COUNSEL TO THE INQUIRY'S SUPPLEMENTARY NOTE ON UNDERTAKINGS

Introduction

1. The purpose of this Further Note is to set out our observations in response to the submissions which have been made on the issue for consideration at the hearing on 27 April 2016. That issue is whether the Chairman should ask the Attorney General for an asymmetric extended undertaking of the kind advocated by the Non State Non Police Core Participants.

2. We use the term "civilian" in this note to cover anyone who is not either a State or former State agent.

3. The scheme of this Note is to examine the following questions:

    3.1. In what circumstances might evidence provided by a civilian to the Inquiry be used in the subsequent criminal investigation and prosecution of a third party civilian, absent an extended undertaking?

    3.2. Would an asymmetric extended undertaking assist the Inquiry to fulfil its terms of reference?

    3.3. What would the consequences of an asymmetric extended undertaking be on the administration of justice?

    3.4. Is an asymmetric extended undertaking required in order to comply with section 6 of the Human Rights Act 1998?

    3.5. What has been the approach of previous public inquiries?

In what circumstances might evidence provided by a civilian to the Inquiry be used in the subsequent criminal investigation and prosecution of a third party civilian, absent an extended undertaking?

4. The criminal activity of civilians, whether it is actual or suspected, may be relevant to the Inquiry in a number of ways. For example, when considering the justification for commencing an undercover operation, the actual or suspected criminality of the target, as perceived by the police when authorising the operation, will be relevant. Although we do not rule it out altogether, this aspect of criminality seems to us unlikely to lead to civilian witnesses being asked questions the answers to which would tend to incriminate others. This is

because the focus will be on what the police knew or believed at the material time.

5. Such questions seem more likely to arise as the Inquiry proceeds to examine whether undercover operations, particularly long term deployments, continued to be justified throughout. Issues may arise as to whether a target was involved in criminality at all and, if so, whether it was such as to justify continuing the operation.

6. Examination of the commission of unsolved crimes by undercover officers, as part of an infiltrated group, may call for evidence which potentially incriminates others, albeit that the focus in such a case would be on the actions of the police officer.

7. In cases where lawful and successful undercover policing has led to an arrest and conviction following a fair trial, the criminality of the target will be relevant but uncontroversial.

8. The position may be different where the involvement of an undercover police officer gives rise to a concern that a miscarriage of justice has occurred. We cannot rule out that evidence of civilian criminality given to the Inquiry might, in some circumstances be relevant. For example, in the event of a retrial following a successful appeal based on the miscarriage of justice.

9. A scenario might conceivably arise in which an intelligence-led, long term undercover deployment uncovered criminality which was not investigated or acted upon because to have done so would have jeopardised the ongoing intelligence operation. To establish in evidence that police knew about but ignored the commission of an offence could involve evidence being sought from one civilian which might incriminate another.

10. The problem does not arise in relation to groups whose members have acted lawfully. For example, if it transpires that a law abiding group was the target of an undercover operation or was infiltrated during the legend building phase of an undercover operation which had a different ultimate target. We note in this regard the submission at paragraph 5 of the Non Police Non State Core Participants' skeleton argument that there is not widespread criminality amongst their friends and fellow campaigners.

11. How widespread is the issue of potential third party incrimination likely to be? For the reasons set out in the section above, we envisage that evidence potentially incriminating of third parties may, in certain circumstances, be

relevant. However, it is not yet clear how frequently the need to elicit such evidence will arise. Such evidence will not be the focus of the Inquiry's work.

12. An important practical consideration is the six months' time limit for laying an information in respect of a 'summary only' offence: see section 127 of the Magistrates Court Act 1980. Almost all of the time period being considered by the Inquiry falls outside this time limit. Consequently, evidence provided about 'summary only' offences committed more than six months previously cannot give rise to a risk that such offences will be prosecuted. We annex to this Note a list of examples of the sorts of offences, potentially relevant to the Inquiry, which are 'summary only' offences. In practical terms, therefore, the undertaking which the Non Police Non State Core Participants seek is one which relates only to offences of sufficient gravity to be 'triable either way' or 'indictable only' offences.

13. It may not be possible to determine whether and, if so, to what extent there are persons with relevant evidence who will not come forward because they are concerned that they would be required to give evidence about criminal acts perpetrated by others.

14. Another important practical consideration is that if someone gives evidence about their own and others' joint criminality in a group, the status, outside the Inquiry, of one group member's evidence as against the rest would be that of hearsay from a co-perpetrator/co-defendant which would be *prima facie* inadmissible. Only admissible evidence from a prosecution witness (as opposed to a co-defendant) can be relied on to bring a prosecution. In a joint trial, a co-defendant cannot be compelled to give evidence against another co-defendant.

15. Therefore, the circumstances in which the need for such an undertaking might arise will be limited to those where a person witnessed but was not involved in serious criminality that falls outside the 'summary only' offending that is relevant to the Inquiry's terms of reference.

Would an asymmetric extended undertaking assist the Inquiry to fulfil its terms of reference?

16. There are various means short of an extended undertaking which may assist the Inquiry properly to discharge its terms of reference even if the potential to incriminate a third party does discourage people from coming forward, or causes those who do to baulk at the prospect of giving such evidence.

16.1. Such evidence will only be sought where it is relevant to the Inquiry's work.

16.2. Witnesses, it is hoped, will recognise the public interest not only in assisting the Inquiry but also in assisting the administration of justice by giving evidence of criminal wrongdoing. See the attached list of 'triable either way' and 'indictable only' offences for examples of the gravity of offence which potentially might be involved.

16.3. Adverse inferences may be drawn from a refusal to answer a relevant question or from an evasive answer to such a question.

16.4. A person can be compelled to produce evidence or to attend and give evidence to the Inquiry: section 21 of the Inquiries Act 2005. Failing, without reasonable excuse, to do anything required by a section 21 notice is a criminal offence: section 35(1). A failure to comply, or a threatened failure to comply with a section 21 notice can be certified to the High Court and compliance with the notice enforced through that court: section 36.

16.5. If, on the facts of a particular case, it was not reasonable in all the circumstances to comply with a section 21 notice, an application could be made to set it aside or have it varied: section 21(4). By this mechanism an exceptional case of third party incrimination could, if necessary, be considered for a bespoke solution.

16.6. A wilfully false and material answer, given knowingly, would expose a witness to the risk of prosecution for perjury: section 1 of the Perjury Act 1911.

17. Only if the Chairman is satisfied that the considerations above are insufficient to enable the Inquiry to get to the truth and to discharge its terms of reference, or that compulsion would be inappropriate, is it necessary to consider the issue further. It is our view that this is an issue which might best be addressed on a case by case basis if and when it arises.

18. If the Chairman were so satisfied, the next question would be the extent to which an extended undertaking would make a positive difference. Would it tip the balance and make reticent witnesses come forward? Would it cause persons to produce an incriminating document that would not otherwise have been produced, even under compulsion? Would it cause witnesses to give relevant evidence of criminal conduct by a friend which would not otherwise have been given? These questions, again, seem to us to be ones which might best be determined on a case by case basis.

What would the consequences of an asymmetric extended undertaking be on the administration of justice?

19. The breadth of the extended undertaking being sought is striking. It covers all offences, no matter how serious. It would be wide enough to permit the identification of a murderer and to prevent his prosecution in circumstances where he would, but for the extended undertaking, be prosecuted.

20. The proposed undertaking covers all civilian witnesses. Given the scope of the Inquiry's terms of reference it might shield from prosecution an organised criminal, a terrorist, a violent right wing extremist, or a violent left wing extremist.

21. The proposed undertaking would prohibit the use of evidence given by a third party in the investigation or prosecution of a person even if, absent an extended undertaking, the provider of the evidence would have produced it anyway.

22. If evidence is given of indictable offending, there is real potential for persons who might otherwise be brought to justice to escape justice. This would risk bringing the administration of justice into disrepute. It would also risk denying justice to victims of crimes, possibly very serious crimes. We submit that this is a very important consideration to be weighed in the balance when deciding what form of undertaking to seek from the Attorney General.

Is an asymmetric extended undertaking required in order to comply with section 6 of the Human Rights Act 1998?

23. There are those who participate in the Inquiry either as confirmed victims or as arguable victims of undercover policing which contravened their rights under the European Convention on Human Rights who have a procedural right to effective participation. What "effective participation" requires was the subject of submissions at the restriction orders hearing on 22-23 March 2016.

24. The question that now arises is whether the Strasbourg jurisprudence prohibits a person who is a victim for the purposes of the European Convention on Human Rights from being required to answer, in the course of an investigation, a relevant question the answer to which would tend to incriminate a third party. No authority for that proposition has been cited in the written position papers and skeleton arguments submitted to the Inquiry. The Inquiry counsel team has searched for and found no such authority. We conclude that the European Court of Human Rights has not recognised such a right. That is unsurprising because its effect would be likely to undermine the rights of other victims. It

would interfere with the State's ability to bring offenders to account and do justice for the victims of crime.

What has been the approach of previous public inquiries?

25. Protection of third parties from the incriminating statements of others was an issue considered at the undertakings hearing in the Baha Mousa Public Inquiry. In that inquiry the military witnesses advocated, amongst other things, an undertaking that: *"no application will be made on behalf of the crown, under the hearsay provisions of the Criminal Justice Act 2003, to adduce evidence given before this Inquiry by a witness against any other witness in the Inquiry in criminal proceedings"*: see paragraph 6(1)(b) of Rulings (First Directions Hearing) at http://webarchive.nationalarchives.gov.uk/20101015141120/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf

26. The submission was rejected. Whilst accepting that an extended undertaking might encourage some soldiers to tell the truth, Sir William Gage concluded that it was wholly inappropriate to limit the use in subsequent proceedings of one person's evidence against another. The argument is considered at paragraphs 24 – 27 of the ruling which we set out in full below.

> *"24. The second limb of Mr Dingemans' proposed extension seeks an undertaking from the Attorney-General that evidence given by any witness to the Inquiry will not be used by way of hearsay evidence pursuant to the hearsay provisions of the Criminal Justice Act 2003 against any other witness in the Inquiry. This further extension of the Attorney-General's undertaking is supported by those appearing for other soldiers who may be witnesses in the Inquiry.*
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> *"25. Mr Dingemans accepts that such an undertaking is unprecedented. He also accepts that it does not engage directly the privilege against self incrimination. However, he submits that as a matter of principle, undertakings provided in the context of public inquiries need not be limited to the privilege against self-incrimination. He further submits that such an undertaking might encourage witnesses, not themselves involved in any misconduct but who had observed others so engaged, to give evidence about what they had seen. He submits that such an undertaking might assist in breaching what the Judge Advocate in the Court Martial proceedings described as "the wall of silence".*

> *"26. Mr Rabinder Singh in his written representations described Mr Dingemans' representations on this issue as "staggering and deeply disappointing". I would not myself go so far as to describe Mr Dingemans' submissions on this issue in those terms, but I am quite satisfied that I should reject the request for this extension of the Attorney-General's undertaking. All counsel agree that a balance has to be struck between measures taken by the Inquiry to promote an environment which will enable it to discover the truth and the public interest enshrined in Articles 2 and 3 of the European Convention on Human Rights. In regard to the latter the Inquiry must so far as possible not only establish the facts, but do so in such a way that those responsible for what occurred may be held accountable.*
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> *"27. In my judgment it is neither necessary nor appropriate to invite the Attorney-General to give this proposed undertaking in respect of hearsay evidence. The Inquiry has power to compel witnesses to give evidence. The process of examination and cross-examination of witnesses is, in my view, sufficiently robust to determine where the truth lies. Where it is appropriate to do so, I will not shrink from drawing inferences from witnesses who choose to remain silent. In addition, as Mr Singh points out, the Criminal Justice Act 2003 provides some safeguards in respect of the admissibility of hearsay evidence. Whilst I recognise that if given the protection of this undertaking some witnesses, who would not otherwise give a truthful account of what they knew of the events of 14/16 September 2003, may decide to do so. Nevertheless in my view this is not sufficient to outweigh the public interest in preserving the right of prosecuting authorities to use statements made in the Inquiry for the purposes of any subsequent appropriate proceedings. Soldiers are public servants who should feel obliged to tell the truth. There is the potential for this Inquiry to uncover some very serious misconduct by some personnel. In the circumstances, in my opinion, it is wholly inappropriate to limit the use of the evidence of some witnesses in subsequent proceedings against another witness or witnesses."* [Emphasis added].

27. It will immediately be apparent that the submission made to the Baha Mousa Inquiry was directed at encouraging frankness from soldiers and not from civilian witnesses. Moreover, an important part of the reasons for rejecting the proposal was the very fact that the soldiers were public servants. Their conduct was at the heart of the inquiry. The extended undertaking would have interfered with the ability of the courts to hold to account soldiers found responsible for

violations of Articles 2 and 3 of the European Court of Human Rights. In these respects the arguments in the Baha Mousa Public Inquiry differ from those currently under consideration. There would be a closer analogy if it were police officers who were seeking an extended undertaking.

28. However, the decision is not wholly irrelevant for current purposes. The approach followed by Sir William Gage was to balance competing public interests. In the present case, any positive effect on establishing the truth falls to be balanced against any negative effect on the administration of justice. It is notable that Sir William Gage declined to seek an extended undertaking despite recognising that some witnesses might give a truthful account in response. He did so notwithstanding that a previous Court Martial, arising from the death of Baha Mousa, had been confronted with a "wall of silence" erected by military witnesses. Very considerable weight was attached to maximising the chances of prosecutions for potentially very serious crimes. Regard was also had to the range of alternative means by which that inquiry could get to the truth.

29. In two other public inquiries the conduct of non State witnesses was in question to an extent which might have given rise to a request for an extended undertaking but did not do so. Thirth five paramilitary or former paramilitary witnesses gave evidence to the Bloody Sunday Inquiry. An extended undertaking does not appear to have been sought.

30. In the Al-Sweady Inquiry an issue was whether some of the Iraqi civilian witnesses, who claimed to have been innocent civilians caught in crossfire, had in fact been gunmen firing at British soldiers. They did not seek an extended undertaking.

Conclusions

31. It is noted that nobody in their perfected skeleton arguments has submitted that there is merit in seeking a blanket 'symmetric' extended undertaking which would permit protection for all from evidence given by <u>any</u> witness to the Inquiry.

32. The decision as to whether to request an asymmetric extended undertaking requires the Chairman to balance the public interest in favour of such an undertaking against the public interest against it.

33. It seems likely that at least some questions will need to be put the answers to which might tend to incriminate a third party. However, at this stage it is not clear how common such questions will be. Such questions should not arise in relation to protest groups whose activities have been entirely lawful. They will

only be asked where they are relevant to the terms of reference. The investigation or prosecution of a summary only offence is most unlikely because of the usual six months' time limit for laying an information.

34. Although an extended undertaking might encourage a witness to come forward, or a witness to speak more frankly, the extent to which this would be the case is unclear at this stage. There is, in any event, a range of measures which the Inquiry can use to get to the truth short of an extended undertaking. These include drawing adverse inferences, if appropriate, in the event that a witness refuses to answer a question or gives evasive answers. Ultimately, the Inquiry has powers of compulsion, backed by sanctions.

35. The extended undertaking which is being sought is extremely broad. It would cover all offences, including those of the utmost gravity. It would cover all civilian witnesses. Given the breadth of the Inquiry's terms of reference this is particularly striking. It would not be limited, for example, to undercover policing of political groups. The extended undertaking would bind the police and the Crown Prosecution Service even in a case in which the witness would have provided the evidence without the extended undertaking.

36. There is no precedent in the Strasbourg jurisprudence for an extended undertaking.

37. The extended undertaking sought would risk undermining the administration of justice. It has the potential to deprive victims of crime of justice and to leave justice conspicuously undone. This could arise in respect of very serious crimes.

38. In these circumstances the Chairman may prefer not to seek a blanket asymmetric undertaking. Instead, the issue could be considered on a case by case basis when and if it arises. Such an approach is not without its own difficulties because it has the potential to slow or disrupt the progress of the Inquiry. However, it appears to us, at this stage, to be preferable to a blanket asymmetric extended undertaking. Such an undertaking risks serious undesirable consequences.

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ANNEX TO COUNSEL TO THE INQUIRY'S SUPPLEMENTARY NOTE ON UNDERTAKINGS

Mode of trial	General type of criminality	Offence
Summary only offences	Criminal damage	Criminal damage (committed intentionally or recklessly) valued at £5000 or less, s. 1(1) Criminal Damage Act 1971 and s.22 Magistrates Court Act 1980
	Terrorism	Wearing clothing or displaying articles leading to suspicion of support for proscribed terrorist organisation, s. 12 Terrorism Act 2000
	Public Order	Causing fear or provocation of violence with intent, s.4 Public Order Act 1986
		Causing harassment, alarm or distress with intent, s. 4A Public Order Act 1986
		Using threatening or abusive words or behaviour, s. 5 Public Order Act 1986
	Violence	Common assault or battery, s. 39 Criminal Justice Act 1988
Triable Either Way offences	Criminal damage	Arson, s. 1(1) and (3) Criminal Damage Act 1971
		Obstructing an engine or carriage on railway, s. 36 Malicious Damage Act 1861.
		Criminal damage (committed intentionally or recklessly) value exceeds £5000, s. 1(1) Criminal Damage Act 1971
		Racially or religiously aggravated criminal damage, s. 30 Crime and Disorder Act 1998
		Threatening to destroy or damage property, s. 2 Criminal Damage Act 1971
		Possession of articles with intent to destroy or damage property, s. 3 Criminal Damage Act 1971
	Terrorism	Membership of or supporting a proscribed organisation, ss. 11 and 13 Terrorism Act 2000
		All offences relating to fund-raising, weapons training, or possession or collection of useful information in relation to terrorism, ss. 15-19, 54, 57, 58 Terrorism Act 2000
		Use of (or causing a hoax about) noxious substances to cause harm or intimidate, s. 113 (s. 114 for hoax) Anti-Terrorism, Crime and Security Act 2001
		Disseminating terrorist publications, s. 2 Terrorism Act 2006

Mode of trial	General type of criminality	Offence
Triable Either Way offences (contd.)	Public Order	Violent Disorder, s. 2 Public Order Act 1986
		Affray, s. 3 Public Order Act 1986
		Racially or religiously aggravated public order offences (s. 4, 4A,5), s. 31 Crime and Disorder Act 1998
		Offences relating to stirring up racial hatred, ss. 18-23 Public Order Act 1986
		Communicating a bomb hoax, s. 51 Criminal Law Act 1977
	Animal research	Intimidating person connected with animal research organisations, s. 146 Serious and Organised Crime and Police Act 2005
	Firearms	Firearms offences such as possession of firearm or ammunition, Firearms Act 1968
	Violence	Assault occasioning actual bodily harm or unlawful wounding, s. 47 and 20 Offences against the Person Act 1861
		Racially or religiously aggravated common assault and more serious assault, s.29 Crime and Disorder Act 1998
	Drugs	Possessing or supplying drugs of Class A, B or C, Misuse of Drugs Act 1971
Indictable Only offences	Criminal damage	Destroying property with intent or being reckless as to endangering life, s. 1(2) Criminal Damage Act 1971
		Arson with intent to or being reckless as to endangering life, s. 1(2) and (3) Criminal Damage Act 1971.
		Malicious damage to railways, s.35 Malicious Damage Act 1861
		Causing (or attempting to cause) explosion likely to endanger life or property, s. 2 (s. 3 for attempt) Explosive Substances Act 1883
		Making or possession of explosive under suspicious circumstances, s. 4 Explosive Substances Act 1883
	Terrorism	Preparing a terrorist act, s. 5 Terrorism Act 2006
		Terrorist training or making/use of devices connected to terrorism, ss. 9-11 Terrorism Act 2006
	Public Order	Riot, s.1 Public Order Act 1986
	Firearms	Firearms offences in connection with committing an offence or with intent to or threatening to endanger life, Firearms Act 1968
	Violence	Using or sending explosives or corrosives maliciously or with intent to do grievous bodily harm, ss. 28-30 Offences Against the Person Act 1861
		Causing grievous bodily harm with intent, s. 18 Offences Against the Person Act 1861
		Murder, Common Law.