The Special Air Service in Northern Ireland

What they did, why it matters, and what is being done to them now

Air Marshal Edward Stringer CB CBE, Lord Faulks KC, Sir Stephen Laws KCB, KC (Hon) and Andrew Dinsmore

Foreword by Al Carns DSO OBE MC MP

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Foreword

Al Carns DSO OBE MC MP, Labour MP for Birmingham Selly Oak, former Minister for the Armed Forces

Throughout my military career, I have operated at night in almost total darkness, when there are seconds — sometimes less — to decide: friend or foe, civilian or terrorist, threat or no threat.

My generation had enormous advantages: night vision and thermal imaging, surveillance overhead, extraordinary intelligence and communications — all helping the person on the ground make the right decision.

The men whose voices you hear in this paper often had none of that.

Put yourself in the shoes of a young serviceman in Northern Ireland during the Troubles, operating in darkness and uncertainty against capable, disciplined and lethal terrorists. Those soldiers lacked the technological advantages my generation relied upon, in an extraordinarily complex political and legal environment, often with only seconds to decide what to do.

None of that places anyone above the law. Nor does it mean that every decision taken was right. Anyone who broke the law should answer for it. But if we are going to judge those decisions decades later, we first have a duty to understand the environment in which they were made — and ensure accountability does not become punishment by process.

That is the central difficulty of Northern Ireland legacy: how do you reconcile the irreconcilable? Those caught up in the Troubles were not morally equivalent. But peace required people with profoundly different experiences to find enough common ground to move forward.

The extraordinary achievement of the Good Friday Agreement was that, despite those different perspectives, people moved forward anyway. Progress was bought in percentage points. People had to contemplate things they regarded as unthinkable. Prisoners were released. Weapons were decommissioned. Painful compromises and extraordinary assurances secured peace. Nobody got everything they wanted. Everyone gave something up.

That symmetry mattered.

Had those who negotiated the Agreement known how the legacy process would operate, I find it difficult to believe they would have accepted practical finality for some while those sent by the state to protect life remained exposed to repeated legal process decades later. Reconciliation

was meant to allow Northern Ireland to move beyond the conflict, not litigate its history indefinitely in one direction.

This paper challenges a persistent narrative in which the SAS has too often been cast as the villain. It makes a powerful case that those who served helped counter the IRA, protect life and create the conditions for political settlement. Drawing on first-hand testimony, it puts you alongside men deployed under ministerial authority, in support of the police and under the ordinary criminal law, sometimes with seconds to make decisions about life and death.

It is easy, from the safety of today, to forget how violent the Troubles were. More British military personnel were killed during the Troubles than in Iraq and Afghanistan combined. Civilians, police officers, soldiers, politicians and members of the Royal Family were targets. The Birmingham pub bombings killed 21 people and injured more than 200 — one of the defining atrocities of the mainland terrorist campaign, in the city where my constituency sits today. Thousands died, many more were injured, and the wounds endured long after the violence.

There was another burden for soldiers on the ground. Successive governments treated Northern Ireland not as a conventional war but as an internal security problem. The Army operated in aid of the civil power and under police primacy. The veterans in this paper describe confronting heavily armed terrorists who believed themselves to be fighting a war, while British soldiers remained constrained by a policing and criminal-law framework.

Politically, I understand why governments did it. But it left the young man on the ground carrying an extraordinary burden. These soldiers were neither freelancing nor operating outside the law or authority of the state. Successive governments sent them there. Political leaders cannot authorise people to take extraordinary risks and then distance themselves from the consequences or fail to protect them from an unfair, potentially never-ending legal process.

Every use of lethal force by the SAS was investigated at the time, and those who served were subject to the law. Where genuinely new and compelling evidence emerges, it should be examined. What is unfair is to subject veterans to repeated investigation of the same events decades later simply because the process or legal standards have changed.

In opposition, Labour did not interrogate the complexities of Northern Ireland legacy deeply enough and did not engage sufficiently with the veteran community. The previous Legacy Act was deeply flawed, and I do not believe immunity is the answer. But the Northern Ireland Troubles Bill currently before Parliament risks creating precisely the wrong architecture. Rather than one authoritative route to truth, reconciliation and justice, it allows multiple processes to operate alongside one another. The result is what I have previously called a hierarchy of truth.

On one side sits the Independent Commission for Reconciliation and Information Recovery (ICRIR), led by former Lord Chief Justice Sir Declan Morgan, with access to sensitive information and power to investigate and

refer cases where evidence warrants it. Alongside it sit inquests, civil cases and other processes capable of running independently for years. That is not one route to truth, but competing routes to different versions of it.

For a bereaved family, the instinct to choose the route offering the greatest public scrutiny is entirely understandable. But there is an unavoidable asymmetry. The British state kept records. Its soldiers were named. Its rules of engagement, intelligence assessments and chains of command were documented. The IRA left no comparable archive.

Over time, that imbalance writes its own version of history.

The answer is not less truth. It is a system capable of finding more of it, fairly and consistently, for every family.

This paper also examines how the development and application of human-rights law has contributed to today's legacy system, challenging the assumption that governments have no choice but to allow the past to be relitigated indefinitely. That deserves serious consideration. But responsibility ultimately rests with Parliament and government to create — and own — a fair, lawful and durable settlement.

If this system continues another fifteen years, so will its consequences for elderly veterans and Northern Ireland politics, while costs grow. Policy Exchange estimates total legacy costs at £2.2–£2.7 billion in 2024 prices, including around £1.3 billion of future costs. That is money unavailable to support victims, veterans and communities still living with the Troubles.

The Republic of Ireland also has responsibilities in this history. Dublin cannot be treated as a detached observer to events in which the Irish state had a complicated role. Any durable settlement requires both governments to cooperate and commit to fairness, truth and finality.

As parliamentarians, we have two obligations which must never become mutually exclusive. We must do right by the citizens and families of Northern Ireland who deserve answers about what happened to those they loved. And we must do right by the veterans who served in extraordinarily difficult circumstances to protect life, defeat terrorism and preserve the democratic wishes of the people of Northern Ireland as part of the United Kingdom.

No soldier should be above the law. Equally, no soldier should face endless legal jeopardy. Accountability is not the same as perpetual investigation. Justice is not served when the process itself becomes the punishment.

That is why this paper matters. It gives voice to men who were there, making decisions almost impossible to recreate forty or fifty years later. It explains how we got here and offers recommendations for moving forward. I do not agree with every conclusion or recommendation. But this is a serious contribution to the legacy debate which parliamentarians on every side should consider carefully.

We have spent nearly three decades trying to resolve the legacy of a conflict that the Good Friday Agreement was intended to help us leave behind. It is time to finish the job.

My own view is straightforward: one body, one process and one

authoritative record. A process that establishes truth, refers wrongdoing where evidence warrants it, treats every family with dignity, protects those who served from endless repetitive investigation and ultimately provides what every genuine peace process must: finality.

Reconciliation does not require us all to agree about the past. Northern Ireland has shown that we probably never will. What it does require is a process people can trust to be fair — and, eventually, the courage to stop relitigating the past and allow the next generation to get on with the future.

Executive Summary

The British Armed Forces were deployed in Northern Ireland from 1969 to 2007 in response to the Northern Ireland Troubles. This deployment – Operation Banner – was the longest continuous deployment in British military history. Between 1976 and the end of Operation Banner in 2007, the Special Air Service (SAS) was deployed in Northern Ireland in aid of the civil power, under strict rules of engagement, and primarily against the Provisional IRA, a well-armed and lethal terrorist organisation that was responsible for the majority of terrorist incidents throughout the conflict. Drawing on original interviews with over a dozen SAS veterans – the first account of its kind – this paper shows the important contribution the unit made to Operation Banner by degrading the IRA's capacity to kill, restoring order in areas where the IRA had operated with near-impunity, and helping convince the republican movement that armed violence could not succeed.

Yet those who served in the SAS in Northern Ireland, and other veterans too, now face renewed investigation, inquest, and possible prosecution in their old age. This is profoundly unjust to them, as well as damaging to the morale and future capability of special forces now. This paper explains how and why it has come to this and what should now be done about it.

The central problem is that the UK Government has uncritically accepted the authority of an ill-conceived body of judge-made human rights law. The European Court of Human Rights in Strasbourg (the Strasbourg Court) has misread Article 2 of the European Convention on Human Rights (ECHR), a misreading which has then been applied retroactively to the conduct of the SAS, and others, decades earlier. While this approach to the legacy of the Northern Ireland Troubles should be firmly rejected, it is alas an approach that is set to be entrenched by the Government's new Northern Ireland Troubles Bill.

What the SAS actually did in Northern Ireland

- The SAS was deployed by ministers, in support of the police, to stop imminent terrorist attacks and degrade the ability of terrorists to kill police officers and civilians.
- These ends were to be achieved ideally by arresting suspected terrorists, and by using force against them only when arrest was in practice impossible. Members of the SAS operated under the Army's "Yellow Card" rules and the ordinary criminal law of Northern Ireland.

- SAS training put great emphasis on the rules of engagement and ensuring its soldiers understood and followed the legal limits on the use of force.
- Every use of lethal force by the SAS between 1976 and 2007 was investigated at the time. Soldiers were cleared, disciplined, or referred to prosecutors under the standards then in force, and reasonably believed those matters were closed.
- Veteran testimony gathered for this paper helps to illustrate the contribution that the SAS made in degrading the IRA's capacity to kill, restoring order in areas where the IRA had operated with near-impunity, and helping to convince those who supported the IRA's armed campaign that violence could not succeed.

Why former members of the SAS are still being pursued now: the role of Article 2 of the ECHR

The key to understanding why veterans of Operation Banner, including members of the SAS, continue to be pursued by investigators, prosecutors and the courts is to be found in a series of decisions by the Strasbourg Court and the UK Supreme Court.

- Article 2 ECHR protects the right to life. It says nothing about investigations. Properly understood, as it was from 1950 when the ECHR was agreed until developments in 1995 and 2001, Article 2 would be irrelevant to the question of whether the UK Government now, in 2026, must investigate and prosecute members of the SAS in relation to their use of force decades ago.
- However, in 1995 the Strasbourg Court held for the first time that Article 2 requires an effective official investigation into every death caused by state agents. Then, in 2001, the Court spelt out detailed requirements for an Article 2 compliant investigation, including independence, adequacy, promptness, public scrutiny, family participation, and found the UK in breach because Troubles-era inquests failed to meet standards that did not exist when they were held.
- In later case law, the Court has held that the State's duty to investigate "revives" whenever plausible new material emerges, meaning that the UK can be obliged to reinvestigate, and if possible to prosecute, the use of force by members of the SAS many decades after the fact.
- The Human Rights Act 1998 is the UK legislation that gives effect in our law to the ECHR and to the case law of the Strasbourg Court. Parliament clearly intended the Human Rights Act to apply prospectively only, and the House of Lords confirmed in a 2004 case that this meant that it did not apply in relation to Troubles-era deaths.

- However, in 2011 the Supreme Court reversed course, reading the Human Rights Act so that it applied with retrospective effect to Troubles-era deaths. The Supreme Court did this in order to comply with the Strasbourg Court's case law. This misreading of the Human Rights Act opened the door in domestic law to reopening virtually every Troubles-era death linked to the security forces.

How this misreading of Article 2 has frustrated efforts to draw a line under the past

- The Northern Ireland peace process, to which the Belfast (Good Friday) Agreement 1998 is pivotal, gave substantial protections and quasi-amnesties to terrorists: early release under the Sentences Act 1998, immunity for information on victims' remains, a bar on forensic use of decommissioned weapons, and over a hundred "comfort letters" to on-the-run paramilitaries (one of which collapsed the Hyde Park bombing trial). No equivalent assurance has ever been given to soldiers or police.
- The Legacy Act 2023 tried to shift UK policy on Troubles-era deaths from a focus on prosecution to a focus on truth recovery, with a conditional immunity scheme introduced for those who gave a truthful account of their role in any death. In 2024, the Northern Ireland courts declared this scheme incompatible with Article 2. The new Labour Government abandoned an appeal, denying the Supreme Court the opportunity to reverse this declaration. The Republic of Ireland launched an inter-state case at Strasbourg, alleging that the Legacy Act 2023 placed the UK in breach of Article 2. The Government has since introduced a new Northern Ireland Troubles Bill, which will repeal and replace the Act as a whole if or when it comes into force.
- Decades of Article 2 litigation have resulted in a wholly disproportionate focus on the actions of soldiers during the Northern Ireland Troubles. By 2017, former army personnel accounted for around 30% of legacy investigations despite the Army being responsible for around 10% of Troubles deaths. Notably, where fresh inquests have examined SAS operations, coroners and juries have repeatedly found the use of force justified, with one outlying verdict having been challenged by the Government by way of an application for judicial review.
- This disproportionate focus on the action of the security forces has not arisen from the discovery of new evidence of wrongdoing but rather by the retrospective imposition of the Article 2 case law to past events.

What the Northern Ireland Troubles Bill will do if it is enacted

- While Article 2 litigation has placed considerable pressure on successive governments in relation to legacy cases, it is important to note that the Government has chosen to attempt to repeal the Legacy Act 2023 rather than to defend it before the Supreme Court or, if need be, before the Strasbourg Court. Even if the Strasbourg Court had held that enacting the 2023 Act was incompatible with the ECHR – which it has not – it would be open to the UK to maintain the Act in force. So, the Government is choosing a new legacy policy and cannot plausibly maintain that no other course of action was open to it.
- The Government's new Troubles Bill embodies what this paper calls Article 2 maximalism: a prosecution-first approach to legacy issues. Its proposed new Legacy Commission will operate under an effective presumption that investigations should be conducted as *criminal* investigations, with referral of individuals (including former members of the SAS) to prosecutors.
- Families of those killed during the Troubles (including members of the IRA killed by the SAS) may request investigations for five years, but the Secretary of State, police chiefs, coroners, prosecutors, and the Commission's own Directors may initiate them indefinitely, whenever "ECHR compatibility" is said to require it. If this legislation is enacted, veterans, including members of the SAS, face open-ended legal jeopardy for the rest of their lives.

Why the approach taken by the new Troubles Bill needs to be abandoned

- Soldiers are being judged by investigative standards invented in 2001 and applied to the 1970s–90s, standards the state could not have met at the time even if it had tried, because the institutions they presuppose (an independent police ombudsman, legal aid for inquest families, witness compellability) did not then exist.
- It is difficult for reinvestigation decades on to be fair and accurate: memories will fade, records are lost, and witnesses die. And for the individual veteran, the process of investigation itself becomes a kind of the punishment – years of renewed scrutiny, distress, and criminal exposure, regardless of the final outcome.
- The message this treatment sends to today's armed forces is corrosive: lawful service at the State's direction may, decades later, be treated as the subject of criminal investigation under standards that did not exist at the time. This will have significant detrimental consequences for recruitment, retention, and operational confidence, especially in special forces.

- A change of direction by the Government that involved a clear acknowledgement of what is required in the case of veterans by fairness and justice, as well as by the mutual obligations of loyalty and honour between the state and those in its military service, would be a significant step towards repairing the damage that has been done both by the situation that had developed before the 2023 Act and by the Government's proposal to use the Troubles Bill to restore that situation and maybe even to make it worse.

Recommendations

- **Withdraw or reject the Northern Ireland Troubles Bill (or repeal it if it has been enacted).** Neither Government nor Parliament should accept that they are bound by domestic law or international law to adopt the approach taken by this Bill. The Government and Parliament have the right and the duty to choose the approach to legacy cases that they think is best placed to secure peace and reconciliation in Northern Ireland and to avoid unjust treatment of those who served during Operation Banner. The Government and Parliament should maintain or if need be reinstate the 2023 conditional immunity scheme, drawing a line under the past.
- **Rule out new inquests or inquiries into legacy cases.** The Government and Parliament should also maintain or if need be reinstate the 2023 Act's prohibition on opening new inquests into legacy cases. In addition, there should be a prohibition on new public inquiries into legacy cases, which are extraordinarily expensive and very unlikely to secure new evidence. The sole route to consider legacy cases should be the Independent Commission for Reconciliation and Information Recovery, the point of which should be to determine the truth rather than to facilitate prosecutions.
- **Restore the Human Rights Act to its intended, prospective scope**. Parliament should clarify that the Act does not apply to deaths before 2 October 2000 and/or should bar claims relating to deaths before 2 October 1988, that is, is twelve years before the Human Rights Act came into force.
- **If the conditional immunity scheme is not maintained or reinstated, the law should be changed to filter prosecutions instead.** Parliament could (a) introduce a statutory certification scheme protecting those who honestly believed their use of force was justified, (b) enact a "new and compelling evidence" threshold before any reinvestigation is allowed to proceed and (c) impose a requirement that the Attorney General give her consent before any prosecution is brought in relation to actions of serving or former forces personnel on active service.

- **Be prepared to face down the Strasbourg Court.** If the Strasbourg Court rules that the UK is in breach of Article 2, for maintaining a conditional immunity scheme or for taking other action to prevent unjust treatment of those who served in Northern Ireland, including members of the SAS, the Government should engage in principled non-compliance within the Council of Europe (as it did over prisoner votes). The Strasbourg Court should not be permitted to regulate how peace and reconciliation are achieved in Northern Ireland. Withdrawing from the ECHR and repealing the Human Rights 1998 should remain options on the table.
- **Refocus priorities and resources on information and truth recovery.** If expensive inquests, criminal investigations and attempts at prosecutions that are unlikely to succeed are set aside, resources and institutional capacity could instead be redirected towards reviving the original purpose of the Independent Commission for Reconciliation and Information Recovery: investigating and producing, as far as possible, a truthful account of how a person came to be killed or seriously injured. Combined with some form of conditional immunity, such a process would maximise the prospects of witnesses coming forward to provide truthful accounts of any role they may have played. The objective would be to establish a rigorous but efficient, affordable and scalable system of information and truth recovery, rather than one that becomes bogged down in the procedural and doctrinal complexities and expense associated with Article 2 compliance.

Introduction

Between 1969 and 2007, the United Kingdom conducted one of its longest and costliest military deployments since the Second World War. Operation Banner, the codename for the Army's support to the civil power in Northern Ireland, lasted thirty-eight years and involved over 300,000 military personnel. At its heart, this was a sustained crisis of law and order – 'the Troubles' – in which the authorities attempted to subdue Republican and Loyalist paramilitary organisations, who between them killed over two thousand civilians and one thousand security personnel.[1] The Provisional Irish Republican Army[2] (IRA) was the most well-armed, organised, motivated, and deadliest of these organisations, and was responsible for the majority of Troubles-era deaths.

Much has been written about the history of this conflict and the actions of various groups and individuals within it. It is not the purpose of this report to attempt to re-tell that story in full. Instead, the aim here is to consider the actions of one particular organisation, which played an indispensable, if largely hidden role, in the effort to counter terrorist violence: the British army's elite special forces unit, the Special Air Service (SAS).

Precisely because the SAS – for reasons of operational security – operated "out of the shadows" in Northern Ireland, its role there has become the focus for various myths and assumptions – not the least of which is that this unit constituted, at best, a rogue actor, who played fast and loose with the law and legal constraints. As part one of this report demonstrates, this was categorically not the case. Chapter one situates the SAS deployment within the wider political and security context of the Troubles: it highlights the fact that the unit was deployed in aid of the civil power, to combat a sophisticated, ideologically committed, well supplied, and ruthless terrorist organisation, as part of a wider strategy that sought to contain violence in Northern Ireland, so as to facilitate a political solution.

Chapter two then gives voice to those who served. Drawing on original interviews with over a dozen SAS veterans of Operation Banner, it provides an account of the campaign as experienced and understood by the men who conducted it. These testimonies illuminate the operational realities of the SAS's role in the province: the intelligence picture of the threat posed by the IRA, the rules of engagement and legal constraints they worked under and how central they were, and the broad framework which determined how the SAS were deployed and their close relationship with the police. These interviews also outline how SAS veterans understood their impact on the conflict, including their key role in degrading the

1. Bew, J. '*Mass, Methods, and Means: The Northern Ireland "Model" of Counter-Insurgency*', in Gventer, C. W., Jones, D. M. and Smith, M. L. R. (eds.), *The New Counter-Insurgency Era in Critical Perspective* (Basingstoke: Palgrave Macmillan, 2014), 156–72.
2. A prominent feature of the militant republican movement in Ireland in the mid to late twentieth century was its propensity to fracture and split. By the late 1960s, divisions in the Irish Republican Army were beginning to sharpen over questions of tactics and strategy. One group, styling itself the Official IRA, wished to pursue a policy of class struggle and agitation along Marxist/socialist lines and was wary of escalating activity into a full-blown armed campaign. The breakaway group that adopted the title *Provisional Irish Republican Army*, with a nod to the 1916 Easter Rising and the Provisional Government proclaimed therein, was much more eager to use armed violence to, as they saw it, remove the British occupation from the six counties of Northern Ireland. The Provisional IRA rapidly became the dominant faction: the most motivated, the most heavily armed, and the most willing to use lethal force. The majority of deaths during the Troubles are attributable to the Provisional IRA. For the sake of brevity, this report, when it refers to "the IRA", is referring to the Provisional IRA.

IRA's ability to mount lethal operations, restoring civil order in areas of extreme violence where the IRA formerly operated with near-impunity, eroding paramilitary morale and resolve, and ultimately helping force the republican movement away from armed violence and towards a negotiated political settlement. These veterans' accounts speak for themselves, and they constitute a primary historical account that has been insufficiently integrated into popular contemporary discussion of the Troubles.

Moreover, what all of this underlines is the extent to which the SAS rendered the state a significant service in extremely challenging circumstances. In recovering the truth of that service, part one of this report therefore intends in part to provide a corrective to more tendentious accounts of the unit's role in Northern Ireland.

This then provides the foundation for part two of the report, which considers how SAS veterans are now being subjected to renewed investigation, inquiry, and possible prosecution for their actions during the Troubles. Chapter three examines the way in which this is being driven by the expansive interpretation of Article 2 of the European Convention on Human Rights developed by the European Court of Human Rights ("the Strasbourg Court") and applied by domestic courts. The procedural obligations imposed by Article 2, requiring the investigation of deaths involving state agents according to criteria invented by the Strasbourg Court, have been applied to events that occurred before the ECHR was incorporated into domestic law and before the current Article 2 framework was established by the Strasbourg Court in 1998, and it has been applied to a situation in which the security context was radically different from that in which [or for which] modern human rights standards were conceived. It was this Article 2 (along with Article 3) jurisprudence that was used to fatally undermine the previous Conservative government's attempt, through the Legacy Act 2023, to establish a conditional immunity scheme and to redirect legacy processes towards truth recovery and reconciliation, rather than prosecution. The current government's proposed legislative approach threatens to entrench what this paper terms Article 2 maximalism, a prosecution-first posture toward legacy issues that will inevitably place veterans, and not the terrorist architects of political violence, disproportionately at the centre of state investigations and inquiries.

Against this backdrop, chapter four examines the consequences of the state's treatment of Operation Banner veterans. Our interviews show that the damage being done to individual veterans is real and serious. Men who served with distinction in very difficult tours of duty, who acted within their rules of engagement and existing legal constraints and on the authority of army command and successive governments, now face the prospect of renewed investigation, questioning, inquiry, and possible prosecution. They are to be pursued in their old age for decisions made decades ago, and often in split-second life-or-death situations. We shall also draw attention to how the consequences of the state's current treatment of veterans extend beyond Operation Banner veterans. The

message being issued to those currently serving in special forces [and potentially in the armed forces more generally], is that lawful service undertaken at the direction of the state may, decades later, become the subject of criminal proceedings conducted under a legal structure that did not exist at the time. This has measurable effects on recruitment, retention, and operational morale for the special forces of today. A state that cannot credibly be relied on to protect its own soldiers from retrospective legal jeopardy will, over time, find it more difficult to ask those soldiers to take the risks that effective military operations, especially by special forces, require.

This report does not argue that state actors are above the law of the land, or that the deaths that occurred during Operation Banner require no accounting. But it does insist that the current approach to legacy issues is not working, and that justice is not served by the retroactive application of evolving and judicially constructed legal standards to veterans who acted in good faith within the legal and operational framework of their time. The passage of time and the demands of both justice and fairness require a different approach.[3]

Chapter five concludes the paper by setting out recommendations to address the problems that the report has noted and critiqued. This includes a call for the scrapping of the Troubles Bill 2025; limited reform of the Legacy Act 2023 (rather than its simple repeal); and the renouncement, or reform, of European human rights law (the ECHR and its domestic incorporation by way of the Human Rights Act 1998) to protect this approach. Other changes are also likely to be needed in relation to inquests and inquiries.

More generally, this chapter will reflect on the cultural and political changes that are necessary if the SAS's service in Northern Ireland is to be assessed justly and fairly, and in a way that avoids devastating consequences for the armed forces and UK national security.

3. For the sake of completeness, we note that this report only concerns the role of the SAS in Northern Ireland during Operation Banner. It is not intended to be a commentary on SAS operations in other regions, before or since the duration of Operation Banner.

Part I: The Role of the SAS in the Northern Ireland Troubles

Chapter 1: Understanding the Political and Military Context

Introduction

Whitehall departments are traditionally averse to ceding any authority to the Ministry of Defence (MOD). In return, the MOD is wary of its personnel being used to cover for any perceived failings in the preparations of other government departments. For that reason, requests for Military Aid to the Civil Authorities (MACA) have to be signed off by a quorate representation of the Defence Council: usually a minister and a senior officer within the operational chain of command delegating for the Chief of the Defence Staff.[4]

The SAS, and the other units of the UK Special Forces Group, are often deployed early in any overseas crisis, for the obvious need in such circumstances for covert action, self-sufficiency in the most hostile environments, resourcefulness in confusing situations, and the ability to see through that confusion and make clear reports of the true position. But the flip side is that the unit's aura will always attract interest, and its reputation will generate conspiracy theories to fill the void left by the normally mandated government response of "neither confirm nor deny" (NCND).

That aura arose from successful counter-insurgency operations overseas, mostly in the dissolving Empire – Malaya, Oman and elsewhere. It was later bolstered by the global televising, in 1980, of the operation to free the hostages held in the Iranian Embassy at Princes Gate, London. As usual on such occasions, the unit was swept away from the scene and back to the relative anonymity of its barracks as soon as control could be handed back to the police. Maintaining a standing counter-terrorism capacity at high alert is what all nations must now do. But the assumption had been that such a capacity would be used against foreign agents – for example, plane hijackers or the Iranian Embassy terrorists – in reactive, short-duration emergencies, where a military task is completed before control is returned to the civil authorities as quickly as possible.

For Harold Wilson to deploy the SAS within the United Kingdom in 1976, and for all four of his successors to sustain that as a continuing commitment until the end of Operation Banner in 2007, implies that the circumstances must have been considered exceptionally grave in political terms. In his seminal account of the SAS's role in the conflict, *Big Boys' Rules*, Mark Urban identifies the escalating surge of violence in south Armagh as

4. MACA is the contemporary umbrella term for armed forces support to the UK civil authorities. In the August 1969 deployment that launched Operation Banner, the Inspector General of the Royal Ulster Constabulary requested that the UK Home Secretary authorise "Military Aid to the Civil Power" (MACP), as the term was then used, and deploy troops onto the streets. Requests for such aid are signed off by a quorate representation of the Defence Council, usually a minister and a senior officer in the operational chain of command delegating for the Chief of the Defence Staff.

the trigger – in particular the Provisional IRA's massacre of ten Protestant workmen at Kingsmill in January 1976.[5] Whether that single atrocity was decisive or not, events had been generating their own momentum for some time. No government can countenance losing control of its monopoly on the use of force, and so being demonstrably unable to maintain the peace. It was to reverse this situation in Northern Ireland that many within Government felt they had no choice but to turn to the SAS.

The Context for Deployment

When British troops were first deployed onto the streets of Northern Ireland in August 1969, the expectation of Harold Wilson's Government had been that the mission would be short-lived. The rationale was that the soldiers would reinforce the civil power, supporting the Royal Ulster Constabulary (RUC), which had all but collapsed from exhaustion in the face of disorder arising from the Civil Rights Movement campaign. The hope was that the Army might restore order, so as to facilitate political reform at Stormont, site of the devolved Northern Irish government.

In the event, reforms came too little, too late. The inter-communal tension awakened by the unrest could not be so easily put to bed; and the British Government soon faced a new and more deadly enemy – a Provisional IRA demanding not the reform of Northern Ireland, but the destruction of the state and its absorption into a united Ireland – pursued through a deliberate policy of provocation.

Faced with this nascent threat, the Army took a series of steps that, viewed with hindsight, seemed only to make things worse: the Falls Curfew of July 1970, when soldiers sealed off the Lower Falls area of west Belfast for some 72 hours; the introduction of internment in August 1971; and the events of Bloody Sunday in January 1972, when paratroopers shot dead fourteen unarmed civilians in Derry.

Far from calming the province and crushing the emergent IRA, such actions proved the most effective recruiting sergeant available to the new Provisional IRA.[6] Consequently, 1972 marked the nadir of the conflict, with more lives lost in Northern Ireland than in any year before or since.[7] The same year, London was forced to embrace the political outcome it had initially sought to avoid: the suspension of Stormont and the imposition of direct rule from March 1972.

In the face of the deepening and increasingly protracted crisis, the British government began to adjust its approach to the security challenges arising from the Troubles. The first indications of a change could be seen in the establishment of the "Diplock" courts in 1972 and the Northern Ireland (Emergency Provisions) Act 1973, which specified a list of "scheduled offences" relating to paramilitary/terrorist violence.[8] This was followed by the Prevention of Terrorism Act of late 1974, passed in the aftermath of the Birmingham bombings, which allowed suspects to be detained for seven days and for "undesirables" to be excluded from the mainland.[9]

In parallel, internment was slowly phased out.[10] And from 1 March 1976 special category status was ended, and anyone convicted of scheduled

5. M. Urban, *Big Boys' Rules: The SAS and the Secret Struggle Against the IRA* (London: Faber, 1992), esp. ch. 1. On the Kingsmill atrocity of 5 January 1976: gunmen stopped a minibus carrying eleven Protestant workmen near Kingsmill, south Armagh, and shot them, killing ten; the sole Catholic aboard had been ordered to run away, and one of those shot, Alan Black, survived. The attack was claimed by the cover-name "South Armagh Republican Action Force", but the Historical Enquiries Team review (2011) and the Coroner's inquest findings (2024) attribute it to the Provisional IRA.
6. A. McIntyre, 'Modern Irish Republicanism: The Product of British State Strategies', *Irish Political Studies*, 10 (1995).
7. CAIN: Sutton Index of Deaths, http://cain.ulst.ac.uk/sutton/tables/Year.html.
8. *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (the Diplock Report) (London, 1972); *Northern Ireland (Emergency Provisions) Act* 1973.
9. H. Patterson, *Ireland Since* 1939 (Oxford, 2002), 250.
10. UK National Archives, FCO 87/446, Secretary of State to Prime Minister, 30 October 1975, Security Policy on Northern Ireland.

offences was to be treated as an ordinary criminal.[11]

Taken as a whole, the changes meant new emphasis was now placed on securing criminal convictions. The primacy of the RUC, and in particular Special Branch – rather than the Army – was underlined.[12] This approach, centred on "police primacy" – labelled "criminalisation, Ulsterisation and normalisation" – was to be the hallmark of British security strategy thereafter. The policy of successive governments throughout the Troubles was that this was not a war, but rather an internal security problem.

Even so, the Army remained on hand to support the police – particularly in those rural areas, such as South Armagh and East Tyrone, which remained deeply unsettled. By October 1976 a general assessment of the division of labour ran as follows:

> *The Army [are] adjusting to the growing emphasis on normal policing; and the RUC [are] taking more of the initiative and obtaining results … The RUC, while being encouraged to assume a more prominent role, should have the assurance of continuing support by the Army, and the Army, in turn, should be in no doubt of the continuing importance of the part they [have] to play.*[13]

On the basis of this deployment of forces, the political objective pursued by successive governments was to reduce the level of violence to the point where a political solution might emerge, one that would see some restoration of devolved government at Stormont on a more equitable basis – usually imagined to involve power-sharing between 'moderates' from the two communities. As the Labour Party's Secretary of State for Northern Ireland, Merlyn Rees, later reflected: "The hope of finding a successful solution lies with the Northern Irish people, not with outsiders in Dublin and London talking by proxy."[14]

It was against the backdrop of this calibrated picture that the Wilson government opted to announce (itself a highly unusual move) the deployment of the SAS to south Armagh in January 1976, in the wake of a particularly vicious bout of sectarian killings.[15] The Prime Minister wrote to his Irish counterpart, Liam Cosgrave, justifying the move:

> *The Spearhead Battalion has started to move today over to Northern Ireland and will be deployed in South Armagh. We need to catch a relatively small number of people on both sides, and no effort will be spared. I wanted you also to know that we propose soon to dispatch part of the special air service [SAS] who are trained particularly for surveillance and are particularly well suited for the problem we face … It is a sad start to the new year but we are utterly determined to bring matters in Northern Ireland to a happier state.*[16]

Much controversy was to surround the SAS over the following two decades. Many nationalists viewed the unit's deployment with unease, and it enjoyed a mythic reputation in some quarters.[17] When eight SAS men were arrested on the wrong side of the border on 6 May 1976, the incident generated a crisis in Anglo-Irish relations that lasted the rest of the year.[18] The British struggled to convince Dublin that the affair was an accident, a task made harder when it emerged that the men carried eleven

11. P. Taylor, *Provos: The IRA and Sinn Fein* (London, 1997), 196.
12. G. Ellison and J. Smyth, *The Crowned Harp: Policing in Northern Ireland* (London, 2000), 90.
13. UK National Archives, CAB 134/4040, Cabinet Committee on Northern Ireland, 19 October 1976.
14. M. Rees, *Northern Ireland: A Personal Perspective* (London, 1985), 354.
15. T. Harnden, *Bandit Country: The IRA and South Armagh* (London, 1999), 134.
16. UK National Archives, PREM 16/958, Message from Prime Minister to Taoiseach, 6 January 1976. Official records suggest the message was in fact drafted by James Callaghan, then Foreign Secretary, who was shortly to succeed Wilson as Prime Minister.
17. R. Rapple, 'British Misled Irish on SAS', *The Sunday Business Post*, 31 December 2006.
18. G. FitzGerald, *All in a Life: An Autobiography* (Dublin, 1991), 277-8.

weapons between them, including daggers and sawn-off shotguns.[19] [20]

The new security policy became most closely associated with Rees's successor, Roy Mason, a tough-talking Yorkshireman with a reputation as a hard-liner.[21] As Defence Secretary, it had been Mason who pushed for the Spearhead Battalion to be dispatched.[22] Like Rees, whom he replaced as Secretary of State for Northern Ireland in September 1976, Mason concluded that the constitutional question should be put "on the back burner" until the right security atmosphere had been created.[23] He was, by his own estimation, intent on harassing the IRA "with as much vigour as was possible in a liberal democracy". "We are squeezing the terrorists like rolling up a toothpaste tube", he told *the Daily Express* in 1977.[24]

And yet, to a significant extent, the unit's high-profile introduction in early 1976 cut against the grain of the policy put in place incrementally over the previous years. The deployment of the SAS was a knee-jerk response to public outcry. The failure to observe NCND – making its deployment overt – demonstrates just how political the decision was. And those in charge of strategy were initially eager to play down its wider significance. Rees, for instance, was concerned that the deployment of "the Regiment", with its fearsome reputation, had not been fully thought through in the rush to use that reputation as a deterrent. And when Airey Neave, the shadow Secretary of State, grew excited about the unit's potential, senior army officials told him "it was important to realise that the job of dealing with terrorists in the border areas was very much a long haul one".[25]

The Nature of Deployment

From the start, the SAS was deployed to pre-empt terrorist attacks and, where possible, make arrests. The deployment of the British Army's most elite special forces unit could itself be seen as a back-handed compliment to the level of lethality and capability achieved by the IRA. SAS action was taken on the basis of intelligence gathered by the security forces collectively working under the primary direction of the RUC Special Branch. (Intelligence was gathered by a range of different organisations including: RUC Special Branch itself; regular army units; and several specialist units that evolved over the course of the conflict, such as 14 Intelligence Company and the Force Reconnaissance Unit).

Like the rest of the British Army deployed to Northern Ireland, members of the SAS were required to operate according to clearly defined "rules of engagement". These were famously articulated in the "Yellow Card" that all soldiers carried. As the Army's own later analysis of Operation Banner observed:

> *The Yellow Card itself has no force in law, but seeks to reflect the law of self defence and identify the circumstances when potentially lethal force may be used. It was effectively the Rules of Engagement for most operational circumstances. It was intended that so long as soldiers adhered to the contents of the Yellow Card then they would be acting within the law; and that was proven to be the case.*[26]

19. R. Mason, *Paying the Price* (London: Robert Hale, 1999), 168-9.
20. UK National Archives, PREM 16/1339.
21. G. Wheatcroft, 'A Happy 80th Birthday to the IRA's Deadly Foe', *The Daily Telegraph*, 18 April 2004.
22. B. Donoughue, *Downing Street Diary* (London, 2005), 622.
23. Mason, *Paying the Price*, 160-72; see also M. Cunningham, *British Government Policy in Northern Ireland* (Manchester, 1991), 17-19.
24. D. Hamill, *Pig in the Middle: The Army in Northern Ireland, 1969-1985* (2nd edn, London: Methuen, 1986), 220.
25. UK National Archives, CJ4/1351, Account of a meeting between Airey Neave and John Biggs-Davison at HQNI, with the army GOC, 29 March 1976.
26. https://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf

Given the complex and changing nature of the threat that the security forces were required to counter in Northern Ireland, it was perhaps inevitable that any attempt to codify specific "rules of engagement" would generate tensions and dilemmas. Soon after its emergence, the Provisional IRA had become a serious threat. It was organised, highly disciplined and well-funded; it received assistance – including arms shipments – from external powers and overseas supporters, which made it the most heavily armed paramilitary-cum-terrorist group in Europe. And over the course of its thirty-year campaign, it showed remarkable ingenuity, devising myriad ways to inflict death and destruction.

To suppress the IRA's capacity for violence necessarily required the Army to embrace an intelligence-led, campaigning mindset – one that could understand and target the threat across its breadth and depth, as it evolved – while continuing to operate in support of the civil power.

Suffice to say, this was a context rife with potential ambiguities. As Sir John Hermon, RUC Chief Constable, 1980-89, put it, "[the IRA's] job is to murder, damage, suppress and wreck. If you are going to stop that, you don't want Boy Scouts. You want people who can stand up and shoot if they are shot at."[27] With such words, Hermon made clear that he refused to cede the monopoly of force and recognised that sometimes, IRA force would have to be met with force. So it proved.

Between 1983 and 1992 the security forces were responsible for shooting dead some 35 IRA terrorists.[28] The single most lethal episode occurred at Loughgall, County Armagh, in May 1987, when an IRA attack on the village's RUC station was countered by an SAS operation that saw the death of all eight IRA men involved.[29] This was just one of several lethal encounters between the SAS and the IRA in this period.

In acting as it did, the SAS was placed at the sharp end of the State's effort to curtail IRA violence. Its soldiers were asked to intercept armed IRA terrorists. In an ideal world, the latter would surrender when challenged; but such neat outcomes were not always possible. At the point of contact, soldiers had to assess the threat level and respond accordingly – acting in complex, multi-actor environments, in which split-second decisions were required. Their job was to neutralise the threat – to protect themselves and the wider public. Sometimes that meant shooting dead the perpetrators, with such action entirely legal under the rules of engagement that always allowed for self-defence. Those deployed understood these realities.

And it is worth underlining that successive generations of politicians who oversaw the SAS's deployment to Northern Ireland recognised all of this too. They knew the tensions that existed, and the difficulties that the SAS operators were being asked to navigate. They recognised that the unit's unique skillset was precisely what allowed it to handle the kind of situations described. And it is this which makes the latter-day treatment of individual SAS troopers all the more invidious. The people who were put on the front line of the State's effort to contain the IRA – and asked to manage the ambiguities and tensions this involved – are now being asked to carry all the liabilities, with little sense of support from the

27. Sir John Hermon, *Holding the Line: An Autobiography* (Dublin: Gill & Macmillan, 1997); interview, *The Irish Times*, 1997.

28. Taylor, *Brits*, 254.

29. The eight IRA volunteers killed at Loughgall on 8 May 1987 were the organisation's largest single loss of the conflict; a passing civilian, Anthony Hughes, was also shot dead and his brother wounded, a fact central to the later Strasbourg litigation.

contemporary political classes.

There is no definitive, official record establishing the precise number of paramilitaries killed by the SAS across the Troubles as a whole, nor the number of civilians who were inadvertently killed in the course of SAS operations. However, a reasonable estimate, based on academic scholarship on the conflict, is that approximately 40 paramilitaries were killed by the SAS over the course of its deployment, while six civilians lost their lives.

Nothing in this report is intended to diminish the tragedy of those civilian deaths. All occurred in the context of mistaken identity or in operations involving exchanges of fire between paramilitary organisations and SAS personnel, often during fast-moving and chaotic confrontations. On one occasion, the death of a civilian mistaken for a paramilitary led to the prosecution of two soldiers, who were subsequently acquitted. There was never any credible suggestion that civilian casualties were the result of deliberate action on the unit's part.

Critics of the SAS (and the security forces more generally) have long claimed that the British were, by the 1980s, operating a "shoot to kill" policy in Northern Ireland. Analysis of the Sinn Fein newspaper, *An Phoblacht-Republican News*, for example, shows the Republican movement deliberately conflating RUC, SAS and Loyalist paramilitary uses of lethal force and placing all under a state-sponsored "shoot-to-kill" banner. Yet such claims have been tested – including in court (see below) – and found wanting.

Within Northern Ireland every discharge of a weapon led to an investigation. As chapter two shows, interviews with SAS veterans reveal a widespread understanding and acceptance that any use of lethal force would result in such an investigation, ultimately to include the possibility of a charge of murder if they were found to have acted unjustly. Many pointed out that they welcomed this oversight: it made operating on UK soil, among and at times against UK citizens, more palatable; it reinforced the primacy of the police; and it protected soldiers against the charge that they had been deployed under a de facto "shoot to kill" policy. Still, the accusation as to the existence of such a policy has continued to be levelled.

The Legal Realities: Kill or Capture?

On 4 May 2001 the European Court of Human Rights at Strasbourg delivered four linked judgments – *McKerr*, *Kelly and Others*, *Shanaghan* and *Hugh Jordan*, collectively the "*McKerr group vs UK*" – arising from killings variously attributed to the army and SAS, the RUC, and alleged loyalist collusion, in effect inviting a composite verdict on the "shoot to kill" charge. The Court did not find that any such policy existed. In *Kelly and Others v United Kingdom* – which examined the Loughgall case – while it found that the United Kingdom was in breach of the procedural limb of Article 2 (the duty to investigate deaths effectively and openly), it made no substantive finding that the shooting of armed terrorists had been unlawful.[30]

Arguably the most high-profile case to raise questions about the

30. Kelly and Others v United Kingdom (App. no. 30054/96), ECtHR (Third Section), judgment of 4 May 2001. The case was one of four linked judgments delivered that day - with McKerr v UK, Shanaghan v UK and Hugh Jordan v UK, the so-called "McKerr group" - arising from killings variously attributed to the army/SAS, the RUC and alleged loyalist collusion. In each the Court found a violation of the procedural limb of Article 2 (the duty to conduct an effective and open investigation), not a substantive finding that the killings of armed terrorists were unlawful.

SAS's use of force was Operation Flavius, the Gibraltar operation against a Provisional IRA bomb team, which reached the Strasbourg Court as *McCann and Others v United Kingdom*. It has been much scrutinised because the three IRA members turned out to be unarmed and, in all likelihood, on a reconnaissance mission when they were confronted and shot. By ten votes to nine the Court found a violation of Article 2 – but located this in the control and planning of the operation, not in the soldiers' conduct. The Court accepted that the soldiers honestly believed lethal force to be necessary, while ruling that the authorities should have arrested the suspects at the border and made greater allowance for the possibility of mistaken intelligence. Crucially, it rejected the allegation that the killings amounted to a premeditated execution or a tacit shoot-to-kill plot.[31]

Perhaps the most persistent question posed of SAS operations – partially reflected in the Strasbourg judgment on Gibraltar – is this: if the SAS was deployed on the basis of intelligence, then surely that intelligence could have been used to arrest the individuals concerned and prevent the terrorism in advance, rather than to situate an armed response that might end in lethal force?

It is a serious charge and deserves consideration. But it is fundamentally misconceived; for it fails to draw the distinction between intelligence and evidence. Intelligence is *not* evidence. It cannot support a criminal prosecution if its source cannot be revealed; yet it would be absurd to suggest that a state confronted with a real terrorist threat should confine its intelligence-gathering to information admissible in evidence. The ordinary criminal law does not allow members of the public to be arrested on intelligence alone, nor should it. A system that did so, taken to its logical conclusion, would involve the internment of any and all suspects revealed by intelligence – which had been tried, and proved both ineffective and counterproductive. In this context, one is left with the alternative of using the military to try to arrest individuals when they are in the commission of a criminal act. That is where the evidence-based and the intelligence-led approaches combine: with troops on the ground, an act could be stopped, while the evidence to prosecute would exist if the perpetrators surrendered.

This is precisely the manner in which the SAS was deployed. Its job was to stop imminent terrorist attacks – ideally by arresting individuals engaged in terrorist activity at the point at which they had incriminated themselves through their actions. Often (and particularly as the 1980s went on), this meant dealing with heavily armed individuals; perforce, therefore, this required the SAS themselves to be armed and ready to use their weapons.

In this respect, allegations that the SAS was deliberately and systematically 'trigger happy' fail to take into account the very situation that had brought the unit into Northern Ireland: that the use of the criminal law to stem the tide of terrorism was proving insufficient to protect the ordinary citizen in the face of a heavily armed, sophisticated paramilitary organisation. The SAS were deployed to stop the IRA from carrying out their often-

31. McCann and Others v United Kingdom (App. no. 18984/91), ECtHR (Grand Chamber), judgment of 27 September 1995, (1996) 21 EHRR 97. The Court found a violation of Article 2 by ten votes to nine, located in the control and planning of the operation; it accepted that the soldiers honestly believed lethal force to be necessary and rejected the allegation of a premeditated execution or tacit "shoot to kill" agreement.

murderous plans, ideally by arresting them, but by incapacitating them if need be. That meant establishing tactical superiority, bringing specialist firepower capability, and being ready to use it if necessary. Where possible, arrests were made, but in several instances, this was deemed not possible, and people were shot dead. The fact that those deaths occurred does not, in and of itself, mean that SAS actions were contrary to either the law, or to their duty to support the civil power; rather, they simply reflected the complex operational challenges that existed in Northern Ireland.

Furthermore, a proper understanding of these dynamics allows us to explain why it was that the SAS grew steadily more lethal as the Troubles continued – with a surge in the number of IRA volunteers killed between 1987 and 1992. Critics of the unit again point to this intensification as further evidence that a decision had been taken to escalate into a systematic 'shoot to kill' policy. Again, though, such narratives fail to appreciate the context. From the mid-1980s, the IRA had been bolstered by its receipt of over 150 tons of weaponry from Col. Gaddafi's Libya – a weapons haul that included Semtex, rocket-propelled grenades, flame-throwers, surface-to-air missiles, thousands of Kalashnikovs and millions of rounds of ammunition. This arsenal was put in the service of a marked escalation in IRA activity, including what the IRA dubbed its own 'Tet Offensive' – an attempt to create a 'liberated zone' along the border. It was to this end that they began blowing up rural police stations. The first to be destroyed was at Birches, County Armagh[32]; it was the effort to replicate this success that brought about the aforementioned confrontation at Loughgall.[33]

What this underscores, then, is the extent to which the intensification in SAS action was merely a reflection of the IRA's own attempt to escalate its campaign. It could scarcely be otherwise. The nature of the SAS deployment was such that tactical initiative lay with the IRA, not with the SAS. The unit only went into the field in order to stop planned IRA operations. But when called upon to do so, they made sure to bring their superior training and tradecraft to bear.

To reflect on this further, it is perhaps useful to put oneself in the position of the commander of one of the central intelligence units of the security establishment – i.e. one of the three Tasking and Coordination Group (TCG) headquarters, operated by the RUC, which collated intelligence and tasked the army units accordingly. You have some intelligence about a planned IRA operation, but it is only partial; you may know who the target is, but not when, and not exactly who will be involved. You do not have the detail of the entire IRA operation and how it will be mounted. What do you do?

Are you prepared to send security forces into the middle of an IRA operation as it is under way – where you cannot know the position or status of every armed individual – on the optimistic assumption that, on being confronted, those individuals will collectively lay down their weapons and surrender? Would you expect that of, say, the East Tyrone Brigade, whose posture was known to be one of attempting to aggressively dismantle and kill state security infrastructure and personnel?

32. https://www.rte.ie/archives/collections/news/21221692-ira-bomb-ruc-stations/

33. For the best account of all this, see Moloney, *A Secret History*.

In most cases the answer to the question "what do you do with the intelligence?" was to set up a series of observation points around the assumed target and wait to see what was revealed. Often the answer to this was, "not a lot". In some cases an attack was prevented with arrests – the terrorists did drop their weapons when challenged. In some cases an attack was stopped with lethal force, and deaths ensued. A precise breakdown of such operations by outcome is hard to come by, since – in the prevailing climate – there seemed little point in cataloguing the many occasions that came to nothing. But anecdotal evidence (see, for instance, chapter 2) suggests that SAS operations that ended in arrest far outnumbered those that resulted in deaths (which is again, ironically, perhaps why those instances that did see deaths loom so large in popular historical memory).

To return to our fictional commander, if the assumed purpose of policy was to keep the pressure on the IRA, why would he or she *not* conclude that – in the absence of any other way of protecting the target of a terrorist operation – some form of surveillance and the deployment of a highly skilled, quick-reaction force, able to capture or, if necessary, kill the terrorists in the act, and remove them from circulation, was the best that could be done?

Of course, there *were* many instances of clever deflection being used to spook an IRA active service unit and put it off, especially in urban settings: an overt but routine-seeming police presence, or a staged car accident to block a route and force the abortion of a planned attack. But what if such ruses failed? How then to deal with an armed and active IRA unit proceeding to launch an attack?

In all cases, the location and the likely impact on the local population were considered. Was that always perfect? No – but could it ever be, in a complex theatre where chance and contingency always had a part to play?

The IRA was a lethal, ruthless foe and Northern Ireland was as demanding an Area of Operations as any the SAS faced. Reading all the evidence and listening to the testimony of the SAS veteran witnesses (see chapter 2), it is clear that the Troubles at times amounted to a situation of war – but not one where the law of armed conflict applied, or where enemy forces could be designated as combatants and targeted as such.

Terrorists only became de facto combatants once they revealed themselves in the act of terrorism. This loss of the tactical initiative – which was, in effect, wilfully handed over to the IRA – formed part of what made it especially dangerous. The transition between these two states was also fraught with legal and political risk – a risk that SAS troopers had to manage in the moment. But as the rest of this report suggests, this was a challenge that they embraced willingly – and for the most part handled admirably.

Conclusion

By the early 1990s the IRA's capacity for "war" had been curtailed. According to the former RUC Detective Superintendent Ian Phoenix, by 1994 eight out of ten operations planned by the IRA's Belfast Brigade were

being thwarted by the RUC.[34] No British soldier died on duty at the hands of the IRA in Belfast after August 1992, and the last major commercial bombing in the city came in May 1993.[35] In the words of the one-time informer within the IRA, Sean O'Callaghan, "[Gerry] Adams and [Martin] McGuinness had looked down the road and seen slow defeat staring them in the face".[36]

In bringing this state of affairs about, few can doubt the important contribution made by the SAS. The unit was deployed to Northern Ireland during the premiership of Harold Wilson, and kept there by the following four Prime Ministers, because of a serious *raison d'état*: the authority and legitimacy of the state were at stake.

That is the context in which the millisecond decisions over the resort to lethal force, made by SAS troopers in contact, should be judged. As the next chapter will show, the evidence suggests that those troopers knew full well the seriousness of what they were engaged in. It suggests that, in the great majority of cases, they balanced multiple requirements – to protect the targets of terrorism, to deal with threats firmly but lawfully, and to avoid collateral damage – in circumstances where such equations rarely gave clean answers.

34. J. Holland and S. Phoenix, *Phoenix: Policing the Shadows* (London: Hodder and Stoughton, 1996), 391.

35. *Ibid*., 393.

36. S. O'Callaghan, *The Informer* (London: Bantam Press, 1998), 337.

Chapter 2: SAS Veterans in Their Own Words

The SAS Role in Northern Ireland in Operation Banner

In order to better understand the nature of what the SAS did during the Troubles in Northern Ireland, this project undertook to interview a number of unit veterans, who agreed to speak on condition of anonymity.[37] The soldiers thus interviewed served across several decades of Operation Banner, from the early 1970s to the 1990s and before the 1994 Provisional IRA ceasefire and 1998 Belfast/Good Friday Agreement. Despite the span of time and the variety of roles they occupied, a consistent picture emerges from the interviewees of how they understood their purpose and role in Northern Ireland. That picture can be summarised in a phrase used repeatedly across the transcripts: support to the civil power (see chapter 1 for more on this).

The SAS, in the understanding of those who served in it, was a specialist instrument placed at the disposal of the Royal Ulster Constabulary (RUC), deployed selectively based upon intelligence supplied by RUC's Special Branch, in order to perform tasks that lay beyond the capacity of ordinary policing.

The most emphatic point of consensus across the interviews is that the soldiers did not conceive of themselves as participants in an armed conflict in the conventional sense. Soldier C, who had served in Northern Ireland in the regular army before joining the SAS, was unequivocal: "By 1975 it [SAS deployment] was definitely in support of a police operation, of police primacy. The whole thing was aid to the civil power. It wasn't armed conflict. We were most definitely in support of a policing operation. That's how we saw our role." Soldier L offered a similar formulation: "It was clear to me we were supporting police operations, not soldiers engaged in a declared armed conflict in the conventional sense." Soldier H put it most simply: "Our role was always to aid the civil power, to restore and maintain order."

Soldier B's response reflected a degree of ambiguity in the question of whether the SAS were engaged in a policing support role or in a low intensity armed conflict, suggesting to us that "the answer is both". But overall, Soldier B effectively came down on the same side as his colleagues, saying that their role was: "more supporting the police operation overall, but shaped by the political nature of the conflict." Soldier I described how this understanding was instilled from the very beginning of his service: "It

37. The methodology for the interviews was as follows. Mr. Stringer was the lead interviewer, and he shared an agreed list of questions, agreed with the other authors, with the selected participants. The names of the participants were not known to the interviewer or the other authors, but were verified through a trusted intermediary who was familiar with the names and ranks of the participating soldiers.

The list of questions sent to each of the participants was deliberately framed so as not to go into particular operational details, including details about specific uses of force. Instead, the questions were framed at a higher level of abstraction. The focus was on the role of the SAS in Northern Ireland, the reasons for their deployment, the participants' assessment of its impact in broad strategic terms on the conflict, and their concerns about the current treatment of the unit and other veterans by the UK Government.

That was the focus of the questions sent to each of the participants. The other authors had access to the recordings and transcripts of the relevant interviews for the duration of the writing of the paper. Upon completion of the paper, and with the permission of the participants, all recordings and transcripts were deleted after verbatim transcripts had first been prepared and relied upon in the report.

was very much in support of the police. That relationship came through from early days, that you were going to work with the police and almost for the police. That underwrote rules of engagement, the yellow card, and legal constraints." He added, with some emphasis: "At no time did we think we were operating outside our rules of engagement or the law."

Some soldiers suggested that while their first and main purpose was to act as an aid to the civil power, they also had a strategic political role to play, and that they were an important policy tool for the Government. While the soldiers consistently described their role in terms of bolstering police primacy, most of them also recognised that their operations served a broader political purpose: namely, creating the conditions under which a negotiated political settlement to the violence might become possible. Soldier L described how this understanding was communicated through the command structure. He asserted that "Our operations were part of a political strategy. There needed to be both carrot and stick to shape IRA behaviour; to show they couldn't win and that there were costs to continued violence." (For more on this see below).

Why the SAS and Not Ordinary Police?

If the operation was fundamentally one of policing, an obvious question that might arise is why the SAS was required at all. Why could the RUC not handle the IRA's terrorist activity? Chapter 1 has already explored this issue in some detail, and when this question was put to the interviewees, the soldiers' answers converged on two points. First, the severity of the threat posed by groups like the Provisional IRA and Irish National Liberation Army, and second, the existence of specialist skills that neither the regular army nor the police could replicate.

On the threat level posed, the soldiers unanimously characterised the Provisional IRA as qualitatively different from organised criminal activity. Soldier C put it bluntly: "The Provisional IRA had declared a war. They were fighting a war and were not scrupulous, any means possible: killing, bombing. We took them very seriously." Soldier A described the IRA's most active members as "heavily armed and highly motivated," noting that a small group of members serving as the actual trigger men and bombers were "sometimes psychopathic, and well-equipped with military-grade weapons and explosives, often operating from safe havens."

Soldier J suggested that while, in an open fight, the IRA were no match for the training of the SAS, they nonetheless "had respect for their ability to create surprise attacks. Surprise was their advantage. They could intervene unexpectedly; they were a challenging adversary." It was precisely this level of threat, the soldiers argued, that made specialist intervention necessary and "more robust tactics than civilian policing."

In addition to the high civilian death toll caused by IRA activity, the security forces themselves also suffered heavy losses. With respect to the threat posed to the RUC, Soldier B described how "the threat level became high" and he could "recall around 300 RUC officers were killed during that period [of Operation Banner]". Soldier M noted that

the British army had "lost more people" during the Operation Banner tour than most post-WW2 operations.[38] Part of what made the IRA so dangerous was the extent of its external support and supply network. Several soldiers drew attention to the organisation's access to weapons, explosives, and funding from abroad, which gave it a material capability well beyond what a purely domestic terrorist organisation might have assembled. Soldier B noted that "the IRA had substantial external suppliers of weapons and Semtex — from Libya, Spain" in addition to "funding and supply from the USA." Soldier C corroborated the Libyan connection from personal experience: "When I was in Iraq I worked with a Jordanian editor who had seen Libyan propaganda photos, Gaddafi supplied weapons to the IRA and there were rumours of training." The presence of external funding and supplies of weaponry gave the IRA a destructive power and capability far exceeding ordinary criminal enterprises.

Rules of Engagement and Legal Constraints

The starting point, on which every soldier interviewed was agreed, was that SAS operations in Northern Ireland were conducted under ordinary British law. There were no special rules or parallel legal framework that applied to the regiment. Soldier A stated: "The legal basis for force was the same as for anyone in the UK. A person may use reasonable force in the circumstances to prevent a crime or arrest a suspect. The 'Yellow Card' was a simplified guide to that law, not the law itself." Soldier H confirmed that this applied across the board: "There were no special rules of engagement unique to us; the yellow card and ROE applied consistently across regiments." Soldier I, who served across multiple tours spanning both the regular army and the SAS, described how this understanding was present from the very beginning of his service: "It was very much in support of the police. That relationship came through from early days, the methodology that you were going to work with the police and almost for the police. That underwrote rules of engagement, the yellow card, and legal constraints." Soldier I was unambiguous that "at no time did we think we were operating outside our rules of engagement or the law."

As described in chapter 1, the Yellow Card was the practical instrument through which the legal framework was communicated to individual soldiers. It was a short document issued to all servicemen that summarised the law on the lawful use of force, and when soldiers might be able to use force. Its status was described in consistent terms across the interviews. The Yellow Card was not the law in itself, but a condensed practical guide to the legal standard of reasonable force. Soldier A was careful to maintain the distinction that "the yellow card illustrated the law but was not the law". Soldier G similarly said that the Yellow Card gave "guidance on what was reasonable; we learned the legal standard 'reasonable' in context." The emphasis placed on the Yellow Card in training was, by every account, considerable. Soldier H described a pre-deployment training regime in which the card's provisions were relentlessly reinforced. He noted how

38. British losses were heavier in the Korean War.

> *"Training lasted about eight weeks. Throughout, the rules of engagement were constantly reinforced: weapon use is the last resort. Intelligence and planning aim to avoid needing to use weapons. If there is truly no alternative, you can use weapons to protect yourself or others. The yellow card was drilled into us and reminded on every set of orders. Interpretation wasn't left to the individual; it was explicit: if the conditions for weapon use did not apply, using a weapon could be a criminal offence. That was embedded in training and the special forces environment."*

Soldier I described a similar experience, with the additional detail that the card's provisions were physically present in the environment where soldiers lived and worked:

> *"The rules of engagement never changed. I remember when I first did my tour at 18, they were a mouthful and hard to remember. We literally used to put the rules under our beret liners and read them because they were complicated. From my first tour to my last, the details were the same. The rules of engagement were heavily weighted against using lethal force, shooting was the last resort, but they still enabled the task. In highrisk operations they sometimes sat on the edge of what was workable and created as many problems as they solved. I ran training for the regiment for several years after my last tour. The yellow card was part of training: lessons on it, pinned up everywhere in barracks, briefing rooms, corridors. People were made very aware of it and many could nearly recite it."*

Soldier A's account of the training regime stressed the same point. He recounted that from "day one SAS personnel knew they operate under UK law. Training reiterated that you are still under British law; you cannot shoot people without legal justification. Counterterrorist teams practiced constantly and were reminded to operate within the law. Lectures covered legal limits and how to prepare accurate statements postincident. The yellow card illustrated the law but was not the law."

Soldier H described the Yellow Card as "our bible. It was amended over time to reflect evolving threats, but adherence was consistent. Use of weapons was a last resort; the emphasis in training was detain and arrest where possible." The legal framework shaped not only how soldiers were trained but how operations were planned. Soldier A described the commander's responsibility in terms that locate legal defensibility at the heart of the planning process, noting how commanders "had to plan operations to avoid putting men in positions where they might have to use unreasonable force. We planned contingencies so any force used would be legally defensible." Soldier D, who operated in the mid-1990s, similarly said the "operations were planned with a sensitivity I've rarely seen. We trained on legalities and processes". Operations that posed unacceptable risks to life were stood down rather than pressed ahead. Soldier H was explicit about this, noting that if an "operation posed unacceptable risk to the public, to us, or to other forces, we would stand it down for another day, knowing the target would re-emerge."

Soldier L described the rules of engagement as:

> *"fundamental. The core principle was that you do not fire unless your life, or someone else's life, is at risk and there is no other way to stop the threat. That was the essence of the yellow card and training emphasized precision and control. Training stressed post-incident procedures and forensic requirements, doing things properly after an incident was a major part of the training profile."*

Several soldiers, however, were candid about the tensions and difficulties built into the legal framework as it applied to the operational reality they faced. The most fundamental of these was identified by Soldier B, who noted that:

> *"Troops underwent rigorous training before deployment, including explanation of the yellow card. The yellow card was woefully inadequate in many respects. The key problem: you were operating on UK soil without combatant immunity like under the Geneva Conventions. The yellow card emphasized warnings — 'stop, put your hands up' — but against armed, determined opponents with firearms, RPGs or petrol bombs, that's often a non-starter. In split-second situations, the next escalation is imminent danger, and you must act. The absence of combatant immunity and the constraints of UK law (rather than the law of armed conflict) made things legally and operationally complicated."*

Soldier C described with equal candour the tension that could be created between the card's provisions and the speed of events on the ground:

> *"Everyone had done Op Banner tours and had the yellow card drilled into them. In an ideal world you'd give a warning, but in fast-moving situations there's no time. We knew what it said, but you had to match it against situations where you had seconds between a movement and a glimpse of a weapon. It wasn't something we spent a lot of time worrying about; we expected to be pitched into fast, high-risk situations — often on the fringe of the yellow card."*

Despite the tensions they might face in adhering to the Yellow Card, when force was used, the soldiers were in no doubt that it had to be legally defensible. Soldier G described the standard that applied when IRA members were encountered in the act. He said that "We were confident in the hard arrest scenario: if intelligence showed hooded, armed terrorists likely to act, forceful response was reasonable." Soldier E stated the imminent threat principle with equal clarity. Soldier E noted that "the Yellow Card set the ROE, but when a clear imminent threat existed, you acted to prevent loss of life. The IRA didn't operate to the same constraints, we knew what the threat looked like and acted accordingly." Soldier A was categorical about what the use of force was and was not for. He confirmed that there "was no 'shoottokill' policy; force was a tool to effect arrest or prevent crime." And Soldier I surmised that "We were told what to do, it was legal at the time, we followed the yellow card and were cleared."

SAS Operations Against the IRA

On the question of how the SAS conducted its operations against the IRA, a clear operational template emerged from the interviews. SAS operations were intelligence-led, police-directed, and oriented toward

the arrest of terrorists and disruption of serious terrorist operations. The SAS was a specialist unit deployed selectively, at the direction of RUC's Special Branch, to perform high-risk arrest operations against armed and dangerous opponents, operations that could and sometimes did result in lethal force, but which were designed, planned, and executed with arrest as the primary objective.

Every soldier interviewed was emphatic that SAS operations were intelligence-led from start to finish. Without good intelligence, there were no operations. Describing the basic architecture of the system, Soldier A noted that "Special Branch handled sources and technical collection and passed intelligence to a Tasking and Coordination Group (TCG). TCG then tasked police and military units. As a troop commander my job was to take the TCG briefing and plan operations around it. I accepted that Special Branch or TCG might know more than they told me; I planned with what I was given." Soldier M described how this structure developed over time and why it mattered: "There were many incidents prevented because of SAS involvement. With the TCG introduction, the intelligence agencies developed sources and then determined if the SAS should be involved. The process was iterative, and approvals for operations and personnel numbers required senior sign-off." During Operation Banner, operations were not self-generated by the SAS. Soldier C noted that "We took tasking from Special Branch".

The chain of authorisation for an SAS operation extended well above troop level, and required sign-off from higher authority personnel. Soldier L noted that "higher-level or noisier operations were briefed up through brigade to GOC [General Officer Commanding] and possibly to government; political leaders and intelligence chiefs were responsible for those strategic choices, not the soldiers on the ground." Soldier K confirmed that formal approval processes governed all operations, with the most significant operations being approved at a higher political level, noting that "When an executive action was necessary against an active service unit, approvals were cleared through GOC and the Chief Constable. Most deployments resulted in nothing; some resulted in lethal contact when the threat was genuine."

The operational concept that appears most frequently across the interviews is that of "hard arrest", a term used by the security forces that several soldiers found imprecise or unsatisfactory but which they thought best summarised what they actually did. Soldier A explained it as the ability to intervene in terrorist operations at a point of high payoff and high risk, often requiring potentially lethal force, based on good intelligence from Special Branch, to arrest suspects while committing serious crimes. In other words, intervening to prevent IRA personnel from committing a crime at the point of, or threshold of, its commission.

Soldier H was careful to distinguish hard arrest from any intention to use lethal force. The term 'Hard arrest', he explained,

> *"ultimately seeks to detain and arrest the person committing criminal acts, that*

> *was always the aim. There was never a hidden agenda to kill. Often there was simply no opportunity for surrender: they [the IRA] were engaging to murder within seconds or had already started exchanging fire, placing others at risk of death or serious injury. If there was an opportunity to detain and arrest, we took it, we did so on many occasions. We detain; the police perform the arrest. Hard arrest refers to the detention under difficult circumstances, not to police arrest procedure."*

Soldier G offered a detailed account of what the concept entailed in practice: "I rail against the simplistic term 'ambush', it's misleading. We adopted the concept of 'hard arrest' which better described what we did: deploy where intelligence indicated activity and be ready to act across the spectrum, from surrender to lethal engagement." He continued: "Intelligence gives you a reasonable idea that an ASU (IRA unit) will be out with a target; you deploy within a capability box to encounter them. Operational command and all ranks had the authority to call action if they saw it. It wasn't linear, everybody had to be conditioned to act because you never knew exactly what would happen. The term captures the full range of action from surrender to lethal engagement."

One of the most consistent themes across the interviews is the insistence that the SAS conducted far more arrests than shootings, and that this fact is systematically ignored in public debate about the unit's role. Soldier I suggested that the "ratio of arrests to shootings was probably around ten to one in favour of arrest. The 'shoot to kill' narrative is fiction."

Force, when it was used, was a response to the immediate situation rather than a predetermined outcome. Soldier G described the conditions under which lethal force became legally and operationally necessary. He said that "We were clear about reasonable force: if someone in the dark presented a weapon suddenly, a lethal response was legally and prudently reasonable." Soldier K was equally clear that lethal contact, when it occurred, reflected genuine threat rather than design. He noted that "Often nothing happened, but sometimes contact resulted in people being shot because they represented an immediate, lethal threat. That decision-making fitted within the Yellow Card and British law. Critics sometimes crudely suggest stage-managed outcomes, but in reality operations were messy and dynamic. We arrested more people than we shot."

The question of why suspects were not arrested in their homes before they armed and deployed was one that several soldiers addressed directly. Soldier G's answer captured the operational dilemma:

> *"Arresting a suspected terrorist in their bed would often be impossible without an arrestable offence and would risk exposing intelligence sources. If you go early, you might prevent a crime, but the consequence could be losing the source and making future operations impossible"*

Soldier G said that the timing of an arrest "was critical: arresting too early might prevent a crime but risked exposing sources and training the adversary to change tactics, possibly leading to more casualties. The decision belonged to police intelligence".

A similar rationale for this approach was also articulated by Soldier A, who said that "arresting them in the act allowed stronger prosecutions (e.g., attempted murder)" instead of less serious and harder to prove offences like conspiracy. Soldier L noted that the option of arresting terrorists before they embarked on an action was complicated by the fact that "intelligence is rarely perfect. Even when you think you have it, it can be incomplete or misleading". Moreover, arrests taken outside the immediate context of apprehending an operation require evidence, and "presenting evidence can expose sources and destroy key advantages." Sometimes, Soldier L suggested, the "only practical way to prevent an imminent lethal act was to deny the organisation [the IRA] the ability to act by having a military capability able to deliver decisive effect. There were many occasions where operations were police-led and non-lethal methods were successful, but where intelligence didn't allow a safe evidence-based arrest" the option of a hard arrest "might be a political decision."

Post-Incident Procedures

The accounts of the soldiers build a consistent picture of what happened in the aftermath of any operation in which weapons were discharged or lethal force was used. Across different tours, different decades, and different roles within the regiment, they describe a process that was formalised and legally conscious. Soldier A described the process that followed a discharge of firearms in the following terms:

> *"weapons were seized, soldiers were removed and given a 24hour 'soak' period before detailed police interviews. Initial statements were often brief, asserting why the action was lawful. After the last shot the commander took verbal accounts from soldiers before handing the scene to police. The system created an evidential break between immediate operational command and later formal statements."*

Soldier I provided an account of what the post-incident process felt like from the perspective of an individual soldier who had discharged his weapon:

> *"If a weapon was discharged…Lawyers, CID/RUC officers and forensic teams would be involved. You'd be interviewed and issued an identifying number; everything from then on was handled under that reference. Even if you didn't fire your weapon, you were interviewed because you were part of the picture. These debriefs were detailed — I once gave a fourhour statement. The interviews were conducted by senior CID officers with an army lawyer (or your lawyer of choice) present. If a weapon hadn't been discharged and it was a hard arrest, the process was similar but less intense."*

Soldier H's account, while briefer, corroborated the same essential structure:

> *"After every operation we conducted a postoperation debrief: what happened, what went well, what could be improved. Debriefs refine future operations. If*

an incident involved discharge or fatality, there would be further investigation: you are usually interviewed by a police officer so a statement in your words can be taken and signed, which may be used in court if required."

Soldier L added detail about the logistical and legal support that was mobilised in the immediate aftermath of an incident. Post-incident procedures, he stated, "were standard and well documented in Army and legal training. All weapons were handed over; that could render a unit operationally inactive temporarily, but it was necessary. Flying lawyers (lawyers dispatched to the scene) would attend; there was an immediate debrief, and then a formal debrief. Weapons and evidence were forensically examined. Ensuring these procedures were done properly was a significant training effort." Soldier K's account situated this post-incident process within the broader legal framework that governed the campaign as a whole, confirming that in the "event of contact or death there would be full forensics and witness statements within 24 hours, and potentially a coroner's inquest. Duty of care and training for handling these procedures developed over time."

The Impact of SAS Operations on the IRA and the Wider Conflict

On the question of what SAS operations actually achieved, the interviewees' assessments converge on a similar conclusion: namely, that the sustained pressure exerted by the SAS, in combination with Special Branch intelligence and the broader security apparatus, played a material role in degrading the IRA's capacity to operate, eroding its internal cohesion, and ultimately pushing it toward the negotiating table.

The most consistent effect described across the interviews was deterrence. The mere presence of the SAS in the province, and the knowledge that it might appear at any time and any place, constrained the IRA's freedom of action in ways that went well beyond the outcomes of individual operations. Soldier J asserted that we were a "very effective deterrent. SAS operations curtailed the IRA's freedom to plan and execute attacks because they never knew where we might appear." Soldier H described the same effect in terms of how it shaped IRA behaviour at the operational level, noting that "the presence of a capable special forces element made IRA operators feel they had to adapt; they preferred larger, protected operations. We were a deterrent in that sense. Intelligence capabilities were critical on both sides, but our skills added pressure and made them look over their shoulder."

Soldier I described how this deterrent effect could ripple outward from a single successful operation to suppress activity across the province. He noted that when "we had a big success in a rural area, there might be no incidents in Belfast for two weeks, they knew we were out. The thought of us being there affected them tactically." Soldier L extended this analysis to encompass the effects of SAS operations on individual IRA members. He argued that "Physically removing some very dangerous individuals likely

saved lives; the psychological effect across the organisation" was also important "Overall, our impact was both physical, removing dangerous actors, and psychological by amplifying caution inside the organisation and shaping behaviour toward negotiation."

Beyond deterrence, the soldiers described a range of more specific tactical effects that SAS operations produced within the IRA's structure. One of the most striking of these was the tendency of successful operations to trigger internal security reactions within the organisation itself. Soldier K claimed that successful "actions often triggered internal security reactions inside the IRA, sometimes causing them to shoot each other and disrupt their own intelligence flows." Soldier F similarly noted that "ops created internal pressure and suspicion within the IRA, contributing to infighting and mistrust."

Several soldiers argued that the cumulative effect of their operations helped to move Republicans away from the idea they could achieve their political aims through armed violence. Soldier C argued that "the Provisionals had been brought to the negotiating table partly because they were riddled with informers and had internal factions drained of motivation and morale. Special Branch, the SAS, and others contributed to that pressure."

Soldier D suggested that the SAS managed to dent the IRA's ability to engage in lethal operations, which facilitated the move toward a political solution. He suggested picturing

> *"violence on a vertical axis and time on a horizontal axis. When violence is above a certain level, talking stops — you can't negotiate. When it drops below that level, the 'talking shop' can proceed. The goal of our operations in Northern Ireland was to reduce violence below that threshold to sustain negotiations. Use of force was selective and designed to remove the capability that threatened the peace process."*

Soldier G offered a longer historical perspective on how this dynamic played out over the full span of the conflict: "From about 1986–87 we were in the end game: attrition, better intelligence, arrests, and court processes constraining the IRA. Ultimately the IRA ran out of options and negotiating became more likely; Adams steered Sinn Féin toward political channels. I think security pressure forced consideration of negotiation." Soldier I similarly suggested that the SAS's "successes toward the back end of the Troubles contributed to bringing people to the table; combined military pressure and political/legal pressure helped drive talks."

The most emphatic statement of this position came from Soldier F, who drew a link between the regiment's operations and the Good Friday Agreement itself. He claimed that "without our continuous operations and successes there would have been no Good Friday Agreement, in my view. Our successive operations pushed the IRA, and consequently Sinn Féin, toward the negotiating table. Combined with other intelligence agencies, the SAS's impact was significant in bringing them to negotiations."

Part II: Retrospective Judicial Over-reach and its Consequences

Chapter 3: The Pursuit of Veterans through Article 2 of the ECHR

Introduction

During Operation Banner many soldiers and police officers took operational decisions involving the use of force — in some cases split-second, life-or-death decisions — in conditions of acute danger. These decisions were made under the command structures and legal frameworks of their time, and those who used lethal force were subsequently investigated, sometimes prosecuted,[39] and in many cases either formally acquitted or cleared by the investigative processes then available. Several decades later, however, many of these same personnel remain open to renewed investigation and potential prosecution.

Many will think it is unfair to those who served, who were investigated at the time and assured that they would not face charges (or who faced charges and were acquitted), to have allegations reopened, to be subject to inquest proceedings, to be investigated again on suspicion of murder (or other very serious offences), and to face prosecution. They may also agree that the unfairness remains even if most cases will not result in prosecutions and most prosecutions will fail to result in convictions (as seen recently with the collapse of the Soldier F trial at a very early stage). Many citizens will also understand that those who served do not ask for impunity from the law, only that having been investigated at the time, they should not continue, long after the events in question, to be subject to indefinite civil and criminal legal risk.

Why, some might ask, are Operation Banner veterans still being subject to investigation decades after their service? A large part of any explanation of the British State's current treatment of veterans is that there is serious legal pressure on UK authorities to investigate and if possible prosecute Troubles-era conduct that comes from Article 2 of the European Convention on Human Rights (ECHR). Article 2 provides:

> *"(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*

39. British Army *An Analysis of Military Operations in Northern Ireland* (2006) p.46 para 431 http://www.vilaweb.cat/media/ attach/vwedts/docs/op_banner_analysis_released.pdf. The same report cites there were four convictions for murder, one of which was overturned on retrial.

> *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."*

Before the European Court of Human Rights (the Strasbourg Court) delivered its Grand Chamber judgment in *McCann and Others v United Kingdom* in September 1995, the conduct of security force operations, the use of lethal force, and the adequacy of post-death investigations were matters regulated through domestic law mechanisms: through internal police and military inquiries, criminal prosecutions, coroner's inquests, and the political accountability of ministers to Parliament.

In *McCann*, a case which concerned the shooting of an IRA bomb squad by the SAS, the Court held that the ECHR's Article 2 right to life entailed that member states are obliged to undertake an independent and effective official investigation into all deaths caused by state actors. After *McCann*, the Strasbourg Court proceeded to elaborate an extensive set of requirements for an Article 2 compliant investigation. These standards have been used by courts to find the UK in breach of Article 2 for its "failure", in the past, to comply with investigative standards that the Strasbourg court had just invented. UK courts have largely followed this case law and in some cases have arguably gone beyond it.

Taken together, the Strasbourg Court and UK domestic courts have created an extensive set of obligations on British authorities concerning when, and how, they must investigate suspicious deaths and serious injuries linked either to state actions or omissions to proactively protect life. It is important to note at the outset, as the former Attorney General of Northern Ireland John Larkin KC points out, that these obligations do not come "from the text of Article 2 as agreed by the member states of the Council of Europe", but rather "from the text as, in effect, rewritten by the European Court of Human Rights."[40] As Larkin notes, there are simply:

> *"no procedural obligations in the text of Article 2. It can never, I think, be sufficiently emphasised that the procedural aspect of Article 2 ECHR is a creation of the Court and not the product of agreement by the member states of the Council of Europe."*[41]

The former UK Supreme Court justice Lord Hughes similarly observed that "Article 2 does not say anything at all about investigation, but it's a perfectly rational extension on the basis that the primary right won't be effective unless you also have a secondary right to investigation. But it is pure judicial legislation of the kind which – if it happened in relation to an English statute by an English court – would attract, rightly, some would say, a great deal of criticism."[42] This section outlines the development of the court's Article 2 case law – or "judicial legislation" – as Lord Hughes put it.

40. John Larkin KC, "The ECHR and the Future of Northern Ireland's Past" (Policy Exchange, 2020) 10, https://judicialpowerproject.org.uk/the-echr-and-the-future-of-northern-irelands-past/
41. *Ibid*, 10.
42. Speaking at Goldsmiths Law's annual criminal justice symposium at the British Academy, 27 March 2019.

Creation of the Article 2 Procedural Obligation

McCann and Others v United Kingdom[43] arose from a British intelligence and military operation known as "Operation Flavius". This operation involved the deployment of the SAS in Gibraltar to prevent an IRA unit detonating a bomb. The applicants were representatives of the estates of three deceased members of the IRA.

Evidence before the court showed that UK authorities had received intelligence of an intended car bomb attack targeting the changing of the guard ceremony, which it was believed could be detonated by a push-button remote device. On the basis of this intelligence, the Ministry of Defence briefed SAS soldiers on the suspected mode of detonation and the possibility that the suspects would attempt to detonate the device if confronted.

The SAS on the ground thought they had discovered the car bomb and believing it could be detonated remotely at any moment, moved to intercept the suspects. When confronted, the SAS team concluded the IRA members were reaching for either a weapon or detonator and opened fire, killing the suspects.

Relatives of the suspects brought suits against the United Kingdom's Ministry of Defence in the domestic courts, arguing that the killings were unlawful and unjustified. Those suits were dismissed on sovereign immunity grounds. The relatives then brought complaints to the European Commission on Human Rights, alleging violations of Article 2 of the Convention. The Commission admitted the application and, by eleven votes to six, ruled that there had been no violation of Article 2.

The case was subsequently referred by the Commission to the Strasbourg Court. The Court stated that the use of force must be no more than "absolutely necessary" and "strictly proportionate" to achieving a legitimate aim. The Court accepted that the soldiers who fired had acted in the honest and genuine belief, based on the intelligence with which they had been furnished, that firing was necessary to prevent detonation of a bomb and the consequent loss of innocent life.

The Court held that a justification under Article 2 may be grounded in an honest belief that is, for good reasons, perceived to be valid at the time, even if it subsequently proves to be mistaken. To require otherwise would, in the Court's view, impose an unrealistic and disproportionate burden on state agents in the execution of their duties. On this basis, the Court did not find that the individual soldiers' actions, considered in isolation, amounted to a violation.

However, the Court found that the broader organisation and control of the anti-terrorist operation by the relevant authorities was contrary to Article 2. The Court identified several failures, including the failure to arrest the suspects at the border, so as to safeguard all human lives concerned; the fact that intelligence about the suspects having a remote detonator and weapons on their person was conveyed to SAS personnel in an unequivocal way, giving the impression it was based on established facts and not assumptions, which it felt increased the risk the SAS would

43. Application No. 18984/91 | (1996) 21 EHRR 97.

resort to lethal force. The Court also said the failure to make provision for a margin of error in the intelligence had to be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead.[44] The Court found 10-9 that there was a violation of Article 2 in the planning by the authorities, in that it was not "strictly proportionate" to the objectives to be achieved in stopping the IRA operatives and saving lives.

More relevant to our current discussion is that the Court in *McCann* also unanimously found that a "general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities." The Court found that the obligation to protect the right to life in Article 2 "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."[45] The Court said that it was not necessary at that time "to decide what form such an investigation should take and under what conditions it should be conducted".[46] The court would elaborate on the requirements of Article 2 in a series of judgments also stemming from incidents during the Troubles.

Development of Article 2 Requirements

In May 2001, the Strasbourg Court handed down judgment in four cases it had heard concurrently: *McKerr v UK*[47] *Hugh Jordan v. the United Kingdom*[48], *Kelly and Others v. the United Kingdom*[49] and *Shanaghan v. the United Kingdom*.[50] The cases arose from killings in Northern Ireland by security forces, or in circumstances involving alleged state collusion with paramilitary forces, and raised very similar legal questions about the interpretation of Article 2. In the four judgments, the Court held unanimously that there had been a violation of Article 2 with regard to the failure to conduct an effective investigation into the circumstances of the deaths, all of which concerned the killing of individuals in Northern Ireland by soldiers, police officers, and paramilitaries.

The procedural requirements the Court outlined in these cases for a compliant Article 2 investigation include:

- **Independence:** The investigation must be conducted by persons who are not implicated in the events and who are institutionally and practically independent of those responsible.
- **Adequacy and effectiveness:** it must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible. This can require enabling an investigation to have the power to compel witnesses to give evidence.
- **Promptness:** Investigations must proceed with reasonable expedition, as delay undermines fact-finding and public confidence.

44. *Ibid*, para 202-214.
45. *Ibid*, para 161.
46. 161-162.
47. Application no. 28883/95
48. App no. 24746/94.
49. App no. 30054/96.
50. App no. 37715/97.

- **Public scrutiny:** There must be a sufficient element of public scrutiny, with next of kin being involved in the process to the extent necessary to safeguard their legitimate interests.
- **Effective participation by families:** This includes access to legal representation and, where necessary, legal aid where its absence prejudiced the ability of the family to participate in proceedings;
- **Scope must address the real issues:** Where there are serious and credible allegations of collusion or unlawful planning, the investigation must not prevent any particular matters relevant to the death being examined.

The Court found violations of Article 2 in each case on the ground that the inquests held into killings by security forces in Northern Ireland were flawed. The reason they were flawed was that they failed to match these minimum requirements that the Court thought essential to a sound investigation. The Court, in effect, applied these requirements retroactively to the time of the deaths and their initial investigations.

Given that UK authorities at the time could not possibly have known what the Court would decide in respect of Article 2 and its procedural requirements, it is unsurprising the Court found they had acted in breach of the ECHR. A larger consequence of these judgments is that it left open the possibility that most original investigations and inquests into Troubles-era killings could be challenged as inadequate relative to the standards demanded by Article 2.

In subsequent cases the Court added that the Article 2 procedural obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures aimed at elucidating the circumstances of a death and establishing responsibility for it.[51] However, the procedural obligation to investigate can also be revived where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing.[52] This means authorities can have an Article 2 obligation to investigate and, where possible, prosecute many decades after the relevant death took place.

For many observers, the logical outcome of this body of case law was that contemporaneous Troubles-era investigations into the use of lethal force by security personnel were invariably flawed by reference to Article 2, and that the State had an ongoing duty to revisit these deaths and to ensure they receive an ECHR-compliant investigation, with a view to establishing whether the use of force was justified or not and, if not, potentially punishing the individual in question.

51. *Šilih v. Slovenia* [GC], 2009, § 157.
52. *Brecknell v. the United Kingdom*, 2007, § 71.

Temporal Scope of Article 2 Procedural Obligations in Domestic Law

These developments posed a serious question for UK authorities; in particular, how the Strasbourg Court's case law interacted with the terms of the Human Rights Act 1998 (HRA 1998). Section 6 of the HRA 1998 made it "unlawful for a public authority to act in a way which is incompatible with a Convention right". A critical issue the domestic courts had to resolve was whether the HRA 1998 applied to deaths that predated its enactment.

If the HRA 1998 did apply retroactively, it would put a domestically enforceable statutory obligation on UK authorities to ensure Article 2 compliant investigations of the actions of veterans and security personnel who served during Operation Banner, even if this meant reopening cases otherwise settled decades previously. If the HRA 1998 did not apply retroactively, the UK authorities might have an international law obligation to conduct Article 2 compliant investigations, but not a domestically enforceable duty.

Section 22 of the HRA 1998 addresses the Act's commencement, application and extent. While it is less clear than it ought to be, the Act is reasonably understood not to have retrospective legal effect – that is, not to apply to acts that pre-date the commencement of the Act – save as expressly provided for in section 22(4) (a section which permits a person to rely on convention rights in proceedings brought *against* him or her by a public authority in relation to events that arise before the HRA came into force).

Based on this interpretation of the HRA, the House of Lords held in 2004 in the *In re McKerr* case[53] that Article 2 obligations only arise in UK law in relation to deaths that post-date the commencement of the Act. This meant, of course, that the HRA did not apply to deaths that took place during the Troubles, thereby limiting the domestic enforceability of the Strasbourg standards.

This authoritative ruling was thoroughly undone several years later in *Re McCaughey* [2011] UKSC 20. This case concerned a challenge brought by the families of two IRA men killed by the SAS in 1990. Their families claimed that any inquest or investigation into the death needed to follow a procedure which satisfied Article 2 duties. Initially they did not succeed because of *McKerr*. But then, in *McCaughey*, the Supreme Court departed from *McKerr* and retrospectively imposed those duties anyway.

The *Judicial Power Project* has previously pointed out that this ruling cannot be squared with the statute, nor indeed with the rule of law which deprecates the retrospective imposition of legal liabilities. There are two ways for a victim to rely on the duty in s.6 HRA. First, by bringing proceedings against the public authority: s.7(1)(a) HRA. Second, by relying on Convention rights when making arguments before any legal proceeding: s.7(1)(b). This is crucial because the HRA, with several exceptions, came into force on the day appointed by the relevant order

53. [2004] UKHL 12

made by the Secretary of State: s.22(3) HRA. That day for the purpose of the relevant parts of the Act was 2 October 2000.

The only exception to this is s.22(4) HRA, which provides that reliance on Convention rights under s.7(1)(b) in relation to an act taking place before that day is only possible as a defence in proceedings brought by or at the instigation of a public authority. But in this case, it was the claimants who brought proceedings under s.7(1)(a). So, s.22(4), clearly did not apply. It follows that the Act was not intended to create a cause of action for breach of s.6 HRA if the conduct occurred before 2 October 2000. To decide for the claimants, the majority in *McCaughey* had effectively to write into the HRA a "transitional provision that never was".[54]

To do so, the majority relied on *Šilih v Slovenia* (2009) 49 EHRR 996. There, the Strasbourg Court swept away its own jurisprudence to hold, for the first time, that Article 2 applies to investigations of deaths which occurred prior to even the Convention's ratification. Even if this decision is sound on its own terms, what does it have to do with the temporal scope of the HRA? Any link is dubious. Nobody doubts the HRA was largely intended to be prospective. As such, the HRA was bound not to apply to certain acts, even if they plainly violate the Convention as a matter of international law.

The HRA 1998 operated, not to treat the Convention as always having been part of domestic law, but to give effect in future in domestic law to rights under the Convention in ways they did not apply before. After *Šilih*, under international law the UK has procedural duties under Article 2 even for deaths which occurred prior to 4 November 1951 (when the UK ratified the ECHR). This has no bearing on whether the claimants have a cause of action, under s.7(1)(a) HRA, for deaths which occurred prior to 2 October 2000.

Moreover, the temporal scope of the HRA cannot depend on the "technicalities of the analysis of the various rights".[55] This is an issue about when and how the statute came into force, not about the content of the rights which that statute protects. Failure to recognise this distinction led the majority to suppose the 'mirror principle' supports the retrospective application of s.7(1)(a) HRA. The mirror principle – that there should generally be correspondence between how the Strasbourg Court and the UK courts construe the content of the Convention rights – has no application to the issue in *McCaughey*. By creating this retrospective cause of action under the HRA, *McCaughey* threw the position on inquests, particularly in Northern Ireland, into doubt. To quote Lord Phillips, it "struck a blow to legal certainty".[56]

One immediate practical consequence of *McCaughey* was that the Supreme Court opened the door to legal action against UK authorities for failure to investigate (or investigate adequately) deaths that took place before the HRA 1998 came into force on 2 October 2000. Henceforth, if an investigation or inquest was held into a death that predated the coming into force of the HRA 1998 there is nonetheless a statutory obligation to ensure that it complies with the requirements of Article 2. Because

54. *McCaughey* at [161], per Lord Rodger
55. *McCaughey* at [157], per Lord Rodger.
56. *McCaughey* at [62], per Lord Phillips.

officials during the Troubles could not possibly have anticipated the *McCann* judgment in 1995, or the standards for investigations outlined by the Strasbourg Court in subsequent cases, this de facto required the State to reopen every death linked to the security services and start a new investigation and, where possible, prosecution.

If in *McKerr* the House of Lords effectively closed off the domestic HRA route to seek mandatory reinvestigations, inquests, or prosecutions of Troubles-era conduct, then the Supreme Court in *McCaughey* dramatically reopened the route. As we discuss in the next section, *McCaughey* helped to facilitate the thwarting of legislative attempts to close off revisiting Troubles-era conduct for investigations, inquests, and possible prosecutions and to move to a truth recovery model of post-conflict reconciliation. With a view to reining this in somewhat, *Re Dalton's Application* [2023] 3 WLR 671 and *Bradley v Ministry of Defence* [2025] NICA 30 later held that the temporal scope of those positive obligations is limited to twelve years prior to the ECHR becoming enforceable in domestic law. This means that, as a matter of domestic law, there are no positive obligations to investigate or prosecute deaths occurring prior to 2 October 1988 and that even the Legacy Act 2023 went far beyond the requirements of the ECHR.

How Article 2 shut down attempts to move to a truth recovery model of legacy

The 1998 Belfast/Good Friday Agreement (GFA) brought a substantial cessation to the period of violence and social disorder known as the Troubles. Since then, in an environment partly framed by the Belfast Agreement, successive UK governments have sought to support the people and communities of Northern Ireland to address the legacy of the past and to reconcile differences between them. The GFA made provision for a partial amnesty for terrorist offences insofar as it authorised the early release, on certain conditions, of prisoners convicted of Troubles-related offences.

In the peace and reconciliation process that followed the GFA, several additional policies were introduced with a conditional amnesty element. This included:

- The early release of hundreds of prisoners on licence pursuant to the Northern Ireland (Sentences) Act 1998, including those who had committed serious offences in breach of Articles 2 and 3.
- The Northern Ireland (Location of Victims' Remains) Act 1999 made provision for immunity from prosecution for those who provided evidence to the Independent Commission on the Location of Victims' Remains (ICLVR) – an immunity available, in practice, only to paramilitaries and their accomplices who were likely involved in the murder or disappearance of a victim.
- Finally, the Northern Ireland Arms Decommissioning Act 1997 expressly provided that: *"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."* The beneficiaries of this amnesty were those who held arms and munitions unlawfully. This meant that no State actor could benefit from it in respect of acts committed in the course of their duty. Section 5 of this Act provides that weapons or munitions recovered as a result of decommissioning could not be forensically tested nor was such material or information derived from it admissible in criminal proceedings. Needless to say, many of these arms were used to commit offences contrary to Articles 2 and 3. Destroying them and prohibiting forensic testing prior to their destruction has made prosecutions for many Troubles-related offences immensely more difficult.[57]

The GFA did not address investigation or prosecution of the security forces and did not provide any bar on future prosecutions of anyone. In 2005, the then Labour government proposed a kind of amnesty by way of the Northern Ireland (Offences) Bill 2005, which was rejected by Parliament.

When this failed, the Government went on to introduce an administrative scheme, which resulted in hundreds of so-called "comfort letters" being sent to so-called "On the Runs" (OTRs); those paramilitaries who had committed Troubles-era offences but had not been prosecuted or imprisoned for them. Many OTRs were sent letters advising them that they were not wanted by the Police Service of Northern Ireland or any other police force in the UK. The scheme came to light in 2014 when the High Court relied on one of the letters to hold that it was an abuse of process to try John Downey for the 1982 Hyde Park bombing (a letter had been sent to him in error).[58]

The subsequent Hallett Report concluded that the administrative scheme was not an amnesty and that the comfort letters did not bar future prosecutions.[59] These conclusions have not been tested in court and are dubious. It is undeniable that special provision has been made to provide assurances to terrorists and has resulted in the collapse of one murder trial to date. No equivalent assurances have been provided to security forces who served in Northern Ireland.

Since 2006, Troubles-era deaths have been investigated by the PSNI's Historical Enquiries Team (renamed the Legacy Investigations Branch in 2014). The Team was set up in response to the *McKerr* et al judgments from the Strasbourg Court. One of the main objectives of the team was to:

> *"re-examine all deaths attributable to "the troubles" and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation."*[60]

In a 2017 report the Defence Select Committee observed that out of the outstanding caseload of the Legacy Investigation Branch "investigations into former army personnel account for a minority of LIB cases", yet "still

57. Decommissioning 'hinders Troubles investigations' says PSNI chief - BBC News.

58. Richard Ekins, Amnesty and Abuse of Process' (2015)131 Law Quarterly Review 196.

59. The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme, HC 380, 2014-1.

60. HMIC, Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 2013, p.109.

amount to a disproportionately high number of investigations (30% of investigations) when compared to the total level of killings attributed to the Army (10%)".[61]

Parallel to the LIB investigations, many families of relatives who died in the Troubles sought to have the original inquest proceedings overturned and a fresh, Article 2 compliant inquest held. The purpose of a coroner's inquest is to find out who the deceased person was and how, when and where they died, and to establish the details the Registrar of Deaths needs to register the death. A coroner's inquest is a fact-finding exercise, not a trial. The coroner is not able to decide, or appear to decide, any question of criminal or civil liability or to apportion guilt or attribute blame.

It is important to note that these new inquests were not necessarily ordered because new and compelling evidence had emerged concerning a death, but because it was accepted the original inquests did not (indeed could not have) comply with Article 2 ECHR standards created in the 2000s.

However, their findings may form the basis of a future decision to prosecute. Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must, as soon as practicable, send to the Director of Public Prosecutions a written report of the circumstances.[62]

The 2014 Stormont House Agreement between the United Kingdom and Ireland touched on a range of issues, including public sector reform, increased funding for Northern Ireland, additional fiscal devolution, parades, and legacy issues. The Agreement notes at paragraph 31 that "the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements."[63] In 2019 a dedicated unit was established by the Coroners Service for Northern Ireland to deal with outstanding legacy cases. The Lord Chief Justice of Northern Ireland developed a plan to hear legacy inquests within a five-year timeframe. As of 2020, the legacy inquest caseload under the Lord Chief Justice's five-year plan comprised 53 inquests relating to 94 deaths.

Several inquests concerned deaths occurring during SAS operations. In two inquests, the Coroner found no breach of Article 2 in the use of force. In 2012, a new inquest was opened into the shootings of Dessie Grew and Martin McCaughey. The inquest jury ruled that an SAS soldier was justified in the shooting. During the case, an SAS witness identified only as 'Soldier D' admitted opening fire on Mr Grew while he was on the ground. However, he insisted his actions had been justified, claiming the IRA man had made a noise as the SAS entered the shed and he believed the soldiers' lives were in danger. Reaching its verdict after hearing weeks of evidence, the jury ruled that the SAS had used "reasonable force" during the operation and that the IRA men's own actions had contributed to their deaths.

The verdict stated that "Mr Grew and Mr McCaughey put their lives

61. Defence Select Committee, Investigations into fatalities in Northern Ireland involving British military personnel, HC 1064, Session 2016-17, para. 15

62. Section 35 Justice (Northern Ireland) Act 2002.

63. The Stormont House Agreement (December 2014), https://www.gov.uk/government/publications/the-stormont-house-agreement

in danger by being in the area of the sheds in the vicinity of a stolen car, which was expected to be used in terrorist activity". It added that they "were both armed with guns, wearing gloves and balaclavas and were approaching soldiers who believed that their lives were in immediate danger." It was reported that the jury could not agree on whether the SAS had attempted to arrest the IRA men. However, they ruled that the soldiers were justified in opening fire as they thought the IRA men had moved towards their positions and they believed they were under attack. The verdict provided that: "We cannot be unanimous on the balance of probabilities whether or not there was an opportunity to attempt arrest in accordance with the Yellow Card (British Army rules on soldiers opening fire) prior to the soldiers feeling compromised. "However, once the soldiers felt compromised we agree that there was no other reasonable course of action."[64]

In April 2023, an inquest was opened into the death of Francis Bradley and concluded in April 2024. The Coroner found that the use of force by the soldiers, including the use of lethal force, was both reasonable and proportionate. He also concluded that the operation was planned and controlled in such a way as to minimise to the greatest extent possible the need for recourse to lethal force.[65]

In another inquest, into the 1991 shootings at Coagh, the Coroner found that soldiers had justifiably used force, but that the operation they participated in had not been planned consistently with Article 2. An inquest into the shootings in Coagh was opened in 2022.[66] In respect of the actions of individual soldiers Judge Humphreys said:

> *"The actions of the cover group were entirely within the guidance provided by the Yellow Card. There was no opportunity to give a challenge or warning to those in the Cavalier since to have done so would only have increased the risk to the life of Soldier L. The cover group fired only aimed shots and did so in circumstances where there was a clear and immediate threat to the life of Soldier L. Each of the soldiers held a subjective belief that this was the case. As the vehicle moved, they maintained this belief that the individuals within the Cavalier continued to present an ongoing threat to life."*[67]

He concluded that the "use of lethal force at Coagh on 3 June 1991, which resulted in the three deaths, was justified."[68] However, the Judge also concluded that the operation was not planned and controlled in such a way as to minimise to the greatest extent possible the need for recourse to lethal force.

Finally, in the inquest into the shootings of an IRA unit in Clonoe, the Coroner found that all of the deaths resulted from an unjustified use of force.[69] He concluded that the fatal shots for each of the dead terrorists came when they were incapacitated.[70] He said each IRA deceased was shot in the following manner:

(i) O'Donnell – in the back whilst attempting to flee and in the head whilst lying incapacitated on the ground;

64. https://www.bbc.co.uk/news/uk-northern-ireland-17938189
65. [2024] NICoroner 30.
66. [2024] 12 NICoroner 22.
67. Para 299.
68. Para 315.
69. [2025] NICoroner 1.
70. *Ibid*, para 309-322.

(ii) Clancy – whilst attempting to flee and then repeatedly whilst in a crouched or kneeling position on the ground;
(iii) Vincent – whilst seated in the cab of the lorry and then when lying incapacitated across the seat of the lorry through its open doors; and
(iv) O'Farrell – in the back whilst running away and then in the face whilst lying on the ground incapacitated.

The judge concluded that "the soldiers did not have an honest belief that it was necessary in order to prevent loss of life and the use of force by the soldiers was, in the circumstances they believed them to be, not reasonable." The coroner also found that the operation was not planned and controlled in such a way as to minimise to the greatest extent possible the need for recourse to lethal force.[71] The presiding coroner Judge Humphreys consequently sent a report of his findings to the Director of Public Prosecutions. No decision has been made by the DPP, and the ruling is currently subject to a judicial review challenge brought by HM Government.

From 2021 to 2023, the then UK government attempted a significant shift in the UK's policy toward Troubles legacy issues. Broadly speaking, it sought to move away from relying on criminal investigations, prosecutions, and inquests as mechanisms for promoting reconciliation. Instead, it took steps to replace inquests and criminal and civil litigation with a process focused primarily on information and truth recovery for as many people and families as possible.

In its 2021 command paper, *Addressing the Legacy of Northern Ireland's Past*, the Government's rationale was that it wanted:

> *"…to deal with the past in a way that focuses on providing information to as many families as possible. It wishes to help Northern Ireland's wider society to look forward rather than back, and to achieve this by delivering measures intended to facilitate reconciliation. Through reconciliation, the UK Government wants to help create strong relationships across communities, which respect differences and enable the right decisions for the people of Northern Ireland to be taken.*
>
> "…
>
> *"The need for criminal courts to consider the criminal evidence standard (beyond reasonable doubt) inevitably means that, in many cases where the criminal evidence standard is not met, criminal courts are not able to provide families with the answers they are seeking. More than two thirds of deaths from The Troubles occurred more than 40 years ago. The passage of time means that ultimately, for those cases that get as far as a trial, there is a high likelihood of 'not guilty' verdicts or trials collapsing. For both families of victims and those accused this can be a very distressing outcome following years of uncertainty.*

Furthermore, the criminal justice approach is in stark contrast to the

71. *Ibid*, para 343.

wider aims envisaged in the Belfast/Good Friday Agreement and the Stormont House Agreement of promoting societal reconciliation through acknowledgement, recognition of different narratives and information recovery to the extent that is now possible given the passage of time.

> "...
>
> *"We know, not least from recent cases, that the prospect of successful criminal justice outcomes is vanishingly small. It is not simply the case that positive outcomes are rare; pursuing a criminal justice outcome can also have negative consequences. There are finite resources available to address this complex challenge, particularly in terms of time and people. Using limited resources to pursue a small number of cases to prosecution standards currently means that, while a tiny number of families may see someone prosecuted, and an even smaller number may see an eventual conviction, this is likely to be at the expense of failing to deliver positive outcomes to the vast majority of families, who will miss out on the opportunities to successfully recover information. There is an imperative to take action while those who want – or have – information are still with us. Rather than pursuing a goal (convictions) that will fail almost every family, we want a process of information recovery that will deliver for every family that wants it. The UK Government's aim is to deliver as much information as possible, to as many people as possible, as quickly as possible."*[72]

The Government was concerned that without a serious change in policy direction, "the vast majority of families would never get the answers they desire, and legacy issues would continue to burden and traumatise individuals and society in Northern Ireland for decades to come."[73]

This policy led to the enactment of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The Legacy Act 2023 closed the possibility of further inquests, criminal investigations, and civil litigation in respect of Troubles-era conduct. It provided that the work of investigating Troubles offences would be carried out by the Independent Commission for Reconciliation and Information Recovery (ICRIR). The ICRIR was set up as an independent investigative body with power to conduct reviews into Troubles-related deaths and serious injuries and to publish reports of its findings, including about what happened to the victim in question and who was responsible for their death or injury. The ICRIR was given the power to compel witnesses, test forensics, and to grant conditional immunity from prosecution for those who come forward with truthful information. This body was also given power to refer Troubles-related conduct to the prosecution authorities where the person alleged to have committed it lacked a conditional immunity certificate.

The Legacy Act 2023 was strongly opposed by the Irish government, which in December 2023 began an inter-state case against the UK before the European Court of Human Rights for an alleged breach of Article 2 of the ECHR. The then Taoiseach, Leo Varadkar, said that Ireland was left with "no option" but to legally challenge the UK over the Legacy Act, on the basis of strong legal advice that the Act was in breach of Article 2.[74]

72. HM Government, Addressing the Legacy of Northern Ireland's Past (CP498, July 2021), https://assets.publishing.service.gov.uk/media/60eed6e18fa8f50c797792c1/CP_498_Addressi ng_the_Legacy_of_Northern_Ireland_s_Past.pdf, pp. 8-10.

73. *Ibid*, p. 22.

74. https://www.thejournal.ie/irish-government-to-take-uk-to-court-over-troubles-legacy-act-6255333-Dec2023/

The then Secretary of State for Northern Ireland, the Rt Hon Chris Heaton-Harris MP, issued a statement criticising this move and defending the UK's policy and its legal basis. He also pointed out that Ireland:

> *"…have been critical about our proposed approach on the grounds that it moves away from a focus on criminal prosecutions. We believe that the Irish Government's stated position on dealing with legacy issues is inconsistent and hard to reconcile with its own record. At no time since 1998 has there been any concerted or sustained attempt on the part of the Irish state to pursue a criminal investigation and prosecution-based approach to the past.*
>
> *We note, in particular, the former Irish Justice Minister and Attorney General's 2014 reference to an informal decision on behalf of the Irish Government to not investigate Troubles cases – something that he restated publicly in 2021 in response to our proposals.*
>
> *Indeed the Irish Government should urgently clarify the number of criminal prosecutions brought in Ireland since 1998 relating to Troubles cases. "It is also a matter of public record that successive UK and Irish Governments during the peace process worked closely together on a range of initiatives which have provided conditional immunity and early release from prison."*[75]

As Policy Exchange has written elsewhere, since 1998 the Irish State has done very little in the way of criminal investigation, inquests, or information and truth recovery of Troubles-era deaths.[76] The former Attorney General and Tainiste (deputy Prime-Minister) Michael McDowell said, tellingly, of many years in period in government (1999-2007) that the:

> *"Irish government of which I was a member took the decision that further investigation and prosecution by An Garda Síochána of such historic offences was no longer warranted or justified by reason of the greater interest in ending the Provisional campaign and all other political violence in Northern Ireland. And so, as far as this State was concerned, a line was drawn across the page of historic Provisional IRA criminality in Northern Ireland."*[77]

The Legacy Act's compatibility with Convention rights, including Article 2, was also challenged in the Northern Ireland High Court. In February 2024, the High Court in *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11 declared several provisions of the Legacy Act to be incompatible with Articles 2, 3 and 6 of the ECHR.

The declarations applied to provisions that included those relating to conditional immunity from prosecution, the prohibition of criminal enforcement action for offences that are neither serious Troubles-related offences nor connected to a serious Troubles-related offence, the discontinuance of Troubles-related civil actions, and the exclusion of evidence gathered by the ICRIR from use in civil proceedings.

The core of the High Court's conclusion was its understanding that Strasbourg jurisprudence fell just short of a categorical ban on amnesties, such that amnesty-like provisions are permissible only in very limited

75. Northern Ireland Office, 'Statement in response to legacy inter-state case by the Irish Government' (20 December 2023), https://www.gov.uk/government/news/statement-on-thenorthern-ireland-troubles-legacy-and-reconciliation-act.

76. Conor Casey, Richard Ekins, Sir Stephen Laws, Providing for the Future of Northern Ireland's Past (Policy Exchange, 2025).

77. Michael McDowell, 'Sinn Fein needs reality check on history prosecutions from troubles' (Irish Times, 20 October 2021) https://www.irishtimes.com/opinion/sinn-fein-needs-reality-check-on-historic-prosecutions-from-troubles-1.4704986.

circumstances. The Court accepted that the Strasbourg Court "contemplates the possibility of exceptions" to its general position on amnesties, including where they would contribute to a "reconciliation process" and said that "the scope and limits of any... exceptions have not been defined in the case law".[78]

The High Court reasoned that the provisions of the 2023 Act were incompatible with Articles 2 and 3 of the ECHR because they were not necessary to bring a violent dictatorship to an end, or to bring a long-running conflict to a swifter end. The Troubles ended, the Court said, in 1998, which seemed, to the Court at least, to count against legislating in 2023, or later. The Court held that there was "no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland", and indeed that the evidence was to the contrary.

The government appealed to the Court of Appeal, but before the appeal was heard, a new government assumed office following the 2024 General Election. On 29 July 2024, the new Labour government formally abandoned the grounds of appeal against the High Court's section 4 declarations of incompatibility. The Court of Appeal in *Re Dillon and Others* [2024] NICA 59 noted the "unusual"[79] nature of the concession but welcomed it as they agreed with the analysis of the High Court. In respect of the conditional immunity provisions, the Court of Appeal added its own observation that:

> *"We are confident that the ECtHR has set its face against amnesties and immunity in a fashion which would result in the 2023 Act being held to be incompatible with the Convention, notwithstanding the point . . . that immunity was conditional and could be revoked. In addition, we were struck by the clear message from the Committee of Ministers that the introduction of an amnesty provided for by the 2023 Act was likely to be incompatible with the Convention."*[80]

In January 2026, the Secretary of State for Northern Ireland Hilary Benn MP laid the Northern Ireland Legacy Remedial Order 2026 before Parliament. The order, made pursuant to section 10 HRA, repealed the provisions of the Legacy Act concerning the conditional immunity scheme and the bar on new civil claims. The government proceeded by Remedial Order to repeal primary legislation even though their constitutional justification for doing so was weak.

This is because around the same time the government had published the Northern Ireland Troubles Bill 2025, which it intended to enact to repeal other portions of the Legacy Act 2023. No Minister can possibly consider "that there are compelling reasons for proceeding under this section", as required by section 10 of the HRA, when the remedial order is made at the same time as primary legislation that would provide a vehicle for legal change. Despite these constitutional problems, the Remedial Order is being pursued through Parliament. If it is passed, the relevant provisions of the Legacy Act 2023 concerning conditional immunity and a cessation of civil actions will be repealed despite the constitutional concerns raised

78. *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11, para 183.
79. *Re Dillon and Others* [2024] NICA 59, para 16.
80. *Ibid*, para 172.

by the Joint Committee on Human Rights (who made clear in their second report on the remedial order that, where possible, such amendments should have been made through an Act of Parliament).[81]

The government's statutory vehicle for replacing the 2023 Act, the Troubles Bill 2025, is a sure sign that their policy toward legacy issues and the treatment of Operation Banner veterans puts compliance with Article 2 ECHR at the forefront.

Workings of the Legacy Commission

The Troubles Bill renames the ICRIR the Legacy Commission and proposes to significantly change its statutory functions. The Government's initial justification is that such changes were required to address the Declarations of Incompatibility handed down by the Northern Ireland Court of Appeal; however, the only Declarations that remain following the UKSC decision relate to the immunities. It is thus unclear why the Government would proceed with the Bill that seeks to play politics with the Peace Process without any obvious gain to those affected by the Troubles.

The two main functions of the Legacy Commission are to investigate Troubles-era conduct[82] with a view to building a case for a prosecution if possible and to hold inquest-style inquisitorial proceedings for certain Troubles-era cases.

No criminal investigation of any serious or connected Troubles-related offence may be continued or begun by a person other than the Legacy Commission.[83] The investigations will be led by two Directors of Investigations appointed by the Secretary of State. He must ensure "so far as practicable" that one of the Directors has experience of conducting criminal investigations in Northern Ireland and the other has experience of conducting criminal investigations outside Northern Ireland.[84]

The Directors are empowered to designate any other Legacy Commission officer as a person having the powers and privileges of a constable, if they are satisfied that the officer: (a) is capable of effectively exercising those powers and privileges; (b) has received adequate training in respect of the exercise of those powers and privileges; and (c) is otherwise a suitable person to exercise those powers and privileges (a matter of judgement for the Directors, taking into account, in particular, the person's policing experience).[85]

The inquisitorial proceedings will be led by members of the Legacy Commission's Judicial Panel. These will be current or former holders of high judicial office appointed by the Secretary of State. The judicial panel also have a subsidiary role in the investigative process.[86]

An investigation can be initiated into a person's death where it is requested by (a) a close family member of the deceased, or (b) if there are no close family members, a family member of the deceased. Where a person suffered serious physical or mental harm due to Troubles conduct, that person may request an investigation.[87] These requests can be made for a period of five years beginning with the day on which the section comes into force.[88]

81. Indeed, the minority of Declarations of Incompatibility since 1998 have been remedied through a remedial order.
82. Troubles-related conduct will include events and conduct that related to Northern Ireland affairs that occurred during the period from 1 January 1966 to 10 April 1998. This not only includes deaths and serious injuries, but any events and conduct concerned with preventing, investigating, or otherwise dealing with the consequences of any other event or conduct relating to Northern Ireland affairs.
83. Clause 88. The same clause ensures that "Troubles related criminal investigations that are outside the investigative remit of the Legacy Commission allowing offences which are not serious or connected Troubles-related offences to be investigated by the relevant police forces." Explanatory Notes, p.62.
84. Clause 5.
85. Clause 12.
86. Clause 6.
87. Clause 27.
88. Clause 27.

The Secretary of State for Northern Ireland may request an investigation, and several public authorities have the right to request an investigation if they meet the requisite statutory criteria.[89]

The Chief Constable of the PSNI; any other chief officer of a police force; the Police Ombudsman for Northern Ireland; the Director General of the Independent Office for Police Conduct; the Police Investigations and Review Commissioner; an inquiry panel within the meaning of the Inquiries Act 2005 can all request an investigation if the investigation is necessary for the purposes of ECHR compatibility,[90] or owing to new evidence (known or reasonably suspected to exist), there is a realistic prospect of information obtained through the investigation being provided to a prosecutor.[91]

Where a person's death was caused directly by conduct forming part of the Troubles, an investigation can be requested by the Attorney General for Northern Ireland and a range of coronial authorities in Northern Ireland, England & Wales, and Scotland.[92]

The Director of Public Prosecutions in England & Wales, Director of Public Prosecutions in Northern Ireland, and the Lord Advocate have the ability to request an investigation on the basis of a report referred to them by the Legacy Commission's Judicial panel, which will be discussed below.

The Directors of Investigations themselves, acting jointly, may initiate an investigation of harmful conduct forming part of the Troubles where it appears to the Directors that (a) the investigation is necessary for the purposes of ECHR compatibility, or (b) owing to new evidence (known or reasonably suspected to exist), there is a realistic prospect of information obtained through the investigation being provided to a prosecutor under section 43.[93]

The Legacy Commission will not accept requests from families or individuals for a new investigation when five years have passed post-enactment. However, public authorities can request an investigation after the five-year period where the investigation is necessary for the purposes of ECHR compatibility or owing to new evidence (known or reasonably suspected to exist), there is a realistic prospect of information obtained through the investigation being provided to a prosecutor under section 43.

In short, the Legacy Commission and public authorities can request/initiate investigations *indefinitely* provided they think it is needed to satisfy ECHR requirements or where there is a realistic chance of prosecution.

After an investigation is opened, the Director must decide whether the investigation is to be carried out as a criminal investigation. There is effectively a presumption in favour of a criminal investigation, as the "Director must decide that the investigation is to be carried out as a criminal investigation unless the Director considers that there is no realistic prospect of information obtained through the investigation being provided to a prosecutor." [94] Where the investigation is not to be carried out as a criminal investigation, the Legacy Commission must (so far as is practicable) determine the facts of the conduct to which the investigation

89. Clause 28.

90. An investigation is said to be "necessary for the purposes of ECHR compatibility" where the United Kingdom would contravene Article 2 or 3 of the Convention (within the meaning of the Human Rights Act 1998) if the investigation were not carried out. Clause 28.

91. Clause 28.

92. Clause 28.

93. Clause 32.

94. Clause 36.

relates.[95] The Legacy Commission must inform relevant family members that an investigation has been opened and the type of investigation it is.[96] The Directors of Investigations acting jointly must determine the order in which investigations are to be carried out and the use of other Legacy Commission officers and other resources in connection with those investigations.

In deciding on the order of investigations and allocation of resources, the Directors must have regard to whether an investigation is necessary for the purposes of ECHR compatibility. The other matters that the Directors must have regard to when allocating resources include whether information obtained through the investigation is likely to be provided to a prosecutor or whether the investigation will only lead to the production of a final report, and the extent to which the investigation is in the public interest.[97]

After an investigation is concluded, if the Director of Investigations considers there is evidence that relevant conduct constitutes an offence by an individual whose identity is known to that Director, they may refer the conduct to the relevant prosecution service, and if the conduct is referred, must notify that prosecutor of the offence concerned. They must give the prosecutor such information and material relating to the conduct as the Director considers appropriate, and must, if requested to do so by the prosecutor, obtain such information or material relating to the conduct as it is practicable to obtain, and give the information or material obtained to the prosecutor.

If any of the conduct to which the investigation relates is or has been referred to a prosecutor, a final report is not to be produced or published unless and until (a) the prosecutor has made a decision not to prosecute a person for any relevant offence, or (b) if the prosecutor has made a decision to prosecute a person for any relevant offence or offences, the prosecution or prosecutions are no longer continuing.

Where there is no referral to a prosecutor, a judicial panel member will be instructed to produce a final report on the conduct investigated, which must be as comprehensive as possible and include a statement of the manner in which the investigation was carried out.[98]

Where the report contains material criticising a public authority or a living individual who was involved in the conduct forming part of the Troubles to which the investigation relates, the Commission must give them a copy of the draft and a chance to comment on it.[99] Another core function of the Legacy Commission is to conduct "inquisitorial proceedings", which the Bill defines as proceedings presided over by a judicial panel member, examining all the circumstances of a person's death. A judicial panel member presiding over inquisitorial proceedings must not rule on, and has no power to determine, any person's civil or criminal liability. But a judicial panel member should not be inhibited in the discharge of their functions by any likelihood of liability being inferred from facts that they determine.[100]

Inquisitorial proceedings can be held in respect of a death caused

95. Clause 36.

96. Clause 37.

97. Clause 35.

98. However, the need for comprehensiveness must be balanced by regard to the duties imposed on the Legacy Commission by sections 10(1) and 17(2). Section 10 requires the Legacy Commission not do anything that would damage, or risk damaging, UK national security; put, or risk putting, the life or safety of any person at risk; or prejudice, or risk prejudicing, actual or prospective criminal proceedings in the UK. Section 17 permits the Secretary of State to prohibit the disclosure of sensitive information where they determine it is not in the public interest. They must consider whether the proposed disclosure would risk damaging, or would damage, the national security interests of the United Kingdom, the potential seriousness and extent of any such risk or damage, and the significance of the information to be disclosed to matters of public concern.

99. Clause 40.

100. Clause 48-49.

directly by conduct forming part of the Troubles if (a) the Secretary of State gives a direction to the senior judicial panel member in relation to the death, (b) the Advocate General for Northern Ireland gives a direction to the senior judicial panel member under section 16AB of the Coroners Act (Northern Ireland) 1959 in relation to the death, or (c) a coroner in Northern Ireland ceases progressing a resumed inquest into the death for reasons relating to public interest immunity.

The Secretary of State may give a direction in relation to a death only if a coroner in Northern Ireland ceased progressing an inquest into the death for reasons relating to public interest immunity during the period beginning with 28 February 2019 and ending with 30 April 2024. A coroner ceases progressing an inquest "for reasons relating to public interest immunity" if— evidence or documents are (or are to be) withheld from the inquest on grounds of public interest immunity, and the coroner considers that, without the evidence or documents, it is not possible for a final determination, verdict or findings to be made or given at the inquest.[101]

The judicial panel member has considerable discretion in organising the conduct of proceedings. But in deciding how the proceedings should be carried out, the relevant judicial panel member must take into account any investigation (of any kind, including an inquest) of the death that has previously been carried out by any other person, and must (in particular) ensure that they not do anything which duplicates any aspect of any such previous investigation unless, in their view, the duplication is essential. They must also "ensure that, in the carrying out of the proceedings, regard is had to the context in which the conduct examined in the course of the proceedings occurred".[102]

A person required by the relevant judicial panel member to give evidence at inquisitorial proceedings may apply to the judicial panel member for permission to give that evidence through a live audio link or live video link (and may do so if permission is given). The judicial panel member must give permission unless they consider that it is impracticable for the person to give evidence in that manner. The presiding judicial panel member must take reasonable steps to ensure that members of the public (including reporters) are able to attend the inquisitorial proceedings or to see and hear a simultaneous transmission of the proceedings; to obtain or to view a record of evidence and documents given, produced or provided to the proceedings.

Restrictions may be imposed on attendance or reporting from proceedings by the presiding judge or the Secretary of State where it is conducive to the proceedings fulfilling their purpose, or necessary in the public interest, having regard (in particular) to the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern; any risk of harm or damage[103] that could be avoided or reduced by any such restriction; the extent to which not imposing any particular restriction would be likely to be detrimental to the welfare of any witness; any conditions as to confidentiality subject to

101. Clause 50.

102. Clause 51.

103. Harm or damage here includes death or physical or mental harm or damage to the national security interests of the United Kingdom or to international relations.

which a person acquired information that they are to give, or have given, at the proceedings.

Upon the conclusion of proceedings, if the relevant judicial panel member considers there is evidence that relevant conduct constitutes an offence by an individual whose identity is known to that judicial panel member, they will refer that information to the relevant prosecution services. If any of the conduct examined in the course of the inquisitorial proceedings is or has been referred to a prosecutor, a final report is not to be produced or published unless and until— (a) the prosecutor has made a decision not to prosecute a person for any relevant offence, or (b) if the prosecutor has made a decision to prosecute a person for any relevant offence or offences, the prosecution or prosecutions are no longer continuing. If these conditions do not apply, the judicial panel member can direct the publication of the final report.

The relevant Director of Investigations or relevant judicial panel member (as the case may be) must, in exercising their functions in relation to the investigation or proceedings, have regard to the welfare of any individual who gives evidence to, or otherwise participates in, the investigation or proceedings.[104]

The Bill establishes a separate information recovery body, the Independent Commission on Information Retrieval (ICIR), to receive and retain information about deaths and, where requested, to seek information and provide reports about those deaths to families.[105] A person's death is within the remit of the ICIR if the death was caused directly by conduct forming part of the Troubles. It is a function of the ICIR to receive and retain information about deaths within its remit.[106] The ICIR must not disclose the name or identity of any individual from whom the ICIR has received information about a death within its remit. Where the ICIR has received information about a death within its remit, it must not disclose the name or identity of any individual who is identified by that information as being responsible for any of the conduct which caused the death.[107] The provision of information by a person to the ICIR does not give the person immunity from prosecution for any criminal offence. However, information provided to the ICIR about a death within its remit and any evidence obtained directly or indirectly as a result of the information being provided to the ICIR (a) is not admissible in legal proceedings, and (b) may not be used by the Legacy Commission in connection with an investigation or inquisitorial proceedings.[108]

The ICIR must not do anything which would risk prejudicing, or would prejudice, the national security interests of the United Kingdom or Ireland, would risk putting, or would put, the life or safety of any person at risk, or would risk having, or would have, a prejudicial effect on any actual or prospective legal proceedings in any part of the United Kingdom or Ireland.[109]

If enacted, the Troubles Bill would clearly place criminal investigations and prosecutions at the heart of the State's treatment of legacy issues.

104. Clause 69.
105. Clause 72.
106. Clause 73.
107. *Ibid.*
108. *Ibid.*
109. *Ibid.*

The Problem of Perpetual Accountability for Former Security Personnel

With the repeal of the Legacy Act 2023 and likely enactment of the Troubles Bill 2025, many veterans of Operation Banner may find themselves, decades later, liable to renewed investigation and potential prosecution. These investigations will be conducted on the basis of standards of investigative adequacy that did not exist when they acted, that were created by judges rather than by Parliament, and that were applied retroactively to conduct predating the Article 2 procedural framework that generated those standards.

The procedural obligation under Article 2 was not recognised until *McCann* in 1995. Its detailed requirements – of independence, adequacy, promptness, public scrutiny, family participation, compellability – were not articulated until the 2001 string of cases. The autonomous and detachable character of the Article 2 obligation, permitting its application to deaths predating even the Convention's entry into force, was not declared until *Šilih* in 2009.

Serving security personnel could not have known any of this. The operational framework within which they acted was determined by their rules of engagement, including the Yellow Card system governing the use of force in Northern Ireland, and the domestic criminal law of Northern Ireland. Security personnel who resorted to lethal force were investigated under those standards and either cleared, disciplined, or referred to the prosecution services. In each instance they will have reasonably concluded that the matter was at an end. It must also be stressed that an investigation that did not meet the Strasbourg Court's view on contemporary Article 2 standards may nonetheless have been serious, conscientious, and reasonably robust by the standards, resources, and legal arrangements of the time.

The post-*McCann* procedural requirements are, in many respects, requirements that the investigating bodies throughout the Troubles could not have satisfied even if they had tried, because the institutional infrastructure to satisfy them did not exist. For example, the Police Ombudsman for Northern Ireland was not established until 2000. The capacity to conduct institutionally independent investigations of RUC conduct did not exist throughout the Troubles because no independent investigative body with the necessary powers and independence had been created. The legal aid structures enabling family participation in inquests were not in place. The coroner's rules did not require the compellability of soldiers and police officers.

To find a violation of Article 2 in respect of investigations in 1972, 1982, or 1992 because they did not comply with standards formulated by a Court in 2001 is therefore to judge investigations of the past by the standards of the future. This produces findings of violation of the right to life not because of any deliberate wrongdoing by the investigating state, but because of the absence of institutional structures that had not yet been

created and adherence to a legal doctrine that had not yet been articulated.

The unfairness of applying retroactive investigative standards gains additional force when the operational context in which the original decisions were taken is brought into the analysis. The Northern Ireland cases arose from decisions taken in the context of an active terrorist insurgency, involving genuine and serious risks to life. Soldiers and police officers operated under rules of engagement that were themselves subject to legal challenge and revision. They acted in conditions of uncertainty, time pressure, and physical danger that the post-hoc environment of an inquest or public inquiry many decades later cannot replicate. New inquests also suffer from the fact that memories will have faded, contemporaneous records may have been lost, and the witnesses best placed to contextualise their decisions are dead or unavailable. The conditions for a fair and accurate re-examination of the original events have materially deteriorated with the passage of time. The likelihood of accurate factual reconstruction decreases as years pass. The risk of distorted or incomplete fact-finding increases.

Moreover, a fresh investigation, even if it does not result in a prosecution, is a serious and potentially gruelling event: the process is the punishment. It involves the re-examination of the soldier's actions, the potential for new evidence to be adduced, the possibility of referral to the Director of Public Prosecutions, and the real risk of prosecution decades after the event. The investigation and the criminal exposure it might create are closely linked from the perspective of the individual under scrutiny (who is forced to re-live traumatic events again and again).

There must also be real concerns about the impact of Article 2 investigations, inquests, and litigation on the psychiatric health of those under investigation, and on current and future service morale,[110] recruitment and operational effectiveness.[111] The spectacle of former service personnel being reinvestigated in relation to events from half a century ago will not reassure serving personnel, or prospective recruits, that the nation values their service.

110. Defence Committee, Who guards the guardians? MoD support for former and serving personnel, HC 109, 10 February 2017, para. 29. For a more personal reflection, see: Brian Wood, Double Crossed: A Code of Honour, A Complete Betrayal (Virgin Books, 2019).

111. Lucy Fisher, "David Petraeus: Call to cease 'lawfare' on war veterans", The Times, 19 October 2018. "David Petraeus has raised concerns about the spread in Britain of 'lawfare', the legal pursuit of soldiers over alleged actions on the battlefield. 'The growing "judicialisation" of conflict should concern the UK — just as it concerns me,' he said. 'The current "fog of law" may undermine the operational effectiveness of British troops engaged in multinational coalitions."

Chapter 4: The Consequences of Judicial Over-reach for British Armed Forces

In this chapter, we return to the interviews conducted with SAS veterans. As will become clear, ongoing judicial activism, of the kind described above, carries serious, deleterious consequences for these men – both as individuals and as a collective who served their country honourably, in extremely difficult circumstances. The words of the men make clear the profound sense of injustice that they increasingly feel. No less important is what they have to say about the likely impact of all this on the future of the SAS, and the British army more generally.

How Veterans Feel They and Their Comrades Have Been Treated by the Government and the Legal Process Post-Peace Process

A consistent objection raised across the interviews to the current treatment of Operation Banner veterans is to what the soldiers regard as the retroactive application of legal and human rights procedures that did not exist at the time the relevant actions were taken. Soldier A told us that "a major legal problem now is retroactive application of human rights standards introduced after 2001." Soldier E made a similar point, noting that "I don't think human rights law was part of our framing in the 1980s and 1990s. It's judging past actions by today's standards and values. We acted within the rules and regulations of the time, and the frame of reference has shifted with hindsight." Soldier L similarly argued that revisiting incidents that were cleared at the time and applying contemporary ECHR standards of investigative compliance is "deeply unfair" because it judges "soldiers who acted in good faith, within the rules and training of the time, by standards that did not exist then. The state asked them to take on dangerous roles; it should protect them, not abandon them to legal processes decades later based on frameworks that weren't in place when they acted." Soldier B said some veterans felt disorientated because they understood themselves to be acting within the rules of engagement and law of the land, and had never imagined that those actions might later be the subject of criminal proceedings. At the time, he recounted, "human rights weren't something we focused on, we followed orders and the Yellow Card… I didn't imagine we'd be having this conversation now

about legal consequences." Soldier I, who spent years after his final tour training new generations of soldiers in precisely those rules of engagement, brought a particular weight to his summary of the position. He noted how "We were told what to do, it was legal at the time, we followed the yellow card and were cleared." Soldier C made a related point about what the legal framework of the time actually required of soldiers, and what protection those who complied with it are now owed. Soldier C asserted that "we operated in a different era. Rules have changed dramatically. Soldiers need to know what's expected of them; if they did it properly at the time and within the rules, the yellow card, the law, there should be some protection" in the future.

Some soldiers expressed concern at the unfairness in reopening investigations. Soldier H focused on the evidential problems created by the passage of time, pointing out that "many of the cases being re-examined had been properly investigated at the time. Re-examining old cases with modern standards and sparse, aged evidence is problematic." Soldier E was equally direct about the practical impossibility of fair inquiries after so many years, arguing that "trying to get convictions decades later is problematic. Memories degrade, people's recollections change, and anecdotes get embellished over time. It's hard to get a fair conviction under those circumstances."

Several soldiers expressed deep frustration at the air of unreality and superficiality with which courts and lawyers scrutinise the millisecond decisions of armed operations taken decades before through the lens of leisurely post-hoc analysis. Soldier G said that inquiries involve judges and lawyers later parsing "actions with counterfactuals and impossible hindsight; they'll talk about milliseconds and ballistic details to criticise decisions that were sensible under the circumstances."

The psychological toll of the legacy process on individual veterans was highlighted by Soldier H, who suggested that the cumulative effect "on morale and mental health of soldiers and veterans is significant. They did their duty and now face legal jeopardy; that is deeply wrong." He added: "Soldiers acted professionally, within the law and rules of engagement at the time. Looking back with today's standards and using evidence from decades ago is deeply unfair and distressing for the soldiers and their families."

Several soldiers expressed frustration at what they saw as an asymmetry in how IRA terrorists and security forces have been treated post-conflict. Soldier E felt that "If the price of peace was to let IRA members out, that's one thing, but the army and state should have pushed for reciprocity. The MoD could have done it in 1998. Soldiers didn't ask to be put in those positions; they followed orders. They are individually responsible in law, but the state placed them in those circumstances." Soldier G bluntly said many veterans felt a sense of state abandonment: "Government has often not defended soldiers; soldiers have been thrown under the bus."

The Potential Future Impact on the Armed Forces

While the focus of this report has been primarily on the injustice in the State's current treatment of Operation Banner veterans, it is also important to consider the current and future impact of all this on the UK's armed forces. A legal framework which subjects operational military decisions to open-ended, evolving, and retrospectively applied standards may have downstream effects on how armed forces personnel act, how they understand their relationship with the state, and how potential recruits assess the risks of service.

The armed forces have long operated under well-understood rules governing the use of force, and the principle that lethal force must be justified, proportionate, and necessary is deeply embedded in both domestic and international law. The problem we have discussed here, rather, is the nature of the constraint introduced by the Article 2 ECHR procedural framework as it has developed through cases such as *McCann v United Kingdom* and its successors. That framework does not simply regulate conduct at the moment force is used; it subjects decisions to later reconstruction against a structured and evolving set of criteria concerning operational planning, intelligence, and possible alternatives to the use of force. Moreover, through developments associated with cases like Šilih v Slovenia and their domestic uptake in *Re McCaughey*, those criteria may be applied to events long predating their articulation.

The operational implication is that the legal horizon against which decisions are judged is not fixed at the point of action. A soldier making a split-second decision to use force does so under rules of engagement and training that reflect the law as it then stands. But the possibility that the same decision may, decades later, be reassessed under a more demanding and differently structured set of criteria introduces a form of uncertainty that is qualitatively different from ordinary legal constraint. There are several plausible risks that this uncertainty might generate.

In high-pressure situations, hesitation in the use of force can carry grave consequences. If personnel internalise the possibility that any use of force may later be subject to prolonged scrutiny under human rights standards that cannot be fully anticipated, they may become more cautious in planning operations involving force than might be prudent. That does not necessarily mean unlawful force is avoided; it might instead mean that lawful force may be delayed, qualified, or avoided in circumstances where it would otherwise have been properly used. Over time, this might shift the balance of decision-making toward risk aversion in contexts where decisiveness is often critical.

Alongside this risk sits a second, more institutional concern, relating to the relationship between the British state and those it deploys in its service. Armed forces personnel typically operate on the reasonable understanding that if they act within their lawful authority, and if their actions are investigated and cleared under the standards applicable at the time, then the matter is settled. In other words, they understand they will not be treated with immunity, but that they can enjoy legal certainty

and finality. The Article 2 framework, as it has been applied in the legacy context, seriously weakens that expectation. The combination of evolving Strasbourg jurisprudence and its domestic incorporation means that closure on the legal justifiability of an operation becomes provisional rather than definitive. An investigation that was regarded as adequate at the time may later be deemed insufficient, not because it was conducted in bad faith or failed to pursue the truth, but because it did not conform to standards articulated by the Courts only afterwards. Even if the probability of eventual prosecution remains low, the prospect of renewed investigation decades later, entailing legal uncertainty, reputational risk, and personal strain, is itself significant. This is particularly so where the justification for reopening cases rests on the application of standards that were not and could not have been known at the time.

These considerations feed into a third risk, which concerns the possible impact on recruitment and retention. Where service is understood to carry a form of open-ended legal exposure, extending beyond retirement and potentially triggered by evolving legal doctrines, this may influence the decision of some to join or remain in the armed forces. This was certainly the view of those veterans interviewed for this project, and it has a particular relevance to an all-volunteer army such as that of the UK.

Soldier L expressed concern that "there is a risk that future soldiers will be deterred from making necessary decisions in the field if they fear prosecution decades later by standards unknown at the time of action."

Soldier B, meanwhile, said that he had encountered current serving soldiers who "expressed real concern, one said he'd be leaving the regiment soon. This is not isolated. There's a real sense of uncertainty: 'If I fire now, will I be prosecuted in 25 years?' That worry affects serving personnel." Soldier C reported that "I've heard morale is low. Guys live under pressure and feel separated. If they feel they won't be backed by higher authorities, they won't stick around. Selection is tough, but not being backed up is an insidious problem."

Soldier D described the impact of the current approach to legacy issues in the starkest of terms, stating that it was "Catastrophic, there's no other word." He identified two distinct but related forces that were together degrading military morale and effectiveness. Soldier D argued that "Two things are killing morale: the government's inability to commit to defence, and the lack of authorities to allow forces to operate as a combat force." Soldier D argued that "If retrospective application of laws like Article Two of the Human Rights Act means you can be prosecuted for actions taken operating under the rules of the time, people will not join or will leave. That is killing retention and recruiting." He also identified what is at stake in terms of institutional identity and purpose: "We're becoming a gendarmerie rather than a warfighting capability. Why would people join the SAS when they won't be allowed to fight? Selection and the ethos are about being a fighting soldier."

Soldier K identified two levels of impact from the current approach to the legacy issues, both strategic and operational. At the strategic level

Soldier K said that "Incorporating ECHR domestically has created a permanent vulnerability for the military that can be exploited by hostile actors, hybrid warfare, state or non-state actors who can weaponise legal processes. There's confusion between law of armed conflict and ECHR, and allies may operate on different legal frameworks. This harms national security." At the operational and cultural level, Soldier K described a haemorrhage of capability from key units, noting that "It causes a bleed from key units. Police firearms units nearly withdrew over similar cases two years ago; who would backfill those roles? The armed forces risk being asked to take police roles they aren't structured for".

Chapter 5: What is to be done?

The Government now has a choice. It can adopt a policy that promotes truth recovery and reconciliation and deals justly with those police and soldiers who served the state in the most difficult circumstances. Or it can persist with the Troubles Bill and its prosecution-led policy, and invite unjust and asymmetric treatment of veterans, yield little information or truth for those anxious to know what happened their relatives, and continue to sew division amongst the communities of Northern Ireland.

Ministers sometimes speak as though the endless investigation of elderly armed forces personnel is forced on them by law. That Parliament must legislate to facilitate criminal investigations of veterans. This is simply false. For a start, the Supreme Court has recently found that it remained open to the Strasbourg Court to find that "a reconciliation exception" did exist to any assumed general prohibition on amnesties for state actors inferable from the Convention. An exception, therefore, may exist which would be available to permit the conditional amnesty provisions of the 2023 Act to be enacted and implemented without any incompatibility with Convention rights. More fundamentally, Parliament is sovereign and is not bound by a court's declarations of incompatibility and may reach its own judgment about how peace is secured and what is owed to those who served. Options for a lawful and more just approach to dealing with legacy issues and veterans remain open. In what follows, we set out several such options.

A. Withdraw or reject the Troubles Bill, or repeal it if it is passed

There are several policy options available that are different from the Government's current prosecution-centric approach to legacy issues.

The first step towards a fairer approach to legacy issues as they relate to veterans would be for the Government to withdraw its Troubles Bill, or for Parliament to reject it. If it is passed, it should be repealed. The Bill is likely to result in an uptick in investigations and inquiries, and possibly in the prosecution of veterans. The proposed remedial order in relation to the 2023 Act should also be abandoned. The situation that will be produced by what the Government proposes promises to be worse even than the situation before the passing of the 2023 Legacy Act.

If that first step is taken, the questions then arise of what should be done instead, and of how the human rights law issues that arise should be addressed, both in deciding what to do and in deciding how to do it.

Reinstate the 2023 conditional immunity scheme

The most obvious and satisfactory solution would be the reinstatement of a conditional amnesty scheme: either the one in the 2023 Act or something very much along the same lines. That is what fairness and justice require for veterans and everyone else involved, on both sides, in the Troubles. In the case of veterans, it is also what is required by the mutual obligations of loyalty and honour between the state and those who put their lives on the line in military service to the state. An acknowledgement by the Government that that is indeed what is required, and for those reasons, would also be a significant step towards repairing the damage to service morale, particularly in the special forces, that has been done both by the situation that had developed before the passing of the 2023 Act and by the Government's proposal to use the Troubles Bill to restore it and maybe even make it worse.

It is for those reasons too, therefore, that the Government should abandon its maximalist approach to Article 2 compliance and go further than just restoring the situation to what it was before the 2023 Act. It should not accept that the jurisprudence of the Strasbourg Court directs how its obligations to those who served in the military should be discharged, still less should it accept the questionable inference drawn from that jurisprudence by the Northern Irish courts. Neither should it accept direction on those matters from the Republic of Ireland, whose own history makes it ill-placed to criticise.

In principle, reinstating the conditional amnesty scheme would be the natural consequence of not proceeding with the Troubles Bill and of withdrawing the remedial order. But, in practice, more might be needed to fully implement the reinstated scheme. Not all the provisions providing for the scheme have been commenced and there might be some scope - provided the fundamental nature of the scheme is retained - for making minor improvements to it before commencing it or for supplementing it with some of the proposals discussed below. Obviously, the task of reinstating the scheme would be even more onerous if the Troubles Bill is passed, or the remedial order made, because the effects of the Bill and the order would need to be undone.

It is important to remember, though, that it is very far from clear that either a conditional amnesty scheme like the one in the 2023 Act or, therefore, the doing of whatever is necessary to fully implement it, would be incompatible with Convention rights.

The High Court in Northern Ireland made its declaration of incompatibility and the Court of Appeal in Northern Ireland upheld it because the Government conceded the arguments in favour of the declaration. Subsequently, however, the Supreme Court, on an appeal in the Dillon case on other matters, was asked to consider if the making of the declaration was justified. It decided that it did not have jurisdiction to decide the matter in an authoritative way because of the concessions made by the Government in the Court of Appeal, but it chose nevertheless to comment on the matter in a way that was not binding but obviously has

to be taken seriously.

The Supreme Court's view was that a domestic court would need to uphold the declaration, but not because a decision by the Strasbourg Court that the conditional amnesty scheme was incompatible with Convention rights was inevitable. On the contrary, the Supreme Court thought it remained open to the Strasbourg Court to find that a "reconciliation exception" did exist to any assumed general prohibition on amnesties for state actors inferable from the Convention. An exception, therefore, may exist which would be available to permit the conditional amnesty provisions of the 2023 Act to be enacted and implemented without any incompatibility with Convention rights.

The reasoning the Supreme Court then applied for justifying its view that a declaration of incompatibility would need to be upheld by a domestic court was that it was not for a domestic court to decide that such an exception does exist in advance of a decision that it does by the Strasbourg Court. The reasoning by which this argument arrived at the conclusion it did is highly problematic,[112] but the main premise on which it was based – that, so far as Strasbourg jurisprudence is concerned, it is not clear that the 2023 conditional immunities provisions are incompatible with Convention rights – was clear enough.

It follows from all this that Government and Parliament are under no obligation to proceed on the basis that the conditional immunities in the 2023 Act are manifestly incompatible with Convention rights. Even if the Government and Parliament had only the NI courts' declaration of incompatibility, and even if the Supreme Court had authoritatively upheld that declaration on its merits, they would still be fully entitled to ignore it, and to proceed as they thought best. That is because their capacity to do so in accordance with the doctrine of Parliamentary Sovereignty was part of the settlement that resulted in the passage of the HRA 1998 and is specifically and consciously preserved in that Act, particularly in section 4.

In this case, however, the Supreme Court's judgment on the matter makes it even clearer that the decisions of Government and Parliament in the case of the policy in the 2023 Act should not be seen as mandated by European human rights law, which remains unclear about what is and what is not compatible with the Convention when it comes to amnesties – and is certainly not as clear on the matter as the Northern Irish courts, and the Government when it made its concessions, appeared to think.

There is no convincing reason, particularly in the context of its preserved capacity to disregard a declaration of incompatibility, why Government and Parliament should prefer the analysis of the Northern Irish Courts to that of the Supreme Court. The Government and Parliament can and should make their own decisions about what to do to promote peace and reconciliation in Northern Ireland and to discharge their moral obligations to veterans and others – and they should accept full responsibility for those decisions without any need to feel constrained by the (as yet unknown) requirements of European human rights law.

112. The reasoning seemed to adopt an inappropriately literalist approach to judicial dicta in the UK case law about how UK courts should "mirror" decisions of the Strasbourg Court. It also seemed to adopt a misconceived notion of how legal propositions derive from case law. It seemed to assume that case law starts with a general quasi-legislative judicial statement of broad principle that the courts then refine in subsequent cases to be more targeted. It assumed that case law development proceeds from the general to the specific, rather than - as is the correct way of looking at it even in jurisdictions without a doctrine of *stare decisis* - vice versa: with each new case shedding more light on how specific factors in the earlier cases can be expressed in more general terms to suggest that later cases need to be treated in a way that is consistent with the earlier one. Apparently relying on this misconception, the Supreme Court then managed to reach the surprising conclusion that there was a general rule that was clear enough to be "mirrored" in domestic law even though the circumstances in which it did not apply were not clear. The rule and its exceptions were wrongly treated as separate when they are both part of a single proposition. The general rule against amnesties, the Court said, had to be applied in a case in which, it was conceded, it might turn out to be inapplicable, and the reason for that was that its inapplicability in that case was only a possibility and had not yet been decided with sufficient certainty. The simpler and more obvious way of putting this was that it was as yet unclear whether the rule against amnesties applied to an amnesty provided in the form and circumstances that were contemplated in the Legacy Act.

B. Other legal changes supplementing abandonment of the Troubles Bill policy

Even if the conditional amnesty scheme were not reinstated, and the starting point for reform were the legal position as it stood before the 2023 Act, other policy options are available that should be considered; and some of them would also be worth considering even if the conditional amnesty scheme in the 2023 Act is to be fully reinstated and implemented.

a) Disapplying the Human Rights Act 1998

The first option is to adopt measures that would indirectly or directly limit the reach of the HRA 1998 in its application to legacy cases. It was the operation of that Act that was driving the unfairness that the 2023 Act was passed to remedy.

Such measures might also be a useful option to adopt even if the provision for a conditional amnesty is to be fully implemented. It would avoid further domestic litigation on human rights grounds about amnesty provisions and would divert any further argument about any potential incompatibility with Convention rights into the Strasbourg Court, which the Supreme Court has said is the only place where, as things stand, it can be decided authoritatively.

If an amnesty is to be retained, a disapplication provision might also prove a useful mechanism for Parliament to indicate to the Strasbourg Court that it had made a properly considered decision to go ahead with it. In the light of the outstanding but questionable declaration of incompatibility in the Northern Ireland courts, that might be particularly valuable in so far as an amnesty might otherwise be revived by mere inaction (viz. by a failure to proceed with the Troubles Bill and the remedial order). It might be of value in mitigating, at least in part, the risk that the outstanding declaration of the Northern Ireland courts (albeit one with its certainties doubted by the Supreme Court) would colour the Strasbourg Court's consideration of the matter when it reached that court. It would amount, in practice, to legislation retrospectively, and for justifiable reasons, overturning the judgments in which the declarations were given.

One form such a disapplication could take would be to amend the HRA to make clear that it only applies prospectively to deaths occurring after 2 October 2000, when the ECHR was incorporated into UK law. This accords with the broad rule of law principle that the law should not be applied retrospectively and it would squarely address the fact that events 30 years ago are (wrongly) being assessed by reference to maximalist modern views of the requirements of Article 2 ECHR – but also, it appears, in the light of some "minimalist" views on the mischief of retrospective double jeopardy.

This amendment would be a legitimate act of Parliamentary Sovereignty to overturn *McCaughey* and to restore the effect of the House of Lords *McKerr* case. A statutory confirmation that the Act speaks only prospectively would re-establish the original position that *McCaughey* dislodged, and it would

do so on reasoning that the House of Lords itself regarded as the natural construction of the statute, before Strasbourg moved the goalposts of what Article 2 required, and the courts decided that the Strasbourg Court's view of the Convention could, in effect, be understood as requiring the non-statutory modification of the commencement provisions of the 1998 Act.

The effect of such an amendment would be to remove any domestic law requirement to conduct an Article 2 compliant investigation into Troubles-related deaths.

Alternatively or in addition, Parliament could amend the HRA 1998 to provide that no claim may be founded on any Convention right in respect of a death occurring before 2 October 1988, or of any act or omission after that date in respect of such an occurrence. That would be consistent with *Re Dalton's Application* [2023] 3 WLR 671 and would draw a line under the majority of Troubles-related conduct.

These are amendments that might well be worth making irrespective of their impact on legacy cases. The domestic courts have arrived at a version of retrospective effect for the HRA 1998 which was never contemplated by Parliament when it passed that Act and is potentially incompatible with rule of law principles.

Of course, another more direct approach would be an express provision in primary legislation simply disapplying the HRA 1998 just in relation to legacy cases or, if the immunities are revived, just in relation to the conditional amnesty. That would be just as effective at ensuring that domestic courts cannot pre-empt and "gold-plate" Strasbourg decisions. However, it might also be significantly more controversial and less easy to defend than an approach that specifically challenged the apparent and unfair way the domestic law has applied Convention rights retrospectively contrary to the intentions of Parliament when it passed the HRA 1998.

It is possible that any direct or indirect disapplication of the HRA would be challenged in the Strasbourg Court, or even, so far as it allowed it, in the domestic courts. The Government would have good arguments to resist the challenge and, for all the reasons we have given, should do so first in the domestic courts and, if it loses there, should ensure that it reaches the Strasbourg Court and can be resisted there.

(b) Domestic reforms to filter prosecutions of security service personnel

(i) Self-defence filter

In the event that the Government nonetheless decides that the 2023 Act immunities are not to be maintained or revived and insists on acting in accordance with its questionable understanding of Convention rights, an alternative legislative option – one that recognises the moral gulf between those actors who undertook planned killings and those who killed in unexpected, unwished-for circumstances – would be to make provision for a statutory certification scheme for the commencement or continuation of any Troubles-related case.

This statutory scheme could provide that no investigation or proceedings in respect of a "qualifying offence" (defined to cover all Troubles-related offences, reproducing s.3(7) of the Northern Ireland (Sentences) Act 1998) could proceed without a certificate.

The statutory scheme could build on s.3 of the Criminal Law Act (NI) 1967 and the common law rules about self-defence, by adding extra steps to the decision-making process on investigations and proceedings. It could provide that the subjective-belief protection in relation to self-defence that already attaches to the existence of circumstances is treated as extended, for certifying purposes, to the reasonableness and legality of the force used. So, a purely subjective but honest belief that the force was justified would block proceedings irrespective of whether there were reasonable grounds for the belief. The provision could then consequentially provide that, where there is evidence that is likely to establish beyond reasonable doubt that the suspect believed at the time that the force was unreasonable or unlawful, the case should be certified and proceed, but with s.3 then applying substantively in the ordinary way.

The filter would be neutral as to whether the individual was in the armed forces or security services but would nevertheless have the effect of objectively screening killings resulting from split-second errors of judgment, while leaving the prosecution of deliberate and intentional killings untouched.

It is possible that a rule of this sort might be challenged (in the absence of a disapplication of the HRA 1998 as suggested above), first in the domestic courts and ultimately – if the Government chose to defend it – in the Strasbourg Court, but just as in the case of the conditional amnesty scheme, there would be good arguments that it was compatible with Convention rights.

(ii) New and compelling evidence filter

At the time of writing, an amendment to the Troubles Bill is proposed to introduce a requirement that any new investigations must be based on 'new and compelling' evidence. There is some merit in this proposal, in that it could ensure that veterans are not vexatiously pursued repeatedly in relation to issues that have been well investigated already, whilst maintaining the possibility of investigation only for where there has been a substantial change of evidential circumstances.

This 'new and compelling evidence' requirement tracks *Brecknell v United Kingdom*, in which the Strasbourg Court held that the investigative obligation in respect of historic deaths revives only where genuinely new and plausible material comes to light. Article 2 requires that unlawful killing be capable of investigation and punishment where evidence and justice demand it; it does not require the indefinite, unfiltered pursuit of every historic death.

Nevertheless, this too might be subject to an HRA 1998 challenge in the absence of a disapplication and it might also have the potential, in practice, to become problematic without the addition of some further

provision about how the concept of "new and compelling" is defined and applied.

(iii) AG consent filter

In addition to these proposals, legislation should provide that the consent of the UK's principal Law Officer, the Attorney General for England and Wales, should be sought and given before any prosecution of any former or serving member of UK forces in respect of their actions while on active service. This would ensure that a politically accountable minister can decide on whether the public interest justifies prosecution of a former Operation Banner soldier, a decision for which they can be held accountable in Parliament.

C. How to respond if Strasbourg rules against the UK approach

But what happens if the Government adopts some or all of the above ways forward, robustly defends them in the domestic courts and then, by failing (as it is entitled to do) to remedy any declaration of incompatibility of which they are made the subject, finds that the matter has reached the Strasbourg Court? There is, of course, a risk that, in due course, the matter will be decided in that Court against the UK there. What are the options then?

a) Principled defiance of Strasbourg

The Government is only required by the Convention to comply with judgments against the UK under Article 46 of the ECHR that have been made in the case in question. It is not otherwise required by international law to take account of the jurisprudence of the Court, or indeed the incidental implications of any judgment in a particular case, to take any further action. The task of enforcing the judgments of the Court rests with the Council of Europe.

How the Government should respond either to a specific judgment or to its wider implications would very much depend on the nature of the judgment and the implications.

However, there is obviously an option of ignoring it and entering into a dialogue within the Council of Europe about the way forward. The issues of peace and reconciliation in Northern Ireland and the Government's obligations and commitments to members of the armed forces of the state and others are so important that it should not concede the existence of any unacceptable constraints imposed by the Strasbourg Court on how it discharges those obligations.

The case for "principled defiance" is especially powerful where any constraints that might be imposed by the Strasbourg Court would rest on Article 2 case law that clearly innovated retrospectively to expand the reach of that Article beyond what was agreed originally by the member states and beyond even what could reasonably have been predicted by

them. It is a feature of the Supreme Court's dicta in *Dillon* that the Supreme Court thought that it is still not yet possible to predict what approach the Strasbourg Court will take to the conditional amnesty in the 2023 Act.

The precedent of the intransigent way in which the prisoner voting rights issue was handled by the UK shows both what is possible and what might be achieved by such an approach.

b) Withdrawing from the ECHR and repealing the HRA

Finally, there is a strong case, if Parliament is persuaded that the conditional immunities scheme in the Legacy Act 2023 needs to be retained, for repealing the HRA altogether, and for the UK to withdraw from the ECHR. That would remove any need to have regard to how the Convention rights and the opinions of the Strasbourg Court impact on immunities in a post-conflict situation.

That Court should not be regarded as the regulator of how peace and reconciliation is to be achieved in Northern Ireland.

This, of course, has to be an option if the UK loses a relevant case in Strasbourg and principled defiance, as set out above, results in an impasse. For many, however, it may be already clear that this is the only way to resolve the difficulties created by the ECHR in relation to legacy matters and indeed other areas of policy.

D. Information and Truth Recovery

Nothing in this report forecloses subjecting unexplained or unresolved Troubles-era deaths to a searching process of truth and information recovery. This remains a concern shared by the principal parties to the peace agreement: there is widespread agreement that information and establishing the truth about unresolved deaths is an important part of addressing the legacy of the conflict.

More than £1 billion has now been spent on a small number of Article 2 inquests and inquiries into Troubles-related deaths.[113] This provides some indication of the extraordinary cost associated with each individual inquest. It is prohibitively expensive to contemplate applying this model to provide answers in respect of hundreds upon hundreds of unresolved Troubles-related deaths. Attempting to investigate each of these cases through the existing inquest process would entail costs and delays of an astronomical magnitude.

If expensive inquests, inquiries, criminal investigations and attempts at prosecutions that are unlikely to succeed are set aside, resources and institutional capacity could instead be redirected towards reviving the original purpose of the Independent Commission for Reconciliation and Information Recovery: investigating and producing, as far as possible, a truthful account of how a person came to be killed or seriously injured.

Combined with some form of conditional immunity and a prohibition on new public inquiries into legacy cases, which are extraordinarily expensive and very unlikely to secure new evidence, such a process would maximise the prospects of witnesses coming forward to provide truthful

113. See Jeffrey Dudgeon & Graham Gudgin, The £2 Billion+ Cost of Legacy in Northern Ireland Measuring the Financial Burden on the United Kingdom (Policy Exchange, 2025).

accounts of any role they may have played. Unlike expensive and highly legalistic inquest and inquiry processes, it could be designed to minimise legal costs and operate at scale. The objective would be to establish a rigorous but efficient, affordable and scalable system of information and truth recovery, rather than one that becomes bogged down in the procedural and doctrinal complexities associated with Article 2 compliance.

Concentrating truth and information recovery within a single commission would also provide a means of producing authoritative accounts of unresolved cases, rather than leaving competing institutions or actors to construct competing narratives of the same events. The choice, therefore, need not be between pursuing truth and abandoning it. The more realistic choice may be between an extraordinarily expensive and legally constrained system that can address only a small number of cases, and a streamlined truth-recovery process capable of addressing the much larger number of unresolved deaths that remain.

E. Conclusion

The justification for the 2023 provisions – that it was desirable to draw a line under the past, reflecting the Belfast Agreement – remains compelling. The options set out in this Chapter would all contribute, to a greater or lesser extent, to ensuring that investigations that are very unlikely to result in prosecutions and convictions do not proceed. They would facilitate and encourage the people of Northern Ireland to address the legacy of the Troubles in a different, and better, way – a way that would lead to more answers and truth for more of the families affected through ensuring that all combatants could speak freely as to what happened without the perpetual fear of being subjected to oppressive forms of investigation and inquiry or of being then hauled through the courts.

The passing of more than a quarter century between the Belfast Agreement and legislation about this matter should not be accepted as weakening the case for legislating. There is a persuasive case to be made that it actually strengthens it. If Government is persuaded and Parliament agrees that the adoption of options in this paper would represent a sounder approach than relying on investigations and prosecutions that are likely to have an asymmetric impact on security service and military personnel, then it should make its decisions about them based entirely on the public interest, and not hide behind European human rights law as an excuse for closing down ideas that are otherwise worth considering and implementing.

Afterword

Lord Glasman, Labour Peer and author of Blue Labour: The Politics of the Common Good, 2022

The Special Air Service is the jewel in the crown of our Armed Forces. Professional, effective and feared.

'The Regiment' provides a unique advantage to Britain in any violent conflict. Explicitly elite, and built on the virtues of courage, honour and skill it was founded to win wars through special operations. Speed, skill and intelligence are their modus operandi.

Their reputation is international.

When I was at Trump's inauguration I heard many criticisms of our Armed Forces but it was always accompanied by praise for the SAS. It was the one branch of our Armed Forces that received unanimous respect.

This report is an excellent analysis of the role of the SAS in Northern Ireland from 1976 to 2007. They were sent to confront a well-funded, armed and organised terrorist organisation. They played a decisive role in convincing the Provisional IRA that the 'armed struggle' could not win. Without the SAS there would have been no Good Friday Agreement.

It is also excellent in that it describes the pernicious effects of enforcing an extreme interpretation of human rights law as the ultimate legal framework, and how that degrades effective political sovereignty and action.

Special Forces were deployed in Northern Ireland under the ordinary law of the land. It was only when the Good Friday agreement was signed that the retrospective legal actions against veterans began. While the soldiers of the Provisional IRA were sent letters of pardon and forgiveness.

This is what happens when the rule of law morphs into the rule of lawyers, enforced and created by judges who have no experience of war and are hostile to any reality that does not conform to individual rights.

We owe a debt of great gratitude to the veterans of the SAS who served in the long deployment in Northern Ireland. They served with great courage and honour in extremely dangerous and violent conditions. It is a breach of our military covenant that veterans are investigated and prosecuted in their old age because of an understanding of the law that did not exist when they were active. This is demoralising 'The Regiment' and leading to severe problems in recruitment.

A great injustice is being done by the pursuit of these prosecutions by the British State. Reciprocity requires a mutual amnesty and the conditions

of geo-politics have never needed an effective SAS more. From Ukraine to Iran their experience and expertise are central to our national interest.

The Labour Government of 1945 refused to join the European Court of Human Rights. Ernest Bevin did not look kindly upon 'Foreign Judges deciding British Law'. It is time for this Labour Government to learn from its own tradition.

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