Policy and Law: Treatment of Former Soldiers

⁷ Austen Morgan, *Tony Blair and the IRA*, London 2016, pp 49-51.

⁸ Austen Morgan, *Tony Blair and the IRA*, London 2016, pp 174-93.

⁹ One only needs to study Gerry Adams’ involvement in the Jean McConville investigation in 2015.

26. There is nothing comparable as regards special treatment for the security forces. During the troubles, there was a trickle of police and soldier prosecutions – and convictions and sentencings.

Article 2

27. We then need to factor in the European court of human rights ('ECtHR'), and its development of article 2 procedural from 4 May 2001, creating an obligation to investigate deaths by state forces (but seemingly no longer terrorists' killings). This is, and was, retrospective Strasbourg jurisprudence (and not common law precedent): institutions in NI have been held to have acted unlawfully from the 1970s, even though the law did not exist until 2001. Strasbourg seems to have been sold the Saville and bloody Sunday scenario, and not the 60, 30, ten one – with government lawyers leaving it to victims' representatives to put the case. Strasbourg picks the standards, and changes them long after the events.
28. The jurisprudence has come to obscure article 2 substantive, and the UK's efforts – given republican and loyalist terrorism - to protect the right to life during the troubles. There was considerable achievement, on the part of successive governments, even if the rule of law was tarnished from time to time. How about defending life versus violating the procedural right of dead terrorists (or their relatives)?
29. It remains the case today that, under our domestic law, Strasbourg has no legal effect as regards investigations of deaths before 2 October 2000 (when the Human Rights Act 1998 entered into force): *Re McKerr's Application for Judicial Review* [2004] UKHL 12 [2004] 1 WLR 807.

30. But that has not prevented the expansive confusion of international and domestic jurisprudence on article 2. And this has had a deleterious effect on the police service of NI, which decided in July 2013 reactively to review uniquely military killings during the troubles.¹⁰
31. I have published separately on article 2, which continues to be used ideologically, not legally, in NI.

Lawfare: Lawyers' War

32. Since the Belfast agreement, there has been a growing emphasis – related principally to the 2010 Saville report – on the prosecution of aging soldiers. Between 2011 and 2017, Barra McGrory QC was the director of public prosecutions.¹¹ He was assisted by choices the police service of NI ('PSNI') made, regarding which historical killings they would re-investigate and when.
33. ...
34. Actions against soldiers have inspired an important veterans' movement in the UK, driven by the rank and file but with some senior military support. Political support has been forthcoming, from MPs and peers. There is now a minister for veterans: Johnny Mercer MP. The government has lawfare in its sights.

¹⁰ In 2006, Sir Hugh Orde, the chief constable, established the historical enquiries team. It did good work. However, in 2013, the chief inspector of constabulary perversely criticized it. It was replaced with a legacy investigation branch. In December 2016, the police claimed there was no bespoke investigation of former soldiers.

¹¹ Previously in private practice, he had acted as a solicitor for Sinn Féin, including as regards OTRs, in 2006-10.

35. Among the publishing landmarks in this recent movement, which began with Afghanistan and Iraq, and only moved on to NI later (in 2017), are:

- Policy Exchange, *The Fog of Law: an introduction to the legal erosion of British fighting power*, 18 October 2013;
- Policy Exchange, *Clearing the Fog of Law: saving our armed forces from defeat by judicial diktat*, 29 March 2015;
- HC defence committee: *Investigations into fatalities in Northern Ireland involving British military personnel*, HC 1064, 26 April 2017;
- Policy Exchange, *Protecting those who serve*, 28 June 2019;
- HC defence committee, *Drawing a Line: protecting veterans by a statute of limitations*, HC 1224, 22 July 2019;
- Claire Mills & David Torrance, *Investigation of former armed forces personnel who served in Northern Ireland*, HC library briefing paper, CBP 8352, 8 October 2019;
- Policy Exchange, *Lawfare: resisting the judicialization of war*, 10 November 2019.

Writing a forward to the Policy Exchange report of 28 June 2019 (above), shortly after losing his job, Gavin Williamson MP, the former secretary of state for defence,

stated: ‘But in the time since the Good Friday Agreement, and a partial amnesty for terrorists was introduced, many in the security forces – some now in retirement homes – now see old cases reopened and incidents reinvestigated.’¹²

36. There have been debates in the house of commons on veterans: 19 April 2017; 25 January 2018; 15 May 2018; 25 June 2018; 16 May 2019; and 20 May 2019. The house of lords debated the subject on 5 September 2018 and 16 May 2019.¹³
37. A point on terminology: the term NI veterans could mean only soldiers recruited from NI; but it is being used in the policy debate to mean operation banner veterans, whether from NI, Great Britain, or the commonwealth.

Discrimination in Practice

38. Looking at the criminal justice system in NI, as it is dealing with historic cases in the absence of any legislation, and comparing it with the rest of the UK, there are three ways in which veterans and terrorists are being treated differently:
- first (as indicated above), the PPS has put veterans into court disproportionately with terrorists;

¹² p 5.

¹³ There are interlinked usefully in the HC library briefing paper.

- second, and as regards the official letters mentioned above, while John Downey walked free in London, in two prosecutions in Belfast, soldiers' letters did not lead to abuse of process applications being granted; and
- third (and as was to be revealed on 18 March 2020), the government admitted the risk of treating the NI veterans unequally, in comparison with all other veterans.

Government Policy

Legacy

39. The government has sought to address the past in NI, through the concept of legacy, for some considerable time:

- first, the Eames/Bradley report of 23 January 2009¹⁴, which proposed a legacy commission to run for five years (this probably was the origin of the 'legacy' concept);
- second, the Haass/O'Sullivan draft agreement of 31 December 2013¹⁵, which proposed a range of bodies including a historical investigations unit (taking over from the police and the police

¹⁴ *Report of the Consultative Group on the Past.*

¹⁵ *An Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; Contending with the Past.*

ombudsman in order to free up the criminal justice system from having to deal with legacy cases);

- third, the Stormont House agreement of 23 December 2014¹⁶, which adopted the four Haass/O’Sullivan bodies (it is not clear what parties agreed this, other than Sinn Féin);
- fourth, the fresh start agreement of 17 November 2015¹⁷, which dealt with other issues (and not significantly the past – on which there was disagreement);
- fifth, a draft Northern Ireland (Stormont House Agreement) bill of 11 May 2018 (this was after the collapse of Stormont in January 2017), for the Westminster parliament (120 pp);
- sixth, a NIO consultation on legacy, also of 11 May 2018 (to run for 21 weeks), which led to a report on responses of 6 July 2019¹⁸ (38 pp) and a promise: ‘**The Government will work with a newly restored Executive...to discuss the key issues raised and to agree the way forward**’¹⁹;
- seventh, in the 2019 conservative and unionist party manifesto, in a section on NI, there is the following: ‘We will continue to seek better ways of dealing with legacy issues that **provide better**

¹⁶ Comprising a principal agreement of 14 pp and a five-page financial annex.

¹⁷ *A Fresh Start: the Stormont agreement and implementation plan.*

¹⁸ *Addressing the Legacy of Northern Ireland’s Past: analysis of the consultation responses.*

¹⁹ p 4.

outcomes for victims and survivors and do more to give veterans the protections they deserve’ [original bold]²⁰;

- eighth, the sudden inclusion of legacy in the restoration of Stormont document of 9 January 2020²¹ (including a UK government undertaking: to legislate at Westminster within a definite timescale).

One may conclude from more than a decade of UK policy work on legacy in NI: first, there is widespread discontent with the lack of policy; second, the parties do not agree; third, there is no principled approach; fourth, there is a ratcheting up of so-called promises regarding institutions, timescales and budgets; fifth, there is no realistic basis for prosecution all round, based upon the investigation of every troubles death (the first being fifty years ago); sixth, the alternative idea of drawing a line is stymied by the fact that Sinn Féin (with early prisoner releases, immunities, OTR letters and political participation) will not let any soldiers off the hook – even in return for getting John Downey and others off; and seventh, the 9 January 2020 document, whether agreed or not by the political parties, was a surprising fix by London and Dublin.

New Decade: New Approach

40. In this impossible context (with no obvious agreement), the UK government committed to the following on 9 January 2020 along with the Irish government: ‘**As part of the Government’s wider legislative agenda, the Government will, within**

²⁰ *Get Brexit Done: unleash Britain’s potential*, p 45.

²¹ *New Decade, New Approach* (62 pp) plus three draft Stormont bills.

100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland’s legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.’²²

41. Arguably, that is not a commitment to legislate the draft Stormont House agreement bill. What otherwise would be the purpose of an intensive process?

Veterans

42. The government also addressed the other side of the question – veterans – in the 2019 general election. The conservative and unionist party’s manifesto, in a section on the armed forces, contained the following: ‘**...we will introduce new legislation to tackle the vexatious legal claims that undermine our Armed Forces and further incorporate the Armed Forces Covenant into law**’²³. Query does ‘giv[ing] veterans the protection they deserve’ in NI (in the manifesto) amount to the same protection as in the rest of the UK?
43. On 4 December 2019, during the general election, the conservatives issued a first one hundred days set of promises. These included: ‘**A system which prevents vexatious claims being brought against Armed Forces veterans**’. That did not distinguish NI from the rest of the UK.

²² P 48.

²³ P 52.

44. Asked about whether the proposed historical investigations unit would investigate every troubles death, at prime minister's questions on 15 January 2020, Boris Johnson, the prime minister, replied: **'I wish to reassure the House that nothing in the [*New Decade, New Approach*] agreement will stop us going ahead with the legislation to ensure that no one who has served in our armed forces suffers vexatious or unfair prosecutions for cases that happened many years ago when no new evidence has been provided. We will legislate to ensure that that cannot happen.'**²⁴ The wording suggested civil and criminal liability.
45. Julian Smith adopted this language in following days. On 13 February 2020, he was widely perceived to have been sacked by Boris Johnson. Brandon Lewis replaced him.
46. The government was not inactive in February and March 2020, dealing with the two 100 days promises: the first of 4 December 2019, promising legislation on veterans (by 18 March 2020); the second of 9 January 2020, promising legislation on legacy (by 17 April 2020). The interaction was to produce an interesting result.

The Government's Bill

47. On 18 March 2020, the government published the overseas operations (service personnel and veterans) bill. It secured a first reading in the house of commons on the same day: **bill 117**.

²⁴ HC, *Hansard*, vol. 669, col. 1020.

48. While a second reading was announced for 19 March 2020, this did not in fact transpire.
49. This bill deals with veterans in all theatres, but not operation banner in NI, 1969 – 2007. Arguably, by excluding NI, the bill also excludes GB.²⁵
50. On the same day (18 March 2020), the new secretary of state (Brandon Lewis) made a written ministerial statement: *Hansard*, vol. 673, col. 21WS. This short statement referred to the 9 January 2020 policy document, but announced major shifts in government perspective.
51. This written ministerial statement appears not to have been cleared with the Irish government. The parties in NI are being invited, in negotiations, to agree a new bill on legacy, and one where, for the first time, veterans of operation banner are to be provided for as well.

Proposed Legislation in the Round

52. On the one hand, there is a Westminster bill within 100 days of 9 January 2020, apparently based on the Stormont House agreement (of 2014), and in draft since May 2018. And, on the other, and on the basis of the 100 days commitment of 4 December 2019, and, according to the new secretary of state's written ministerial statement of 18 March 2020, there is to be a new – different – legacy bill, which will incorporate NI

²⁵ The long title refers to 'outside the British Islands'. That will limit any possible amendments.

veterans, alongside the overseas operations (service personnel and veterans) bill progressing through parliament.

53. I take the view that the Stormont House agreement bill was never agreed. This is most evident from the fresh start agreement of late 2015. Even if the DUP reached an agreement with Sinn Féin, the former party no longer supports the elaborate institutional structure of Stormont House.
54. Further, it is – as always – unclear which parties agreed *New Decade: New Approach*, on 9 January 2020. Clearly, the UK and Irish governments agreed it, as usual. Even if the DUP reached an agreement with Sinn Féin, the former party can no longer be construed as supporting the Stormont House agreement.

The Secretary of State's Written Ministerial Statement, 18 March 2020

55. Several points may be made, conscious that this is a ministerial statement and not statutory language.
56. First, the wording suggests a new dawn: '**...we are setting out how we propose to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into the Troubles...that has failed victims and veterans alike...'**. These are all new concepts. They are welcome.

57. Second, the Stormont House agreement bill is not to proceed: **The Stormont House agreement in 2014 was an important milestone, but it did not stop the debate continuing.**'
58. Third, there is to be a new legacy bill: **'Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones – while this is still possible.'** This has echoes from the past (see conclusion).
59. Fourth, this is to include protection for NI veterans (along the general lines being proposed): **'ensuring equal treatment of Northern Ireland veterans and those who served overseas.'**
60. Fifth, the attempt to reconcile the written ministerial statement of 18 March 2020 with *New Decade: New Approach* is gestural and unconvincing: **'The Government are committed to introducing legislation in line with our commitments in "New Decade, New Approach", to move forward and deliver for all communities in Northern Ireland and beyond.'**

Conclusion

61. The UK government has manoeuvred itself into an interesting position, knowingly or unknowingly.

62. One, it has re-conceptualized legacy in NI, and come up with a solution which looks and sounds like Sir Hugh Orde's PSNI historical enquiries team ('HET'). That was relatively successful in 2006-13, and should have been defended by the NIO. Its destruction contains salutary lessons.
63. Two, the government has also brought the NI veterans into legacy policy, for the first time.
64. It has also created a rod for its own back: **'ensuring equal treatment of Northern Ireland veterans and those who served overseas.'** Progress on NI legacy has been tied, for the first time, to the fate of the overseas operations (service personnel and veterans) bill.
65. The NI veterans cannot be added to that bill. There will therefore have to be a NI legacy bill, on current plans, which includes veterans alongside victims.

May 2020