



SUBMISSION TO THE UNITED NATIONS HUMAN
RIGHTS COMMITTEE CONCERNING THE UNITED KINGDOM'S
COMPLIANCE WITH THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS



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1. INTRODUCTION

- 1.1 British Irish RIGHTS WATCH is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available free of charge to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual constitutional outcome of the peace process.
- 1.2 This submission to the Human Rights Committee of the United Nations concerns the United Kingdom's observance of the provisions of the International Covenant on Civil and Political Rights (ICCPR). All our comments stem directly from our work and experience. In the interests of brevity, we have kept details to a minimum, but if any member of the Committee would like further information about anything in this submission, we would be happy to supply it. Throughout the submission we respectfully suggest questions that the Committee may wish to pose to the United Kingdom (UK) during its examination of the UK's sixth periodic report.

2. THE UNITED KINGDOM AND HUMAN RIGHTS

- 2.1 In its 2001 examination of the United Kingdom's observance of the provisions of the ICCPR, the Human Rights Committee recommended that the United Kingdom incorporate all the provisions of the ICCPR into domestic law¹. However, the UK has yet to comply with this recommendation.
Suggested question:
- What plans does the UK have for incorporating all provisions of the ICCPR into domestic law and what is the timetable?
- 2.2 The Human Rights Committee's last examination of the UK's observance of the provisions of the ICCPR further recommended that the UK should consider, as a priority, accession to the first Optional Protocol². The UK has not however taken any steps to meet this recommendation, thereby depriving people within the UK of the right of individual petition to the Human Rights Committee.
Suggested question:
- What plans does the UK have for ratifying the Optional Protocol and what is the timetable?
- 2.3 In October 2000, the UK enacted the Human Rights Act 1998 (HRA), which was intended to incorporate most of the provisions of the European

¹ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 05/11/2001; CCPR/CO/73/UK, CCPR/CO/73/UKOT, paragraph 7.

² Ibid

Convention on Human Rights (ECHR) into its domestic law. Due to the similarity of many of the provisions of the ECHR and ICCPR, the Human Rights Committee found that, through the HRA, the UK has also incorporated many ICCPR rights into its domestic legal order³. However, the House of Lords has recently held that, instead of *incorporating* the ECHR rights into domestic law, the HRA merely *gives effect* to these rights in domestic law⁴. Therefore, the UK courts do not have to apply the HRA retrospectively and require the Government to remedy any breach that occurred prior to the coming into force of the HRA in October 2000⁵. Individuals who have claims for violation of their human rights arising from incidents before 2 October 2000 can therefore not vindicate their rights before the domestic courts. This approach was more recently confirmed in the 2007 House of Lords decision in *R (on the application of Hurst) v. Commissioner of Police of the Metropolis*⁶. The Court held that, where the positive obligation to protect life has not arisen in domestic law as the death was prior to 2 October 2000, the procedural obligation to investigate the death cannot give rise to a domestic obligation because it is consequential upon the substantive obligation to protect life. Therefore, the requirement set out in section 3 of the HRA – to read and give effect to all legislation, so far as possible, in a way that is compatible with Convention rights – does not mean that public bodies must have regard to Article 2 ECHR and other Convention rights where the death occurred prior to the HRA coming into force. Given the similarity between provisions of the ICCPR and ECHR, this denies individuals the full protection of ICCPR rights.

Suggested question:

- How will the UK ensure that the provisions of the ECHR are fully incorporated into domestic law and that human rights violations retrospective to the HRA are fully investigated?

2.4 The HRA did not incorporate Article 13 of the ECHR into domestic law, which provides for an effective remedy for breaches of Convention rights.

Suggested question:

- Will the UK incorporate Article 13 of the ECHR into domestic law?

2.5 Under the terms of the Good Friday peace agreement in Northern Ireland, the UK has established a Human Rights Commission for Northern Ireland, which is currently engaged in drawing up a Bill of Rights to supplement the ECHR. The Commission has produced two draft Bills of Rights, in September 2001 and in April 2004. Although the Commission consulted widely over the first draft, it was flawed, in that it confused majority and minority rights, and appeared to reflect considerable disagreement amongst commission members. By the time the second draft was

3 Ibid

4 *In re McKerr* [2004] UKHL 12

5 Ibid

6 [2007] UKHL 13

produced, the Commission had lost public confidence, and the Government felt under no obligation to move the process along. The Commission had effectively become a 'political football', lacking meaningful political backing, and coming under attack from unionist politicians which the Government failed to adequately defend. Finally, in September 2006 - some four years after it was proposed - a Bill of Rights Forum consisting of representatives of political parties and civil society was established. This has now agreed terms of reference and has set up a number of working groups on particular aspects of the Bill of Rights. The Forum is due to submit recommendations to the Commission and UK Government in March 2008. However, there are concerns that the Government may be influencing the debate behind the scenes, as the timetable for drafting of the Bill is short and resources are too limited for proper outreach to take place⁷.

Suggested questions:

- How will the Government ensure that the Bill of Rights Forum is best placed to establish an effective Bill of Rights for Northern Ireland?
- Will the Government guarantee the Forum the necessary resources to conclude its work effectively?
- Should the Forum require more time to finish its work, will the Government extend the timetable?

2.6 On 3 July 2007, the UK Government revealed details of its route map to constitutional reform, as set out in the Green Paper "The Governance of Britain"⁸. This proposes the creation of "A Bill of Rights and Duties" for Britain, which will draw upon and add to the provisions of the HRA, and therefore the ECHR and its corresponding articles in the ICCPR. It is envisaged that the Bill will give people a clear idea of what they can expect from public authorities, and from each other, and that it will set out a framework for giving practical effect to common values.⁹ Conservative party and opposition leader David Cameron, on the other hand, has recently called for the HRA to be entirely scrapped in favour of a British Bill of Rights, which he claims will better balance rights and responsibilities "in a way that chimes with British traditions and common sense". It is submitted that the establishment of a Bill of Rights for Britain should be encouraged since, as set out in paragraphs 2.3 and 2.4 above, the HRA does not provide for an effective remedy for human rights violations, and the judgments in *McKerr* and *Hurst* mean that there is a twin-track system for the vindication of people's human rights, depending on when the violation occurred. The Government should learn from the Northern Ireland Bill of Rights experience, concentrating as much on the process and timing of the Bill and ensuring proper consultation, as on its content. Furthermore, since the Northern Ireland Bill of Rights has

⁷ Funding has only been made available for two outreach workers for the period mid-October 2007 to 31 March 2008

⁸ <http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>

⁹ *Ibid*, paragraph 209

progressed so far, it makes sense for the UK to wait for the outcome of that process before embarking on a British Bill of Rights, so that lessons can be learned from the Northern Ireland experience.

Suggested questions:

- In relation to a British Bill of Rights, what plans does the UK have for the creation of a successful drafting process and for consultation with relevant stakeholders?
- Will the UK wait until the Northern Ireland Bill of Rights process is concluded before introducing a British Bill of Rights?

2.7 Since its establishment, the Northern Ireland Human Rights Commission has repeatedly sought an increase in its resources and powers in order to be able to function effectively. Most recently, in response to these requests, sections 14 to 20 of the Justice and Security (Northern Ireland) Act 2007 introduced a number of changes to the Commission's powers, which are to be welcomed. One of the reforms has enabled the Commission to rely on the ECHR when instituting, or intervening in, judicial review proceedings. However, BIRW is concerned that these changes do not go far enough. Specifically, although the Commission can now have access to places of detention, it must prepare terms of reference in advance and provide them to the relevant affected persons (section 17). This will remove the element of surprise in any investigation, forewarning public bodies of the issues under consideration and, in the worst case scenario, enable documents to be 'lost' or destroyed. Thus the *ad hoc* nature of the Commission's investigations and the aims of any such investigation are undermined. There are complaints that the process through which its members are appointed to the Commission has become politicised, and that they do not adequately reflect the local community. In addition, the Commission has not been designated a national preventive mechanism under the Optional Protocol to the UN Convention Against Torture (UN OPCAT), which the UK ratified in December 2003 and which came into force on 22 June 2006. This is surprising given the nature of the Commission and its aims and purpose. The procedures through which the UK Government has designated the national preventive mechanisms within Northern Ireland lack transparency and clarity. The criteria for selecting a body or organisation are insufficiently precise, and there has been a marked failure to adequately consult with and consider representations from members of Northern Ireland's civil society in relation to the Commission's potential to become a designated mechanism.

Suggested question:

- Will the UK commit to extending the Northern Ireland Human Rights Commission's resources and powers and designate it a national preventive mechanism under UN OPCAT?

2.8 In addition to those set out above, the UK has failed to implement many of the recommendations made by the Committee. These will be highlighted under the appropriate article of the ICCPR throughout the rest of this submission.

3. ARTICLE 1: THE RIGHT TO SELF-DETERMINATION

3.1 The island of Ireland has been partitioned since the 1920s, with six counties (Northern Ireland) retained within the UK, while the other 26 form the Republic of Ireland. Irish nationalists have maintained that the people of the island of Ireland have been deprived of the right to self-determination. However, under the terms of the 1998 Good Friday Agreement, the partition will remain until such time, if ever, that a majority of people voting on both sides of the border decide that Ireland should be united. In the 1998 referendum, a large majority of those voting in both countries supported the provisions of the Good Friday Agreement and, although there has been some decline in that support, by and large this situation has pertained to date, especially with the recent re-establishment of the Northern Ireland Assembly.

3.2 In November 2006, the St Andrews Agreement – designed to restore devolution to the suspended Northern Ireland Assembly by 26 March 2007 – was approved by both the House of Commons and House of Lords. Elections to the Northern Ireland Assembly took place on 7 March 2007 and the Assembly was restored on 8 May 2007. Ten areas of government – trade, regional development, culture, social development, environment, finance, education, employment, health and agriculture – have been devolved to the Northern Ireland Assembly. However, there is still a significant number of areas which have not yet been devolved: policing, security, prisons, crime, justice, international relations, taxation, national insurance, and the regulation of financial services, telecommunications and broadcasting. The Government should now ensure that the devolution process continues without delay or derailment, and that the models for devolution of the various bodies are open and transparent, ensure an effective and efficient justice system, represent the diversity of Northern Ireland and deliver the administration of justice to the highest standards, as laid down in international and national human rights law.

Suggested question:

- What plans does the UK have to ensure a transparent and effective devolution process, resulting in the establishment of public bodies which are fully compliant with the relevant human rights obligations?

4. ARTICLE 2: ENJOYMENT AND ENFORCEMENT OF ICCPR RIGHTS WITHOUT DISCRIMINATION

4.1 The proportion of Protestants of working age in employment in 2003 was 72.5%, whilst the proportion of working-age Catholics in employment was 62.9%. The economic activity rate for those of working age was 76.4% for Protestants and 67.9% for Catholics. In 2003, the unemployment rate for Catholics was 7.2% while for Protestants the figure was 4.8%.¹⁰ It would

¹⁰ 2003 Labour Force Survey, Office of the First Minister and Deputy First Minister,

therefore appear that Catholics are considerably discriminated against in the workplace. The Fair Employment and Treatment (Northern Ireland) Order 1998, as amended, makes it unlawful to discriminate directly or indirectly on the grounds of religious belief and/or political opinion in the field of employment. However, the Order only applies to employers who have eleven or more employees, so small companies are not covered or regulated. In addition, discrimination also persists within the civil service, the largest employer in Northern Ireland. While Catholics are represented in proportion to their numbers in society, in that 44.7% of those employed in the Northern Ireland Civil Service are Catholic, the figure for the percentage of Catholics employed in the Senior Civil Service is 30.4%, a gap of almost 12%.¹¹

Suggested question:

- What steps is the UK taking to overcome higher unemployment rates amongst Catholics in Northern Ireland?
- Will the UK extend the fair employment provisions to all employers?

- 4.2 As part of the 1998 Good Friday Agreement, the Government set up an independent review of policing in Northern Ireland, known as the Patten Commission, whose 1999 report made various recommendations. As a result, reforms have been introduced: for example, in November 2001, the force's name changed from the Royal Ulster Constabulary (RUC) to the Police Service of Northern Ireland (PSNI), and a policy of recruiting at least 50% of all new serving officers from the Catholic community was adopted. However, significant discrimination issues still exist. Although Catholics constitute around 44% of the population, they make up only 21% of the PSNI¹². As of 1 January 2007 there were 2,156 Catholic PSNI staff, of whom 1,677 (78%) were police officers and 489 (19%) were support staff¹³. Figures issued by the Northern Ireland Office in late 2006¹⁴ disclosed that only about 36% of applications to join the PSNI come from Catholics; this figure has been fairly static since the 50:50 Catholic:non-Catholic recruitment policy was introduced in 2001. In the most recent round of recruitment, there were 3,136 applications from Catholics, but only 1,734 (55%) of these came from Northern Ireland Catholics¹⁵. This suggests that nearly half of Catholic applications come from residents of other countries. While other Catholic communities in Northern Ireland should of course be reflected in the PSNI, they should not be counted for the purposes of redressing the indigenous imbalance in Catholic

Northern Ireland Statistics and Research Agency, Statistical Bulletin, (June 2005). While this report was published in June 2005, the figures relate to the position of the labour market in 2003.

¹¹ Department of Finance and Personnel, 2005

¹² Letter from Chief Constable to BIRW, 15 January 2007

¹³ Letter from Chief Constable to BIRW, 9 February 2007

¹⁴ Northern Ireland Office consultation on Review/renewal of 50:50 and lateral entry provisions, 2006

¹⁵ Letter from Chief Constable to BIRW, 9 February 2007

representation within the PSNI. What is more, the 50% quota does not apply to support staff, but only to serving officers. Further, although new recruits take an oath of office when joining the police, they are not barred from being members of the Loyal Orders¹⁶ whilst serving as a police officer. These Orders have oaths of allegiance which directly contradict the PSNI oath of office. Existing members of the PSNI do not have to take the oath of office. This gives rise to concerns that the PSNI has not taken any significant steps to eradicate sectarianism within its own ranks.

Suggested questions:

- What steps is the UK taking to ensure that the PSNI reflects the whole community in Northern Ireland?
- What steps are being taken to ensure that the PSNI eradicates sectarianism within its ranks?
- What steps are being taken to ensure that the PSNI is able to deliver effective policing equally to all sections of the community, free from discrimination and sectarianism?

4.3 BIRW is aware that the police in Northern Ireland have awarded contracts for building works etc to known paramilitaries. Correspondence with the PSNI over this matter has not elicited any adequate explanation as to how it possible for this to happen¹⁷. Recently, a civilian PSNI employee was charged with passing information obtained from police computers to paramilitaries¹⁸. This man had passed standard vetting procedures designed to screen out such undesirable employees.

Suggested questions:

- Will the Government review its vetting procedures to ensure that paramilitaries are not able to work for the PSNI, whether as contractors or employees?
- Will the Government seek an explanation from the Policing Board as to why PSNI vetting procedures have failed?

4.4 As explained in paragraphs 2.1 and 2.4 above, the UK's failure to incorporate the ICCPR or Article 13 ECHR means that there is no specific remedy in UK law for breaches of ICCPR or ECHR rights.

5. ARTICLE 3: EQUAL RIGHTS OF MEN AND WOMEN

Women continue to be seriously under-represented at the senior levels in the public sector in Northern Ireland.

Suggested question:

- What steps is the UK taking to ensure appropriate numbers of women in senior posts in the public sector?

¹⁶ The Loyal Orders are Protestant free-masons which ban Catholic membership

¹⁷ Letter from PSNI Deputy Chief Constable Paul Leighton to BIRW, 7 September 2007

¹⁸ *More than 100 were warned by UVF probe police officers*, by Chris Thornton, *Belfast Telegraph*, 18 April 2007

6. ARTICLE 4: DEROGATION

The Human Rights Committee's 2001 concluding observations recommended that any measures to combat terrorism undertaken by the UK should be in full compliance with the provisions of the ICCPR and the provisions on derogation contained in Article 4¹⁹. However, since 2001, the UK has enacted vast amounts of legislation with the aim of countering terrorism, creating a twin-track system of justice with fewer due process rights for certain suspects and defendants determined by the supposed motivation for their acts. This legislation perpetuates the so-called emergency laws enacted in response to the conflict in Northern Ireland. Yet there is no state of emergency in Northern Ireland, or elsewhere in the UK, and such laws are unjustified. The legislation is considered in more detail in sections 9 and 10.

7. ARTICLE 5: ACTS DESTRUCTIVE OF RIGHTS

7.1 Research by NGOs, including by BIRW, and by state agencies such as the Police Ombudsman, has exposed systematic collusion between members of the army, the police and the intelligence services and both loyalist and republican paramilitaries. Collusion has evolved over almost forty years in Northern Ireland, reaching ever-greater levels of sophistication. It has occasionally been the result of collaboration between members of the security forces acting on their own initiative, but has more often been the direct result of government policies, such as:

- the recruitment of local, part-time members of the Ulster Defence Regiment with known loyalist sympathies;
- an aim of infiltrating the IRA at all costs, to the point where the need for intelligence has overridden the duty to protect life; and
- the facilitation of the purchase of illegal weapons, in breach of the then government's own trade embargo with South Africa, for use by loyalist paramilitaries, whose capacity to commit murder increased significantly as a result.

Far from taking rigorous measures to stem collusion, however, the UK Government has appeared to condone it by a series of official cover-ups, the failure to publish reports on collusion, the failure to prosecute known agents of collusion, and the use of Public Interest Immunity certificates at trials and inquests to withhold information concerning collusion.

Suggested questions:

- What steps is the UK taking to prevent collusion between members of the security forces and paramilitaries, and to protect victims of that collusion?
- What steps is the UK taking to establish the extent of past collusion and to provide effective remedies for victims of collusion?

¹⁹ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 05/11/2001; CCPR/CO/73/UK, CCPR/CO/73/UKOT, paragraph 6

- 7.2 In January 2007, the Police Ombudsman for Northern Ireland (PONI) published a report of her extensive investigation into the circumstances surrounding the death of Raymond McCord Junior in 1997. The report provided a summary of the investigation that had been named "Operation Ballast". Although the inquiry had begun as a result of allegations of collusion between police officers and loyalist paramilitaries into the murder of a single individual, it led PONI to consider the murders of 10 people and 72 instances of other crime, including 10 attempted murders, 10 "punishment" shootings, 13 "punishment" attacks, a bomb attack, 17 instances of drug dealing, and additional criminality, including criminal damage, extortion and intimidation. The investigation disclosed institutionalised and systemic collusion between the police and loyalist paramilitaries as recently as 2003. Many of the findings gave rise to concerns about current serving officers and practices.
- 7.3 Some of the most serious concerns included evidence of a pattern of work by certain officers within the Special Branch (the intelligence wing) of the RUC designed to ensure that an informant and his associates were protected from the law. These included a series of instances when Special Branch officers took steps to ensure that police informants who had committed a crime were protected from other police officers investigating those crimes and from other agencies within the criminal justice system; reports of informants being "babysat" through interviews to help them avoid incriminating themselves; the creation of false interview notes; the blocking of house searches to locate arms held by the Ulster Volunteer Force (UVF, a loyalist paramilitary group) and the blocking of a search of a UVF arms dump for no valid reason; the preparation of misleading information for the Director of Public Prosecutions; and the withholding of vital intelligence likely to have assisted in the investigation of serious crimes, including murder, from police investigation teams. In particular, collusion was established between certain officers within Special Branch and a UVF unit in North Belfast and Newtownabbey. "Prior to 2003 some RUC/PSNI Special Branch officers facilitated the situation in which informants were able to continue to engage in paramilitary activity"²⁰, including some informants being involved in murder, without the Criminal Investigation Department having the ability to deal with them for some of these offences.
- 7.4 Although police practices have changed since 2003, no explanation has been provided for the fact that, in a major review of police informers, the current Chief Constable does not appear to have pursued charges against the 12% of informers who were 'dropped' at that time because of their alleged involvement in serious criminal activity. It is not clear whether

²⁰ *Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, January 2007, paragraph 17*

any criminal charges were considered with regard to the police handlers of those informers considered to have been engaging in serious criminal activity.

Suggested questions:

- What steps is the UK taking to end the legacy of impunity as a result of the UK authorities' failure to instigate prompt, independent, impartial and effective investigations?
- How many police officers have been charged with criminal offences arising out of collusion, how many were disciplined or prosecuted, and what was the outcome?

8. ARTICLE 6: THE RIGHT TO LIFE

8.1 To date, over 3,600 people have died as a result of the conflict in Northern Ireland, including over 1,100 members of the security forces. The majority of deaths (87%) were caused by republican and loyalist paramilitaries, while 10% were caused by the security forces, many of them in disputed circumstances. According to our calculations, 82% of those killed by the security forces were Catholics, although Catholics represent only around 40% of the population of Northern Ireland.

8.2 One of the most serious violations of the right to life has concerned the operations of a British army intelligence unit, the Force Research Unit (FRU), which functioned in Northern Ireland between 1980 and 2007 (having changed its name to the Joint Support Group in or about 1991 – the JSG is currently operating in Iraq). In recent years, information about its activities has gradually come to light. It is alleged that FRU infiltrated agents into paramilitary groups and assisted those groups to target people for murder. They are also said to have allowed bombings and shootings to go ahead, resulting in more deaths, in order to protect their agents from discovery. It is further alleged that they caused the deaths of paramilitaries by falsely identifying them as informers. The following have been identified as victims of the FRU's methods:

- Patrick Hamill, killed in September 1987,
- Francisco Notorantonio, killed in October 1987,
- John McMichael, killed in December 1987,
- Terence McDaid killed in May 1988,
- Gerard Slane, killed in September 1988,
- Patrick Finucane, killed in February 1989,
- Patrick McKenna and Brian Robinson, killed in September 1989,
- Eddie Hale, Peter Thompson and John McNeill, killed in January 1990, although there were almost certainly many other victims besides these 11 men.

8.3 In response to wide international and local criticism about the lack of investigation of these and other high profile deaths, the UK Government

has now established inquiries into the murders of Rosemary Nelson²¹, Billy Wright²² and Robert Hamill²³, all of which concerned allegations of collusion. Yet the investigations into the latter two murders have controversially been converted into inquiries under the Inquiries Act 2005. BIRW consider that the Inquiries Act undermines the rule of law, the independence of the judiciary and human rights protection, and therefore fails to provide for effective, independent, impartial or thorough public judicial inquiries into serious human rights violations. This is because, instead of inquiries being under the control of an independent judge, they are controlled in all important respects by the relevant government minister. Under the Act, the Minister:

- decides whether there should be an inquiry
- sets its terms of reference
- can amend its terms of reference
- appoints its members
- can restrict public access to inquiries
- can prevent the publication of evidence placed before an inquiry
- can prevent the publication of the inquiry's report
- can suspend or terminate an inquiry
- can withhold the costs of any part of an inquiry which strays beyond the terms of reference set by the Minister.

Suggested question:

- Will the UK repeal the Inquiries Act 2005?

- 8.4 The UK Government still has yet to establish an inquiry into the death of Patrick Finucane, a human rights lawyer from Belfast, who was shot dead in February 1989 by loyalist paramilitaries. Substantial and credible allegations of state collusion have since emerged, including evidence of criminal conduct by police and military intelligence officers acting in collusion with members of the UDA. Allegations of a subsequent cover-up have implicated government agencies and authorities, including the RUC Special Branch, FRU, the UK security service (MI5), and the Office of the Director of Public Prosecutions in Northern Ireland. It has also been alleged that his killing was the result of state policy. In 1999, Sir John Stevens (now Lord Stevens), a senior UK police officer, conducted an investigation into the allegations of collusion made in the case of Patrick Finucane (known as Stevens 3), and particularly those made in a 1999 report by BIRW. A summary overview of Stevens' findings was not published until 2003. It found that there was evidence of collusion in the murder and in another murder, that of Brian Adam Lambert. It also

²¹ A lawyer who was blown up in a car bomb by loyalist paramilitaries in 1999 after the government ignored consistent warnings about the threat to her life from NGOs, the UN and the Irish and American governments

²² A loyalist paramilitary leader who was murdered in 1997 inside the Maze prison by a republican faction after the prison authorities ignored warnings about his safety

²³ A Catholic who died in 1997 after a sectarian beating which took place in the presence of the police, who later assisted his loyalist assailants to avoid justice

confirmed the existence of the British Army's secret intelligence unit known as the FRU, which had actively colluded with loyalist paramilitaries in targeting people, including Patrick Finucane, for assassination. However, the full findings of the Stevens 3 investigation have never been made public.

8.5 In 2003, the European Court of Human Rights ruled that "proceedings following the death of Patrick Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel", and that there had therefore been a violation of Article 2 ECHR.²⁴ The UK Government announced in 2004 that there would be an inquiry into the Finucane case, following an independent investigation into the case by former Canadian Supreme court judge Peter Cory, who recommended an independent public inquiry into the case. However, the UK Government still has not established an inquiry, in breach of the commitment it gave in the Weston Park Agreement to implement Judge Cory's recommendations. Even more worryingly, in 2006, the Secretary of State for Northern Ireland stated that a Finucane inquiry would only be constituted under the Inquiries Act 2005. The UK authorities also stated that it was likely that a large proportion of the evidence would be considered in private since it involved issues "at the heart of the national security infrastructure in Northern Ireland". The Finucane family and NGOs have rejected any such inquiry. In addition, on 26 June 2007, the Prosecution Service announced that they would not be charging any policemen or soldiers as a consequence of the Stevens 3 report. This denies justice to the Finucane family and other victims of collusion.

Suggested question:

- Will the UK set up an independent judicial inquiry into the murder of Patrick Finucane and the activities of the FRU?

8.6 The UK is particularly weak when it comes to providing an effective investigation, especially where there has been a violation of the right to life. In May 2001, the European Court of Human Rights issued four landmark judgments²⁵ which affirmed the right to an effective investigation into deaths caused by agents of the state or where collusion was alleged. The UK has not implemented these judgments and these four cases have remained under consideration by the Committee of Ministers ever since. One of the applicants, the son of Gervaise McKerr, who was killed by the RUC in a shoot-to-kill incident in 1982, applied to the domestic courts to vindicate his right to an effective investigation. This led to the House of Lords decisions in *In re McKerr*²⁶, explained in more detail at paragraph 2.3 above, that the UK courts do not have to apply the HRA

²⁴ *Finucane v UK*, App. no. 29178/95

²⁵ *Hugh Jordan v UK*, no 24746/94, 4.5.2001; *Kelly & Others v UK*, no 30054/96, 4.5.2001; *McKerr v UK*, no 28883/95, 4.5.2001; *Shanaghan v UK*, no 37715/97, 4.5.2001

²⁶ [2004] UKHL 12

retrospectively or remedy any human rights violation that occurred prior to the coming into force of the HRA in October 2000²⁷, followed by the decision in *R (on the application of Hurst) v. Commissioner of Police of the Metropolis*²⁸. Individuals who have claims for violations of their human rights arising from incidents before 2 October 2000 can therefore not vindicate their rights before the domestic courts. This denies victims of the most fundamental of human rights violations an effective investigation into the breach, in flagrant contravention of the UK's international human rights obligations. The UK has thus failed to comply with the Committee's 2001 recommendation that the UK should as a matter of urgency implement the measures required to ensure a full, transparent and credible accounting of the circumstances surrounding violations of the right to life in Northern Ireland²⁹.

Suggested question:

- What steps is the UK taking to ensure that ALL human rights violations, including those occurring prior to October 2000, are fully investigated?

8.7 In 2006, the PSNI established the Historical Enquiries Team (HET), whose sole job is to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998. Whilst we welcome the establishment of this body, we have concerns that the HET will not provide Article 2 ECHR compliant investigations. The HET answers to the Chief Constable of the PSNI, thus eroding its independence, combined with the fact that the HET is subject to the jurisdiction of HM's Inspectorate of Constabularies, currently headed by Sir Ronnie Flanagan. He was a serving RUC officer for over thirty years, eventually becoming Chief Constable of the RUC, and presided over some of the worst acts of collusion, as recently exposed by the Police Ombudsman's report into the murder of Raymond McCord Jnr. The Council of Europe Committee of Ministers has confirmed this view, stating:

"In particular, the establishment of the Historical Enquiries Team, especially designed for re-examining deaths attributable to the security situation in Northern Ireland during 'the Troubles'³⁰ and containing a unit solely staffed with officers from outside the PSNI, seems encouraging. It is clear however, that it will not provide a full effective investigation in conformity with Article 2 in 'historical cases' but only identify if further 'evidentiary opportunities' exist."³¹

²⁷ Ibid

²⁸ [2007] UKHL 13

²⁹ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 05/11/2001; CCPR/CO/73/UK, CCPR/CO/73/UKOT, paragraph 8

³⁰ A common euphemism for the conflict in Northern Ireland

³¹ Cases concerning the action of security forces in Northern Ireland – Stocktaking of progress in implementing the Court's judgments, Cm-Inf-DH(2006)4rev2E.htm, paragraph 65

8.8 BIRW has concerns that seven cases are currently being withheld from HET investigation by the PSNI, despite the fact all these cases fall under the HET's remit³². There are also concerns about the co-operation between the HET and Police Ombudsman. The overlap which exists should ideally provide a holistic and complete investigation into conflict-related deaths. In reality, however, we fear that there may be cases which the HET has investigated, only for the case to be re-investigated by the Police Ombudsman, or vice versa, causing unnecessary trauma to families. We hope that these issues can be overcome by excellent liaison and co-operation between the agencies, although without any compromise of the Police Ombudsman's independence. However, we are concerned that as yet no memorandum of understanding has been concluded between the two agencies.

Suggested questions:

- What steps will the UK take to ensure that investigations by the HET are compliant with Article 2 ECHR and the corresponding obligations under the ICCPR?
- What is the UK doing to ensure that the work of the Police Ombudsman and that of the HET complement one another?

8.9 Plastic bullets continue to be deployed by both the police and the army in Northern Ireland. BIRW is opposed to the deployment of plastic bullets because we regard them as lethal weapons that should have no place in the policing of a democratic society in the twenty-first century. Although intended as a non-lethal weapon, seventeen people have died as a result of the use of rubber and plastic bullets between 1970 and 2005: 14 of these were caused by plastic bullets. Nine of the seventeen victims were aged 18 or under, the youngest being 10 years old. Six of the victims did not die immediately but lingered for between one and fifteen days. Plastic bullets have also caused very serious injuries and permanent disabilities such as blindness.

8.10 In 21 June 2005, surrounded by controversy, the attenuating energy projectile (AEP), was brought in to replace the plastic bullet, following research commissioned by the Northern Ireland Office to search for a less lethal alternative to the plastic bullet, as recommended by the Patten Commission on police reform. As the Oversight Commissioner whose office was established to oversee the Patten reforms has commented³³, the AEP is not an alternative, but simply a different type of plastic bullet. The Defence Scientific Advisory Council's sub-committee on the Medical Implications of Less-Lethal Weapons (DOMILL) has concluded that the risk of an AEP impact to vulnerable areas such as the head, chest or abdomen "will not exceed" that of the previous plastic bullet. In other

³² 'Cold case' cops in dark over murders, by Alan Murray, *Belfast Telegraph*, 11 February 2007

³³ Office of the Oversight Commissioner, Report 11, September 2004, p. 52

words, in these respects, the AEP is no safer. Further, there was no consultation exercise prior to the introduction of AEPs.

- 8.11 Regrettably, AEPs were used within three weeks of their introduction, after an unofficial moratorium on the use of plastic bullets which had lasted for nearly three years. Twenty-one AEPs were fired on 12 July 2005 in Ardoyne, and a further eleven on 4 August 2005 in Woodvale in north Belfast, all of them by the police³⁴. A very large number of AEPs were also fired over the period 11 to 13 September 2005, during serious rioting following a ruling by the Parades Commission that the Orange Order's Whiterock parade be re-routed. Of a total 281 AEPs fired between July and September 2005 by the police, 211, or 75%, hit their mark. It is not known how many injuries were caused and it is also not known how many persons were hit by a further 140 AEPs fired by the army. Guidelines on the use of AEPs provide that they may only be fired in situations of serious public disorder, to reduce the risk of loss of life or serious injury. Officers are trained to use the belt-buckle area as the point of aim at all ranges, thus mitigating against "upper body hits."³⁵ Unfortunately, this guidance does not mitigate the possibility of striking the abdomen or the genitals. Further, the guidance provides that, unless there is a serious and immediate risk to life, use at under one metre or aiming the weapon to strike a higher part of the body at any range is prohibited. Yet a range of only one metre is exceptionally close and must increase significantly the potential to cause injury. The guidelines also specifically recognise the fact that AEPs can cause fatalities³⁶ and that they can ricochet and thus have the potential to harm others apart from the intended target³⁷. In 1998, the United Nations' Committee against Torture again found "the continued use of plastic bullet rounds as a means of riot control" to be a matter for concern, and recommended their abolition³⁸. In 2002, the United Nations' Committee on the Rights of the Child said;

"The Committee is concerned at the continued use of plastic baton rounds as a means of riot control in Northern Ireland as it causes injuries to children and may jeopardize their lives."
It too urged the abolition of plastic bullets.³⁹

Suggested question:

³⁴ Reply to Freedom of Information request made to the PSNI: F-2005-02695, 19 December 2005 (July and August)

³⁵ ACPO Attenuating Energy Projectile (AEP) Guidance, amended 16th May 2005, paragraph 1.17

³⁶ Ibid, paragraph 4.1

³⁷ Ibid, paragraph 7.5

³⁸ Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, A/54/44, 11 November 1998

³⁹ Concluding observations: United Kingdom of Great Britain and Northern Ireland, Committee on the Rights of the Child, CRC/C/15/Add.188, 9 October 2002

- Will the UK discontinue the use of plastic bullets?
- 8.12 The current use of a 'shoot-to-kill' policy by UK police forces is both open to abuse, and has already resulted in tragedy. Following the fatal shooting of Jean-Charles de Menezes on 22 July 2005 by the Metropolitan Police Service (Met), BIRW has been researching the use of a 'shoot-to-kill' policy by UK police forces, specifically the Met. The killing of de Menezes was sanctioned by a policy known as Operation Kratos. This policy is, in the words of the Met, the "operational name for a wide range of tactics used by the MPS (Metropolitan Police Service) to protect the public from the potential threat posed by a suicide bomber". BIRW used the Freedom of Information Act 2000 to obtain information about Operation Kratos and how it is used by the Met. Although the Met has consistently denied the existence of a shoot-to-kill policy, a Metropolitan Police Authority Memo dated 8 August 2005 obtained by BIRW states, "This is a national policy which was adopted by ACPO centrally and ratified in 2003. It is known as Operation Kratos. 'Shoot-to-kill' is a vernacular term which the police themselves prefer not to use." The Met indicate that a shot to the head, a key component of Operation Kratos, is not intended to kill the suspect but only incapacitate him or her. Yet a single shot to the head is almost certain to result in death, if not serious brain injury, while multiple shots to the head, as were employed in the case of Jean-Charles de Menezes, will inevitably result in a fatality.
- 8.13 The use of lethal force by the UK police has resulted in the deaths of innocent individuals, in direct violation of international human rights standards. In each of these incidents, none of those killed was armed or posing any threat at the time of his death. IRA member Diarmuid O'Neill was shot and killed in a Hammersmith hotel in London by police in 1996. He was unarmed, overcome by CS gas, and trying to surrender when he was killed. Harry Stanley was shot in 1999 in Hackney, when the table leg he was carrying was assumed by the police to be a sawn-off shot gun. They also assumed he was Irish; in fact, he was Scottish. Neil McConville was killed by police in Northern Ireland in April 2003, following a car chase. False media reports suggested McConville had threatened the police with a gun. There was a gun in his car but no ammunition, and he never attempted to use it. A PONI report on this shooting is imminent and is expected to find serious shortcomings in the intelligence employed in the police operation. In July 2005, Jean-Charles de Menezes was shot in Stockwell on an underground train by plainclothes police officers who mistook him for a suicide bomber. Reports that he had failed to stop when challenged by the police, vaulted the ticket barrier at the underground station, and was wearing unusually bulky clothing for the time of year, all turned out to be false. He was a wholly innocent man. Steven Colwell was shot dead in 2006 by the PSNI in Northern Ireland after the stolen car he was driving apparently failed to stop at a checkpoint. The case is also being investigated by the PONI. The clear links with the case of Neil McConville indicates that lessons have yet to be learnt by the

police about the use of lethal force. It is clear that the use of this policy inevitably leads to the abuse of lethal force, and the deaths of innocent people, contrary to Article 2 ECHR, which applies a test of absolutely necessity to the use of force, and Article 6 ICCPR.

Suggested question:

- Will the UK bring police practice on the use of lethal force into line with international human rights standards?

8.14 In the past, the practice and procedure of inquests in Northern Ireland has fallen far short of the standards laid down by the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. Professor Tom Luce conducted a 'Fundamental Review of Inquests' in 2003; the subsequent draft Coroners Bill, published for consultation in 2006, attempted to address the reforms recommended by this review. However, the Bill, unlike the Luce review, did not apply to Northern Ireland. We had concerns that, should this Bill have become law, that it would have been applied to Northern Ireland without appropriate consultation. Equally, an application of this Bill to Northern Ireland would have failed to take into account the legacy of 30 years of conflict and the significance of the deep flaws in the Northern Ireland coronial system. In the event, the Coroners Bill was dropped from the legislative programme. While the Northern Ireland Court Service has recently made some administrative reforms to the coronial system, this has not gone far enough to provide investigations which are Article 2 compliant and the Service does not have the power to make the changes necessary to bring this about without any legislative basis.

8.15 One issue which featured in the case of *Jordan, McCaughey & Ors*⁴⁰, was the nature of the verdict which the Northern Ireland Coroner is able to issue. While we acknowledge that the Council of Europe's Committee of Ministers decided to close the examination of the measures taken in respect of this aspect of the Court's judgments⁴¹, we respectfully assert that this remains a crucial issue. Cases currently proceeding through the Coronial system, such as the 2003 murder of Danny McGurk – the inquest into which was held in September 2006 – have highlighted the limits of a Northern Irish inquest in both the investigation of deaths, and the closure brought to families and the wider community by the inquest process. In particular, the limits placed on verdicts, the restricted scope of inquests and the absence of legal aid for families all undermine the Coronial system and continue to deny those in Northern Ireland their ECHR Article 2 rights.

Suggested question:

⁴⁰ *Jordan (AP) (Appellant) v. Lord Chancellor and another (Respondents) (Northern Ireland) McCaughey (AP) (Appellant) v. Chief Constable of the Police Service Northern Ireland (Respondent) (Northern Ireland)* [2007] UKHL 14

⁴¹ Please see paragraph 8.6 above

- Will the UK reform the inquest system to ensure that it is compliant with international human rights standards?

9. ARTICLE 7: FREEDOM FROM TORTURE

- 9.1 The Chief Constable of the PSNI, Sir Hugh Orde, has recently decided to deploy tasers (electric stun guns) in Northern Ireland. This decision has yet to be authorised by the Policing Board, which oversees the work of the PSNI. BIRW has grave concerns about the potential introduction of tasers. The lack of data on the long-term effects on the body of exposure to electric shocks powerful enough to incapacitate and the known risk of causing heart attacks give rise to significant concern. Tasers also raise the possibility of violating the prohibition on torture and cruel, inhuman and degrading treatment because, as has been vividly demonstrated in a *Panorama* documentary⁴², they inflict intolerable pain. Whilst we accept that the use of force will inevitably inflict some pain on its victims, with tasers the infliction of pain is the means of incapacitating people, rather than a side effect of their use. Furthermore, where other means are used it is possible for the operator to use restraint and to try to avoid inflicting unnecessary pain. However, with a taser, a high level of pain is inevitable. To force another human being to act, or refrain from acting, in a particular way by means of the infliction of pain amounts at the very least to cruel or inhuman treatment or punishment, and may very well be torture.
- 9.2 Manufacturers of tasers recommend that they should not be fired on anyone with a dysfunctional heart, pregnant women, or small children⁴³. This renders them impractical: police officers can have no way of knowing just by looking at someone that s/he has a dysfunctional heart, or has a pacemaker. Similarly, it is not always possible to tell that a woman is pregnant. There is also scope for accidental injury to such persons, and to children, especially in crowds. Tasers can set fire to flammable liquids,⁴⁴ including CS spray, which is used by the PSNI. Regrettably, the petrol bomb is still a weapon of choice among Northern Ireland rioters. If tasers were to be deployed, the nightmare spectre arises of demonstrators attacking police officers firing tasers with petrol. We fear that both police officers and demonstrators could be seriously hurt in such circumstances. Elsewhere in the UK, tasers are typically used against deranged persons wielding weapons. While we appreciate that such persons need to be restrained before they harm themselves or others, including, of course, police officers, we are concerned that the administration of powerful electric shocks to deranged persons is a barbaric response which may add to the person's mental problems and is reminiscent of the worst aspects of electro convulsive "therapy" applied in the past to the

⁴² *Less Lethal*, BBC *Panorama* documentary transmitted on 9th December 2001

⁴³ need more here Phase 3 Report, Chapter 3, paragraph 32

⁴⁴ *Ibid*, Chapter 5, paragraph 132

mentally ill. In two surveys conducted in America on the use of the M26 Advanced Taser used in a UK trial, over 50% of the persons confronted with the weapon were impaired by alcohol, drugs or mental illness⁴⁵. According to Amnesty International, since 2001, over 150 people have been killed in the USA by tasers. One person, Brian Loan, who had a heart condition died in the UK on 14 October 2006 three days after being struck by a taser⁴⁶.

Suggested question:

- Will the UK ban the use of tasers?

9.3 The Northern Ireland Prison Service (NIPS) is currently deploying PAVA pepper spray in Northern Ireland prisons for a trial period. We are concerned that arming prison officers with an incapacitant spray carries risks to both prison officers and prisoners and also carries the danger that it may be used as a weapon of first rather than last resort, or as a substitute for better, non-violent, methods of prisoner management. We are also concerned that some violent persons are either mentally ill or mentally handicapped and unfortunately end up in confrontations with police or prison officers because of their violence, instead of receiving the medical treatment they require. The use of PAVA may well exacerbate the mental condition of such persons, especially those suffering from paranoid delusions. When PAVA is used as an incapacitant, it is essentially a pepper spray, sprayed into the eyes, and its aim is to incapacitate and/or to obtain compliance by causing acute pain. For that reason, BIRW is opposed to its use in the same way that we are opposed to the use of tasers. The use of PAVA raises the prohibition on torture and cruel, inhuman and degrading treatment because it inflicts intolerable pain.

Suggested question:

- Will the UK ban the use of PAVA pepper spray?

9.4 In January 2003, the PSNI were authorised by the Policing Board to introduce the use of CS spray. BIRW is concerned about the use of CS spray and the injuries that it can cause, especially when used against children and in confined spaces. In particular, PSNI officers are able to use CS spray within a custody suite, where the effects of such use could well be severe, on police officers as well as suspects. It is also worrying that CS spray is used in alcohol-related incidents where individuals may well be more vulnerable. The high levels of use on drunk individuals point to a need to find a less lethal alternative for controlling violence in such a situation. Changes also need to be made in situations where the time for the decontamination of a prisoner upon whom CS spray had been used is cut short. Where the decontamination of individuals is compromised, officers involved in handling the prisoner may be at an increased risk of contamination. Further, when CS spray was first introduced, it was agreed that the PONI would investigate and report on the appropriateness of

⁴⁵ Phase 4 Report, Chapter 7, Appendix B

⁴⁶ *Death sparks Taser safety concern*, BBC Internet News, 18 October 2006

each use. This provided the PSNI with a useful oversight mechanism, particularly in cases where the CS spray was used incorrectly. However, this procedure has now changed: the Ombudsman now only investigates the use of CS spray where complaints are raised. In common with tasers, the use of CS spray amounts at the very least to cruel or inhuman treatment or punishment, and may very well be torture.

Suggested question:

- Will the UK ban the use of CS spray?

10. ARTICLE 9: LIBERTY AND SECURITY OF PERSON

10.1 Since 2001, the UK has enacted a worrying amount of counter-terror legislation. In February 2001, the Terrorism Act 2000 replaced the previous emergency laws, the Prevention of Terrorism (Temporary Provisions) Act, which covered the whole of the UK, and the Northern Ireland (Emergency Provisions) Act, which only applied in Northern Ireland. In 2001, the Anti-Terrorism, Crime and Security Act supplemented this counter-terrorism legislation, followed by the Prevention of Terrorism Act 2005 which, *inter alia*, introduced the power to make control orders. The following year, a number of new offences were created with the enactment of the Terrorism Act 2006. These offences are commented upon in more detail below at paragraph 10.6.

10.2 In our view, this vast swathe of counter-terror legislation is unnecessary. Terrorism in Northern Ireland, while still a threat, does not entail any activity that cannot be dealt with by the ordinary law, as can acts of terrorism elsewhere in the UK. The counter-terror legislation enshrines in English law a permanent legacy of the so-called emergency laws enacted in response to the conflict in Northern Ireland. It creates a twin-track system of justice with fewer due process rights for certain suspects and defendants determined by the supposed motivation for their acts.

10.3 BIRW has particular concerns about the use of control orders. Control orders are detention without trial. We have seen the use of a similar policy in Northern Ireland in the 1970s: internment without trial. This policy not only violated the right to be free of arbitrary detention, but served to alienate a large section of the Catholic community from both the state and the security forces. We believe that if there is enough evidence to charge individuals and bring them before a court then this should be done; but if there is not enough evidence, then people should be released. The limbo in which suspects exist while subject to control orders creates the potential for the abuse of due process rights. Further, the opportunities for quashing a control order are few. The fact that the application of a control order can be based on secret evidence undermines the ability of the individual and their legal team to rebut the allegations of terrorist activity. Despite the clear indications that control orders are an unsuitable method of addressing a terrorist threat, the UK Government continues to use them as a counter-terrorism measure.

Indeed, a ruling in the High Court by Mr Justice Sullivan stated that control orders violated Article 5 ECHR (right to liberty): this ruling was subsequently upheld by the Court of Appeal⁴⁷. In spite of this, the UK Government is now appealing the case. These problems are compounded by the fact that seven individuals, suspected of involvement in terrorist activity and subject to control orders, have absconded.⁴⁸

- 10.4 While control orders only apply to the individual, the effects are felt by the families of those living under control orders. As the Committee on the Prevention of Torture (CPT) has noted, the criteria of a control order can be such that no pre-arranged meetings without prior authorisation of the Home Office can take place, nor any visits to the individuals' homes without the interested persons submitting details to the Home Office - both of these equally effect the children and spouses of 'controlees'. The CPT also voiced concerns about the psychological impact of the control orders on the 'controlees', citing conditions such as depression and anxiety with risks of self-harm and suicide.⁴⁹

Suggested question:

- Will the UK repeal the legislation which provides for the use of control orders?

- 10.5 The Prevention of Terrorism Act 2005 introduced a 28-day period during which a suspect can be detained without charge. This was a compromise measure after the Government failed to persuade Parliament to agree to a 90-day period. However, the UK Government is again threatening to extend this. Extending pre-charge detention to 28 days already pushed against the boundary of human rights compliant policing. The detention of a suspect for three months without charge can have serious psychological and social implications for both the detainee and their family. It also undermines the fundamental principles of the British legal system such as the presumption of innocence, and the right to a fair trial. In our view, such protracted detention amounts to internment without trial. The Government's justification for such an extension is that it will enable the police to gather more evidence. BIRW believe that such evidence should be in place before arrest so as to prevent protracted detention or the holding of innocent individuals. Similarly, we do not agree with the Government's claim that judicial and parliamentary oversight of extended detention would provide suitable safeguards to

⁴⁷ *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141; *Government's control order 'problem'*, by Jon Silverman, *BBC News*, 28 June 2006

⁴⁸ *Q & A: Control orders*, by Dominic Casciani, *BBC News*, 24 May 2007

⁴⁹ Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (20- 25 November 2005) http://www.cpt.coe.int/documents/gbr/2006-28-inf-eng.htm#_Toc142715377

protect the rights of suspects or the rule of law. The employment of this kind of oversight has not been successful with control orders.

Suggested question:

- Will the UK abolish prolonged detention without charge?

10.6 The definition of terrorism in the Prevention of Terrorism Act 2005 and the subsequent Terrorism Act 2006 is problematic. The definition of terrorism utilised in the Terrorism Act 2006 is so broad and diffuse that it runs the risk of creating crimes without real victims, an outcome which would bring the law into disrepute. "Terrorism-related activity" includes the commission, preparation, or instigation of acts of terrorism, facilitating such acts, encouraging such acts, and supporting or assisting those who are engaged in such acts. It is "immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally". "Terrorism" is defined as the use or threat of action designed to influence the government or to intimidate the public or a section of the public the purpose of advancing a political, religious or ideological cause. It includes serious violence against a person, serious damage to property, endangering the lives of others, serious risk to public health or safety, serious interference with or disruption of any electronic system, the use or threat to use firearms or explosives. This definition applies to all countries, peoples and governments throughout the world.

10.7 The objective of most actual terrorism is usually the overthrow of the state, or at least the status quo. That being so, it is crucial that a democratic state does not over-react to terrorism or the threat of terrorism, because to make any of these errors can catapult a state out of democracy and into despotism, creating the very situation that terrorists are seeking to achieve. Terrorism is not an act; it is a description of the motivation of a person carrying out any of a range of acts, many of which, absent the terrorist motive, are perfectly harmless and legal. To give an example from Northern Ireland, a woman who buys a pair of rubber gloves to protect her hands while doing the washing up is behaving perfectly legally. If, on the other hand, she buys them to protect her hands while making a bomb, she commits an offence. The problem for the police and the courts is how to prove that the mere act of purchasing the gloves was illegal.

Suggested question:

- Will the UK revisit its approach to countering terrorism and review all its anti-terrorism legislation with a view to ensuring that it is proportionate to the actual threat posed by terrorism and that it does not undermine human rights or fundamental freedoms?

11. ARTICLE 14: THE RIGHT TO FAIR TRIAL

11.1 Those tried under the Terrorism Act in Northern Ireland used to be dealt with in special courts known as the Diplock courts. These courts employed lower standards of admissibility of confession evidence than the ordinary

courts and sat without a jury. Both factors militated against a fair trial. However, on 1 August 2005, the Northern Ireland Office announced that the Diplock courts were to be phased out, as part of the normalisation process. The Diplock courts were abolished in 2007. However, Diplock style courts will still be used where certain circumstances exist. The Director of Public Prosecutions can decide that exceptional cases should be tried without a jury if there is a risk of jurors being intimidated. This situation is likely to arise less and less frequently in Northern Ireland, as sectarian tension and security concerns diminish. In our view, the solution to this problem is to provide adequate safeguards for jurors, not to do away with the jury. In the absence of a jury, a single judge acts as the tribunal of both fact and law. This leads to a quite untenable situation when the admissibility of a confession is being contested. Although a jury would be excluded from hearing the arguments as to the validity of the confession and the means by which it was obtained, the judge both hears and adjudicates them. This is a clear breach of the right to a fair trial. In 2001, the Committee expressed concern about the continued use of juryless courts⁵⁰.

Suggested question:

- Will the UK abolish the use of juryless courts in all situations where a jury would normally sit?

11.2 In 2007 the UK intends to transfer responsibility for all counter-intelligence operations from the PSNI to the intelligence service, MI5. MI5 is a secretive organisation which goes to great lengths to protect its operatives and methods from identification or public scrutiny. Although MI5 will work jointly with the PSNI in counter-terrorism cases, while the actions of police officers will come under the independent, public scrutiny of the Police Ombudsman, those of MI5 agents will not come any scrutiny at all.

Suggested question:

- Will the UK undertake to put in place a mechanism for the independent public scrutiny of the activities of MI5 agents?

12. ARTICLE 17: PRIVACY, FAMILY LIFE AND REPUTATION

12.1 People living in Northern Ireland continue to be subjected to an exceptionally high level of surveillance. In the past, sophisticated visual and audio devices have been used to track the movements of individuals and to listen to conversations inside homes and vehicles as well as in public places. Large amounts of intelligence are collated on people, often in the absence of any suggestion that they are involved in any illegal activity, and stored on computers. Innocent people have found themselves labelled as terrorists when stopped by, for example, traffic police in other countries. There have been many incidents, including

⁵⁰ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 05/11/2001; CCPR/CO/73/UK, CCPR/CO/73/UKOT, paragraph 18

recently, of people who were unaware that there was a file on them being visited by the police and warned that information about them has found its way into the hands of terrorists.

Suggested question:

- What steps is the UK taking to reduce surveillance of the population in Northern Ireland and to destroy intelligence files on individuals?

12.2 Evidence has recently come to light that detainees' consultations with their lawyers whilst in the Serious Crime Suite at Antrim Police Station have been the subject of covert surveillance. Similarly, there are concerns that covert surveillance of such consultations in prison has occurred, and also the surveillance of a medical consultation by an independent medical professional, carried out in custody.⁵¹ A number of potential victims of such surveillance have recently sought a declaration from the PSNI and the Prison Service that their consultations were not the subject of covert surveillance. The application was heard in June 2007 but judgment has not yet been delivered. The central issue in the case is whether the Applicants' right to a private consultation, as confirmed in statute and in the Prison Rules, can be overridden by the legislation which provides for surveillance, the Regulation of Investigatory Powers Act 2000 (RIPA). The case raises fundamental questions about the principle of legally privileged information and the protections afforded such information. In addition, the use of evidence gained by listening to such conversations would be disproportionately advantageous to the prosecution, and undermine the right to a fair trial. Intercepted communications between suspects and their lawyers should never be admissible as evidence.

Suggested question:

- What steps will the UK take to ensure that intercepted communications between suspects and their lawyers are never admissible as evidence?

12.3 The UK Government is currently proposing to introduce further counter-terror legislation and is engaged in a consultation process to that effect. One of the proposed measures is the use of intercepted communications as evidence against a suspect during trial. Given that terrorists can avail themselves of the benefits of modern technology, on the face of it there is an argument for giving the prosecution equality of arms. However, careful attention needs to be paid to the human rights implications of covert surveillance, in particular its impact on the privilege against self-incrimination, which forms an important element of the right to a fair trial. Care also needs to be exercised in targeting suspects for such surveillance, because of its impact on the right to respect for privacy, not only of the suspects but of third parties. Intelligence gathering of this sort should not be used to build databases on people who are not involved in terrorism, and records engendered in the course of combating terrorism that involve innocent persons should be destroyed at the earliest

⁵¹ *In Re Applications by Coleman, Avery, Walsh, Mulhern & McElkerney*

opportunity. The use of intercepted telephone communications as evidence should be the subject of keen safeguards, with a rigorous system for approval. We believe that the use of interception should be kept to a minimum and be subject to regular review. The aim should be to remove them at the earliest opportunity. A system which enables individuals to find out if their telephones or other means of communication, such as email, are tapped, and to subsequently challenge such surveillance, should be put in place and must be robust and transparent.

Suggested question:

- What plans does the UK have to ensure that the use of intercepted communications as evidence meets the relevant human rights standards?

- 12.4 If intercepted communications are to be allowed in evidence, then so too must information about how such evidence was obtained, in order that the defence may challenge evidence that was gathered improperly. The use of intercepted material which is shrouded in secrecy because of an alleged need to protect sources and methods is not acceptable. The current legislation governing covert surveillance - Regulation of Investigatory Powers Act 2000 (RIPA). Under this legislation, a person who believes, for example, that his or her telephone is being tapped without cause, can make a complaint. However, the only outcome of the complaint is that s/he will be told that the authorities cannot confirm or deny that the telephone is being tapped, but can assure the complainant that, if it is being tapped, then the tapping is in compliance with the law. There is no mechanism for having the interception stopped.

Suggested question:

- Will the UK review the provisions of the Regulation of Investigatory Powers Act 2000 and ensure it complies with international human rights laws?

- 12.5 In the past, BIRW has drawn the Committee's attention to the widespread practice on the part of the police of identifying defence lawyers with the alleged crimes and causes of their clients, in contravention of the Basic Principles on the Role of Lawyers. While there have been significant improvements in this area, following the 1997 mission by the Special Rapporteur on the independence of judges and lawyers, whose recommendations have mostly been belatedly implemented, we continue to have some concerns. The interception of lawyer's consultations with their clients referred to above has done considerable damage to the relationship between lawyers and the police, as has the failure to hold an independent public inquiry into the murder of Patrick Finucane. Recently, we were disturbed to learn of an unprovoked assault on a defence lawyer by two police officers who apparently disapproved of his involvement in a particular criminal case.

Suggested question:

- What steps is the UK taking to ensure that defence lawyers are supported in their role as an integral part of the criminal justice system?

13. ARTICLE 19: FREEDOM OF EXPRESSION

Section 1 of the Terrorism Act 2006 introduced the offence of “encouragement of terrorism”. This is an extremely vague offence. It is virtually impossible to prove that someone “knows or believes”, still less “has reasonable grounds for believing”, anything. It is harder still to prove that someone publishing a statement knows or believes what the general public’s understanding of that statement will be, especially when that understanding can encompass indirect threats. Similarly, section 2 makes it a crime to “disseminate terrorist material.” Banning the publication of terrorist publications is futile, given the existence of the internet. While it may be possible to make a case for banning literature that describes how to kill and maim people, the interaction of this section with that on the encouragement of terrorism could lead to draconian consequences, and violate the right to freedom of expression.

Suggested question:

- Will the UK repeal the provisions of the Terrorism Act 2006 relating to the encouragement of terrorism and dissemination of terrorist material?

14. ARTICLE 22: FREEDOM OF ASSOCIATION

Under section 3 and Schedule 2 of the Terrorism Act 2001 and section 28 of the Terrorism Act 2006, membership of 46 organisations is proscribed. 14 of those proscriptions relate to Northern Ireland. 7 of these are republican groups: the Irish Republican Army, the Irish National Liberation Army, Cumann na mBan, Fianna na hEireann, Soar Eire, the Continuity Army Council and the Irish People’s Liberation Organisation. The other 7 are loyalist groups: the Red Hand Commando, the Ulster Defence Association, the Ulster Freedom Fighters, the Ulster Volunteer Force, the Loyalist Volunteer Force, the Orange Volunteers and the Red Hand Defenders. The other 21 groups on the list are all based outside the UK. Membership of proscribed organisations is a criminal offence, as is canvassing support or fund-raising on behalf of such a group. In our view, proscription is in itself anti-democratic and is largely counter-productive. Proscribing organisations and prosecuting their members drives them underground and increases their allure. For example, when the UDA was eventually banned the media reported that its membership increased considerably. Membership is difficult to prove and prosecutions on such a basis are open to abuse. Proscription may also breach the right to freedom of expression and to freedom of association.

Suggested question:

- Will the UK repeal the provisions of the Terrorism Acts 2000 and 2006 relating to proscription?

15. ARTICLE 25: DEMOCRATIC RIGHTS

As set out in paragraph 3.2 above, in November 2006, the St Andrews Agreement – designed to restore devolution to the suspended Northern Ireland Assembly by 26 March 2007 – was approved by both the House of Commons and House of Lords. Elections to the Northern Ireland Assembly took place on 7 March 2007 and the Assembly was ultimately restored on 8 May 2007. Ten areas of government – trade, regional development, culture, social development, environment, finance, education, employment, health and agriculture – have been devolved to the Northern Ireland Assembly. However, there is still a significant number of areas which have not yet been devolved but have been reserved to the UK Parliament: policing, security, prisons, crime, justice, international relations, taxation, national insurance, and the regulation of financial services, telecommunications and broadcasting. In these areas, Article 25 is violated by this system of direct rule by the UK Government, which is exclusive to Northern Ireland. It deprives democratically elected Members of the Northern Ireland Assembly of the rights enjoyed by their counterparts elsewhere in the UK to debate and amend legislation, in turn disenfranchising the electorate of their right to participate fully in public affairs.

Suggested question:

- What plans does the UK have for devolving currently reserved powers to the Northern Ireland Assembly?

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