**‘WHAT’S WRONG WITH HAASS?’**

**Austen Morgan**

**Introduction**

I refer to the proposed agreement of 31 December 2013, the seventh draft by Dr Richard Haass and Prof Meghan O’Sullivan, with the ponderous title ‘parades, select commemorations, and related protests; flags and emblems; and contending with the past’ in American English, a document of some 40 pages (‘report’).

Leaving aside political failure (and the blame game) for the moment, the content of the report may be criticized intellectually, and ideologically, as surprisingly outwith liberal-democratic statecraft; Haass and O’Sullivan, as experienced US outsiders[[1]](#footnote-1), have not helped restore the rule of law (the principal objective of a constitutionalist), because – as I submit – they indulged minority nationalism with the prospect of further UK-funded statism in NI.

Here, I produce a critique of their treatment of the three issues – parades, flags and the past - , of which the third was always the most important[[2]](#footnote-2), as lacking in necessary *Realpolitik*. When they flunked the issue of who is a victim, like post-modern relativists, they abdicated scholarly responsibility.[[3]](#footnote-3)

Criticism One: Circumstances

By circumstances, I mean the context for Haass/O’Sullivan action. They were not responsible for the context. But they could have been more aware of, and even handled better, the following factors.

First, Haass/O’Sullivan – who had worked together in the past - had no previous joint involvement in Northern Ireland[[4]](#footnote-4), before the former’s appointment by OFMDFM, on behalf of the NI executive in July 2013. This strength quickly became a weakness (as suggested below).

Second, though NI had a functioning assembly from 2007, and they were being asked to make recommendations in 2013, Haass/O’Sullivan appear to have picked up the following batons (becoming implicated in past failures): the post-Hillsborough draft NI assembly bill of 2010 on parades[[5]](#footnote-5), which was not enacted; the 2000 Mandelson 18 notified days for the union flag[[6]](#footnote-6), a dated quick-fix solution; and the semi-official[[7]](#footnote-7) report of the consultative group on the past, chaired by Lord Eames and Denis Bradley, in January 2009[[8]](#footnote-8), which self-immolated with the proposed £12k payment to the nearest relative of all who had died in the troubles. Continuity militated against genuine creativity.

Third, though their academic discipline of international (or foreign) relations recognizes law, while appreciating the limitation of legal solution alone, Haass/O’Sullivan were left without necessary official legal advice, from Belfast but especially London – the latter being the keeper of the UK constitution. The report is frankly legally naïve; the statutory code of conduct on parades is an important instance.

Fourth, while Haass/O’Sullivan could have provided recommendations as outsiders (and departed before Christmas), they concentrated upon securing political agreement to an arbitrary deadline. They therefore substituted unsuccessfully for the failed executive leadership of Robinson/McGuinness, by biting off more than they could chew.

Fifth, while Haass/O’Sullivan, with knowledge of radical academic culture in the US (including at Harvard), should have politely avoided the state-sponsored community and voluntary sector, and the discredited NI human rights community (including NIHRC, the commission), they exacerbated the continuing substitution of democratic politicians by gesturing towards the policy advice of the former.[[9]](#footnote-9) This was a major error: the very many well-funded[[10]](#footnote-10), and self-regarding, bodies, which contributed many of the six hundred submissions, do not occupy the space of a genuine civil society worthy of the name.[[11]](#footnote-11)

Criticism Two: Institutions

The problems given to Haass/O’Sullivan are predominantly civil society issues: they relate to the collective behaviour of the two so-called NI tribes (plus, now, the third – alliance party – tribe, which abandoned the moral high ground of anti-sectarianism through its first Westminster MP[[12]](#footnote-12)). Given the existence of the Belfast agreement (promoted by the UK and Irish governments), there had to be some role for the state in resolving these issues, albeit the state in the form of the devolved NI administration. The mediation between civil society and the state (even in NI) is politics: either the democratic politics of elected representatives or new political forces engaging in mass action; with the malignant default position being the republican versus loyalist paramilitaries.

The report is bedevilled by statism, of the sort that I have compared occasionally to late 1940s’ eastern Europe – unfairly to the communists and others in the emerging soviet empire!

There is no evidence, in the report, of the negotiations between the executive parties having been conducted (as claimed[[13]](#footnote-13)), on the basis of a vision of the future premised on: equality before the law; equality of opportunity; good relations; and reconciliation. Those remain in short supply in NI.

Haass/O’Sullivan recommended the following new institutions:

*parades*

(1) office for parades, select commemorations, and related protests (‘OPSCRP’);

(2) authority for public events adjudication (‘APEA’);

(3) a new function for the NI judicial appointments commission (‘NIJAC’);

(4) ‘a new code of conduct…in the legislation establishing…arrangements in order to give it the full force of law’[[14]](#footnote-14) (a quasi-institution);

*flags*

(5) commission on identity, culture and tradition (‘CICT’);

*the past*

(6) historical investigations unit (‘HIU’);

(7) independent commission for information retrieval (‘ICIR’);

*generally*

(8) implementation and reconciliation group (‘IRG’).

This alphabet soup, nourishing to some parts of NI through employment etc, is arguably on a greater scale than the 1998 Belfast agreement reforms (which ran until 2010). These institutions would be staffed by those nurtured in ‘alternative’ – transitional justice – law, by NI’s two universities, and mainland retirees.

Haass/O’Sullivan admit that there would have to be Westminster legislation.[[15]](#footnote-15) Stormont is also to legislate, though not surprisingly on the CICT (that is the commission on identity, culture and tradition): where is the existing authority for the envisaged expenditure? And there is, of course, the question of finance, which is mentioned in an exhortatory way only in the last three paragraphs of the report under ‘resources’.[[16]](#footnote-16)

Criticism Three: Over Ambition

There is a problem with the terms of reference. The report refers to the OFMDFM document: *Together: building a united community* (2013). After 9 July 2013, Haass appears to have brought O’Sullivan in as vice-chair. On 15 August 2013, OFMDFM published formal terms of reference. Haass/O’Sullivan do not appear to have stuck to these: ‘bring[ing] forward a set of recommendations’ for Robinson/McGuinness did not necessarily mean a five-party agreement, yes or no.

Query whether Haass/O’Sullivan have now finished with NI, or will seek to produce an academic article or two after the post-talks *billets-doux* being sent to the five parties?

The three issues, parades, flags and the past, existed in 2013 because of the following: the increasingly successful criticism of the parades commission over several years; the Belfast city hall decision of December 2012 regarding the union flag (and the resultant new-style protest movement); and the earlier mishandling of the publication of the Eames/Bradley report by its joint chairs.

Parades, flags and the past were, and are, discrete issues of different orders. And Haass/O’Sullivan should have looked to sever one or two, or to treat all three in different ways. Unfortunately, they went for one report[[17]](#footnote-17), without alluding to the commonality of the issues – namely, the culture war between Irish nationalism and Ulster/British unionism. If their statecraft had been more alert to secessionary nationalism (Irish but really Ulster, plus Scottish) in the UK state, which is still in a special relationship with the US, then they might have better addressed the three problems constitutionally; neither Haass, nor O’Sullivan (despite her ethnicity), carried the baggage of Irish-Americanism, which influences the democratic party in the US – so they do not have an excuse for their unconscious – and dated - Dublin view of the NI problem, as this may have lingered in the Washington DC corridors.

The strongest point that can be taken against the report is: between 1998 and 2007 (when he stepped down as prime minister), Tony Blair was preoccupied with disarming the republicans and dragging the IRA, in the form of Sinn Féin, into devolved politics (not that they need to be dragged); there was a series of agreements, between London and Dublin, imposed on the NI political parties; but why did Haass/O’Sullivan, as relative strangers, have to recommend continuation of that frenetic Blairite strategy, eight years after decommissioning and with Sinn Féin competing enthusiastically with the DUP in the symbolic (but hardly actual) working of Stormont?

Criticism Four: Parades

It is unforgiveable that Haass/O’Sullivan did not allude to the US concept of freedom of (peaceful) assembly (plus freedom of expression), in the American civil liberties union supreme court case concerning uniformed Nazis marchers and Jewish residents (including concentration camp survivors) in Skokie, Illinois in the 1970s: *National Socialist Party of America v Village of Skokie* 97 S Ct 2205 (1977); 366 N E 2d 347; 373 N E 2d 21. If the US visitors had imported some of their own human rights law, it would have been a constructive contribution to the NI problem.

Instead, there was an unthinking gesture in the direction of a recent opportunistic NI human rights commission report.[[18]](#footnote-18) Neither the Dickson, McWilliams nor O’Flaherty commissions had addressed the problem of parades responsibility over the years, and certainly not in the authentic human rights style of US civil libertarians. Haass/O’Sullivan tapped unwittingly the baneful performance since 1999 of this self-righteous quango, thereby aligning themselves with nationalism.

To the statism of the historic public order approach, inspired by the police, in NI (as in GB), followed by the parades commission solution under 1998 legislation[[19]](#footnote-19), Haass/O’Sullivan have come up with two institutions to replace the existing one (both with less than appealing titles): the office for parades, select commemorations, and related protests; and the authority for public events adjudication.

Nowhere in the report is there a reference to civil society: to the conduct of – mainly – the loyal orders (though the civil rights movement used to be big into illegal marching); and to the fact that resident protestors (especially at Drumcree) had to go out of their way to take offence. And nowhere is there a reference to politics, and to the role of territoriality in residential space, which is the basis, of course, of electoral representation by predominantly sectarian, or confessional, parties.

The parades commission has survived from 1998. The loyal orders principled opposition once looked like Arthur Scargill’s anti-capitalism. But strangely, the objective of public policy has become wooing mainly the orange order to a form of statutory regulation. It will never be known whether Haass/O’Sullivan could have cracked this particular nut, because of their deadlined report. It also remains to be seen whether a new dynamic can be created, most likely by OFMDFM, to produce a better governing of parades with the consensus of the loyal orders, and any new movements – like the Belfast city hall protests of 2013 – which might emerge in the future.

Criticism Five: Flags

Flags is, of course, about symbolism. Every state (and the UK is a state) has one: here, the union flag of 1606/1801. Countries may also have flags, particularly in a federation, but these have no international standing. Regional and local governments may also follow suit. And the EU adds another – multi-national – layer of non-constitutional complexity to the world of states.

The starting point for Haass/O’Sullivan should have been Gordon Brown’s inadequately named constitutional reform agenda: *The Governance of Britain* (3 volumes), March 2008, Cm 7342-1 to 3. Referring to an earlier green paper, it stated: ‘…the Government’s view [is] that in recent years the Union Flag, the most recognisable symbol of the United Kingdom, has often become the preserve of political extremists and a symbol of discord rather than harmony. Removing restrictions on flying the Union Flag from Government buildings is a statement reclaiming public ownership of the best-known symbol of British values.’[[20]](#footnote-20)

This indeed was done, through guidance from the department for culture, media and sport permitting UK government departments to fly the union flag every day, if so desired. However, London did not favour a change in NI. But it did state, of Scotland and Wales: ‘We shall consult further with devolved administrations in Scotland and Wales about these wider Union Flag flying suggestions … [namely] the greater use of the Union Flag on other public buildings...’[[21]](#footnote-21).

The position in NI had been a quick fix, by Peter Mandelson, in 2000 during suspension of the assembly, namely the idea of the 18 notified days (and only seven specified government buildings plus others – including the assembly? - , where there had been flag flying in 1998-99): Flags (Northern Ireland) Order 2000, SI 2000/1347; Flags Regulations (Northern Ireland) 2000, SR 2000/347.

The principled questions for Haass/O’Sullivan at the beginning should have been:

what is the flag of the state, what is the practice in the four countries and how does this operate in law (answer: through the royal prerogative still and under the acts of union)?;

if official flag flying is the way to re-appropriate the symbol from extremists (as Gordon Brown suggested), is there a basis for no flying – quietude – in NI (of parts thereof) on public buildings?;

is there any basis for Sinn Féin’s alternative of: the UK and Irish flags together or no flag ever – the answer being no in principle, as would be clear from applying the republicans’ logic to the ROI (another state to which the same rules apply)?;

can the criminal law be brought to bear – again - on unofficial flag flying, of, including this time the union flag, but also other national symbols (including the proxy Israel and Palestine flags)?[[22]](#footnote-22)

Haass/O’Sullivan, failing to ask fundamental questions, were quickly led down the garden path: flying the Irish tricolour when the president and taoiseach of the ROI came north, even though ‘the Irish’ do not observe normal diplomatic protocol. This did not survive for very long.

The idea of a NI flag – the red hand of Ulster or the assembly’s six blue linen flowers? – was not unprincipled, but, in the context of the talks, it led to both (all?) sides disagreeing. Flags was taken off the agenda.

The union flag – on the basis of international law and, therefore, standards – was the one issue on which a firm stand should have been taken, as it was – judging by the outcome.

It is time to roll back the nationalist cultural advance, associated with Dublin’s differential treatment of NI (the British/Irish secretariat in Belfast rather than the consulates of Edinburgh and Cardiff). The dialectic of flying the union flag versus appeasement of Irish nationalists will continue, until such time as this alienated minority – at Stormont and in (but not yet of) Westminster – matures democratically. It is good to say no on occasions.

I have no objections to the Haass/O’Sullivan idea of ‘structured discussion’[[23]](#footnote-23). But why another quango, the commission on identity, culture, and tradition? (Strictly, this was only to be created three months after the proposed agreement being agreed.) The CICT, however, adds to the problem, by resuscitating the late, unlamented NI bill of rights, and bringing in minority languages.

Criticism Six: the Past

This was, by and far, the most important issue. Arguably, it was diminished by being made one of three items. Under the past, one is dealing principally with the IRA war (1969 to 2005). But one is also dealing with the continuing national struggle, in which NI is to be prised out of the UK by any remaining means. These include: having fought the IRA war unsuccessfully, it will now be rerun culturally and ideologically, perhaps with the same volunteers but also with new recruits nurtured through provincial higher education.

The most fundamental criticism of the report is: in 1998, the Belfast agreement, in the rights, safeguards and equality of opportunity section, under ‘reconciliation and victims of violence’ (first paras 11 to 13), looked forward to democratic normalization within a reasonable timescale; in contrast, in 2013, Haass/O’Sullivan constructed a grand perspective, where nationalists could undertake a long march through the institutions of British rule. That is why these US visitors failed to achieve political agreement, and why ‘the past’ paragraphs deserve the strongest professional criticism.

Their proposals are: a historical investigations unit (‘HIU’); and an independent commission for information retrieval (‘ICIR’). But these amount to a new, alternative system of policing and justice (when the old one was rebuilt legislatively in the 2000s). Moreover, this new system – supposedly about the past (and like a bad bank) – would be superior to policing and justice in the present and in the future. The past really would take over. HIU investigators would call in the old police, whether retired or surviving in the PSNI: either as regards the police contribution to state killings (51 of 361 deaths); but universally as regards the investigations of all death, because of procedural article 2 of the convention.

The irony, if not tragedy, is that a wise alternative view was available, from the attorney general, John Larkin QC, who had gone public on 20 November 2013 – and stands by his position[[24]](#footnote-24). Perhaps it is good that a law officer is not very political, as regards timing and message!

Larkin’s idea of a stay on troubles prosecutions was neat (even if it needs to be set in a wider reform context). But the attorney general made a good point undiplomatically about: the increasing unlikelihood of prosecutions being brought (still short of conviction and sentencing) for a series of practical reasons – the original rushed investigations; the security problems of the times; the fact that the investigations antedated in the main DNA and CCTV (which now secure many convictions), failing memories, whether there is good or bad faith; the demise of those involved in paramilitarism; and – frankly – the greater importance of the present, where a victim might be spared today and an ordinary decent criminal might be administered justice tomorrow.

The bloody Sunday soldiers are unlikely to be prosecuted, under the rule of law (though it will not be for want of CAJ trying). The Finucane family is unlikely to have its conspiracy theory admitted. And Ballymurphy is not going to get its Saville-type inquiry. Sadly, police widows are unlikely to see justice. Gerry Adams is not going to be indicted for Jean McConville. And London will not pressure Dublin to hold an international judicial inquiry, into how the Irish state aided the IRA (desirable though that would be).

One understands the instinctive reaction of the nationalist politicians on the panel: we will not abandon ‘our’ victims. The similar response of the unionists is less easy to comprehend, though the we too-ism of Weston Park in 2001 – when protestant victims joined the ranks[[25]](#footnote-25) – did result in the one judicial finding of collusion after over a decade (there was none in Billy Wright and Rosemary Nelson and the Robert Hamill report remains under wraps) – by the Irish state! - , in Judge Smithwick’s report published on 3 December 2013.

By the way, this report is excellent on the relative pointlessness of asking the provisional IRA to help the processes of truth and reconciliation.

The fact that Haass/O’Sullivan was victim driven, from two (three?) sides, may explain the eventual report. But it means that – if there is to be any progress on the past – one will have to start afresh with John Larkin. This alternative will do more for victims, I submit: and, of course, they should remain in our minds.

That is why I rushed – on 8 December 2013 – to table a paper entitled ‘The Past: restoring the rule of law’ (I had earlier provided a legal note on article 2.)

My theme was simple. The rule of law had been interrupted by, not principally the Belfast agreement, but by related legal changes by the Blair government. The beneficiaries had been republican terrorists, with some spill over to loyalists. (There was a precedent in Irish statutes of 1923 and 1924, providing for general amnesties covering 1916 to 1923). I listed the interruptions (offending the principle of equality before the law) in chronological order:

one, the Northern Ireland Arms Decommissioning Act 1997, which expressly created a partial amnesty (which ran until 27 February 2010);

two, the announcement of the Saville inquiry on 29 January 1998, where immunity was granted (as was inevitable) to all witnesses as regards any subsequent civil or criminal proceedings (this applying also to the subsequent three[[26]](#footnote-26)/four[[27]](#footnote-27) Cory-recommended inquiries);

three, the Belfast agreement of 10 April 1998, where there was an extension of the early release provisions for terrorist prisoners only. A 1995 statute would have seen about half that population released, in 1998-2000. The Belfast agreement covered the other half, with the idea of a two-year cut off (which became 28 July 2000);

four, the Northern Ireland (Location of Victims’ Remains) Act 1999, where, in order to help the relatives of the disappeared, there was an additional partial amnesty (which one could see as immunity for certain IRA members);

and five, I forgot to mention the ‘on the runs’ (fugitive offenders and prisoners), because, while London and Dublin included the issue in the joint declaration of 1 May 2003, the UK’s proposals never made it into the Justice (Northern Ireland) Act 2004. One suspects the issue was addressed subsequently and secretly, with the republicans being offered the royal prerogative of mercy).

The point then follows: with all these legal concessions to republicans, in order to replace the IRA with Sinn Féin, why not draw a line under the past, the date of 10 April 1998 (the day of the Belfast agreement) having been inserted already in statute law through a number of these measures?

This would stop the special treatment of republicans. It would at least restore equality before the law. But it would have to be accompanied by something more, to make the future difficult for those who have benefited most from the years of Tony Blair. Though the attorney general did not get a good press, he was only articulating what would be the default position in any liberal democracy (and should have been stated clearly in the Belfast agreement).

Conclusion

The struggle of the Omagh families has been heroic. However, it has taken 15 years to secure civil judgments (after two appeals). This would not have been achieved without Peter Mandelson, and *ex gratia* funding. The relatives have yet to secure remedies, which can only be damages, and these have to be enforced. And any effect on the real IRA has not spilled over, to what may be considered the parent organization.

That is why an alternative has to be found to: more inquiries; more inquests; more prosecutions; more police ombudsman reports; more civil actions; more criminal cases review commission referrals; and more procedural article 2 cases at the European court of human rights in Strasbourg.

I did advocate a bad bank concept in the paper tabled on 8 December 2013, putting the past into a multi-layered institution). It was to be based upon: one, a return to the original emphasis of the PSNI’s historical enquiries team (‘HET’); two, policing and justice legislation at Westminster and Stormont, to include John Larkin’s stay of prosecutions and other measures (including taking the past from the police ombudsman); three, a review by the council of ministers (of the council of Europe) of the article 2 NI procedural jurisprudence; four, the disclosure of state archives into a NI victims’ centre; and five, the facilitation of the writing of scholarly history (which has begun already). All that, I submit, would lead to a proper humanitarian focus on the past: on paramilitary murders (respectively sixty per cent republican and thirty per cent loyalist); and away from the ten per cent of state killings, most of which – though Haass/O’Sullivan never got the point – were not unlawful.

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1. Haass is a former state department policy planner, and is president of the council on foreign relations in New York. O’Sullivan was a presidential national security advisor to George W. Bush, and is a Harvard academic. [↑](#footnote-ref-1)
2. The report deals with them in, respectively, pp 4 to 14, 15 to 18 and 19 to 37. [↑](#footnote-ref-2)
3. Report, p 22: ‘Our understandings of the word “victim” in this context were closely tied to our different narratives of the conflict, which are not presently reconcilable.’ Londoners have no problem about 7/7 in 2005. The Hyde Park memorial has 52 names. Four more (the suicide bombers) died that day, but Hallett LJ - the coroner - held their inquest at the end. [↑](#footnote-ref-3)
4. The former, of course, was the US special envoy to NI in 2001-03, after George Mitchell and before Mitchell Reiss. [↑](#footnote-ref-4)
5. Public Assemblies, Parades and Protests Bill (Northern Ireland). [↑](#footnote-ref-5)
6. Flags (Northern Ireland) Order 2000, SI 2000/1347; Flags Regulations (Northern Ireland) 2000, SR 2000/347. [↑](#footnote-ref-6)
7. The report was commissioned by the secretary of state, but published by the community relations council. [↑](#footnote-ref-7)
8. It recommended: a five-year legacy commission, with a budget of £100m, and a reconciliation forum. [↑](#footnote-ref-8)
9. Report, p 2. [↑](#footnote-ref-9)
10. By Atlantic Philanthropies and the EU principally. [↑](#footnote-ref-10)
11. It is interesting that Jeffrey Dudgeon, long a human-rights hero in NI, was subjected to Orwellian disregard by those in the know, when he emerged as a UUP negotiator; it is surely noteworthy that a leading gay activist has been accepted by liberal unionism. [↑](#footnote-ref-11)
12. Naomi Long MP, majoring in the Belfast city hall struggle, secured the insertion in draft two of the report, of alliance’s proposal for the state licensing of political expression. [↑](#footnote-ref-12)
13. Report, p 2. [↑](#footnote-ref-13)
14. Report, p 13. [↑](#footnote-ref-14)
15. Report, p 5 (parades). [↑](#footnote-ref-15)
16. P 39. ‘We would encourage them [the public?] to weigh the costs of concerted, strategic action such as is outlined here against the long-term costs of continuing hesitation.’ [↑](#footnote-ref-16)
17. Albeit, severing of flags, but with a recommendation of another commission. [↑](#footnote-ref-17)
18. *Parades and Protests in Northern Ireland,* November 2013 (report, p 4). [↑](#footnote-ref-18)
19. Public Processions (Northern Ireland) Act 1998. [↑](#footnote-ref-19)
20. Part 1, para 227. [↑](#footnote-ref-20)
21. Par 1, paras 233-4. [↑](#footnote-ref-21)
22. An obvious reference to the Flags and Emblems (Display) Act (Northern Ireland) 1954, repealed in 1987. The union flag was excluded from this legislation. It effectively dealt with the Irish tricolour, albeit through a public (dis)order test. [↑](#footnote-ref-22)
23. Report. P 16. [↑](#footnote-ref-23)
24. *News Letter,* 3 January 2014. [↑](#footnote-ref-24)
25. Chief superintendent Harry Breen and superintendent Bob Buchanan; Lord justice and lady Gibson; and Billy Wright! [↑](#footnote-ref-25)
26. Rosemary Nelson; Robert Hamill; Billy Wright. The Gibson family preferred no inquiry, and this may have influenced Judge Cory to state there was no *prima facie* case. [↑](#footnote-ref-26)
27. Breen/Buchanan, which was held under Irish law. [↑](#footnote-ref-27)