BRIEF ON PRISONER RELEASE ISSUES

WHY PRISONER RELEASE IS IMPORTANT

International and historical research demonstrates that some agreement on prisoner release must be part of any settlement of a violent political conflict which involves negotiations between ex-combatants. Furthermore, prisoners tend to be a potent symbol of past struggle and could be the occasion for a new conflict.

In the context of a peace process, prisoner release can be seen as having two functions: first, as a confidence building measure during negotiations and, second, as one of the constituents of a "solution package," part of "wiping the slate clean." During negotiations, any discrimination against politically motivated prisoners must be removed (the Remission Act brought scheduled prisoners back into line with the rest in change remission back to 50% but added extra conditions) **and** there should be a clear commitment to major prisoner release as part of the overall settlement. The obfuscations and delaying tactics around the issue in Summer/Autumn 1995 and the fact that the Government declared that the Remissions Act was the sum total of any movement there would ever be on prisoner release were major reasons for the breakdown of the IRA ceasefire.

DEFINITIONAL ISSUES - WHICH PRISONERS MIGHT QUALIFY FOR EARLY RELEASE?

In most jurisdictions, including Northern Ireland, people are sentenced to prison for their acts, but they are distinguished from other prisoners by a legal or administrative assessment of their political motivation. In Northern Ireland, all scheduled offenders are held, by legal definition, to be politically motivated.* All scheduled prisoners must be considered, in the first instance, for release.

SHOULD THERE BE EARLY RELEASE OF ANY POLITICALLY MOTIVATED PRISONERS?

Does early prisoner release undermine faith in the rule of law?

This is a real dilemma when faced with the political imperative to release prisoners. However, law is neither static nor absolute and changes to suit altered social and political circumstances. Modifications made to suit an end to political violence may be proper and reasonable.

Is the integrity of the sentencing process threatened?

Once violence has ceased, the circumstances in which politically motivated offences were committed have disappeared, so reviewing sentences imposed when violence was continuing appears reasonable.

The risk of re-offending - in general

The main point is whether the conflict has actually finished. Given our experience with the ending of the first IRA ceasefire and the breaches that have occurred in the Loyalist ceasefire, no-one could be wholly confident that the violence has ended for good. However, it is the task of these negotiations to remove the causes of violence. If there is a settlement which, at least, convinces all sides that their political aspirations are achievable, if not already achieved, by exclusively peaceful means, then the

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* The Emergency Provisions Act defines terrorism as "the use or threat of violence for political ends." The "Schedule" in the EPA is simply a list of offences, but the Attorney General should "de-schedule" any offences which do not appear to be "connected with terrorism." Therefore, the State considers that anyone put through the Diplock procedure etc. has "used or threatened violence for political ends" i.e. they have political motivation.

conflict as a whole will be over. Those prisoners who are part of the organisations who accept that the conflict is over, would have no reason to re-offend.

The risk of individuals re-offending

Statistics show that the risk to the public in prisoner release was relatively low during the conflict; it would be reasonable to suppose that it would be lower still after the conflict.

Unreleased prisoners as a possible cause of future violence

Refusing to release prisoners, releasing them selectively or in general "messing about" with the process has been a cause of maintaining or increasing violence in several juridictions e.g. Italy, Spain, Palestine. It is hard to conceive of an overall solution to our political conflict which left significant numbers of prisoners still to serve long periods. Even were the existing armed organisations to accept that position, there would be a real danger that schismatic groups would resort to tactics such as hostage-taking in order to achieve the release of prisoners.

Victims

It is clear that the views and feelings of victims must be taken into account in the public debate surrounding early release. However, it is important that the views of ALL victims, not just those of paramilitary organisations, be taken into account and that the views of victims in all their diversity be recognised.

We fully support the demand made by victims' organisations here that the funding and resources be made available to enable victims to be properly supported during this time.

It is a simplistic and dehumanising view to suggest that the pain of victims is reduced in inverse proportion to the pain inflicted upon perpetrators. We believe that victims, just like society as a whole, have interests in justice, in peace and in achieving a situation where there will be no more victims of political violence.

THE PROCESS OF RELEASE

Should release be of all politically motivated prisoners, should one faction be distinguished from another or should there be an individual case by case approach?

Collective release methods

The simplest form of release is immediate liberation of those within a broad definition of politically motivated prisoner. This form of release would imply the speedy release of all those convicted of an offence scheduled under the Emergency Provisions Act (NI) 1973 as amended.

Another method of collective release is across the board sentence reduction. This would maintain the relative effect of original sentences, but would leave some people in prison for relatively lengthy terms. There is also an obvious problem with indeterminate sentences.

A further method is to group offences by seriousness or by some other criterion and release groups of prisoners accordingly. Any process which left large number of politically motivated prisoners in prison because of the gravity of their offences would not in our view be a workable early release process.

Distinguishing between factions

a) Loyalist and Republican

At the present time, Loyalist parties appear to be demanding that their prisoners be released earlier because of the length of their ceasefire. Should there be a distinction in actual release related to length/quality of ceasefires?

Surely a mechanism designed to release those imprisoned as a result of the conflict has to be part of final settlement/end of violence. Release should not be seen as a "reward" for ceasefire but part of the overall process of societal reconciliation. (Special case of Life Sentence Review Board which, being an individual process, may well take into account the behaviour of the particular paramilitary faction of the person under review as para 14 Explanatory Document about the system implies).

To make distinctions between length of ceasefires is to succumb to the idea that ending violence can be seen in isolation from the **political** peace process. It actually denies political motivation since it sees ending violence - and a reward of release - outside the context of a process designed to remove the **causes** of violence. It implies that those factions on ceasefire - or on the longest ceasefire - have seen the error of their ways and will not return to violence, irrespective of the outcome of the peace process.

Signing up to the Mitchell Principles might be seen in that light, though that might be better seen as an acceptance that the **process** of all inclusive talks, with the principle of sufficiency of consent built in and with the outcome to be put to referenda, means that violence can be ended.

However, the IRA has "problems" with the Principles and the Loyalists explicitly reserve the right to go back to military action if the IRA starts again. The reality is that all ceasefires are contingent on the causes of violence being removed - interpreted as a political settlement which is agreed - if not as a final outcome but, at least, as a deal which leaves the way open to everybody's aspirations being capable of effective prosecution by peaceful means.

NOTE: this argument refers only to **release.** Things like transfer and conditions should be dealt with both in their own right - humanitarian and justice issues - and as confidence building measures. Government needs to realise that, in respect of some issues, the "profile" or circumstances of Loyalist and Republican prisoners are different. A balance needs to be made whereby the pressing concerns of each side, especially where they are different, (eg transfer is a bigger issue for Republicans), are dealt with on the basis of some sort of equality. Improvements in conditions, regime etc, even where they apply equally to both sides (in terms of the importance for their particular prisoners) can also help minimise the feeling that "we" have got nothing out of our ceasefire.

b) Factions not on ceasefire

There is likely to be considerable public resistance to early release of those factions not on ceasefire (e.g. INLA and LVF). However, again, early release is not a "reward" for declaring a ceasefire (ordinary criminals do not get released just because they say they will not do it again). It is an explicit recognition that these prisoners were politically motivated **and** that the political **causes** of violence have now been removed. In the context of an overall settlement, and where said factions are actually small and relatively inactive, it may be appropriate to make an act of faith and let any general release mechanism (eg 66% remission) apply to all politically motivated prisoners.

Arguments against distinguishing by faction:

1. It may be a cause of further alienation and thus violence. For example, the refusal of the Israelis to release Hamas and other prisoners, whose organisations did not support the peace process, is a main

reason for the continuance of violence by those organisations. (Note that Fatah **did** want those prisoners, as well as their own, to be released at the beginning of the process.)

2. There is the difficulty of distinguishing exact membership of factions, perhaps particularly in the case of the LVF.

3. There will be legal difficulties, if the release mechanism is to be defined by reference to an already distinguised legal category, i.e. scheduled prisoners. If this is not the case, the implication is that the release process will be an even more explicitly political one, depending on individual prisoners declaring their allegiance to a faction which either does, or does not, accept the peace process. One could easily see, particularly in the case of the LVF, prisoners switching their declared allegiance back to a faction which is on ceasefire. Is such a potentially cynical switch of allegiance an acceptable reason for releasing someone, or should we accept the overall view that the causes of violence have been removed?

Individual release methods

Whether an offence can be deemed "political" or not

One way to consider the question of whether an offence was political or not, would be to consider the target killed or injured by the prisoner in question. Matters to be considered might include whether the target could be defined as a combatant or whether the attack would be judged purely racist (a South African criterion) or, here, purely sectarian. Examining cases in the Northern Ireland context using such a criterion would obviously create a number of extremely difficult questions.

Gravity of offence

Every person in Northern Ireland has one or a range of particular atrocities for which the definition of the offence as political and subsequent release of the perpetrator is an abhorrent idea. Unfortunately in a divided society there is a lack of clear consensus as to what constitutes the gravest offences. It becomes invidious to make distinctions between murders, for example, on a scale of repugnancy.

Conditions for release guaranteeing future behaviour

In the current procedures for release of both fixed term and life sentenced prisoners, there are no conditions regarding a formal declaration of a renunciation of violence for release. It would be ironic if conditions should now be imposed when the conflict is over, and the risk much reduced.

Licensing of released prisoners

Currently lifers and scheduled prisoners serving a sentence of more than five years are released under a form of license. The system for license revocation has been rightly criticised as lacking due process, although government has stated that only the commission of further offences will normally be held as sufficient for license revocation. Other fixed termers are not subject to any license, but may have to serve the rest of their sentence if reconvicted while released on remission. If this system is to be retained, though it is criticised by prisoner groups, it may be a help in gaining public support for the release of those prisoners belonging to factions not on ceasefire.

SPECIFIC RELEASE MECHANISMS

1. Amnesty

An amnesty would provide an explicit recognition of the political nature of the conflict, it would symbolise drawing a line under a completed period of history and would guarantee equality between all of the protagonists.

However, this explicit recognition of the political nature of scheduled offenders would be a major ideological shift which could create political difficulties, including the passage of appropriate legislation.

2. Executive Release

The Royal Prerogative is the most obvious existing mechanism by which Executive Release could be effected. It is our view that any fetters on the exercise of the Royal Prerogative on the question of early release are political rather than legal.

The arguments in favour of using the Royal Prerogative are that it is flexible; that it appears a much less obvious ideological capitulation to the various protagonists but rather is a means which the Executive can employ in the societal interest of overall peace and reconciliation; there is a well established historical precedent both in Britain generally and in Northern Ireland and the process would be reasonably speedy and straightforward to administer.

Some of the advantages can also be seen as drawbacks if examined from a different perspective. The wide discretion which this powers confers on the Executive could be viewed as arbitrary, with a lack parliamentary accountability and therefore obviously open to abuse.

3. Indeterminate Sentences

With appropriate political will, the high degree of flexibility built into the Life Sentence Review Procedure could be used to release such prisoners, who make up 25% of the sentenced prison population, relatively quickly. Flexibility has been shown in the past, in the case of Private Ian Thaine, for example, released after two and a half years and Private Lee Clegg, currently being reviewed after only 3 years. The statement by the Secretary of State in September that the "duration and quality" of ceasefires would be taken into account by the LSRB demonstrates the political character of this release process.

4. Sentence Reduction

There are recent historical examples of change in remission rates in Northern Ireland, because of changed security and political circumstances. The rate was changed to 50% in 1976, changed back to 33% for scheduled offenders serving over five years, in 1989 and changed back again by the Remission Act in 1995.

A significant increase of remission rates to, say, 66% at this juncture would require no explicit ideological acceptance of the political nature of paramilitary prisoners, would maintain the integrity of the sentence and would be an effective measure for releasing some prisoners quickly.

5. Amplification of existing temporary release mechanisms

There are a number of existing mechanisms already in the Northern Ireland Prison system whereby prisoners are temporarily released from prison. Mechanisms of temporary release could certainly be

used to get people out of prison quickly. There does not appear to be any legal restriction on the purposes for which temporary release can be allowed or the length of temporary release permitted. However, any scheme which envisaged the return of prisoners to prison, at the whim of the Executive, might well meet with opposition from prisoners.

6. Politically Motivated Prisoners held in British Prisons

Prisoners who are held in British prisons and have been convicted of politically motivated offences arising out of the conflict in Northern Ireland should, in justice, be treated in the same way as similar prisoners held in Northern Ireland. Those with close family in Northern Ireland should be granted permanent transfer and placed under the jurisdiction of the Northern Ireland Office for release purposes. This would bring them into line with those convicted here. While there may be some legal or administrative obstacles to using exactly the same mechanisms as in the Northern Ireland jurisdiction, for those still held in Britain because they have no close family, or were never domiciled in the North, the exercise of the Royal Prerogative is an available method of achieving similar results in terms of release.

REINTEGRATION OF RELEASED POLITICALLY MOTIVATED PRISONERS

This refers to a process of facilitating ex-prisoners to play a full and productive part in society after their release from prison. While some of the methods and techniques may be similar to those employed in non-political situations, it is important to see the reintegration of these politically motivated prisoners as a separate exercise undertaken as part of the peace process. Furthermore, reintegration should be seen as a two-way process, with change needed by society as well as by prisoners. For example, the discrimination against those with criminal records, in employment, insurance and other areas, and the current security vetting system for some jobs, are barriers to effective reintegration.

"Working out" or temporary release schemes are sometimes justified on the basis of their reintegrative potential. We believe that, for politically motivated prisoners, that is disingenuous.

A barrier to effective reintegration were the "Hurd criteria," enunciated in 1985, which formalised a policy of withdrawing or denying funding to organisations where it was alleged that they might lend support to paramilitary organisations. While these seem to have been withdrawn, there is still evidence of discrimination against some projects involving ex-prisoners. In particular, government ought to be asked if the RUC anti-racketeering squad circulates lists of "suspect" projects which then might be blacklisted by government departments or agencies.

Specific reintegration projects ought, in general, to be self-help enterprises led by ex-prisoner organisations themselves, subject to reasonable monitoring and evaluation. Such projects should be facilitated by voluntary and statutory agencies where appropriate and consideration given to "mainstreaming" them when special peace funds are exhausted.

SOME INTERNATIONAL EXPERIENCES

THE SITUATION IN SOUTH AFRICA

The first phase of the release of politically motivated prisoners began in 1987-1989 as a precursor to the initiation of negotiation between the National Party government and the ANC. After the release of Nelson Mandela and other ANC leaders in February 1990, the process of the release of other prisoners developed through four phases.

1. The Indemnity Act 1990 established a commission of three judges who reviewed the cases of people convicted before 8 October 1990. This used criteria developed from international extradition law to assess the political motivation of particular offences by individual prisoners. This process was widely regarded as restricted and the ANC argued for a new procedure.

2. The Further Indemnity Act of 1992 dealt with more serious cases and adopted broader criteria. Although releases increased, it was also seen as an attempt to indemnify the servants of the state from liability for their past actions.

3. After the elections in April 1994 when Nelson Mandela became President of a government of National Unity , the new cabinet established "An Advisory Committee on Amnesty and Indemnity." They considered 1200 individual applications and recommended indemnity in 260 cases. The "cut off date" for this committee remained October 8th 1990.

4. A Truth and Reconciliation Commission has now been established which is considering the cases of those imprisoned between 8 October 1990 and 5 December 1993. It also invites people to declare their commission of offences for which they have not been prosecuted and offers amnesty to those which are found to have been politically motivated.

THE SITUATION IN ITALY

Political violence in Italy from both right and left wing groups was a complex phenomenon which was an intricate part of the body politic from 1969 until the mid 1980's.

From 1979 onwards the introduction of the "Decree-Law" granted remission to "pentiti" or repentant terrorists who gave information on their former comrades and publicly abandoned the use of political violence. This was followed in 1982 by another Pentiti law which gave between 33% and 66% remission to repentant terrorists who had confessed their own crimes, worked effectively to reduce the harmful consequences of his\her action and provided proof about other crimes.

In the early 1980's many prisoners began process of individual and group disassociation from political violence. While these "Dissociati" were unwilling to pass information on former colleagues to the authorities, they had abandoned "armed struggle." Finally, a law was introduced in 1987 granting substantial reductions in sentence for those who had definitively abandoned violence, admitted their own crimes and would make a public declaration to that effect. In addition many of the originally lengthy sentences were reduced upon appeal. For the approximately 200 politically motivated prisoners remaining in prison, popularly known as "irreducibili", most of these have also abandoned "armed struggle" but either did not complete the necessary disassociation within the allotted timeframe, or have refused to engage in a process which they believe undermines the nature of their political detention.

THE SITUATION IN SPAIN

The conflict in Spain that concerns us here is that between ETA, the Basque nationalist paramilitary organisation and the Spanish state. There was a general amnesty for ETA personnel in 1977. However, this was not successful in ending violent conflict. In 1981 there was an agreement with one ETA

faction, ETA Politico-Militar.This led to a phased release of the relevant prisoners and a process of reinsertion into society, but violent conflict continued.

Later, the Government adopted a dual policy. On the one had, it tried to wean ETA prisoners away from their allegiance and was prepared to offer early release and "reinsertion" into society for such people. On the other hand, ETA prisoners, from 1989, were dispersed amongst the most far-flung prisons in Spain in order to demoralise them and reduce the influence of their organisation over them. This policy is opposed by all Basque nationalist opinion and is a main reason for the continuing violent campaign of ETA. The Spanish government practises a rigorous policy of political exclusion of ETA and its political supporters, Herri Batasuna. This does not work and is a main cause of continuing conflict.

The reinsertion process is carried out under powers granted in Section 57 of the Spanish penal code. In practice, for politically motivated prisoners, this process requires a public denunciation of armed struggle and a certain level of collaboration with the authorities. Under these conditions major reductions in sentence can take place and the ex-prisoner is assisted to reintegrate into society. By ETA hardliners, however, such people are regarded as traitors and some have been assassinated.

THE SITUATION IN ISRAEL/PALESTINE

On 13 September 1993, the Palestine Liberation Organisation and Israel signed the Declaration of Principles (Oslo Agreement) which was supposed to commence a peace process. At that time there were 12,337 Palestinian prisoners (persons held in administrative detention or convicted of a variety of offences against the Israeli state).

Israeli government statements indicated that there would be a mass release of Palestinian prisoners. There were various stipulations, however. The cut-off arrest date for prisoners who might be released was 13 September 1993, members of political parties who opposed the agreement were to be excluded, no release would take place unless the Palestinians declared an amnesty for collaborators and releases would be conditional on progress on the issue of missing Israeli soldiers.

On 4 May 1994, the Cairo Agreement was signed, which provided for the release, or handing over to the new Palestinian National Authority, of 5,000 prisoners within five weeks. This new authority was given certain autonomous administrative rights over the Gaza strip and a small area around the town of Jericho. By 9 June, however, only 3,800 prisoners had in fact been released, though by the end of July, a further 700 had been released. Release was conditional on signing an individual declaration in support of the peace process.

The current situation is that only prisoners whose organisations support the peace process and who personally sign up to it have been released. Many of those have been released under highly restrictive conditions. Prisoners feel that they are the pawns of the Israelis and that their interests are largely ignored by the Palestinian authorities.

THE SITUATION IN THE REPUBLIC OF IRELAND

Since partition, after every period of political violence, from the civil war in the early 1920's, to the IRA campaign in the 1940's and the late 1950's, cessations of violence have been quickly followed by release of politically motivated prisoners in the Irish Republic (formerly the Irish Free State). The releases which have come about as a result of the 1994 cease-fires were originally intended to happen under the temporary release mechanisms contained in the Criminal Justice Act 1960. However after objections from some of the prisoners, releases took place under the Offences Against the State Act 1939, the Emergency Legislation under which the prisoners were tried.