NORTHERN IRELAND: ON THE RUN

The Secretary of State promised the Prime Minister an early progress report on the review which Sir Quentin Thomas has been conducting, at his request, of the options for dealing with the on the run issue.

Sir Quentin has now produced the attached interim assessment. The Secretary of State has not yet had the opportunity to discuss it with Sir Quentin and consider the options with his advisors but, given the speed at which things are moving, thought that you might find it helpful to have a copy of the note, as work in progress.

The Secretary of State promised to keep the Defence Secretary closely informed of this work and I am, therefore, copying this letter to his Private Secretary and to Mr. Hermon, who will be keeping the Attorney’s Office, but not more widely at this stage.
AN AMNESTY SCHEME

1. Since, and partly as a result of, the Good Friday Agreement, there has already been special treatment for terrorist offenders. In particular:

(a) Under the Northern Ireland (Sentences) Act 1998 over 400 prisoners have been released early on licence. Those released had to satisfy the Sentence Review Commissioners that they were not supporters of a specified organisation (that is a paramilitary organisation not observing a ceasefire), that they were not likely to become concerned in terrorism and, in the case of lifers, that they would not be a danger to the public. Those released were subject to recall.

(b) In September the Secretary of State announced that extradition would not be pursued in respect of sentenced fugitives who appeared to qualify for early release under the 1998 Act and who, on making a successful application, would have had little if any of their original sentence left to serve.

2. There are others, who may be within the jurisdiction or fugitive outside it, who have not been convicted or whose cases are not covered by (a) or (b) above. The options in respect of these include:

(i) To continue to apply the normal process of law.

(ii) To decide as a matter of policy in the public interest not to pursue extradition in respect of those suspected, but not convicted, of relevant offences even though proceedings might be initiated if those concerned were found within the jurisdiction. (Any remaining sentenced fugitives might also benefit.) This might be done without legislation.

(iii) To provide an amnesty in respect of all relevant offences committed in Northern Ireland before the Good Friday Agreement. This would require legislation.

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3. It is assumed that any scheme under (ii or iii) would be confined to 
offences arising from the troubles and not to ordinary crime. It would apply to scheduled and equivalent
offences committed in connection with terrorism and the affairs of Northern Ireland.

4. An amnesty scheme in these terms would apply to relevant offences committed by
members of the security forces, unless express provision were made to exclude them.

Option (i)

5. Option (i) is the present position, subject to what has already been done (see
paragraph 1 above). It is broadly what the public expects: amnesties having been
repeatedly distinguished from what has been done, and implicitly ruled out.

Option (ii)

6. If the scheme were to apply only to offences committed in Northern Ireland the
Secretary of State could after consultation introduce a scheme on these lines. The right
approach would be to announce both a policy shift, and the reasons for it, and that each
live case had been reassessed in the light of that policy. That approach would also
minimise the risk of successful judicial challenge. (If the scheme were to apply also to
offences in Great Britain, the Home Secretary and the relevant authorities in Scotland
would need to take parallel action.)

7. A scheme of this sort would be controversial. It could not be presented, as could the
Secretary of State’s September announcement on fugitive sentenced offenders, as a piece
of tidying up consequent on the early release scheme. It would raise difficult, and
arguably unanswerable, questions. Some of the awkward issues would include:

(a) On the face of it only terrorists, or suspected terrorists, would benefit, and not
members of the security forces since, even if abroad, they are not on the run outside
the jurisdiction.
(b) If members of the security forces were excluded from the scheme in principle it would be seen as unfair. But if members of the security forces could benefit in principle then it would be an invitation to any who felt vulnerable to skip the jurisdiction.

(c) The scheme would not apply within the jurisdiction, and would not therefore be worth much to republicans, though in practice the prosecution authorities would be placed in a difficult and perhaps untenable position if one of those concerned were arrested here.

(d) What consideration of public interest or principle could be said to justify this approach which would not also point to dropping prosecutions within the jurisdiction? But if the scheme extended within the jurisdiction then legislation would be required and we should be adopting option (iii). Nonetheless a case could be assembled for this approach, partly on practical grounds.

(e) The scheme has no pedigree in the Good Friday Agreement and would lack the legitimacy conferred on the product of all-party agreement in Northern Ireland.

(f) In any political and press controversy the Government would find it difficult to identify principled ground on which to stand, bankable benefits, or any vocal political support.

Option (iii)

8. Whether option (iii) – namely an amnesty – applied to offences in Northern Ireland only or, as might be more appropriate, to relevant offences throughout the United Kingdom, it would require primary legislation.

9. The legislation might confer immunity from criminal proceedings in respect of relevant offences: scheduled and equivalent offences committed before the Good Friday Agreement in Northern Ireland (or UK-wide) in connection with terrorism and the
affairs of Northern Ireland. (It would be necessary to cover also offences of escape and offences committed in connection with escape from detention arising from proceedings in respect of relevant offences.) Once the amnesty was conferred on an individual who established that he was qualified it would be unconditional and irreversible. There could be no question thereafter of supervision, licensing or recall. It is just possible that a proposition at large that no prosecutions be brought in particular circumstances could be reversed.

10. An amnesty could either be (a) automatic in applying to all relevant offenders and offences in the period in question or (b) selective: that is, applying only to cases thought to be "deserving", as was the case with the early release scheme.

**Automatic amnesty scheme**

11. The simplest, and in some ways cleanest, amnesty would apply to any relevant offences (scheduled and equivalent offences committed before the Good Friday Agreement in connection with terrorism and the affairs of Northern Ireland). Prosecution in respect of such offences would be ruled out by legislation.

12. The consequences would be:

(a) The scheme would be easy to administer: no new machinery would be required.

(b) The scheme would be relatively clear in its effect. The only uncertainty would arise from whether the offence was scheduled or equivalent and concerned with terrorism and the affairs of Northern Ireland. (Some paramilitary robberies, for example, are borderline.)
(c) Immunity would be conferred on offences even if committed by active terrorists opposed to the Good Friday Agreement. (In practice it is not clear if anyone of this kind is wanted for offences in the pre-Good Friday Agreement period.)

(d) Members of the IRA would benefit without having to submit to any procedure involving application to, and consideration by, the British authorities. This would have considerable appeal to them. It would also relieve the Government from devising and running an uncomfortable procedure – see below.

(e) The slate could be wiped clean. In this respect it would be of particular benefit to the new post-Patten Northern Ireland Police Service to close files on many difficult and potentially divisive cases.

(f) The scheme would create anomalies: its beneficiaries would be better off than some of those dealt with under the early release scheme. Probably on equity ground, those whose offences would have qualified under the automatic amnesty would have to be released (including the 1 or 2 lifers judged a danger to the public) or be relieved of the licence conditions. That would plainly make a nonsense of all that had been done to select those deserving to benefit under that early release scheme.

13. It would be easy to attack a scheme on these lines. The contrast with the more selective early release scheme, which itself could claim a pedigree in the all-party negotiations, would be particularly stark. Everything would have to rest on the proposition that the Good Friday Agreement was a defining moment. (though this had only just been realised), so that the slate could be wiped clean and/or that it was in recognition of (perhaps not in exchange for) such a major step towards normalisation by the paramilitaries that a veil could be drawn over the earlier period. The reassurances in the early release scheme (selectivity; conditional release) would not be available; and it would, in principle if not in practice, benefit dissidents as well as supporters of the Good Friday Agreement. Future offences would of course be prosecuted.
Selective amnesty scheme

14. A selective amnesty scheme might also apply to scheduled or equivalent offences in connection with terrorism and the affairs of Northern Ireland committed before the Good Friday Agreement. The selective element might be, and be presented as, an extension of the early release scheme and be administered by Commissioners like the Sentence Review Commissioners. An amnesty would be given in respect of qualifying offences following an application in which the offender gave sufficient information to identify the offence and his, but not others’, part in it, unless the Commissioners judged that he was a supporter of a “specified organisation” – that is a paramilitary organisation not observing a ceasefire – or was or could become concerned in terrorism. (It might be possible to raise the threshold in some way in an attempt to extract a more definitive commitment to peace from the individual or his organisation.) The application would not be admissible in evidence in subsequent criminal proceedings. The outcome of the process would be a certificate establishing the individual’s immunity.

15. The scheme would need to provide, as did the early release scheme, an opportunity for a hearing for the applicant if he chose or his representative when an adverse decision was in prospect. Applicants would enter the jurisdiction under safe conduct (and would presumably have to be allowed to leave afterwards).

16. There could be a procedure, analogous to section 11 of the 1988 Act, to enable victims to receive information about applications made and granted. (It is not envisaged that there would be public hearings on the lines of the South Africa Truth and Reconciliation Commission though this is a possibility.)

17. A selective amnesty would:

(a) not enable the police to close all the relevant files concerning qualifying offences in the relevant period (a considerable attraction in the automatic scheme). Indeed even when one offender has received an amnesty his co-accused might stand to be prosecuted for the same offence.
(b) be more consistent with the early release scheme, but would still involve some disparity with those released on licence for analogous offences;

(c) be less attractive to the IRA as it would involve making an application and disclosing information to the British authorities. (This would no doubt require a dispensation from the PAC if an offence against the IRA code is to be avoided.) Note the scheme might work without the need for information about the offence, but it would be odd to grant an amnesty on a selective basis unless it was plain which offence was in issue.

18. Neither version of the amnesty would conflict with international obligations as far as is known. (We might have to extradite people for offences when an analogous offence in the relevant period could not be prosecuted in the UK.) But there is some apparent discrepancy between an amnesty in (or as respects) Northern Ireland and the forward position adopted by the United Kingdom in respect of the need (sometimes said to be a pre-requisite to a settlement) to bring to justice those wanted for offences in conflicts overseas: for example in the Former Republic of Yugoslavia.

19. An amnesty works best when there is some self-evident discontinuity: a rebellion suppressed, a civil war ended, or a revolutionary shift of power. Unless it is an act of magnanimity in victory, it can serve to legitimize, at least partially, what was done in challenging an undemocratic or oppressive regime and at the same time, particularly if it applied to the security forces, to deligitimise that regime. The implication, as in South Africa, is that the nature of the regime was such that both its opponents and servants were driven to act outside the rule of law.

Key choices

20. In framing an amnesty, key decisions are:

- should it be an automatic or selective amnesty?
should members of the security forces suspected of relevant offences benefit or should they be expressly excluded?

Views of the IRA

21. One objective is to create the context in which there is progress towards disarmament, disbandment of the IRA and/or a definitive statement about the end of the armed struggle. The views of the IRA are accordingly crucial. An amnesty has some value to them: in particular some key players could be brought back to the jurisdiction to help with the cause and to show that the “army” looks after its troops. A selective amnesty in which applications had to be made to the British authorities would be much less attractive, particularly if some information about the offences had to be disclosed. The attraction of an amnesty to them will also be diminished greatly if it applied equally to members of the security forces. Adams has said this would turn a positive move into a negative one (though that may be partly tactical in order to reduce the price expected for it).

Views of the unionists (and others)

22. The views of the unionists and other politicians is likely to be highly negative. An amnesty, whether selective or not, could be seen as the final evidence that the Good Friday Agreement was an instrument for surrender of principle and betrayal of unionist interests. It would be worse if the scheme were automatic and if security force personnel were expressly excluded. But removing those elements would not neutralise the opposition. There would be some recognition of its purpose if the amnesty could be shown to be a response to (rather than traded for) some definitive move: actual decommissioning (or putting arms credibly beyond use); disbandment of the IRA; the definitive renunciation of physical force. That negative reaction would no doubt be reflected in Great Britain and in the British press.
Parallel scheme in the Irish Republic?
Conclusions

- In a zero sum game an amnesty is a **dumb play**. That is because it has a relatively low positive value for the Republicans and a high negative value for unionists and most others.

- This conclusion remains valid whatever form the scheme takes, but the precise balance will be critically affected by two factors: should the amnesty be **automatic or selective**? Should it apply to members of the **security forces** as well as to paramilitaries?

- An amnesty would be a **Christmas present for anti-Agreement unionists**, to be opened with bitter glee, and make it harder for Trimble to sustain his position.

- It would be different if an amnesty was one **agreed product from an inclusive negotiating process** (as was the early release scheme) or a **response to bankable evidence that the IRA was going out of business**: actual decommissioning; disbandment; **definitive renunciation of physical force**.

- An **automatic amnesty** (that is applying to all relevant offences, whether the perpetrator remains active or not) would be of greater appeal to the Republicans, would helpfully close down police files, and would be easier to administer. But it would be hard to justify or to reconcile with the **selective early release scheme**.
- A selective amnesty (not applying to active terrorists and supporters of dissidents groups) would be more easily defended and more consistent with the early release scheme but of less appeal to Republicans. Some would no doubt decline to apply. Administering it would produce some difficulties.

- An amnesty applying also to security force personnel would alienate Republicans and other nationalists without reconciling unionists, would impact on the policing debate.

- If the security forces were expressly excluded from an amnesty (for which there is a case on merits) non-nationalist opinion, and opinion in Great Britain, would contest it bitterly – and the proceedings of the Bloody Sunday Inquiry and other investigations would daily rub salt in the wound. Such a scheme would be harder to get through Parliament.

- The early release scheme would need adjusting. In particular, an automatic amnesty would imply releasing on equity grounds prisoners selected out, or recalled, under that scheme.

QUENTIN THOMAS
30 November 2000