

# So It Was A War Then?

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The Police Ombudsman's report into the Special Branch's handling of the loyalist agent Mark Haddock raises questions about how the security forces dealt with loyalist and republican terrorism and about collusion.

Many people talk about the 'dirty' war. So was it a war then, with the implication that most things were allowable:

'Only those who had never been on a real battlefield asked for unstained virtue and unblemished deeds. (Vikram Chandra)?

## The War Model

Wars are generally fought by professional armies of nation states in 'international armed conflict'. Even civil wars are often fought by recognised armies. Armies are subject to the Geneva Convention which governs the treatment of prisoners and civilians. But what about armed groups – paramilitaries, terrorists, choose your designation – who do not concern themselves with the welfare of civilians and prisoners? Who are engaged in asymmetric conflict – a bombing, shooting – who emerge out of a civilian population and merge back into them, who do not wear uniforms? They are not usually engaged in set piece confrontations with the security forces, and often their 'acts' are as much for the media, to deliver a message to politicians or a hopefully restless electorate, rather than to 'win' in any military sense. And they are often trying to provoke security force over-reaction. Are these groups to be responded to through a 'war' model? And what would a 'war' model look like?

A 'war' model in Northern Ireland would have looked like at its simplest a general policy of shooting terrorists on sight and the indefinite detention of all captured terrorists. It could also have involved reprisals against communities from which gunmen or bombers emerged or in which they were sheltered.

A policy of arresting and detaining suspected terrorists without trial may be pursued without resorting to a full-scale war model and it was used in Northern Ireland from 1971 to 1975. It proved highly counter-productive, increasing the alienation of the Nationalist community and the flow of recruits to the IRA.

The war against international terrorism after September 11 made the Bush Administration declare anyone in the world, of whatever citizenship or location, 'an unlawful enemy combatant' and – solely on that designation – to detain the person indefinitely without charge, beyond the reach of any court. Some of these people ended up in Guantanamo, and allegations of arbitrary and indefinite imprisonment and the practice of torture have followed.

We are struggling to find an appropriate category for people involved in or trained in terrorism – and therefore how to treat them. Is using the category of 'war' useful for such people? For instance, when does a war on terrorism end? When do you release such people?

## The Criminal Prosecution Model

Under a pure criminal prosecution model all suspects, whether they were charged with

terrorist or ordinary crimes, would be dealt with in ordinary criminal courts and would have a right to jury trial in serious cases. In practice, the system of criminal prosecution was substantially modified in Northern Ireland by changes in the common law rules on arrest for questioning, and on the admissibility of confessions, and by the suspension of jury trial. But the criminal prosecution model which was maintained since 1975 remained essentially different from the war or detention models in that a suspect may be kept in custody only if he or she is charged with a specific criminal offence and the prosecution is able to prove his or her guilt beyond reasonable measure.

There were some important consequences of adopting a pure or modified criminal prosecution model. The most important was that some people who were 'known' by the security forces to have committed or organised acts of terrorism were not put behind bars because there was insufficient evidence to bring them before a court or because a court will not convict them. Relying on criminal prosecution thus makes dealing with suspected terrorists rather like dealing with suspected burglars or pickpockets. No one assumes that all of these will be arrested and imprisoned, or that burglary or pick-pocketing will be completely stamped out. The community accepts this as part of the price to be paid for its commitment to the principle that it is better to allow a guilty suspect to go free than to convict an innocent person.

All policies have their consequences and costs. The criminal prosecution strategy enforced restraint on the security forces. The problem of obtaining evidence was very difficult, if not impossible. Emphasis was put on undercover work, the use of informers and sophisticated intelligence gathering. With the understandable pressure to get 'results', to lessen or eliminate terrorism, there were strong temptations for the security forces to seek ways round the restraint. The suspicions of confessions being forced out of people in Castlereagh in the late 1970s, the use of supergrasses in the mid-1980s, the events of 1982 investigated by John Stalker and Colin Sampson, the Stevens enquiry into the murder of Pat Finucane, all highlight the dilemma of how to cope with sophisticated and deeply entrenched terrorism and what the moral costs could be.

The criminal prosecution strategy criminalised people whose motivation is very different from 'ordinary' criminals, because they regard themselves as being at 'war' in pursuit of political objectives. Criminalisation of such people can only work successfully in societies where there is acceptance of the state by virtually everyone. This was not the case in Northern Ireland. We are in the process of making a long journey where it will, hopefully, be the case. The pre-condition was a new political dispensation (and as part of that a new policing one).

## **The Moral Issues**

The Police Ombudsman's report has shed a light on what the use of informers has actually meant – informers who participated in murder, murder that the agents of the State allowed, or perhaps even encouraged or manipulated as part of the 'war' against terrorism. All to save lives. But how many lives were taken in consequence? And who knew? And who was accountable to whom?

There has to be a moral distance between the methods of the terrorist and the methods of those who oppose them. In the words of the Daily Telegraph editorial of March 8, 1988 after the Gibraltar shootings 'it is an essential part of any effective anti-terrorist campaign to maintain the principles of civilised restraint which obtain in a democratic society... Failure to do so argues that terrorism is succeeding in one of its critical aims – the brutalisation of the society under attack.' War against paramilitaries can so easily corrupt us all and undermine the very basis on which any healthy society must be built. We become lost in a miasma of lies and deception. Limits and restraints must be observed, otherwise the state becomes, in

the words of St Augustine, 'organised brigandage' and sections of the security forces become indistinguishable in the end from the paramilitaries (as happened in some South American countries in the mid-1970s). Terrorists and security forces simply mirror each other.

### **So Was It A War Then?**

The answer is: sort of but not quite. Significant elements of restraint did in fact operate. The use of a 'war' model would almost certainly have made the situation worse – the problem could not be solved by a purely security approach, there had to be a political solution.

The criminal prosecution model is the model for a 'normal' society where there is a high level of political consensus. Its use in Northern Ireland, where there was not political consensus and where there was deeply entrenched terrorism, was never going to be fully adequate (but it was still the best model to use). It had to be supplemented by other methods – some of them highly dubious in nature. Possibly what we got was the 'best' that could have been done (that is a subject for debate – particularly around the restraints that operated). The Republican movement had to find out that they could not win through a campaign of violence and that politics was the way to go (because if you are winning through violence why would you change methods?)

We are left with moral queasiness – there is no moral purity in conflicts like ours – and the need to do all in our power to make politics work, because we know what happens when it doesn't.

David Stevens