

NIACRO

Notes for consideration in relation to proposed commission on prisoner release in the context of the negotiations in Northern Ireland

1. *BACKGROUND:*

Prisoner release is rooted in the peace process

Northern Ireland is currently trying to progress a *peace process*. It is important to understand what that means. It is the *negotiated settlement of a violent, political conflict*. It recognises that the violence has *political causes* and seeks to bring peace *by removing those causes through political change*. It is NIACRO's view that prisoner release *must* be part of that process for the following reasons.

1. Prisoners are part of the negotiating organisations - at least the ex-combatant ones. It is inconceivable that they would be abandoned.
2. Prisoners are an influential constituency - their interests must be recognised.
3. In spite of recent events in the prisons, it remains the reality that new attitudes towards violence and the possibility of peaceful struggle were developed within the prisons, by prisoners.
4. Ex-prisoners are in the lead in the peace process, not only as negotiators but in the community working for economic and social development and often helping to reduce inter-community conflict.
5. Not releasing prisoners would *certainly* be a cause of further violence.

But the most important reason is that prisoners are *symbolic representatives* of their communities in the following ways:

- they represent all ex-prisoners. We estimate that there may be some 20,000 already in the community;
- they represent their families. on the basis of 5 close family members, this involves some 100,000 people; and
- they represent their communities.

What happens to prisoners is therefore symbolic of what is happening, or is likely to happen, to their communities. For prisoners are under the control of the State and, accordingly, the

State's attitude towards prisoners is taken *as a test of its sincerity and bona fides as regards the peace process as a whole.*

There are those who ask "Is the State sincere about a *negotiated settlement* or is the "peace process" *counter-insurgency by other means?*" The attitude towards prisoner release is a litmus test of this. For the fundamental requirement is the *recognition of political motivation*. Without that there can be no consideration of prisoner release. Equally, without it, there can be no peace process.

This is not an easy matter for the people of Northern Ireland. It is about one's attitude towards violence - and on both sides. This is not the infamous "ambiguity" towards violence which is held to afflict Irish people but an acceptance of the political motivation of all sides and types of violence, however repugnant.

It also means that the *victims of violence* - of all violence, not just the violence of those currently imprisoned - have to be given a particular place to make their views and demands known. This voice must be heard - as it is (e.g. a quarter of NIACRO's 1995 conference on prisoner release was given over to victims) - in terms of prisoner release, though it cannot have a determining role. It must be heard more clearly and specifically if we have an *amnesty* process, which should be seen emanating as much from victims' as from prisoners' needs.

Recognition of the political motivation of violence is not about relinquishing the ability to make judgements about violence - *to understand all is not necessarily to forgive all*. But it is about consigning violence to the past. It means talking peace, not victory. The symbolic importance of prisoners - the fact that the recognition of political motivation is central to the peace process - means that prisoner release is practically important as well.

Our fundamental conclusion is:

Unless there is an effective process for the release of politically motivated prisoners, there will not be a successful peace process.

2. Particular issues which need to be considered

2.1 The record of the previous Government in relation to prisoner release following the 1994 ceasefires

A distinction has to be made between responses by the British Government on prison conditions and issues such as transfer and the question of release. These responses were not the positive generosity which prisoners were expecting following ceasefires. And in any case, the changes have been mainly minor and either, such as transfer of prisoners from England, are a long overdue redressing of serious human rights abuses or are regime developments which stand or fall in their own right. At the time when most of these changes were made, any "political" aspect or relation to the peace process were explicitly denied.

The only concrete move on release was the Remission of Sentences Act. To the huge disappointment of prisoners and their organisations this simply restored the remission rate of 50% which had anyway applied until 1989 when a discriminatory lower rate of remission was applied to politically motivated prisoners serving sentences of over five years. Furthermore, although the legislation gave the Secretary of State power to further vary the remission rate, that power was so constructed that any future remission rate would have to apply to all prisoners, not just the politically motivated. In any event, the Government declared that they would make no further move on the question of early release of prisoners.

This was not just a limited and inadequate response to the demands for early release, which, it might be hoped, could be changed in the future. It actually represented a calculated refusal to accept that those imprisoned as a result of the conflict should be treated any differently to those imprisoned for ordinary crimes. In Parliament the Secretary of State explicitly denied that the measure had anything to do with the peace process, claiming it was simply designed to bring Northern Ireland into line with the rest of the UK. All the hopes that had been raised by the pragmatic policy in the prisons and by more than a year of peace were dashed by the explicit resurgence of a policy of refusing to accept the political character of the conflict.

In our view, there can be little doubt that this refusal to see the prisoner release issue as part of the peace process contributed to the end of the IRA ceasefire which occurred less than two months later.

2.2 Increased remission and earlier referral to the Life Sentence Review Board

It has been suggested that early release might be restricted to the introduction of 66% remission for determinate sentenced prisoners and some changes to the life sentence procedure (e.g. release after ten years). This is unlikely to be adequate. Working from NI Prison Service figures, three years after such changes were implemented, we estimate that there would be:

- between 70 and 100 determinate sentenced politically motivated prisoners still in prison;
- 80 or more lifers; and
- an unknown number who are yet to be sentenced or who might be prosecuted and sentenced in the future.

Such a situation would be entirely unsatisfactory to the organisations from which the prisoners come. In our view, it will also be unacceptable to those who see prisoner release as a fundamental way of taking violence out of our society.

2.3 Prisoners belonging to paramilitary organisations not on ceasefire

The Secretary of State's 14 point document issued after her visit to UDA/UFF prisoners in January made the point that prisoners of organisations on ceasefire would not benefit from early release. This appears to be fairly widely acceptable. However, individual prisoners may wish to dissociate themselves from such organisations in the context of a release process. The mechanism agreed will therefore need to be able to assess the cases on their merits. It

is important to point out, however, that offences committed during ceasefires should not be excluded retrospectively. Prisoners convicted of or awaiting trial for such offences should be able to apply for release in the same way as others. The way to deal with continuing violence is to impose a cut-off date beyond which the release process does not apply (see below).

2.4 Which prisoners should benefit from release?

A number of points have been raised which appear designed to confuse and obfuscate the issues, rather than to suggest ways through the real difficulties that exist. These include the following:

- ***That distinguishing between politically motivated and ordinary prisoners would constitute discrimination under national and international law.*** In answer to such a suggestion, it is important to point out that national law is irrelevant since Parliament is sovereign and can change any existing law if there is a conflict (which is highly unlikely). As far as we are aware, there are no provisions in international law which prohibit the release of prisoners on the grounds of political motivation. Nor has any such mechanism been so challenged and any situation of conflict. Indeed, while not wishing to enter the debate as to whether the Northern Irish conflict meets the threshold required for the provisions of international humanitarian law to apply, it is clear that this body of law explicitly calls on parties to facilitate the release of prisoners following conflicts.
- ***That releasing members of paramilitary organisations would constitute a benefit for illegal activities.*** In response to this suggestion that such membership would undermine the rule of law, it is important to restate the principle that release of politically motivated prisoners is a political response to a political peace process. Thus comparisons with prisoners would be not member of such illegal politically-motivated groups is, in fact, beside the point. In addition, it will be seen below that membership on its own is not an appropriate way to categorise those prisoners who should be released.
- ***That some prisoners convicted under emergency law are not in fact politically-motivated and vice versa.*** In the Emergency Provisions Act (Section 66 of the 1991 version) says: "Terrorism is the use of violence for political ends..." If a scheduled offence is not "connected with terrorism" it should have been de-scheduled by the Attorney-General. If some prisoners convicted of scheduled offences are not "terrorists" then this is a deficiency in the criminal justice system. It might, of course, be interesting to know what criteria are applied by the Attorney General to determine who is a "terrorist" for the purposes of de-scheduling. If there is a fool-proof set of such criteria, it might be a useful test for the debates which are necessary for agreeing a system for release. However, it is our understanding that the number of cases affected by this point is rather small and could, in any case be dealt with by a modification of the process we outline below.
- ***Some prisoners convicted for politically-motivated offences are now non-aligned with organisations but should also be eligible for any release mechanism.*** This is a problem only if the question of membership is to be used as the only criterion for deciding who should benefit from release. Those prisoners no longer affiliated to a group, who have changed affiliation or who claim affiliation only when the issue of release will have to be given an opportunity to apply for inclusion in the process and the process outlined below does, we believe, address this issue.
- ***What about prisoners who have committed crimes which no-one could reasonably regard as politically-motivated.*** In our view, this important consideration can be addressed by agreeing a list of exclusions which are accepted by all parties. Such exclusions might include, for example, rape, child abuse and, perhaps, drug trafficking. It is hard to believe that any paramilitary group would argue strongly against such offences being excluded. It is, of course, the clear responsibility of government to raise in advance any existing cases which it thinks might be the basis of any exclusion.
- ***Some prisoners believe that they have been given disproportionate sentences or allege they are victims of a miscarriage of justice.*** It is invidious and wrong-headed to try and distinguish between prisoners when a system of early release as part of a peace process is being considered. There should be no distinction based on length of sentence or gravity of offence. In relation to "safety" of convictions, these should be processed through the Criminal Cases Review Commission but release should not be delayed.

2.5 Is release from prison the end of the story?

Currently fixed-sentence and lifer prisoners are released on licence. It has been suggested that such a situation could continue to operate in relation to a general release process following a settlement. However, there is the further business of an amnesty to be considered. This is the process whereby the record of convictions is cleared and the opportunity exists for those who have not been prosecuted for involvement in incidents related to the conflict to obtain immunity from future prosecution. We set out below how we feel this process could take place. In view of these future matters, it may be possible for prisoners to accept that release would be on licence (as long as it happens promptly following a settlement) until an amnesty process clears the criminal record entirely. It is important to remember that the question of license is sensitive, complicated and symbolically significant for both the government and politically-motivated prisoners. It should not be raised as an obstacle, however, and the historic unwillingness of politically motivated prisoners to "sign out" of imprisonment or internment should be borne in mind. We address the question of release on licence below.

2.6 Individuals in other jurisdictions

Those currently serving sentences in other jurisdictions or living in other jurisdictions following convictions in Northern Ireland must be catered for in this process. Thus the Government of the Republic of Ireland will have to adopt a process for release of remaining prisoners and amnesty for, or immunity from prosecution of, previous offences. Similarly, prisoners currently in prison in Britain for offences related to the Northern Ireland conflict should be eligible for release. Most of those currently serving sentences in Britain will be seeking transfer to the two jurisdictions in Ireland and will therefore be able to apply through whatever process for release and amnesty is established. Those convicted in the past for offences in Britain should also be eligible to apply for amnesty. There is also a prisoner in the United States of America as well as other individuals whose extradition is sought to face prosecution in Northern Ireland. Some preliminary consideration is given to these matters in the process outlined below.

3. *A possible system for release of politically-motivated prisoners:* *NIACRO's DRAFT*

3.1 *A commission to carry out prisoner release*

Government must give a commitment to release all politically-motivated prisoners within a particular time-frame. An independent commission should then be established made up of respected international persons with experience of prisoner release following other conflicts. The Commission to have the following brief:

- To develop criteria and process for the release of politically-motivated prisoners.
- To release all politically motivated prisoners, including remand prisoners, committed to the peace process within a reasonable time as it decides and, in any case, within no longer than twelve months after a settlement or the referendum.
- On foot of a referral by the DPP or an application by an accused person, to grant indefinite deferment of prosecution for a politically motivated offence, where the accused person can be seen as committed to the peace process.

All scheduled prisoners, but only prisoners convicted or charged with scheduled offences, would be considered for release. In the case of prisoners not charged or convicted in Northern Ireland, eligibility will depend on whether the offence in question would have been categorised as a scheduled offence. It is understood that the release of prisoners on remand and the deferment of prosecution of those charged or under investigation are difficult and sensitive issues. It is only through a future process of amnesty that the anomalies can be ironed out and a full accounting of responsibility made.

3.2 *Criteria and process*

One possible process which a commission could develop and operationalise is as follows:

1. Is the prisoner convicted of or charged with a scheduled offence? If yes, pass on. If no, ineligible.
2. Has the offence been specifically excluded from this release process? If yes, ineligible. If no, pass on.
3. Is the prisoner, in addition, convicted of or charged with a non-scheduled offence? If no, pass on. If yes, the case should be put back until the sentence for the non-scheduled offence is expired. If it has already expired, pass on.
4. Is the prisoner a) accommodated in free and peaceful association on a wing in the Maze prison recognised by prison management as the location where members of a specific paramilitary group or coalition of groups is housed or b) was the prisoner a member of the security forces acting "under orders" at the time of the offence? If yes to either, pass on to 7. If no, pass on to 5.
5. Does the prisoner wish to claim past or present affiliation to a specific paramilitary grouping (an organisation proscribed under emergency legislation)? If yes, s/he must provide written evidence to the Commission. If the Commission agrees to the claim of affiliation pass on to 7. If the Commission is unconvinced, go to disputed hearing, 9. If no, pass on to 6.
6. Does the prisoner wish to claim political motivation for acts committed outside the ambit of existing paramilitary organisations? If yes, s/he must provide written evidence to the Commission. If the Commission agrees to the claim of political motivation, pass on to 7. If the Commission is unconvinced, go to disputed hearing, 9. If no, ineligible.
7. Is the prisoner a) a past or present affiliate of a paramilitary grouping which is currently on a recognised ceasefire or b) a past or present member of the security forces convicted of

8. Is the prisoner prepared to make a statement which explicitly disassociates himself/herself from the current policy of the organisation with which they are affiliated and expresses a personal disavowal of violence in the context of the current peace process. If yes, to be released forthwith. If no, ineligible.
9. Disputed hearings. In a small number of cases, it may be necessary to hold hearings in order to determine whether the offences of a prisoner were politically motivated. The applicant might be allowed to appear and be represented. It is unlikely that there would be a role for any other party to appear. The test the commission would apply would be: did the applicant appear to be motivated by the pursuit of a political end which could reasonably be seen as directly relevant to the violent political conflict which has been occurring in Northern Ireland over the past decades?

3.3 Release

Release could be made on the same basis as under the Remission Act whereby prisoners remain liable to serve the unexpired portion of their sentence (at the date of release) if they are re-convicted of relevant offences before the full sentence time expires. Also the Secretary of State has power to abrogate the whole process if major violence re-occurs.

Otherwise, in spite of the qualms of organisations, and of possible legal difficulties, it might be possible to find a form of words which meant that both prisoners and the State might regard the release as conditional on the successful negotiation of a peace settlement. If peace broke down, individuals might feel free to go back to violence but, equally, the State would be able to re-arrest and re-imprison them. This is sensitive and difficult, but might prove useful.

3.4 Amnesty

After the achievement of a full settlement, a process whereby victims could tell their stories and also perpetrators could apply for full amnesty might be instituted. On the one hand, this would allow victims an opportunity to put their story on official record. On the other hand, those perpetrators who wished could, on the basis of full disclosure, seek the removal of criminal records and associated disabilities as well as making a formal commitment to the new society. Applications for amnesty should also be available for former prisoners currently living in other jurisdictions such as the Republic of Ireland and the United States of America. It might be felt that this process would be compulsory for those whose prosecution had been deferred. This process should also allow individuals, including current and former members of the security forces, who may be liable to future prosecution to apply for immunity in return for full disclosure. A similar filtering process as outlined in relation to release above could be followed in relation to determining eligibility for amnesty and immunity.

3.5 Cut-off date

It is suggested that a cut-off date, from the time of the full and unequivocal announcement of the Commission and its terms of reference, including a completion target date, be established. Offences committed after that time would not be eligible for consideration.

3.6 Other issues

It is suggested that the above system deals with the problems addressed earlier of determining affiliation and what effect it should have, confusions with the scheduling system and exclusions of unacceptable offences. It also strikes a balance between the proper exclusion of those not committed to peace with the possibility for individuals to make such a commitment so that imprisonment or not is not a matter determined by a non-state body.

3.7 Settlement Document

Because of the short time available until the posited end of negotiations, if the detail of the process of release cannot be agreed, text should be inserted in the final document committing the authorities under a new agreement to establish a commission within a timescale of three months. The text should include the commission's remit as outlined above in 3.1. It should also indicate a maximum time-frame of, say, two years for the amnesty process.