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***The Case for Repeal
of the Emergency Law in Northern Ireland***

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COMMITTEE ON THE ADMINISTRATION OF JUSTICE

THE CASE FOR REPEAL OF THE EMERGENCY LAW IN NORTHERN IRELAND

INTERNATIONAL LEGAL PERSPECTIVE

It is a clear and recognised principle of international law that the use of emergency laws must be strictly proportionate to the exigencies of the situation and must end as soon as the emergency ends.

The European Convention of Human Rights, at Article 15, makes clear that any derogation from the Convention can only be justified if there is in existence an emergency **"threatening the life of the nation"** and that any derogation measures must be strictly proportionate to the exigencies of the situation. The UK entered a derogation from the Convention following a decision of the European Court of Human Rights that its powers of extended detention under the Prevention of Terrorism Act were in breach of Article 5 of the Convention which guarantees the right to liberty.¹

The UK has also derogated in similar terms from Article 9 of the International Covenant On Civil and Political Rights, Article 4 of which echoes Article 15 of the ECHR, in stating that any derogation must only take place in **"time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed"** and only to the extent **"strictly required by the exigencies of the situation."**

The Document of the Copenhagen Meeting on the Human Dimension of the CSCE also addressed this issue and restated basic principles of international law when it said :

"The participating States confirm that any derogations from obligations relating to human rights and fundamental freedoms during a state of public

¹Brogan et al v UK A 145-B (1988)

emergency must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation. They also reaffirm that

---measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments;
---the imposition of a state of public emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law;
---measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation;
---such measures will not discriminate solely on the grounds of race, colour, sex, language, religion, social origin or of belonging to a minority."

We are convinced that the maintenance by the UK government of emergency legislation is in direct contravention of the above and we believe that the arrest and detention powers in the Prevention of Terrorism Act in particular, breach para 5.15 of the Copenhagen Document which guarantees the right of someone arrested or detained to be brought promptly before a judicial officer to have the lawfulness of his or her detention tested. Under the PTA a suspect can be arrested and held incommunicado without access to a lawyer for 48 hours. His or her detention can then be extended for up to five days on the decision of a government minister. There is no judicial input into the decision and no judicial mechanism by which the legality of the detention can be challenged.

The concern of the CSCE with the issue of states of emergency is emphasised in the Moscow Document which states that **"the participating States reaffirm that a state of public emergency is justified only by the most exceptional and grave circumstances, consistent with the State's international obligations and CSCE commitments."**

Para 28.3 makes clear that **"the state of public emergency will be lifted as soon as possible and will not remain in force longer than strictly required by the exigencies of the situation."** Para 28.4 states that a **"de facto imposition or continuation of a state of public emergency not in accordance with the provisions laid down by law is not permissible."**

Para 28.7 obliges states to ensure that, if they derogate from their international human rights commitments, such derogation measures must only remain in force for as long as is strictly required. We submit that it is clear that the derogations from the European Convention of Human Rights and the International Covenant on Civil and Political Rights are no longer strictly required by the exigencies of the situation in Northern Ireland.

This position has been reinforced by the United Nations Human Rights Committee when it considered the report of the United Kingdom under the reporting procedure of the ICCPR in July 1995. The Human Rights Committee, in its final comments, described the emergency powers as **"excessive"** and called upon the UK government to take **"concrete steps to permit the early withdrawal of the derogation made pursuant to article 4 and to dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency."** The Committee also urged the government to **"keep under the closest review whether a situation of "public emergency" within the terms of article 4 still exists and**

whether it would be appropriate for the United Kingdom to withdraw the notice of derogation...which it issued on 17th May 1976."

In November 1995 the United Nations Committee Against Torture reiterated this finding when it called for the **"repeal of the emergency legislation."** The Committee also found that the **"maintenance of the emergency legislation and of separate detention or holding centres will inevitably continue to create conditions leading to breach of the Convention. This is particularly so because at present the practise of permitting legal counsel to consult with their clients at their interrogations is not yet permitted."**

The British government has not only not acted upon the recommendations of these prestigious organisations but has, with apparent disregard, dismissed them. This cavalier attitude is illustrated by a parliamentary answer given by Baroness Blatch, the Home Office Minister of State in the upper house of the British Parliament on 26th October 1995. When asked if any action had been taken in consequence of the Human Rights Committee's comments she replied **"we do not plan any specific changes in our arrangements for the protection of human rights in the United Kingdom in light of the Committee's views....The government regret that the [Human Rights] Committee does not appear to have taken into account our long-standing cultural traditions and other particular circumstances which determine the way in which human rights are protected in this country nor the fact that the protection provided in the United Kingdom in relation to human rights is among the best in the world."**

The only step which the government has taken is to institute a review of the emergency laws to be carried out by two High Court judges, one English and one from Northern Ireland. The terms of reference of this review immediately call into question its conformity with international law in that the review is to consider the need for emergency legislation if the cessation of terrorism in Northern Ireland "leads to a lasting peace." In other words it appears clear that an end of emergency laws is contingent, not on a cessation, but on a political settlement.

HISTORY OF EMERGENCY LAWS

Since the inception of the Northern Irish state in 1920, the government has always employed the use of emergency laws. The Civil Authorities (Special Powers) Act (NI) was introduced in 1922. It was renewed annually until given a five year life span and then was made permanent in 1933. The provisions of this Act, and of the far-reaching regulations made under it, were so extensive that the South African Minister of Justice, Mr Voester, introducing a new Coercion Bill, said that he **"would be willing to exchange all the legislation of that sort for one clause in the Northern Ireland Special Powers Act", the infamous s.2(4).²**

²S2(4) reads: "If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations."

The legislation was finally repealed in 1973 but was simultaneously replaced with the Northern Ireland (Emergency Provisions) Act (EPA) 1973 which substantially re-enacted the earlier legislation. Thus, the new legislation incorporated special powers to stop, search, arrest and detain; to intern without trial; to block roads and to ban organisations. Indeed in one crucial respect, the new legislation went further than the Special Powers Act in that it introduced non-jury trials - known as Diplock trials³ - and made confession evidence admissible before such courts in circumstances in which it would have been excluded under the ordinary law.

From 1974 onwards, further special powers have also existed under the various Prevention of Terrorism Acts (PTA), which unlike the EPA, have applied throughout the UK. The most recent of these is the Prevention of Terrorism (Temporary Provisions) Act 1989, which despite its title is permanently renewable. This legislation allows for detention for up to seven days, the banning of organisations, and the making of exclusion orders which is in effect a system of internal exile.

Further modifications and reviews of the EPA took place in 1975, 1978, 1984, and 1987 finally culminating in the Northern Ireland (Emergency Provisions) Act 1991. This Act repealed earlier Emergency Acts and replaced them for a further five years. There are three main elements to this Act:

- i re-enactment with minor modifications of the provisions of the earlier legislation;*
- ii incorporation into the EPA of the provisions of the PTA which applied only to Northern Ireland; and*
- iii the creation of certain new offences and powers.*

The legislation remains substantially the same as that introduced in 1973.

THE CURRENT LEGAL POSITION

Both the EPA and the PTA are still in force. The PTA must be renewed annually and this was done in May of last year. The government have given no indication that they plan to repeal the legislation this year.

The EPA 1991 provided for renewal of the Act every five years. The current Act will therefore expire in August this year, two years after the cease-fire declared by the Irish Republican Army. It is in this context that the British government recently announced its intention to renew the EPA for a further period of two years and the Emergency Provisions Bill received its second reading on 9th January 1996. The Bill which was introduced in the House of Commons substantially mirrors the 1991 Act. The modifications that have been introduced have actually increased the repressive nature of the legislation in that a new offence has been introduced and the balance of proof in relation to the possession of documents likely to be of use to terrorists has been altered to provide that the court is to take simple possession as proof of guilt.

³So named after the author of the report which led to their establishment : Report of the Commission to consider Legal Procedures to deal with Terrorist Activities in Northern Ireland Cmnd. 5185 (1972).

Despite lobbying by CAJ and other groups against the legislation it was passed in the House of Commons and now proceeds to a committee stage before returning to the House for a third and final reading. It appears highly likely that the Bill will become law.

THE CURRENT SECURITY POSITION

The Irish Republican Army declared a cease-fire at the end of August 1994. Less than two months later the Combined Loyalist Military Command, an umbrella group for the loyalist paramilitaries, also declared an end to their campaign of violence. Both groups maintained that their cease-fires would entail complete cessations of violence.

In the aftermath of the cease-fires the level of violence fell dramatically. However, there are undoubtedly still problems associated with the paramilitary groups. According to the Opposition Spokesperson on Northern Ireland, Marjorie Mowlam MP, speaking in the debate on the renewal of the EPA, there have been nine killings since the cease-fire that can be linked to paramilitary groups.⁴ Another MP, Mr Ken Maginnis, claimed that there had also been 261 "punishment beatings" since the end of August 1994.⁵ While highly regrettable, it is absurd to suggest that this level of violence amounts to a "**public emergency threatening the life of the nation**,"⁶ thereby justifying the continuance of a state of emergency.

Compared to the level of violence which operated before the cease-fire, the situation has improved beyond recognition. Indeed this change has been recognised by the government in security terms. The Northern Irish Secretary of State has confirmed that routine military patrolling has been reduced by 80%, 1600 troops have been withdrawn from Northern Ireland, a number of security installations have been removed or vacated and many border roads have been re-opened.⁷ It is therefore clear that the government and its security advisors are confident that the "**public emergency**" has ended.

Depressingly, despite this apparent optimism, the government has not given any indication that it is considering repeal of the emergency powers. Indeed, quite to the contrary, the government has taken steps to renew and reinforce the emergency legislation.

Statistics issued by the government indicate that the powers are still being widely used. In the last quarter of 1994, after the cease-fires, 178 people were arrested under the PTA, of whom 48 were charged. From July until September 1995, more than one year after the cease-fire, 120 people were arrested, 32 of whom were charged. While it is clear that the number and length of detentions has reduced since the ending of paramilitary violence, it is equally clear that the security forces are still resorting to the use of powers designed for periods of emergency. In recent days we have received reports alleging detention of several individuals for up to seven

⁴Hansard. Parliamentary Debates. Tuesday 9 January 1996, pp 45.

⁵Ibid pp 58.

⁶Article 15 European Convention of Human Rights.

⁷Ibid pp 31.

days without charge or access to court. We have also received allegations of ill-treatment. In one case which has been brought to our attention at time of writing, we have been informed that a 61 year old man, who suffers from diabetes and high blood pressure, has been arrested under the Prevention of Terrorism Act . We have contacted the police and pointed out the government's obligations under international law but to date have received no response.

Thirty five exclusion orders (administrative orders banning an individual from entering Britain from Northern Ireland) are still outstanding and hundreds of premises, occupied and unoccupied, were searched without warrant in 1995.

CONCLUSION

CAJ are firmly of the opinion that the decision of the British government to retain and renew emergency legislation in the face of international criticism reflects a cavalier attitude to their international commitments on human rights. This entails not only the breach of the International Covenant on Civil and Political Rights and the European Convention of Human Rights but also the commitments the UK has made in the Human Dimension Documents of the OSCE.

We believe that if there is no emergency, there should be no emergency law. We believe this is a straightforward but accurate reflection of the relevant principles of international law. It is clear to us that not only do the individual provisions of the EPA and PTA breach OSCE commitments, but that the maintenance and renewal of emergency law sixteen months after the cease-fires in Northern Ireland is inconsistent with the guarantees that the UK has given in the Copenhagen and the Moscow Documents.

The Budapest Document clearly provides that **"human rights and fundamental freedoms, the rule of law and democratic institutions are the foundations of peace and security, representing a crucial contribution to conflict prevention, within a comprehensive concept of security....Neglect of these rights has, in severe cases, contributed to extremism, regional instability and conflict."**

We are seriously concerned that the continued use and abuse of emergency legislation in Northern Ireland may have a deleterious effect on the peace process itself and we urge you to use your good offices to remind the British government of the human dimension commitments it has made to the OSCE.

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