Amnesties, Prosecution & the Public Interest

The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland

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Contents

Acknowledgements & Copyright

This report was prepared by Kieran McEvoy, Luke Moffett, Louise Mallinder and Gordon Anthony as part of the Amnesties, Prosecutions and Public Interest in the Northern Ireland Transition project.

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About the Project

This report is produced as part of a project on *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* (AHRC AH/J013897 1). The project, funded by the Arts and Humanities Research Council is a partnership between Queen's University Belfast School of Law (Kieran McEvoy, Gordon Anthony, and Luke Moffett), the Transitional Justice Institute at Ulster University (Louise Mallinder), and Healing Through Remembering (HTR). HTR is an independent non-governmental organisation made up of a diverse membership with different political perspectives working on the common goal of how to deal with the legacy of the past in Northern Ireland.

The rationale for the project is to explore the inter-relationship between amnesties, amnesty like measures, historical prosecutions, and truth recovery in dealing with the past in Northern Ireland. The project has entailed an extensive programme of meetings and seminars, and the organisation of a number of conferences involving victims, former prisoners, former security force personnel, civil society activists, and policy makers, as well as all of the political parties involved in the negotiations on dealing with the past. In addition we have produced a range of blogs, briefings, and submissions on issues and themes requested by our interlocutors. The team has also been involved in an extensive programme of media engagement in both print and broadcast outlets, providing accurate information and well-founded ideas in an accessible fashion.

Readers will inevitably make up their own minds about what they consider to be the best way to 'deal with the past'. The purpose of this report and all of the other outputs produced from this project is to provide information on the international, historical and legal context on these issues in order to ensure that the public debate is as well informed as possible.

Executive Summary

This report is produced as part of a project on *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* (AHRC AH/J013897 1). The project explores the inter-relationship between amnesties, amnesty like measures, historical prosecutions, and truth recovery in dealing with the past in Northern Ireland (NI). It has included a wide consultation with victims, former prisoners, former security force personnel, civil society activists, and policy makers, as well as all of the political parties involved in the negotiations on dealing with the past.

While it is widely believed that the use of amnesties and similar measures would mark a new departure in NI and the UK, so that speculation about their introduction causes public controversy and threatens political instability, the report demonstrates that such measures have in fact been repeatedly used in a wide range of circumstances since the foundation of the NI state. The paper offers definitions of the key measures which have been employed, including amnesties, sentence reductions linked to peace building and use immunities. It explores their historical use and its consequences.

In the 1920s the government relied upon a range of 'special powers' including guarantees of indemnity for the security forces, and internment, which was subsequently invoked during the Second World War in the 1940s and the IRA's 'border campaign' in the 1950s, each time concluding with early release mechanisms, including use of the Royal Prerogative of Mercy.

Following widespread civil disturbances in 1969, the Prime Minister of NI, by executive decision, introduced a general and unconditional amnesty for both civilians and members of the police force, in an (unsuccessful) effort to de-escalate the situation.

After the major conflict which followed, the peace process led to the introduction of an amnesty in 1997 for those decommissioning paramilitary arms. The early release of politically motivated prisoners was central to the Good Friday Agreement of 1998. Under legislation introduced in the UK and NI, prisoners aligned to paramilitary organisations which were on ceasefire were to be released under license within 2 years of the signing of the accord. This incentivised anti–Agreement organisations to declare ceasefires in order to comply. The scheme did not negate the original convictions.

In 1999, the Independent Commission for the Location of Victims' Remains was set up and legislation enacted to provide immunity from prosecution for those providing information in relation to the recovery of the remains of those 'Disappeared' by republican paramilitaries during the conflict. This has led to the discovery of the remains of a majority of the missing victims. Those providing information were not immune in relation to evidence provided outside of the context of the Commission.

Legislation brought in to deal with the so-called 'On the Runs' (OTR) in 2005 failed. Before and after that failed legislation, the government operated an administrative mechanism to deal with OTRS wherein individuals were given letters telling them whether or not they were currently 'wanted' in connection with conflict related events. Although the scheme was established 'under the radar', the fact of its operation was widely known in Northern Ireland. After an attempted prosecution of

Mr John Downey for attempted murder failed because he had been erroneously given such a letter, the scheme caused a crisis in the peace process in 2013. This led to a number of inquiries and investigations including a judge-led review (the Hallett Review) as well as committee hearings at Stormont and Westminster. The report explores this controversy in some detail because of its implications for future mechanisms.

A range of 'use immunity' style measures have been introduced in the context of public inquiries, starting with the 1969 Cameron Commission into public disturbances and including the 1998 Saville Inquiry into the events of Bloody Sunday and inquiries into the murders of Rosemary Nelson and Robert Hamill. Guarantees of non-prosecution provided for witnesses did not in any of these cases rule out the possibility of future prosecutions based on evidence gleaned from other sources.

Versions of use-immunity have appeared in a number of the key reports, interventions and political negotiations. In 2006 a report by the NGO Healing Through Remembering proposed provisions for guarantees of non-prosecution in return for evidence given at a truth recovery process.[1] The 2007 Consultative Group on the Past (CGP) found that a general amnesty would be inappropriate and proposed instead the setting up of a Legacy Commission to which 'protected statements' could be given.

In 2013 the NI political parties failed to agree on proposals for a truth recovery process which included limited immunity, arising from negotiations on dealing with the past, flags and marching issues under the stewardship of US diplomat Richard Haass and Prof Meghan O'Sullivan. In 2014 the British and Irish governments and the parties to the Northern Ireland Executive negotiated 'The Stormont House Agreement' which includes provisions (similar to the Haass-O'Sullivan proposals) for the establishment of a truth recovery body entitled the Independent Commission for Information Retrieval (ICIR). Those giving evidence to it may do so anonymously and the evidence provided cannot be used against them in legal proceedings, although they could still face prosecution in relation to evidence obtained in any other forum.

The report concludes that different forms of immunity from prosecution in the Northern Ireland have featured regularly since the formation of the state, and notes that the project and other work by the project team has shown that they can satisfy legal obligations arising from Article 2 of the European Convention of Human Rights. It suggests that these facts may 'dampen down' the potential for protests against the legislation which will be required to enact the ICIR. It proposes that given the damage done by attempts at secrecy in relation to the OTR scheme, any new legislation should be openly and publicly debated from the start.

The report also notes that past experience shows that close attention must be paid to the drafting of the legislation to ensure that the intent and spirit of the Stormont House Agreement is enacted. It concludes that for any truth recovery process concerning the past in Northern Ireland to be possible there must be guarantees that

[1] K. McEvoy, *Making Peace with the Past: Options for Truth Recovery Regarding the Conflict in and About Northern Ireland* (Healing Through Remembering, 2006), x and 83, available at http://www.healingthroughremembering.org/images/pdf/Making%20Peace%20with%20the%20Past.pdf accessed 24 March 2015).

those who cooperate in good faith with its mechanisms will not be prosecuted as a result.

Introduction

In the cut and thrust of political debate on these difficult and sensitive matters it is sometimes asserted that an amnesty or similar measure would represent an unprecedented departure in law or politics in either Northern Ireland or the United Kingdom. This is not, in fact, the case. At several junctures during the conflict and the transition, the authorities in Northern Ireland and Britain have introduced or proposed such measures in order to facilitate government policy on different aspects of truth recovery. We have discussed elsewhere the legality of amnesties in terms of the dealing with the past debate in Northern Ireland.[2] This paper is designed to provide a brief discussion of the historical occasions when such measures have been utilised, and their legal consequences.

The paper begins with some basic definitions. It then discusses the guarantees of indemnity given to the security forces and the mechanism to secure the early release of prisoners following the creation of the Northern Irish state in the 1920s. The paper then focuses on the general amnesty which was introduced following civil disturbances in 1969. Similar more recent measures are then explored. These include: the early release of politically motivated prisoners in the wake of the Good Friday Agreement; the amnesty designed to facilitate the decommissioning of paramilitary weapons; the immunity provided by legislation designed to encourage the provision of information which could lead to the recovery of the remains of individuals 'disappeared' by paramilitaries; a range of 'use immunity' style measures designed to facilitate truth recovery in a number of public inquiries; and administrative mechanisms designed to clarify the status of 'On-the-Runs'. The paper concludes by drawing out some of the most salient points which have become apparent as a result of those historical experiences.

[2] See e.g., K. McEvoy and L. Mallinder, *Article 2 Compliant Truth Recovery and Guarantees Of Non-Prosecution* (2009) available at http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,163368,en.pdf accessed 24 March 2015. For a range of further discussions on amnesties, prosecutions, and dealing with the past related themes see the project website, <http://amnesties-prosecution-public-interest.co.uk>.

Definitions

Amnesty

An amnesty should be understood as a legal mechanism utilised by governments to remove liability for criminal prosecutions and/or civil suits for specific offences or against specific groups of individuals.[3] As amnesty generally applies pre-conviction - it can be distinguished from pardons or sentence reductions that remit all or part of a sentence post-conviction.[4]

Immunity

There are several different types of immunities. Direct 'use immunities' mean that the evidence which a person gives to an institution such as a public inquiry (or some other form of truth recovery body) cannot be used to prosecute that person. Under 'derivative use' immunities, no prosecution can take place if future evidence is uncovered but it can be shown that this came about as a result of the incriminating but privileged evidence which was previously given. In other words, that the original admissions pointed the authorities in the direction of further evidence. Personal or 'transactional immunities', ensure that a person who has given evidence about an offence can *never* be prosecuted for that offence. In some Commonwealth jurisdictions, the first and second types of these immunities are quite common, but not the third. In the United Kingdom, while such immunities are of course possible (e.g. in the Inquiries Act 2005), as is detailed below, it has become the practice for the heads of public inquiries to seek (and be granted) immunities specific to each particular inquiry from the Attorney General.[5]

Sentence Reduction

Sentence reduction is a mechanism used by the state to reduce the original sentence decreed by a trial judge. While of course almost all jurisdictions have mechanisms in place such as Parole Boards to make decisions on the amount of remission a prisoner should be granted, the types of sentence reduction discussed in this context are those which arise as a result of changed political circumstances (e.g. declarations of cease-fires or successfully concluded political negotiations). While historically amnesties were granted in both Britain and Ireland in such circumstances, in more recent times (including in the wake of the Good Friday Agreement) specific legislative mechanisms have been deployed, or the government has used the Royal Prerogative of Mercy.

[3] L. Mallinder and K. McEvoy, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies' (2011) 6(1) *Contemporary Social Science* 107-128, 115.
[4] See ECHR distinction between amnesty and pardon in *Case of Lexa v Slovakia*, no. 54334/00, ECHR 2008. Note that there are some hybrid approaches, where an amnesty law benefits persons who have been convicted as well as those who have not been subject to criminal investigations or prosecutions.
[5] J. Beer QC (ed) *Public Inquiries* (Oxford: Oxford University Press, 2011), 209.

I. Indemnity and Early Release in Northern Ireland 1920-1963

In 1922, the Prime Minister of Northern Ireland James Craig introduced powers to

> indemnify all officers of the Crown against all actions or legal proceedings whatsoever, whether civil or criminal, for or on account of any act, matter or thing done or purported to be done, in the execution of their duty during the present troubles or the defence of Northern Ireland, or the public safety, or for the enforcement of discipline, or otherwise in the public interest.[6]

The new government also introduced internment without trial of those suspected of being in the Irish Republican Army (IRA). With IRA violence having petered out in Northern Ireland by 1922, internment was ended in 1924 and the prisoners were released 'on condition that they kept the peace.'[7] Internment was reintroduced in Northern Ireland during the Second World War (1939-45) and again during the IRA's 'border campaign' (1958-62). After the formal ending of this campaign in February 1962, 89 internees were released (again after signing a pledge to renounce violence). By the end of 1963, all sentenced prisoners had also been released by the government, utilising the Royal Prerogative of Mercy.

[6] Hansard Vol 2, Col 603-604, Northern Ireland Parliamentary Debates, 5 May 1922.
[7] B. Gormally and K. McEvoy, *Release and Reintegration of Politically Motivated Prisoners in Northern Ireland: A Comparative Study of South Africa, Israel/Palestine, Italy, Spain, the Republic of Ireland and Northern Ireland* (NIACRO, 1995) 54.

II. The 1969 Amnesty

In May 1969, the Northern Irish Prime Minister, James Chichester Clarke, decided (with the support of his cabinet at Stormont and the Attorney General) to introduce a general amnesty in relation to*:* 'events associated with, or arising out of, political protests, utterances, marches, meetings, demonstrations occurring between 5 October 1968 and 6 May 1969'.[8] This amnesty was an executive decision rather than arising out of enacted legislation. According to the Attorney General, it applied to criminal proceedings that were pending, any future proceedings, and the collection of fines already imposed. It also provided for the remission of sentences for persons already convicted.[9] However, the Attorney General specified that 'proceedings would be taken against any of those persons concerned in any way with acts of sabotage who could be brought to justice'.[10] This amnesty was introduced within a context of growing civil unrest and was designed to de-escalate the conflict, or in the words of the then Prime Minister, to 'wipe the slate clean and look to the future'.[11] It had a wide application to all criminal offences associated with the demonstrations, including attacks on civilian homes, but excluding 'acts of sabotage'. It was designed to cover both civilians and members of the Royal Ulster Constabulary, and was unconditional. Among those released from prison in accordance with the amnesty were Ian Paisley (later to become NI's First Minister) and his close associate, Major Ronald Bunting.

[8] Northern Ireland Information Service Press Release, 6 May 1969.
[9] Ibid.
[10] Ibid.
[11] Ibid.

III. Amnesty for Disarming: The Decommissioning Act 1997

The provision for the decommissioning of arms held by paramilitary groups was provided for in a section of the Good Friday Agreement. However, the legal machinery predates 10 April 1998 and was introduced as a result of the Mitchell report of 24 January 1996. That legal machinery comprised: the Decommissioning Act 1997, the Northern Ireland Arms Decommissioning Act 1997 and an international agreement establishing the Independent International Commission on Decommissioning (known as the De Chastelain Commission) which entered into force on 24 September 1997; and secondary UK and Irish legislation, which did not take effect until 30 June 1998.

Section Four of the Decommissioning Act 1997, which is entitled 'Amnesty', is designed to ensure that prosecutions or the risk of prosecutions do not hinder the process of decommissioning. Section 4(1) stipulates 'No proceedings shall be brought for an offence listed in the Schedule to this Act in respect of anything done in accordance with a decommissioning scheme'. This amnesty was time limited (on an annual basis) but renewable by the Secretary of State.[12] In effect those involved in that process (e.g. in the movement of weaponry or armaments) could not be criminally prosecuted if they were acting in accordance with the decommissioning scheme. In addition, any weapons or munitions recovered as a result of the scheme could not be forensically tested or used in criminal proceedings.[13]

[12] The amnesty period originally ended on the first anniversary of the passing of the Act in 1997. However, it was renewed on an annual basis until finally ending in 2010 after the Commission had overseen acts of decommissioning by the Provisional IRA, Official IRA, Ulster Defence Association (UDA), Ulster Volunteer Force (UVF), LVF and INLA.
[13] Northern Ireland Arms Decommissioning Act 1997, Section 5.

IV. The Early Release of Prisoners as a Result of the Good Friday Agreement

The early release of prisoners was a key element in the negotiations on the Good Friday Agreement. [14] The Agreement states that both British and Irish governments would put legislation in place to provide for the accelerated release of prisoners convicted of scheduled offences in Northern Ireland (or similar offences for those convicted elsewhere). It stipulated that those who qualified would be released within two years of the passing of this legislation. [15] The legislation excluded prisoners who were members of organisations which were not then maintaining a ceasefire. However, the power held by the Secretary of State to keep this question 'under review' proved a significant incentive for smaller organisations such as the Irish Nation Liberation Army (INLA) and the Loyalist Volunteer Force (LVF) which subsequently called ceasefires. This enabled prisoners from these organisations to benefit from the early release scheme.[16]

The Early Release Scheme was enacted through the Northern Ireland (Sentences) Act 1998. Under this scheme, qualifying prisoners have to apply to the Sentence Review Commissioners for early release. All prisoners have to satisfy three conditions in order to be eligible: they have to have been convicted of a qualifying offence; they must not support an organisation not on ceasefire; and upon release they would be unlikely to become a supporter of a specified organisation or become involved concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.[17] Life prisoners have to satisfy a fourth condition that if released they would not be a danger to the community. [18] The terms of the Agreement were that all qualifying prisoners would be released within two years of the signing of the Accord.

Prisoners released under this scheme are released on license – for those individuals who are on a fixed term sentence until the date when they would have been released normally, and for life-sentenced prisoners, for the rest of their life. As of 2012, 482 prisoners were released early under the scheme, 21 of whom were recalled as having breached the terms of their license.[19] In addition, some individuals who were 'on-the-run' and who returned to Northern Ireland after 1998, have availed of the early release scheme in order to avoid

[14] For a history of early release of prisoners and amnesty in Irish history and a more detailed discussion of the Good Friday Agreement negotiation and legal provisions, see Kieran McEvoy, 'Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict' (1999) 26(1) *Fordham International Law Journal* 145-181.
[15] Part 11, para.1 and 3. Soon after, the British government passed the Northern Ireland (Sentences) Act 1998 and the Irish government approved its counterpart the Criminal Justice (Release of Prisoners) Act 1998. Prisoners in the Republic of Ireland were released immediately, McEvoy (n 14) 156.
[16] Good Friday Agreement, Part 11, para.2.
[17] NI (Sentences) Act 1998, Section 3(3)-(5).
[18] NI (Sentences) Act 1998, Section 3(6).
[19] Sentence Review Commissioners, *Annual Report 2011-2012* (HMSO, 2012) 25.

imprisonment, because they had already served over two years in Northern Ireland prisons before their escape.[20]

Although it is often referred to as such in the press, the early release of politically motivated prisoners scheme should not be considered as a straightforward amnesty. While in reality significant numbers of prisoners did benefit from early release for very serious offences, the scheme did not negate their original conviction. Indeed the fact that all of those convicted of conflict-related offences continue to have a criminal record remains a significant problem for many ex-prisoners.[21] The scheme reduced the time served for qualifying prisoners, all of whom had to apply on an individual basis, meet designated criteria, and be subject to a period where they could be returned to prison if they were deemed to have breached the terms of their license. It is therefore better referred to, perhaps inelegantly, as a generous form of sentence reduction linked to peace-building, or as a conditional 'amnesty-like' measure.

[20] See *In the matter of an application by Terence McGeough for Judicial Review,* [2012] NICA 28, para. 18.
[21] OFMDFM, *Recruiting People with Conflict Related Convictions: Employers' Guidance* (OFMDFM, 2007).

V. Use Immunities and 'The Disappeared': The Northern Ireland (Location of Victims' Remains) Act 1999

In 1999, following a successful campaign by families, the UK and Irish governments established a process to recover the bodies of those people who were abducted, murdered and their bodies 'disappeared' by the IRA and (in one case) the INLA between 1972 and 1981.[22] Under the Northern Ireland (Location of Victims' Remains) Act 1999 and the Criminal Justice (Location of Victims Remains) Act 1999 (in the Irish Republic) the British and Irish governments established a Commission to assist in the task of recovering the bodies of these victims. Despite claims to the contrary by some commentators,[23] this legislation does not constitute an amnesty for those involved in the disappearances. People who were alleged to have been involved in the disappearances were and are still liable to be arrested and prosecuted as a result of evidence gleaned from outside the processes overseen by the Commission.[24] Instead, the respective Acts provided immunity from prosecution as a result of any evidence arising from engagement with the Commission. This included evidence provided to the Commission by those involved in the commission of the offence (section 3). The Acts provided that forensic testing could only be carried out to facilitate identification (section 4), and that the information could only be passed on to other authorities for the purpose of assisting with locating the remains (section 5). To date, information gained from this process has helped to lead to the discovery of the remains of ten of the disappeared.[25]

The recovery of those bodies identified to date suggest that, given its very specific remit, the Commission has been a successful post conflict mechanism designed to bring some relief to the families of the disappeared. Certainly representatives from the Commission have repeatedly stressed in public and private that its work would not have been possible without both the guarantee of non-prosecution contained in the legislation in both jurisdictions and also the development and maintenance of relationships of trust between the Commission and its Republican interlocutors.[26] No one has been arrested, charged or

[22] Loyalist paramilitaries are also known to have been responsible for at least five disappearances during the conflict, though the bodies of the five were found within a number of months. See CAIN, *Details on 'the Disappeared'*, available at: http://cain.ulst.ac.uk/issues/violence/disappeared.htm accessed 24 March 2015

[23] A. Morgan, 'The Northern Ireland Location of Remains Act: Amnesty, Immunity or What?' (2002) 37 *The Irish Jurist* 306-321.

[24] For example, in 2014 Sinn Fein President Gerry Adams was arrested and later released without charge after it was alleged by interviewees involved in the Boston College research that he had been involved in the murder and disappearance of Jean McConville. At the time of writing veteran Republican Ivor Bell is awaiting trial on charges that he too was involved in aiding and abetting in Mrs McConville's murder, again based on allegations made by individuals interviewed in the Boston College Project.

[25] In October 2014 the remains of another person were found by Commission investigators in County Meath as a result of information provided by Republicans. .The remains were identified as those of Brendan McGraw, who had been killed and 'disappeared' by the IRA in 1978. At least six other individuals remain to be found.

[26] See e.g. Presentation by the Head Investigator in the Independent Commission on the Location of Victims' Remains Geoff Knuppfer at the Dealing with the Past in Northern

convicted as a result of engagement with or evidence gleaned from the work of the Commission over the past 15 years. As one prominent Republican ex-prisoner suggested to the authors at one of our outreach events for this project:

> in answer to those who say that nothing can be done, the work of the Disappeared Commission would suggest the opposite. With airtight legislation, and good will between the parties involved, it is possible to design effective mechanisms which deal with the past and bring some measure of comfort to those who were so egregiously hurt during the conflict.

Ireland conference (May 2013) available at http://amnesties-prosecution-public-interest.co.uk/conferences/dealing-past-northern-ireland-law-prosecutions-truth-recovery/ accessed 24 March 2015.

VI. The 'On-The-Runs' Issue

By contrast, legislation brought in to deal with the so called 'On the Runs' (OTR) failed and has been mired in controversy, not least because of the administrative mechanism which was established in its wake. This issue has been a highly controversial one, creating a crisis in the peace process and leading to a number of inquiries and investigations including a judge-led review (the Hallett Review) as well as committee hearings at Stormont and Westminster. It is therefore worth exploring in some detail, not least for the possible lessons which may be learned for other past-focused mechanisms which are currently being discussed.

The mechanism to release politically motivated prisoners under the Good Friday Agreement did not extend to people who had gone 'On the Run' and the issue was a source of constant pressure from Sinn Féin upon the British government in the ensuing negotiations. At talks at Weston Park in England in July 2001 between the UK and Irish governments and the pro-Agreement political parties, the British and Irish governments agreed to take such steps as were necessary in their respective jurisdictions to ensure that the people concerned would be 'no longer pursued'.[27] In a further document issued in April 2003 the British government set out its proposals in relation to what would ultimately become the OTRs legislation in a little more detail.[28] The government proposed a complex system.[29] Following the decommissioning of IRA weapons in 2005, the British government produced the Northern Ireland (Offences) Bill. However, this Bill included provisions that not only OTRs from paramilitary organisations, but also state actors, could apply for the scheme. Already facing Conservative and Unionist opposition, the Bill was abandoned when the SDLP and Sinn Féin also withdrew their support – the latter because of pressure from organisations representing victims of state violence. They argued that the Bill offered immunity to security force personnel. Given the commitments that had been made by the British government to Republicans and the importance placed on the issue by the latter, as former Prime Minister Tony Blair told the Northern Ireland Affairs Committee, resolution of the issue was viewed as a crucial element of the peace process.[30]

While negotiations were ongoing, the British government devised an administrative scheme to deal with the issue which operated from 2000 until

[27] Para. 20 of the letter issued to party leaders, 1 August 2001.
[28] Northern Ireland Office, *Proposals in Relation to the On The Runs* (April 2003) available at <http://cain.ulst.ac.uk/events/peace/docs/biotrs010503.pdf> accessed 24 March 2015.
[29] This included an 'Eligibility Body' to determine eligibility for the scheme which would issue a certificate allowing a person to return to Northern Ireland. A Special Judicial Tribunal chaired by a judge would then consider the matter, where prosecuting authorities could pursue prosecutions, but regardless the outcome, anyone convicted would be deemed immediately eligible for the Early Release Scheme without having to serve the two year minimum required under the Northern Ireland (Sentences) Act 1998. Any such individual would be immediately released on licence with similar revocation powers as for other prisoners released early under the Agreement.
[30] Tom Whitehead, 'Tony Blair: "On The Run" Letters to IRA Members vital for Northern Ireland Peace' *Daily Telegraph* (13 January 2015).

March 2014. Names were submitted by Sinn Féin (or in some cases individual solicitors). The NIO would forward the names, via the Attorney General's Office (AGO) and the Public Prosecution Service (PPS) for Northern Ireland, to the PSNI. A dedicated PSNI team conducted a review and submitted a report to the DPP(NI). The DPP(NI) and the Attorney General then determined whether arrest/prosecution was justified. If the police/prosecutorial review concluded that an individual was 'not wanted', the NIO wrote to Sinn Féin enclosing a letter for onward transmission to the individual. If the review concluded that the individual was 'wanted', the NIO informed Sinn Féin, but no letter was sent to the individual. On occasion, a composite letter was sent to Sinn Féin setting out a list of individuals and giving their status. The individual letters of assurance were intended to inform individuals, where appropriate, that, as at the date of the letter, the recipient was 'not wanted' for questioning or prosecution in Northern Ireland or the rest of the UK. As the Hallett Review notes, these letters 'should have contained a caveat that if new evidence or intelligence came to light or circumstances changed, the recipient might face arrest'.[31] In total, 228 names were put forward and 156 people received a letter of assurance. Another 31 were told that they were 'not wanted' in some other way. Twenty-three individuals on the OTR list were informed that they were 'wanted'. Eighteen individuals currently do not have a definitive answer as to their status.[32]

It became clear that the existence of the scheme had been widely known in political circles,[33] though the details of its operation were not. The issue came to a head in February 2014 when the case against one OTR collapsed, bringing the scheme into the public domain.[34] In her review of the scheme, Dame Heather Hallett concluded that the scheme did not constitute an amnesty. She also came to the conclusion that 'properly constituted, the scheme was not unlawful.' While the scheme was not explicitly publicised, references to it were made in parliamentary answers, policing board documents and the Consultative Group on the Past Report. This led Lady Hallett to conclude 'those who followed political affairs in Northern Ireland closely and knew where to look might have been alerted, therefore, to the existence of some kind of scheme.' She also opined that 'Dozens of police officers, prison officers, officials and politicians must have

[31] H. Hallett, *The Report of the Hallett Review: An Independent Review into the On the Runs Administrative Scheme* (HMSO, 2014).
[32] Ibid.
[33] B. Rowan, 'The Nonsense Of Not Knowing: The Twists and Turns of the On-The-Runs' *EamonnMallie.com* (5 April 2014) available at http://eamonnmallie.com/2014/04/the-nonsense-of-not-knowing-the-twists-and-turns-of-the-on-the-runs-by-brian-rowan/ accessed 24 March 2015.
[34] John Downey had been charged with murder and causing an explosion in connection with a 1982 IRA bombing in Hyde Park which killed four soldiers. He was issued with a letter in error but this was not rescinded once the PSNI had realised their mistake. Several years later he was arrested at Gatwick airport having 'acted to his detriment' in reliance on the letter of assurance by travelling to the UK. The trial judge accepted Mr Downey's defence submission that in effect he had been entrapped and that the prosecution amounted to an abuse of the process of the court. The Hon Mr Justice Sweeney described the state's error in informing Mr Downey that he was not wanted by the police as 'catastrophic'. The case was not appealed. R v John Downey, 21 February 2014 available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-downey-abuse-judgment.pdf accessed 24 March 2015.

known that some kind of scheme was in operation by which individuals received assurances that they were 'not wanted'.[35] However, Lady Hallett also noted that

> one very important group of people, namely the victims of terrorism, failed to appreciate what was happening. It is this lack of openness that has caused particular distress, especially following the collapse of the R v Downey trial.[36]

In sum, while mistakes were obviously made in the administration of the scheme (most evidently in the Downey case), the evolution of the administrative scheme to deal with the On the Runs did not constitute an amnesty and was not unlawful. However, the fact that the scheme operated to some extent 'below the radar' was hurtful to those concerned victims who did not know about it and obviously had the potential to lead to political instability.

[35] Ibid 13.
[36] Hallett (n 31) 13.

VII. Use Immunity, Inquiries, and Dealing with the Past

The public inquiry is one of the key mechanisms within British and Irish public law to explore controversial past events. Drawing their procedures from the British legal tradition, such inquiries tend to be characterised by an adversarial formal public examination of evidence, with witnesses examined and subsequently cross-examined by lawyers. Although public inquiries can take different forms, and have developed piecemeal in response to particular events, one of their important features is that a guarantee of non-prosecution may be offered to those who give evidence. This is particularly significant given that witnesses are often compelled to attend. As James Beer QC, author of the key legal text on public inquires explains:

> Many recent inquiries have requested that the Attorney General provide an undertaking prohibiting the use of evidence provided to the inquiry in future criminal proceedings. The aim of the undertaking is to allow witnesses to give evidence freely, knowing they are not at risk of subsequent prosecutions on the basis of it, and to ensure that inquiries are not delayed or obstructed by witnesses invoking the privilege against self-incrimination.[37]

Such inquiries have been much used in a number of important instances during the Northern Ireland conflict and transition, and similar guarantees have been offered.[38] For example, the Cameron Commission which was established in 1969 to investigate civil disturbances from October 1968, operated under a guarantee given by the Attorney General on behalf of the government of Northern Ireland. This guarantee provided that:

> No statement made to the Commission of Enquiry, whether orally or in writing, will be used as the basis of a prosecution against the maker of the statement or for the purpose of prosecution of any person or body of persons. (2) No such statement will be used in evidence in any criminal proceedings[39]

The public inquiries into the events of Bloody Sunday and the murders of Robert Hamill and Rosemary Nelson were all underpinned by similar undertakings from the UK Attorney General. The Billy Wright Inquiry chose not to request such an undertaking but informed its witnesses that individual requests, supported by reasons, would be considered. The guarantee given by the Attorney General to the Bloody Sunday Inquiry chaired by Lord Saville is a useful exemplar. It offered:

> An undertaking in respect of any person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry

[37] Beer (n 5) 326.
[38] Similar mechanisms exist in the Irish Republic. Section 8 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2002 provides that 'A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings'.
[39] Lord Cameron, *Report of the Disturbances in Northern Ireland*. Cmnd 532 (HMSO, 1969), Chapter One, paragraph 4, available at http://cain.ulst.ac.uk/hmso/cameron.jpg.

> relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings (or for that purpose of investigating or deciding whether to bring such proceedings) except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with, aided, abetted, counsel procured, suborned or incited any other person to do so.[40]

The consequence of such guarantees, legally and in practise, is not that any future prosecutions are ruled out entirely. Rather, the guarantee is that the evidence given by an individual before such an inquiry cannot subsequently be used for any such future prosecutions against that individual. Evidence gleaned from other sources could be used for future prosecutions. In the Saville Inquiry, for example, this meant that some witnesses admitted to riotous behaviour or IRA membership, while some military witnesses admitted to having previously lied to the military hierarchy and to the Widgery Tribunal. The purpose of such guarantees is precisely to seek to maximise the potential for an inquiry to get to as much of the truth as is feasible. In his overview of Inquiries, Lord Salmon articulated the argument in favour of such use of immunity provisions in 1967:

> No doubt the extension of a witness's immunity entails the risk that a guilty man may escape prosecution. This would be unfortunate but it is surely much more important that everything reasonably possible should be done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nationwide crisis of confidence than that a guilty man should go free.[41]

Versions of use-immunity have appeared in a number of the key reports, interventions and political negotiations on dealing with the past in Northern Ireland.

The comprehensive report produced by local NGO Healing Through Remembering in 2006 included provisions for guarantees of non-prosecution in return for evidence given at a truth recovery process.[42] The Consultative Group on the Past (CGP) was established in 2007 by the Labour government to find solutions to dealing with the past in Northern Ireland. It considered both amnesties and use immunities. The report repeatedly and explicitly stated that a general amnesty 'would not be appropriate in the present situation' in Northern Ireland.[43] Instead, in order to facilitate truth recovery, the CGP proposed the setting up of a Legacy Commission to which 'protected statements' could be given. Under this system, the statement of the individual would be 'protected' rather than the individual, so that any information given during the truth recovery process could not be a source of criminal or civil proceedings. If,

[40] Attorney General Press Release, 25 February 1999, available at http://bloody-sunday-inquiry.org.uk.
[41] Lord Sir Cyril Salmon, *Tribunals of Inquiry* (Oxford: Oxford University Press, 1967) 17.
[42] McEvoy (n 1) 27-28.
[43] Ibid.

however, any evidence emerged outside of this process that the individual had committed a crime, the individual could be brought before a court.[44]

In December 2013, after protracted political negotiations on dealing with the past, flags and marching issues under the stewardship of US diplomats Richard Haass and Meghan O'Sullivan, the Office of First Minister and Deputy First Minister published the 7th draft document which the Northern Ireland parties had ultimately been unable to agree.[45] Amongst its proposals was the suggestion of establishing a truth recovery body, termed the Independent Commission for Information Retrieval (ICIR). Following submissions and detailed briefings by the current team, the Haass-O'Sullivan document provided for *limited immunity* for statements given to the ICIR. This provided that information given to the ICIR could not subsequently be used in the civil or criminal courts, but that prosecutions might still be possible based on evidence obtained through other means.

In an important judgement in November 2014, the Lord Chief justice signalled strong judicial exasperation at the struggles of the legal system to deal with the legacy of the past. Sir Declan Morgan made his comments in a judgement on an appeal from a legacy inquest concerning the killing in 1992 of unarmed IRA man Pearse Jordan by the security forces. The case to date has involved 24 judicial reviews, 14 appeals to the Court of Appeal, 2 hearings in the House of Lords and one hearing before the European Court of Human Rights. Commenting on the burden placed by legacy cases on the inquest system, LCJ Morgan (with Lord Justice Girvan and Justice Gillen concurring) said:

> It is not the function of this court to determine how the United Kingdom should honour its Article 2 investigatory obligations in the legacy cases but it seems inevitable that the requirement of reasonable expedition will continue to be breached unless there is a new approach. There are models within this jurisdiction, such as the Historical Institutional Abuse Inquiry, which might provide the basis for an effective solution. It would be possible to have all of the legacy cases taken out of the inquest system and all of them considered in a time bound inquiry. Past experience suggests the need for a chair with senior judicial experience. The inquiry would need facilities for independent investigation and powers of compulsion in respect of witnesses and documents.[46]

The Historical Institution Abuse Inquiry model advocated by the Lord Chief Justice and his Court of Appeal colleagues refers to an ongoing inquiry led by retired judge Sir Anthony Hart. The rules of procedure for that Inquiry include a guarantee from the current Director of Public Prosecutions Barra McGrory that

[44] Ibid 129-130.
[45] R. Haass and M. O'Sullivan (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*. Belfast: OFMDFM, p. 34.
[46] *In The Matter Of Three Applications By Hugh Jordan For Judicial Review, Jordan's Applications* [2014] NICA. Available at http://relativesforjustice.com/wp-content/uploads/2014/11/Pearse-Jordan-Court-of-Appeal-17-Nov-14.pdf (accessed 24 March 2015).

> no evidence a person may give before the Inquiry will be used in evidence against that person in any criminal proceedings or relied upon for the purposes of deciding whether to bring such proceedings.[47]

In December 2014 the British and Irish governments and the parties to the Northern Ireland Executive conducted negotiations on a broad range of issues including dealing with the past. The negotiations concluded, apparently successfully, with the production of a document entitled 'The Stormont House Agreement'. On dealing with the past, the Agreement includes provisions (similar to those in the Haass-O'Sullivan document) on the establishment of a truth recovery body entitled the Independent Commission for Information Retrieval (ICIR). Building on 'the precedent provided by the Independent Commission on the Location of Victims' Remains', the ICIR:

> will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. … The ICIR will not disclose the identities of people who provide information. No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfied by other means.

[47] Undertaking from the Director of Public Prosecutions to Sir Anthony Hart, 23 April 2013, available at http://www.hiainquiry.org/index/pps_barra_mcgrory_qc_assurance.pdf accessed 24 March 2015.

Conclusion

While attempting to discuss amnesties and different forms of immunity from prosecution in the Northern Ireland context always provokes controversy, the reality is that such mechanisms have featured regularly since the formation of the state. As we have detailed elsewhere, such mechanisms can satisfy legal obligations arising from Article 2 of the European Convention of Human Rights providing they do not hamper independent and effective investigations of state killings. During the transition, such measures have been deemed necessary in order to advance elements of the peace process such as decommissioning, the recovery of the remains of the 'Disappeared' and various public inquiries into controversial events.

The fact that the deployment of limited or use immunity is a long established and clearly lawful aspect of public law in both the United Kingdom and the Republic in a wide range of past-focused inquiries may to some extent dampen down protests against the legislation required to enact the ICIR as part of the Stormont House Agreement. Learning from the On the Runs experience, whereby administrative measures were introduced 'below the radar' to avoid political controversy, and ended up creating a furore and an aftermath of distrust and rancour, it is clearly appropriate that this new legislation should be openly and publicly debated from the start.

Past experience also suggests that close attention must be paid to the drafting of the legislation to ensure that the intent and spirit of the Stormont House Agreement is enacted. The bottom line remains - no truth recovery process concerning the past in Northern Ireland will be possible without guarantees that those who cooperate in good faith with its mechanisms will not be prosecuted as a result.