



UK/EU/G8

## The "Agencies" demand:

- every phone call
- every mobile phone-call
- every fax
- every e-mail
- every website
- every web page visited/downloaded
- from anywhere
- by everyone
- is recorded, archived and is accessible for all least seven years

## in "*a safe and free society*" everyone is a "suspect"

IUK Home office motto: "for a safe and free society"; the "Agencies" are the police, customs and immigration agencies plus the security and intelligence agencies - MI5 MI6 and GCHQ!

The exposure by the *Observer* newspaper of a "Confidential" report prepared by the Deputy Director of the UK National Criminal Intelligence Service (NCIS) for submission to the Home Office demonstrated the unparalleled, and authoritarian, demands being made by the "Agencies". It calls for all forms of communications (phone-calls, mobile phone-calls, faxes, websites and internet activity) to be recorded by telephone companies (CSPs) and internet service providers (ISPs), archived and held for at least seven years for the "Agencies" to access at will without any form of further authorisation (see Summary). The report is dated 21 August and asks the Home Secretary to write immediately to all CSPs to retain all data pending a legal framework being adopted.

The report says this gives the UK "an opportunity to lead on achieving an international standard for data retention legislation" and:

*A similar strategic outlook is being taken by other EU Member States who share the common view that, in the public interest, longer-term data retention is not negotiable.*

This initiative has come out of long-running discussions in the EU and the G8 High-Tec crime sub-group and the G8 Justice and Interior Ministers meetings (G8 is comprised of USA, France, UK, Germany, Italy, Japan, Canada and Russia plus an EU delegation comprising the Presidency, the European Commission - Romano Prodi - and the Commissioner for external affairs - Chris Patten) (see *Statewatch* vol 9 no 6).

The report says that Belgium, Italy, the Netherlands, Germany and the USA "have taken steps towards a statutory framework". At the G8 Conference in Paris in May 2000 the Italian delegation said that its government and telecommunications industry were proposing to set up:

*a national communications data warehouse to store data from CSPs. This reflects the view expressed by some UK experts who consider the only way forward is to create a Government agency run "UK National Communications Data Warehouse"*

The report says that although this might be "politically sensitive" in the UK the "Agencies" favoured this over the option of a number of private contractors as they would prefer to have just one access point.

Although the report says that "law enforcement agencies" need "statutory authority to maintain their own communications intelligence databases" this is preceded by the statement that: "Most police forces and HM Customs and Excise retain.. data obtained electronically on their own individual databases". It would seem that, yet again, these agencies are acting outside the law and now want their practices to be legitimised.

Direct and automated access, via the internet, is apparently already being given by "certain CSPs" to law enforcement agencies. The report says over the past 12 months the Metropolitan Police Force's "Single Point of Contact" (SPOC) had acquired 63,590 subscriber details and 4,256 billing accounts.

### IN THIS ISSUE

**UK: The Hillsborough trial: a case to answer** see page 13

**Essays for an Open Europe** see page 20 **Cybercrime convention** see page 22

**Statewatch, PO Box 1516, London N16 0EW, UK**

Tel: (00 44) 020 8802 1882 Fax: (00 44) 020 8880 1727 E-mail: [office@statewatch.org](mailto:office@statewatch.org) Website: <http://www.statewatch.org>

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## **Who is behind the demand?**

The report was prepared by Roger Caspar, Deputy Director General of NCIS and chair of the Association of Chief Police Officers (ACPO) Police and Telecommunications Industry Strategy Group "on behalf of" ACPO, ACPO (Scotland), H M Customs and Excise, the Security Service (MI5), the Secret Intelligence Service (MI6) and GCHQ (Government Communications Headquarters) and:

*the Police Liaison Units.. in a number of leading UK Communications Service Providers (CSPs) and Internet Service Providers (ISPs) have been consulted on the proposals put forward in this paper. The CSPs involved include: British Telecommunications PLC; BT Cellnet; NTL/Cable and Wireless, Vodafone, One 2 One, and Orange PCS.*

The Data Protection Commissioner, who was informally sounded out, said they have: "very grave reservations".

On the other hand the Criminal Cases Review Commission (CCRC) are simply used by the report to try and justify the plan. The report is peppered with comments on the "benefit" for defendants and for those appealing against sentence to have access to such data. In its conclusions the report says: "Although the law enforcement arguments for retention of data are critical, its use for a range of others purposes should not be forgotten".

The conclusions say that action is urgent and "the Government should be prepared to defend our position" because there is "significant commercial pressure to delete data" and:

*Communications data is of crucial importance to Law Enforcement, and the Intelligence and Security Agencies but our needs are in conflict with existing legislation arising from data protection provisions and ECHR.*

## **What is the rationale?**

The rationale is a very familiar one. Immediate access to communications data is essential for the "Agencies" to tackle "organised criminal activity but also national security", "drug and illegal immigration conspiracies, murder investigations and other serious crime" and "race hate groups and computer hackers".

As to the "period of retention" it will:

*have to be a balance between law enforcement needs, the legislation requirements of the EU and Human Rights Act, the Data Protection issues and what can be afforded.*

The "Agencies" argument is, not surprisingly, that in the "balance" their needs are greater than peoples' civil liberties and privacy and that seven years or longer is necessary.

## **How should it be made lawful?**

The "Agencies" clearly do not want new legislation which would lead to public discussion and debate. The "Industry" favour an "Industry accepted Code of Practice". But how should this be given legal force? The "Agencies" argued that there is an "important opportunity" to use Article 15 of the EU Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector. This allows EU member states to "restrict the scope" of the Directive where it concerns "national security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system".

Or the government, they argue, could simply allow a "Minister of State" to direct CSPs to retain data under Section 94.1 of the Telecommunications Act 1984.

The newly-enacted Regulation of Investigatory Powers Act (R.I.P) apparently does not give them the powers they need because it is far too time-consuming and potentially visible. Under the Act the "Agencies" have to "obtain a Production Order.. on every occasion" to get access to the data, instead they

want immediate and unlimited access to a "UK National Communications Data Warehouse".

*"Looking to the future: clarity on Communications data retention law: "NCIS submission to the Home Office, 21 August 2000; Observer, 3.12.00.*

## **NCIS submission on Communications Data Retention Law: Summary below, the full text is on: <http://www.statewatch.org/news/dec00/02ncis.htm>**

### **SUMMARY OF RECOMMENDATIONS**

1. A clear legislative framework needs to be agreed as a matter of urgency. A statutory duty is the only basis upon which an efficient mechanism for data retention can be established.

2. Equal statutory obligation on every CSP to retain communications data for the same periods.

3. Government to provide additional funding; (i) to support CSPs set up data retention systems and, (ii) help Agencies meet increasing cost recovery charges for data.

### **4. WHAT TYPE OF DATA SHOULD BE RETAINED?**

4.1 All communications data generated in the course of a CSP's business or routed through their network or servers, involving both Internet and telephone services, within a widely interpreted definition of "communications data" as proposed in the draft provisions of Clause 20, Part 1, Chapter II, Regulation of Investigatory Powers Act.

4.2 Legislation should require every CSP to retain all communications data originating or terminating in the UK, or routed through the UK networks, including any such data that is stored offshore.

### **5. WHY SHOULD DATA BE RETAINED?**

5.1 In the interests of justice to preserve and protect data for use as evidence to establish proof of innocence or guilt.

5.2 For intelligence and evidence gathering purposes to maintain the effectiveness of UK Law Enforcement, Intelligence and Security Agencies to protect society.

### **6. HOW LONG SHOULD DATA BE RETAINED?**

6.1 Communications data generated by or routed through a CSP's network should be retained for real time access by the CSP (or contractor) for a minimum period of 12 months;

6.2 Once data is 12 months old, it should be archived for retention, either in-house or by a Trusted Third Party agency or contractor, and retained for a further six-year period;

6.3 The total retention period for non-specific data before mandatory deletion should be seven years.

### **7. WHO SHOULD RETAIN THE DATA?**

7.1 Legislation should require CSPs either to retain data inhouse, or have the option to outsource retention to a Trusted Third Party; either a Government run Data Warehouse or to a private contractor's facility.

7.2 In the interests of verifying the accuracy of data specifically provided for either intelligence or evidential purposes, CSPs should be under an obligation either to provide appropriate certification at the time or retain the original data supplied for a

period of seven years, or for as long as the prosecuting authority directs.

7.3 CSPs should have the option to either store archive data inhouse, or transfer it to an agency or contractor, who will then take full responsibility for access, retrieval, formatting, forensic integrity and production in evidence at Court.

7.4 Subject to the requirements of the Criminal Procedures and Investigation Act 1996, or as directed by the Crown in Scotland, the Law Enforcement Agencies should be provided with the legal authority to maintain their own data bases of communications data lawfully obtained for specific investigations subject to the following retention conditions:

Access is subject to the provisions of RIPA;  
A designated chief officer has oversight;  
Data less than 12 months old should be available live;  
After 12 months, data to be archived and retained for a further 6 years.

Review to ensure that the purpose for which it is retained is still relevant. After 7 years all data must be deleted. The Commissioner proposed under RIPA should be similarly able to audit applications to access the archives.

## 8. INTERIM ACTION

The Home Secretary should write to the Managing Directors of each UK CSP advising them of the need for agreement on a statutory framework; and the requirement to retain data and not to delete it in the meantime. (Potential expansion of the provisions of Section 94(1) Telecommunications Act 1984).

# CIVIL LIBERTIES

## FRANCE

### Medical records seized at drug treatment centre

On 28 June the investigating magistrate Magali Tabareau in Pontoise conducted a search of the Rivage methadone centre in Sarcelles, Val d'Oise (on the northern outskirts of Paris), where 165 drug addicts are treated annually. The raid, which contravened judicial precedent, resulted in the seizure of a list of patients' confidential medical records on 17 July. Several people receiving treatment at the centre were questioned by police. Staff were outraged that the centre's guarantee that addicts would receive "anonymous" treatment "free of charge" was broken. Medical treatment at the centre was badly disrupted for over two weeks.

A judge issued a search warrant for the centre after two members of staff refused to hand police a list of patients and their addresses on 14 June, during an investigation into cocaine dealing by a former patient - he had claimed that he had occasionally "helped out" people from the centre. Gilles Nester, a psychiatrist who practices in Gonesse hospital and the Rivage centre, explained that the list was protected by the professional duty of confidentiality "and by regulations governing the functioning of care centres for drug addicts". He complained that the duty of medical confidentiality was disregarded, showing the "total inadequacy of the law of 31.12.70. with regards to problems of public health".

This law deals with investigative powers and the medical sector, according to staff at the Rivage centre: "it gives

magistrates all the power". Anne Coppell, president of the *Association française de réduction des risques* (French association for the reduction of risks), confirmed the criticism: "In this story, the problem is that practically everything was legal." The Pontoise court also stressed that Tabareau's actions did not contravene the law. Nonetheless, the daily newspaper *Liberation* commented that "until now it was common practice that judges did not search treatment centres".

The magistrate was able to seize all of the centre's medical records rather than just seizing the record of the person under investigation. Gilles Nester said: "All the patients have been indiscriminately...implicated...simply because they receive medical treatment in the same centre as the person under investigation." He argued that such practices will stop addicts from turning to drug treatment centres for help and will result in "generalised illegality and opacity" by driving users underground. In a press statement he explained that the magistrate's actions forced staff to operate in a "totally unusual manner" for 15 days. Daily trips to collect methadone had to be arranged, and staff had no access to patients' medical records.

Over 50 associations formed a support group and wrote an open letter to Prime Minister Lionel Jospin in defence of the Rivage centre. They stressed the "spectacular results" attained by health programmes for addicts, including the reduction of deaths from AIDS, of numbers of people infected by HIV, of lethal overdoses (down by 80% between 1994 and 1998) and of police interrogations related to heroin use (down by 54% between 1994 and 1998). They called for an urgent review of the law of 31.12.70. to "guarantee access to care by respecting confidentiality". The letter also expressed concern at the magistrate's scrutiny of urine tests which "are not meant to serve as judicial evidence of [drug] use in any circumstance".

The clash between social workers and law enforcement authorities is reminiscent of the case in the UK of Ruth Wyner and John Brock (See *Statewatch* vol 10 no 1 & 3/4), convicted and sentenced to four and five years jail respectively after refusing to disclose details about clients at Wintercomfort day centre for the homeless. Their defence relied on the charity's confidentiality policy which did not allow them to pass the names of suspected drug dealers to the police. They were bailed after seven months in prison and have been cleared to appeal against their sentence.

*Rivage: dossier de presse; Le Monde 1.8.00; Liberation 25.7.00; www.hivnet.ch/migrants/news*

## SWITZERLAND

### Big Brother Awards

On 28 October, the Big Brother Awards were held for the first time in Switzerland at a ceremony in the community centre *Rote Fabrik* in Zurich. The awards were initiated by the Swiss Internet User Group (SIUG), the *Rote Fabrik* as well as the *Archiv Schnüffelstaat Schweiz* and was supported by the Zurich based weekly newspaper *WoZ*. The nominations were submitted from September onwards through the internet and by mail. A jury then selected from around 40 nominations that were received. Amongst others, jury members included Paul Rechsteiner, the president of the Swiss Federation of Trade Unions, Valerie Garbani, a Social Democrat member of the National Council, the writer Daniel de Roulet as well as Dore Heim, the Zurich Commissioner for Equal Rights of Men and Women. The Awards for the best surveillance agencies were divided into four categories.

The State Award, for which government representatives and federal cantonal and municipal agencies could be nominated, went to the Federal Department of Defence for its new surveillance system SATOS 3. With the help of antennas in Heimenschwand and Lenk, the system captures satellite bound

telecommunications and filters them according to key words. Intelligence is passed to the foreign intelligence service (which is part of the ministry of defence) and the Federal Police (political intelligence). The outgoing defence minister, Adolf Ogi declared in parliament in December 1999 that every phone call, fax etc. from Switzerland to Libya or vice versa could be tapped. Theoretically it was also possible to tap communications by mobile phone within the country, but this, it was said, would not happen.

The Business Award went to Basel based chemical and pharmaceutical company Roche SA, for regular urine testing of their apprentices. If residues of illegal drugs are found, apprentices fear being sacked. This practice is still in use, despite strong criticism by the federal data protection commissioner Mr Odilo Guntern.

The E- or Telecommunication Award went to Swisscom, the former state monopoly and now privatised telecommunications company. For six months, the company stores "traffic data" which, in the case of mobile phones, includes the location of the caller and the person being called can be traced throughout the time span. This information is passed on to the prosecutor and thus the police in the case of an investigation, provided they can present a judicial warrant. Since this practice was first under discussion in 1997, Swisscom has always denied that it had taken place. However, the company is obliged to reveal its interception of telecommunications under existing laws and decrees, which even sets the price the police have to pay for such a tracking. The night before the awards, Swisscom threatened to take the organisers to court if they failed to withdraw them from the list.

The Life Time Award was given to Mr Urs von Daeniken, Chief of the Federal (Political) Police since the beginning of the 1990's. Through his consistent endeavour, Mr von Daeniken managed to help the Federal Police out of a crisis which beset the force in 1989, after the scandal over its agencies files. The Federal Police has, for the first time, a (very vague) legal basis. The Federal Police store about 50,000 "subversives" in its computer files at any given time. As it has recently been integrated into the Federal Office of Police, Mr Von Daeniken will soon have a new job: he will become head of the Service for Analysis and Prevention, which is the intelligence department of the Federal Police Office, where he will continue the same work under a new title.

Apart from the awards for the best "surveillance villians", a "Winkelried" award was granted ("Winkelried" was a medieval Swiss hero, who according to legend drew all the enemies' weapons on him saving the Swiss in a historic battle). The award was given to Mr T.F. During the Gulf war, he was working in a regional computing centre which manages the data of the municipal inhabitants' registers of the surrounding towns and villages. Due to the fear of attacks by pro-Iraqi terrorists, the data on all residents of Arab origin transferred to the Federal Police. Mr. T.F. reported this to the parliamentary control commission and the press and thus lost his job. His name was leaked by the president of the commission to the Federal Police, which obviously passed it on to his employer.

*The next Big Brother Awards will be held in October 2001. Nominations can be submitted already, either via the internet ([www.bigbrotherawards.ch](http://www.bigbrotherawards.ch)) or by mail (Stiftung ASS, Postfach 6948, CH-3001 Bern).*

## Civil Liberties - new material

**Submission on the draft codes of practice under the Regulation of Investigatory Powers Act 2000**, Justice, November 2000, 20 pages. From: Justice, 59 Carter Lane, London EC4V 5AQ.

**Articles of Resistance**. Paul Foot, Bookmarks Publications, 2000, pp319 (£14.99). ISBN 1 898 876 649. Fully indexed collection of Paul Foot's often inspirational journalism over the last decade.

## Parliamentary debates

**Freedom of Information Bill Commons** 17.10.00 cols 883-954; 971-1020

**Freedom of Information Bill Commons** 19.10.00. cols 1208-1300

**Freedom of Information Bill Lords** 24.10.00. cols 273-314

**Freedom of Information Bill Lords** 25.10.00. cols 407-476

**Freedom of Information Bill Lords** 14.11.00. cols 134-158; 173-266

**Freedom of Information Bill Lords** 22.11.00. cols 817-852

## IMMIGRATION

### GERMANY

## Asylum seeker threatened with deportation without court hearing

After the prosecution of Cornelius Yufanyi, a member of the German based human rights organisation *The Voice e.V. Africa Forum* the German authorities have issued a deportation order and arrested another member of the organisation, which hosted the Refugee Congress in Jena in May this year (see *Statewatch* vol 10 no 2 & 5). The Nigerian human rights activist and member of the *United Democratic Front of Nigeria* (UDFN), Akubuo Anusonwu Chukwudi, played a pivotal role in the *Caravan for the Rights of Refugees and Migrants*, which toured over 40 German cities in 1998 in protest at the inhumane treatment of refugees and migrants in Germany. On 20 November, minutes after Akubuo had entered the premises, police stormed the offices of the Bremen based *International Human Rights Association* (IMRV) and arrested him. Akubuo has since gone into hunger-strike. This is the second attempt to deport the asylum-seeker who seems to have become a thorn in the side of the German authorities despite their recent pledge to support anti-racist struggles in response to far-right violence and an increase in its media coverage.

The first time the German authorities tried to deport Akubuo was directly after he took part in the *Caravan*, which lasted five weeks and uncovered the extent of isolation, impoverishment and racist attacks suffered by asylum seekers in hostels throughout Germany. His deportation was prevented at the last minute after international protests and the intervention of Nigerian human rights activists. Hours before his deportation, the administrative court in Schwerin ordered the deportation to be stopped on the grounds that he was facing a possible danger to his life in Nigeria, and adjourned a decision on his case after a full hearing. Akubuo is a former leader of a Lagos based opposition group which is targeted by the Nigerian government. In Germany, he continued his political activism, took part in information campaigns on the human rights situation in Nigeria and criticised the human rights situation of refugees and migrants in Germany. Despite the continued deportation threat, Akubuo campaigned against the living conditions in German asylum seekers homes, including his own, in Mecklenburg-Vorpommern.

Campaigners argue that it is not a coincidence the authorities are targeting Akubuo for deportation without allowing an open hearing of his case. The administrative court in Schwerin cancelled the deportation stop in July 2000, thereby reverting its 1998 decision, without prior warning or explanation. Akubuo's supporters argue that he had been a nuisance in the eyes of the so-called foreigner police in the *Landkreis* of Parchim for a long time. His campaigning activities brought him in conflict with the regional authorities:

when he initiated and won the campaign for asylum seekers who had been resident in Germany for three years to receive their meagre living allowances in cash instead of kind (an asylum regulation which the Parchim district failed to follow), the regional authorities excluded Akubuo from the new arrangements. Whereas his fellow residents now receive their payments in cash, Akubuo was refused cash and continued to be paid in vouchers. This, and other incidents, has led supporters to believe that this most recent deportation threat must be seen in the context of political activism, rather than merely another arbitrary asylum decision.

Another irregularity in the proceedings is the timing of the deportation order: the human rights situation in Nigeria is currently deteriorating so that even the administrative court in Hanover, which has not decided in favour of a Nigerian asylum seeker for over five years, had to concede that it could not reach a decision on the asylum case of Sunny Omwenyeke, another member of *The Voice*, until further evidence on the political situation in Nigeria was gathered from Amnesty International and the German Foreign Office in Nigeria. Campaigners point to the similarities between Akubuo's and Sunny's cases, and to their different handling by the courts.

As a rule, Stephanie Wansleben from the IMRV in Bremen comments, a stop on a deportation order is never repealed before the full hearing of an asylum claim and all the evidence has been scrutinised. Akubuo was physically unwell in detention when he entered his eighteenth day of hunger-strike. The medical officer has declared him unfit for deportation but the authorities have kept him imprisoned. *The Voice* and the IMRV have initiated an international fax campaign and are urging supporters to write to the administrative court in Schwerin and the interior minister of the administrative district of Mecklenburg-Vorpommern. It seems the recent assurances by Germany's authorities to actively counter the maltreatment of foreigners in Germany has bypassed the administrative court in Schwerin, and the asylum procedure in Germany as a whole.

*International Human Rights Association Bremen e.V.: Wachmannstr. 81, 28209 Bremen, Tel: 0044(0)421-5577093, Fax: 0044 (0) 421-5577094. The Voice, Africa Forum, Schillergäßchen 5, 07745 Jena, Tel: 0044 (0) 3641-665214, Fax: 0044 (0) 3641-423795, mobile: 0049 (0) 174-4655394.*

## AUSTRIA

### Pilots responsible for deportation deaths?

The preliminary hearings into the death of the Nigerian asylum-seeker Marcus Omofuma on a *Balkan-Air* aircraft on 1 May 1999 (see *Statewatch* vol 9 no 2), which are taking place in the regional court of Korneuburg in Austria, have thrown up far-reaching questions of responsibility for the death or injury of refugees and migrants during their deportation. The defence team for the police officers who had bound and gagged Omofuma and are now accused of "inflicting suffering resulting in the death of a prisoner", are arguing that the pilot of the aircraft is responsible for the death of the deportee as he has sole powers on board (see *Statewatch* vol 10 nos 3 & 4 for a discussion of the legal situation).

Anti-deportation campaigners have long warned aviation companies of their legal responsibilities on board aircraft during deportation and are appealing to pilots, staff and passengers to intervene in and/or refuse to carry out forceful deportations. Although the question of responsibility has become pressing after death rates during deportation attempts have dramatically increased with the forceful introduction of an EU deportation machinery (see *CARF* no 57, September 2000), this is the first official consideration that a pilot be held legally responsible for the death of a deportee on an aircraft.

Gisela Seidler, a Munich immigration lawyer and member of the German campaigning network *no one is illegal* believes that this new development "will create a stir in management circles of the *Deutsche Lufthansa*". The campaign has long pointed to the issue of responsibility and Seidler remarks that "aviation companies as well as every individual pilot would be well advised to refuse to take part in any deportations".

*off limits, number 29 (November) 2000; see also the European noborder website on aviation campaigns, www.deportation-alliance.com*

## ITALY

### Judge questions constitutionality of immigration law

On 4 November a judge in Milan in an unprecedented action refused to approve the detention of 9 Romanian and Albanian undocumented immigrants into the newly reopened *Corelli* detention centre. The rulings challenge the constitutionality of Articles 13 and 14 of the 1998 *Turco-Napolitano* law on immigration. Mrs Rita Errico of the civil section of Milan's court claimed that the detentions would be unconstitutional, based on Article 13 of the Constitution, which does not allow a restriction of personal freedom "without a motivated decision of the judicial authority".

Italian law considers illegal entrance into Italy as a civil, not criminal, offence which carries the penalty of expulsion. The present practice of detaining immigrants for up to 30 days pending their expulsion is deemed a practical solution for law enforcement agencies to identify and administer the sanction. Out of 8,947 immigrants who passed through detention centres in 1999, 773 were released because their arrest resulted from a mistake - 348 were released by judges and 425 by police for "different reasons". Ms Salvato (*Rifondazione Comunista*), in a parliamentary question, pointed out that 56% of those detained remained in Italy after being detained for the 30-day period. Only 43 of the detained immigrants had been charged with a crime.

Explaining her ruling, which threatens to bring the use of Italy's detention centres to a standstill, judge Errico attacked the practice whereby local police chiefs can decide on the forced expulsion of immigrants. *Repubblica* quoted from judge Errico's ruling: "The escorted removal of immigrants via the use of public force is a measure which undoubtedly affects personal freedom, understood in terms of a person's autonomy and availability, a freedom which is protected by Article 13 of the Constitution". She also refers to a 1956 sentence by the *Corte Costituzionale* which established that: "In no case can a person have their freedom limited or denied... if a regular trial is not held for this purpose... without a judicial decision which gives the reasons".

Giorgio Napolitano and Livia Turco, drafters of the law, criticised the decision. Turco inaccurately claimed that the decision "moves us away from Europe", because: "Throughout the rest of Europe the system of administrative expulsions with immediate escort on request from the head of police is in force". Activist Giuliano Acunzoli welcomed the ruling, arguing that the struggle against the *Corelli* detention centre has hit hard "and some of our arguments clearly reached the judicial level". He was at the forefront in the year-long struggle by social centres and civil rights groups which led to the closure of the detention centre in September. He observed that only two weeks after it was reopened on 1 November, there had been two escapes, one self-inflicted injury, one riot and a hunger strike, as well as newspaper reports of a scurvy epidemic.

In Sicily, a judge in Trapani ordered the release of six Chinese immigrants on 14 November after they were transported to Trieste (Italian-Slovenian border region) to be expelled, because their right to a defence was violated. Cinzia Giambruno, defence attorney in Milan, said that "the right to defence is

simply ignored" and that the role of defence attorneys is "a mere formality" in Italian detention centres. She claims that defence lawyers are warned only one day before trials, lack access to their clients (who are denied the time and freedom to collect the necessary documentation) and therefore find themselves having to improvise defence arguments. They sometimes work on a quasi-volunteer basis as they are not guaranteed reimbursement for costs.

In a statement in the Senate, Ms Salvato explained that expulsion measures in "law N.40 of 1998 have, for the first time in Italian legal tradition, introduced the principle according to which a person can have his/her freedom limited as a result of an administrative measure, not a penal sentence". He also claimed that detainees "are not usually informed of their rights, the length of the forced detention period and especially of their right to appeal against the expulsion measures taken within five days of their detention". He reminded MPs that the Committee for the Prevention of Torture (CPT) considers detention not connected to criminal activities as "inhuman treatment". With regards to the proposed creation of more detention centres (see *Statewatch* vol 10 no 1) he observed that, especially in Tuscany, there has been opposition from local councils and officials, regional council's, political groups, trade unions and groups involved in issues such as solidarity, immigration and anti-racism.

*Corriere della Sera* 12.11.00; *La Repubblica* 3.11.00; *Il Giorno* 4.11.00; *Giuliano Acunzoli communique* 15.11.00; *Resoconto Parlamentare: Senato* 5.10.00.

work ban was introduced in 1997 by the then conservative-liberal coalition government. After employment and social courts in several German cities decided in favour of asylum seekers and foreigners who initiated legal proceedings to win the right to work, and after a decision from 22 March 2000 from the social court in Lübeck ruled a general work ban illegal, the employment ministry had to repeal the 1997 regulation and commence talks on the details of new work provisions. The Employment Ministry, the Interior Ministry and Marieluise Beck, the official responsible for foreigners in Germany, agreed that asylum-seekers and "tolerated" foreigners will have access to the labour market after one year. Civil war and "traumatised" refugees are relieved of the one year ban and will be able to work immediately, if no German citizen is available for the job. The so-called *Vorrangprüfung*, or *Inländer-Prinzip*, stipulates that asylum-seekers and civil war refugees can only take up a job if no German, EU-citizen and other third country national with a more favourable position is available. Opinions on the right to work for asylum-seekers are still split in Germany. Whilst Christian Wagner, the conservative Hessian minister for Justice speaks of a "slap in the face for the unemployed", Dirk Niebel, the labour market expert for the liberal party commented that "there is no sensible reason" for the one year waiting period. The government says that the *Inländer-Prinzip* guaranteed that no German would be excluded from the employment market. *Migration und Bevölkerung*, number 8 (November) 2000; *Infodienst des Bayerischen Flüchtlingsrates*, number 76 (November-December) 2000

■ **UK: John Quaquah to sue Home Office:** On 1 September, Mr Justice Elias overturned a decision by the Home Office which refused the Ghanaian asylum seeker John Quaquah leave to remain in the UK to prepare his case and sue the Home Office and the private security firm Group 4, which runs the detention centre Campsfield House, for malicious prosecution. This is the second time the High Court has rebutted the Home Secretary over the application of the law to Mr Quaquah's situation. Quaquah and eight other West African asylum seekers were acquitted of instigating a riot in Campsfield Immigration Detention Centre near Oxford in August 1997 (see *Statewatch* vol 8 nos 3 & 4 and vol 9 nos 3 & 4). The case against the "Campsfield Nine" was thrown out of court after video evidence contradicted the claim by Group 4 private security guards that

## NETHERLANDS

### The Dover-case

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### Immigration - in brief

■ **Germany: Asylum-seekers can work - if no German applies:** The government has announced plans to repeal the work ban on asylum seekers, refugees and foreigners with the legal status of *Duldung* (all asylum seekers who have been rejected in the asylum procedure but cannot be deported for various reasons all receive a pending status of "toleration"). The

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those accused had damaged property and attacked them. After having spent ten months in prison awaiting trial, Quaquah took steps to sue the Home Office and Group 4 for malicious prosecution. He applied for leave to stay, but instead was faced with a deportation order by the Home Office. The order was quashed in judicial review in 1999. The Home Office then continued to prolong proceedings by refusing to make a decision on his case, and again refused to grant leave to stay. The latest High Court decision stated that the Home Office's refusal to grant Quaquah leave was "surprising" and that it needed to give "powerful countervailing reasons" to refuse Mr Quaquah leave to pursue his civil claim for compensation. Suke Wolton from the Campsfield Nine Defence Campaign believes that "the Home Office has a vendetta against the Campsfield Nine and is taking it out on Mr Quaquah". The Home Office "should not be allowed to deport their critics rather than face them in Court", she said. For more background to the case and information on Campsfield Immigration Detention Centre see [www.closecampsfield.org.uk](http://www.closecampsfield.org.uk)

**■ UK: Refugee sues Home Office under Human Rights Act:** An Algerian refugee whose asylum claim was upheld by the Appeals Tribunal in 1997, is suing the Home Office for imprisoning him unlawfully for the last three months of his 19 months detention. The appellant argues that the Home Office was in possession of all the information that led the tribunal to uphold his claim. Further, the 28 year old had been handcuffed and moved from the detention centre at Campsfield House near Oxford to a prison in Birmingham, after he had complained that the detention centre was run like a prison by the private security firm Group 4. Barrister Andrew Nicol QC said that the new provisions introduced under the Human Rights Act provided for the right to sue against unlawful detention and commented, "I would hope the Home Office think long and hard about who they detain. Locking people up is a serious matter". At a recent Barbed Wire Europe Conference (see *Statewatch* vol 10 nos 3 & 4) in Oxford the Close Down Campsfield Campaign and other European anti-detention activists called for a European-wide campaign and day of action in protest at the practice of immigration detention in Europe. The campaign is working towards the wholesale abolition of immigration detention in the EU. *Guardian* 14.10.00; see also [www.closecampsfield.org.uk](http://www.closecampsfield.org.uk)

## Immigration - new material

**Stealing children: institutionalising Roma children in Italy,** Kathryn D. Carlisle. *Roma Rights* no 3, 2000, pp52-55. Analyses practices whereby Italian authorities take Roma children from their families, institutionalising them or handing them over to foster families. Justifications for this practice include "unsanitary living conditions", "exploitation of minors" and "abandonment". Government policies identifying Roma as nomads result in them living in camps where conditions range "between bad and very bad". If parents bring children with them to sell roses or beg, the charge of "exploitation of minors" is applicable; if they leave them in the camps, authorities may rescue them from "abandonment". Also examines common perceptions of the institutionalisation and adoption of Roma children as "saving" them from their parents and culture.

**Campland: Racial Segregation of Roma in Italy,** European Roma Rights Centre (ERRC). Country Reports Series No 9 (October) 2000, pp114. A condemnatory study based on fieldwork and first-hand or eyewitness testimonies of the treatment of *Roma* in Italy. Interviews with public officials highlight policy contradictions which result in numerous abuses of the rights of the *Roma* in Italy. These start from their racial segregation into "nomad camps", abuse at the hands of police and judicial authorities, discrimination and the near impossibility of improving their situation through employment and education. This is due to costs, difficulties in obtaining documents, protests by parents, racial discrimination and instability resulting from living in camps without personal addresses, which occasionally suffer raids resulting in the destruction of their property.

## Parliamentary debate

**Immigration Appeals (Family Visitor) (No.2) Regulations 2000**  
Lords 2.11.00. cols 1204-1226

## LAW

### Law - new material

**Legal Aid and the Human Rights Act,** John Wadham. *Legal Action* October 2000, pp6-8. This is the second part of two articles covering the Human Rights Act 1998 and the possible implications on legal aid provisions, focusing on decision making processes.

**A safe haven for torture suspects?,** Fiona McKay. *Legal Action* October 2000, pp9-10. This piece discusses the UK's involvement in the International Criminal Court, which will try those accused of genocide, war crimes and crimes against humanity. It questions "an important omission" in the draft International Criminal Court legislation which "does not allow for the prosecution in UK courts of non-UK nationals suspected of statute crimes committed outside the UK."

**Human Rights update,** John Wadham & Satnum Singh. *Legal Action* October 2000, pp18-20. Latest update on the Human Rights Act 1998, which came into force in October.

**Your Rights. The Liberty Guide to Human Rights** (seventh edition). Edited by John Wadham and Gareth Crossman, Pluto Press in association with Liberty, 2000, pp383 (£14.99). ISBN 0 7453 1577 1. Handbook covering the spectrum of human rights and civil and political liberties in England and Wales. Updates include the effect of the Human Rights Act, access rights under the Data Protection Act, and summaries of other relevant government legislation.

**Rogue States: The Rule of Force in World Affairs.** Noam Chomsky, Pluto Press, 2000 pp252. ISBN 0 7453 1708 1. A comprehensive political and legal analysis of the actions and effect of rogue states (countries that do not consider themselves bound by international law or convention). Contents include the Balkans, East Timor, "Plan Colombia", Cuba, Iraq, Southeast Asia, Latin America and Jubilee 2000, suggesting that "the rule of law has been reduced to a mere nuisance" for "US statecraft and warmongering".

## Parliamentary debates

**Criminal Justice (Mode of Trial) (No.2) Bill** Commons 28.9.00. cols 961-1034

**Criminal Justice and Court Services Bill** Commons 2.10.00 cols 1133-1206; 1225-1260

**Criminal Justice and Court Services Bill** Commons 4.10.00. cols 1518-1589; 1603-1680

**Double Jeopardy Rule** Commons 26.10.00. cols 115WH-154WH

**Criminal Justice and Court Services Bill** Lords 31.10.00. cols 792-860; 875-938

**Criminal Justice and Court Services Bill** Lords 8.11.00. cols 1535-1559

**Sexual Offences (Amendment) Bill** Lords 13.11.00. cols 18-122

## MILITARY

### Military - in brief

**■ Italy: Life sentence for Argentinian generals.** Generals Carlos Suarez Mason and Santiago Omar Riveros, commanders of Military Zones 1 and 4 following the 1976 coup in Argentina by generals Videla, Agosti and Massera, received life sentences for the murder of five Italian-Argentinian citizens and the

kidnapping of a boy. The second court of assizes in Rome also sentenced naval prefect Juan Gerardi, and junior officers Roberto Rossin, Hector Maldonado, Jose Luis Porchetto and Alejandro Puertas to 24 years for the death and disappearance of another Italian citizen. It is a ground-breaking trial because amnesty laws in Argentina guarantee impunity for crimes committed during the *junta's* regime, including the disappearance of 30,000 left-wing youths. It is also the first time that members of the Argentine armed forces have been sentenced abroad for such crimes. Nonetheless, it is unlikely that they will serve their sentences, as these were passed in an *in absentia* trial, although Italy will request their extradition. The prosecuting magistrate, Francesco Caporale, spoke of how the military *junta* divided the country into five zones, whose commanders had the power "of life and death" over its inhabitants. He alleges that they were involved in the "national reorganisation process" which involved the abduction, torture and murder of left-wing sympathizers. *Repubblica* 7.12.00

## Military - new material

**The secret treaty.** CAAT News (Campaign Against Arms Trade) Issue 163 (November) 2000, pp6-7. This article looks at the Framework Agreement Concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry, which was signed by the UK, France, Germany, Sweden, Spain and Italy in July.

**Gassed: British chemical warfare experiments on human at Porton Down,** Rob Evans. House of Stratus, November 2000, paperback, £20, 468pp. This book, by *Guardian* journalist Rob Evans, exposes the longest-running programme of official warfare experiments on human "guinea pigs" in the world. More than 25,000 people have been used from 1916 through to the present. A good example of investigative journalism with extensive references.

### Parliamentary debates

**Anti-Ballistic Missile Treaty** Commons 20.10.00. cols 1318-1336

**Defence Procurement** Commons 26.10.00 cols. 411-486

**Defence and the Armed Forces** Commons 1.11.00. cols 717-810

**Defence and the Armed Forces** Commons 2.11.00. cols 865-938

**Police (Northern Ireland) Bill** Lords 15.11.00. cols 275-338  
**Disqualifications Bill** Lords 20.11.00. cols 526-556

## POLICING

### NETHERLANDS

## CCTV getting more and more "popular"

In January 1999 the first CCTV-project in public places started in the Netherlands. Since then more than 30 cities have introduced CCTV, and at least the same number are planning to install cameras. There is hardly any discussion about privacy and "Big Brother". "Law and order" is a hot issue and politicians are afraid to speak out against so called "Measures to reduce Crime". Due to this and a lack legislation on surveillance cameras the various projects are changing rapidly. The first CCTV-project, in the city of Ede, started off under relatively strict conditions. There was no direct surveillance and tapes were only watched after an incident had taken place. Only the police were allowed to watch the tapes and which were only kept for 24 hours. Now the situation changed.

In Rotterdam, for example, a whole neighbourhood is being watched 24 hours a day, 7 days a week. In the Hague the "Red Light district" is being watched. There is a big increase in surveillance cameras in shopping-areas, football stadiums and even cemeteries. Tapes are being kept in some cities for 30 days, and the operators are more and more employees of private companies.

There is still no law controlling the use of surveillance cameras and there are no plans for one. In the meantime local authorities are virtually autonomous in deciding when, where and how many cameras to install.

The police have an interest in projects like "Mandrake", which are able to identify people by matching images with a criminal database. The Dutch Institute TNO is working on a system to detect aggression in a large crowds by using "smart cameras". With the encouragement of police forces and the lack of critical evaluation the Dutch landscape is set to become like the UK in a few years.

*Buro Jansen & Janssen, Postbus 10591, 1001 EN Amsterdam.*

### UK

## "Shocking" CPS decision allows officers to escape charges

The Crown Prosecution Service (CPS) has announced that it will not be bringing charges against any of the police officers involved in the death of Roger Sylvester. In a press release issued in November the CPS advised that "there is insufficient evidence for any criminal charges against any police officer." Roger died a week after he was restrained by eight police officers outside his home in north London in January 1999 because he was acting "suspiciously", (see *Statewatch* vol 9 no 1, vol 10 no 5). However, as the Metropolitan police were later to admit when they apologised and retracted claims that he was found naked and causing a disturbance, he was merely knocking on his own front door and there was neither cause for police suspicion nor intervention.

Last August Roger's family and friends held a vigil outside the Home Office to express their concern at having to wait so long for the CPS's decision on whether the nine police officers involved in his death would be prosecuted. At the protest Roger's

## NORTHERN IRELAND

## Northern Ireland - new material

**The roots of the feud,** Colin Crawford. *Fortnight* no 389 (November) 2000, pp12-13. Article on the latest loyalist feud which examines the "corruption and criminality" that lie at the heart of the dispute. Referring to Brian Nelson, the UFF's intelligence officer who was working for military intelligence, the article cites a senior UFF commander saying "we could only "get" [kill] people they [the security forces] wanted dead."

*Just News.* Committee on the Administration of Justice, vol 15 no 9 (September) 2000. This issue contains pieces on a Bill of Rights for Northern Ireland, a "progress (?) report on policing in Northern Ireland" and CAJ's response to the Report of the Criminal Justice Review.

### Parliamentary debates

**Police (Northern Ireland) Bill** Lords 23.10.00. cols 11-134

**Flags** Commons 25.10.00. cols 334-355

**Police (Northern Ireland) Bill** Lords 25.10.00. cols 328-394

**Flags Regulations (Northern Ireland) 2000** Lords 2.11.00. cols 1192-1204

**Police (Northern Ireland) Bill** Lords 8.11.00. cols 1584-1676

mother, Sheila, presented a "letter of dissatisfaction" to the Home Secretary and called for an independent inquiry into the circumstances of her son's death, fearing that the CPS decision would "not be based on the truth and therefore justice will not prevail...". The decision not to prosecute means that the only public forum for the events surrounding Roger's death will be at his inquest, which will now go ahead. Although the police officers involved in Roger's death will be called to give evidence, they will be able to remain silent so that their answers will not incriminate them.

The CPS statement was condemned by Deborah Coles of INQUEST who described it as an "outrageous decision". She criticised the "institutionalised inability or unwillingness of the CPS to bring criminal charges against police officers who are alleged to have abused their powers" and questioned the validity of a flawed investigation process that allows the police to investigate themselves. She asked:

*When is the Government going to act so that when someone else dies at the hands of the state the procedures that follow ensure accountability, openness and a pursuit of truth?*

Commenting on the CPS decision Mrs Sylvester described it as "shocking", but "no surprise";

*...I am no closer to finding out the truth about how he [Roger] died. There is something shameful about a system where when people die in custody their custodians never give a proper account of what they did and the system is not geared towards making anyone properly accountable.*

The Roger Sylvester Justice Campaign can be contacted at PO Box 25908, London N18 1WU, Tel. 07931 970442. A detailed briefing on the case is available on the INQUEST website [www.inquest.org.uk](http://www.inquest.org.uk)

*INQUEST press release 20.11.00; INQUEST "Report on the death in police custody of Roger Sylvester" (2000); Crown Prosecution Service press release 20.11.00*

## Policing - in brief

■ **UK: Demonstration highlights deaths in custody.** Two hundred and fifty people marched on the Prime Minister's London residence at the end of October to call for justice for the relatives of those who had died in the custody of the police, or in prisons or psychiatric hospitals. The "Remembrance Procession" was organised by the United Families and Friends Campaign and was led by children and family members who converged on Downing Street from across the UK. A letter was handed to the Prime Minister, Tony Blair, demanding a full and independent public inquiry into more than one thousand deaths. Family members addressed supporters calling for the abolition of the Police Complaints Authority and for an end to the system that allows police officers to investigate themselves. They also demanded that police and prison officers involved in the death of a prisoner should be suspended until the death has been investigated, the prosecution of those responsible for deaths (particularly after an inquest reaches an unlawful killing verdict) and Legal Aid and full disclosure of information to families facing an inquest. The United Families Campaign say that they will never forget those that have died and they will not allow the government to do so. For more information and messages of support the UFFC can be contacted by telephone: 0370 432 439.

■ **UK: No charges over Harry Stanley:** On 4 December the Crown Prosecution Service (CPS) announced that no police officer would face criminal charges over the death of unarmed Harry Stanley, shot dead by officers from a police armed response unit (see *Statewatch*, vol 10 no 2). Mr Stanley, 46, was killed 100 metres from his east London home in September 1999. He had been carrying a newly repaired table leg wrapped

in a plastic bag home from the pub and someone called the police reporting it to be a shotgun. Police reportedly approached him from behind shouting that they were armed police. Mr Stanley turned and was shot in the head. In response to the "insufficient evidence" decision, Daniel Machover, Stanley family solicitor, suggested that the CPS "appear to be protecting police officers from the criminal justice system by applying the most conservative approach possible to the law and the evidence." Deborah Coles of INQUEST asked "How can we accept that the shooting dead of an unarmed man does not result in a criminal trial where a jury decides whether or not the actions were unlawful?" The family are considering a judicial review of the "remarkable" decision. Inquest, [www.inquest.org.uk](http://www.inquest.org.uk)

## RACISM & FASCISM

### GERMANY

## Token sentences in migrant death case

On 12 February 1999, Algerian asylum-seeker Farid Guendoul (alias Omar Ben Noui) died after being chased by 11 youths (see *Statewatch* vol 9 no 2). After a confrontation with a non-German in a night-club, the gang went on a "foreigner hunt" through the small town of Guben in eastern Germany. They found Farid and his two friends and with the help mobile phones they coordinated their actions and chased them through the city in their car. Terrified by his attackers, Farid jumped through the glass door of a nearby house and severed an artery in his knee. With no help forthcoming, he bled to death within half an hour. Court proceedings against eleven youths started in June 1999 but only three of those standing trial were given minor prison sentences of between two and three years at the conclusion to the trial in November.

After 21 months of court proceedings in the regional court in Cottbus Farid's brothers, who travelled from Algeria, and their lawyer are still in disbelief about the light sentences which judge Joachim Döñitz gave out on 13 November. The sentences, anti-racists and media commentators argue, are a reflection of the past 81 court days during which the defendants humiliated witnesses and ridiculed relatives.

The court proceedings against the eleven youths, between 18 and 21 years old, started on 3 June 1999 and were marked by a string of delaying tactics used by the defence team. The fact that the court case was dealing with racism was pushed to the background because of the charges of manslaughter through culpable negligence and bodily harm, rather than murder. In an interview with the *Berliner Morgenpost* (7.8.99.) about the death of the Algerian, the mayor from the nearby city of Spremberg, Egon Wochatz, commented: "what on earth was he doing at that time of night in the streets anyway?" He also thought that to avoid further trouble, asylum seekers should stick to the curfew in asylum seekers homes between 10pm and 6am.

The denial of a racist motivation and insistence that the accused were "normal" youths with criminal tendencies characterised the court proceedings and were reflected in judge Döñitz's commentaries. When Marcel Preusche, one of the defendants, was caught destroying the flowers put down in front of a stone commemorating the death of Farid Guendoul, the judge empathised that this was obviously due to "the frustration" he was experiencing because of drawn out court proceedings; he issued a court warning.

Only three of the 11 who were standing trial, Alexander

Bode, Daniel Rauscher and Denny Tarnick received prison sentences - of between two and three years. Rauscher and Tarnick were given youth sentences which took account of prior offences, while Bode received a sentence solely on grounds of the murder. Another of those on trial, the self-proclaimed neo-nazi Steffen Henze, was given one and a half years on probation justified on the grounds that the court has "the hope...to bring him on the right path without the implementation of the sentence". Six other defendants were sentenced to probation and two got a court warning.

Three of the youths were cleared of manslaughter through culpable negligence because they remained in the car throughout the chase. All of the defendants were sentenced on grounds of bodily harm. The fact that two of them were only given 100 and 200 hours of "community work" was described by lawyer, Christina Clemm, as "a slap in the face for the victims." She is planning to appeal against the clearing of three of the defendants of manslaughter.

taz 14.11.00; Guardian 14.11.00; International Herald Tribune 14.11.00; ZAG no 33 (July-September) 2000

## UK

### Far right-loyalist links strengthened

Recent events have confirmed increasingly close links between nazis in London and a faction of the Ulster Defence Association/Ulster Freedom Fighters (UDA/UFF) in Northern Ireland. The faction is embroiled in a feud with the Ulster Volunteer Force (UVF), which has claimed seven lives in Belfast. The UFF's lower Shankill C Company, under the leadership of Johnny Adair, has grown in size and reputation due to a ruthless campaign against nationalists in the early 1990s. The onslaught was based on information received from the UDA intelligence officer Brian Nelson between 1987 and 1990, who was also working for the British Army's military intelligence unit (see *Statewatch* vol 2 no 2, vol 3 no 2, vol 8 no 2). Adair's unit also adopted aspects of a neo-fascist philosophy acquired over a decade of collaboration with organisations such as the National Front or Combat 18.

Cooperation between loyalist paramilitaries and the right extend back to the 1970s, when members of the Conservative Party Monday Club, the National Front (NF) and the British Movement were jailed for running guns to Northern Ireland. Adair's links date to a later period, in the 1980s when as a young skin he became involved with the neo-nazi music organisation Blood and Honour (B&H) and marched in demonstrations organised by the NF. It was a period when, united in opposition to the Anglo-Irish Agreement, alliances were forged between loyalists and far-right organisations. As a result, from the late 1980s and throughout the 1990s far right organisations put aside their differences to launch concerted attacks on Irish civil rights marches from London to Manchester.

Adair was jailed for 16 years in 1996 for directing terrorism and was commander of the UFF in Long Kesh (The Maze) prison. He had served four years of his sentence when he was released in 1999 under the terms of the Good Friday Agreement. Last August he was returned to jail for breaching his license by orchestrating loyalist violence, but he has appealed to the early release body to overturn the ruling. In September a picket of Downing Street was organised by a UDA front group, the British Ulster Alliance, to protest at his re-imprisonment. It was supported by the NF and their national activities organiser, Terry Blackham, who took time off from coordinating an aggressive campaign against asylum-seekers in Kent seaports. Blackham, who has convictions for his part in attacks on Irish civil rights marches in London, was jailed for possession of guns

and a grenade launcher which were destined for the UDA in 1994. The previous year another key NF member, Eddie Whicker, had been questioned on loyalist arms charges (see *Statewatch* vol 3 no 3).

Then in November, Steve Irwin, a Shankill UDA member who was convicted for an indiscriminate sectarian gun attack on a bar in Derry that left eight people dead in 1993, joined a Combat 18 (C18) demonstration in London. Irwin, who was jailed for life in 1995, was released in July under the terms of the Agreement. Outside the prison he was greeted by Adair. Irwin was photographed at the C18 Remembrance Sunday counter-rally where he shouted racist slogans and gave nazi salutes. A few months ago the *Observer* newspaper drew attention to the links between Irwin and C18 organiser Mark Atkinson.

In early December two C18 activists and "generals" of the Chelsea Headhunters football firm, Andy Frain and Jason Marriner, were jailed for six and seven years at Blackfriars crown court after being found guilty of conspiracy to commit violent disorder and affray. Frain was a key player in the Chelsea Headhunters, which has been allied to loyalist supporters at Glasgow Rangers since the mid-1980s. He has a string of previous convictions including assault, possession of racist material and importing drugs. The two men were secretly filmed by a journalist organising an attack on "a perfectly lawful" march to commemorate Bloody Sunday in London in 1998. The C18 leader, Will Browning, has also been charged in connection with the attack.

Combat 18 also has a presence within the British Army and a series of police raids in March 1999 resulted in the dismissal of two soldiers for membership of Combat 18 (see *Statewatch* vol 9 no 2). Critics have pointed out that this case was only the tip of a large iceberg and the arrest in November of a 35-year old man, who has been linked in the media to the British Army Bomb Disposal Squad, may provide further evidence of military/far right links. The man was questioned by Thames Valley police in connection with a number of explosive devices that were found Gloucestershire last August. At the time the press described the devices as sophisticated and indicated that they may have been intended for a racist attack on the Notting Hill carnival. The man was released on police bail and is due to report to Banbury police station on January 30.

Irish News 23.11.00; Irish News Round-up 23-24.11.00. [<http://irinet.com/rmlist/>]; Thames Valley police press releases 28 & 29.11.00; Searchlight April 1999, November 2000

### Racism & Fascism - in brief

■ **UK: BNP reinstates expelled executive members.** In a humiliating climbdown the British National Party chairman, Nick Griffin, has been forced to retract his expulsion of three key executive members (see *Statewatch* vol 10, no 5). In September deputy leader Sharron Edwards, her husband and West Midlands regional organiser Stephen, and national treasurer Michael Newland were thrown out of the party for disloyalty after questioning Griffin's expense claims. Their allegations led to claim and counter-claim concerning the BNP's finances and litigation loomed, threatening to expose the groups shady accounting practices both past and present. At a hastily convened meeting earlier this month Griffin was forced to retract his decision; both of the Edwards' were reinstated in their previous positions but Newland rejected any attempt at reconciliation and refused to serve under Griffin. Griffin's u-turn appears to have diffused any immediate threats of litigation, but has reopened old wounds. An immediate consequence saw Sharron Edwards dropped as the BNP's candidate for the West Bromwich by-election in November, where previously she had received a respectable vote for the fascists. Her place was taken by Griffin - he received 794 votes (4% of the total), coming in fourth place and putting an end to

the party's recent successes in one of their few strongholds. Griffin's only "consolation" would have been the BNP's performance in Preston, Lancashire - their candidate, Christian Jackson received 229 votes (1%) and came in seventh of eight.

■ **France: European Court rejects Le Pen's appeal.** Jean-Marie Le Pen, the extreme right-wing leader of France's fragmented *Front National* (FN), lost his seat in the European Parliament in October after the European Court of Human Rights rejected his appeal against disqualification. Le Pen, who was appealing against his 1998 conviction for attacking a woman Socialist candidate during the 1997 election campaign, described the assault as "a minor incident". He denounced the Court's ruling as a "major injustice" and said that he would stand a candidate in the presidential election of 2002.

■ **Cueta: Moroccan children boycotted in school:** Parents in *Juan Morejon* school in Spain's North African colonial city of Ceuta organised a protest against the admission of 30 Moroccan children, aged between 13 and 16. *El País* reports that two years ago the school won a prize for the way in which the values of tolerance and cohabitation were promoted in its classrooms. The children were escorted by law enforcement officials and were subjected to a hail of abuse as they tried to make their way towards the school entrance. The president of the parents' association, Lourdes Mateos, explained that "they aren't children like the rest", adding that they "sniff glue, commit crimes and cannot be trusted" and that they are dangerous "not only for the diseases, but for their aggressiveness". Once again, as happened with a group of Roma children in Barakaldo (Basque Country) in May (see *Statewatch* vol 10 no 3/4) parents' prejudices, hidden behind concern for their children, threaten to exclude children from schools. *El País* 14.11.00

#### Parliamentary debate

**Race Relations (Amendment) Bill [Lords]** Commons 30.10.00  
cols 516-572

## PRISONS

### UK

#### "Shut YOIs" call as racist killer is jailed for life

The killer of nineteen year old Zahid Mubarek was found guilty of murder at the beginning of November and sentenced to life imprisonment at Kingston crown court. Robert Stewart, a violent racist, beat Zahid to death as he was sleeping in his cell on 20 March, the day before he was due to be released after ending a 90-day sentence in Feltham Young Offenders Institution (YOI) for stealing a packet of razor blades. An internal inquiry into the murder by the Prison Service found numerous failings, including the lack of checks on racist letters in which Stewart threatened to kill his cellmate. Zahid's death prompted the head of the Prison Service, Martin Narey, to admit that his organisation was "institutionally racist" a finding echoed by the Chief Inspector of Prisons, David Ramsbotham, who in November called for the government to shut down the "barbaric warehouses" that serve as Young Offenders Institutions.

Last June the National Civil Rights Movement (NCRM) called an emergency meeting, "Behind Closed Doors: Racism in Prisons and Detention Centres" which focused on the "culture of racism" in prisons and detention centres. At the meeting the NCRM pointed out that:

*The fact that Zahid was killed in a Young Offenders Institution and shared a cell with a known racist and violent person has raised*

*fundamental issues of culpability and negligence in the prison regime".*

While an internal Prison Service inquiry pointed to numerous "failings" leading to Zahid's murder, the Mubarek family pressed the Minister of Prisons, Paul Boateng, for an independent inquiry. In November the Commission for Racial Equality (CRE) announced that it will conduct a formal investigation into racism in the Prison Service. The CRE investigation will focus on Feltham YOI, Brixton prison in south London and the Parc private prison in Wales, and belatedly acknowledges the extent of a problem that has been the focus of black communities' protests for the past twenty years or more.

The CRE "formal investigation" came about because of the commissioners understanding "that racial discrimination may be rife in some areas of the Prison Service" and "public concern about the murder of Zahid Mubarek whilst in Prison Service custody (HMYOI Feltham) and the belief that the murder was racially aggravated...". The CRE believes that the Prison Service may have committed unlawful acts under several sections of the Race Relations Act 1976. If the inquiry does reveal unlawful discrimination the CRE can "force the Prison Service to comply with a legally binding Non Discrimination Notice, requiring action to stop racially discriminatory practices and behaviour."

The terms of reference for the CRE investigation are:

*To inquire into HM Prison Service, with reference to the need to eliminate unlawful racial discrimination and the need to promote equality of opportunity and good relations between people of different racial groups...The investigation will be limited to events occurring between mid 1991- and July 2000 in HM Prison Parc and between January 1996 and November 2000 in HM YOI Feltham.*

The terms embrace six specific areas of investigation: i. the nature and frequency of racial incidents in prison; ii. the nature and frequency of complaints of racial discrimination by staff and prisoners and barriers to complaints being made or registered; iii. the way complaints by staff and prisoners are dealt with by governors and/or officers; iv. The nature and effectiveness of action taken in response to complaints; v. the circumstances leading to the murder of Zahid Mubarek in HM YOI Feltham. The final point relates to the findings in reports on individual prisons by Her Majesty's Chief Inspector of Prisons.

Last August the head of the Prison Service, Martin Narey, admitted that his organisation was "institutionally racist" and that there are "pockets of blatant and malicious racism" among prison officers. His findings are shared by the Chief Inspector of Prisons, David Ramsbotham, who found evidence of racism "among members of staff in a very large number of prisons around the country."

This results in conditions that are "unacceptable in a civilised country" and last year Ramsbotham described Feltham YOI as "rotten to the core", with 15-year olds locked up in a cell for 23 hours a day. In August, Ian Thomas resigned as Feltham's Deputy Governor because of the "Dickensian" and "anti-social" conditions, a direct result of "appalling" overcrowding. A recent report by the Prisons Board of Visitors described 49 serious assaults and 10 serious attempted hangings in a single month at Feltham; the report went on to remark that this was just an average month and "not exceptional". They found that prison staff had registered 702 young people as suicide risks. Within three weeks of Thomas' resignation Feltham witnessed its latest death in custody. Seventeen year old Kevin Henson hanged himself in September after writing to his family complaining that he was locked up in his cell for most of the day left only with his "dark thoughts".

*National Civil Rights Movement mail out 5 & 26.4.00, 20.10.00; Commission for Racial Equality press release; Prison Service press release 11.8.00; Independent 21.8.00; Observer 24.9.00, 19.11.00; Times 7.11.00.*

## Raid on Blantyre House "unjustified"

Last May a raid on the Blantyre House resettlement prison by 86 prison officers in riot uniform caused more than £5,000 worth of damage to the jail and shattered "a regime based on trust" that had been built up between inmates and officials. "Operation Swinford" was undertaken with close police cooperation after claims of security breaches and criminal activities at the prison were made by an internal Prison Service investigation team known as the "Chaucer Group", led by the manager, Tom Murtagh. At the outset of the raid the prison governor, Eoin McLellan-Murray, was escorted from the prison and the prison officers were given a free reign. The doors of the prison hospital, church and gymnasium were smashed in and prisoners complained of intimidation and threats. Justifying the raid the director general of the Prison Service, Martin Narey, told the Commons Home Affairs Committee, "Credit cards not held legally, cameras, passports in forged names and escape equipment" were found.

In November the Home Affairs Committee published its report on the Blantyre House raid which concluded that the search "was a failure" and "heavy-handed", and condemned the removal of the prison governor. The report singled out the evidence from Narey, accusing him of misleading the committee "over the significance of what was found" when the Prison Service's own report had already concluded that "there were no significant finds." It also called for the complete overhaul of the Prison Service including an end to the self-inspection of prison service management. The Committee was "completely unconvinced that the search was a proportionate response" and recommended an "immediate review" of the Chaucer Group.

However, the remaining impression from the report is that the raid was an attempt to punish the liberal regime at Blantyre House and undermine resettlement prisons. The "traditionalist" Murtagh was opposed to the liberal regime which re-trains convicts to re-enter the community. This scheme allows prisoners to leave on day-release to work or study and had achieved remarkable results. Only 8% of prisoners from Blantyre House re-offend within two years of release and it has the lowest level of positive drug tests of any jail in Britain.

*Home Affairs Committee "Blantyre House Prison" 9.11.00. (The Stationery Office) ISBN 0 10 269000 6 (£15.90); Observer 20.8.00.*

## Prisons - new material

**Prisoners, deaths in custody and the Human Rights Act**, Hamish Arnott, Deborah Coles and Simon Creighton. *Prisoners Advice Service & INQUEST* 2000, pp36 ISBN 0 9468 5810 1 (£5). This comprehensive briefing, published to coincide with the Human Rights Act which came into force at the beginning of October, is aimed at non-lawyers "and in particular prisoners and other non-governmental organisations." While a wealth of material is available for lawyers "the people whose rights are actually being affected", the authors note, "are not being provided with adequate and accessible information."

**Women prisoners: a survey of their work and training experience in custody and on release**, Becky Hamlyn. *Research Findings* No 122 (Home Office Research, Development and Statistics Directorate) 2000, pp4.

**Prisoner escort and custody services: prisoners' experiences**, Bridgit Williams, Christopher Cuthbert and Ghazala Sattar. *Research Findings* No 123 (Home Office Research, Development and Statistics Directorate) 2000, pp4. The prisoner escort and custody services for the eight areas in England and Wales were "contracted out" (ie. privatised) to Group 4, Premier, Reliance and Securicor between 1993 and 1997. This report summarises the findings of a survey of prisoners'

experiences of the service.

**The prison population in 1999: a statistical review**, Christopher Cullen & Martin Minchen. *Research Findings* no 118 (Home Office Research, Development and Statistics Department) 2000, pp4.

**Our bombastic jailer**, Nick Cohen. *Observer* 19.11.00. Profile of Prisons minister, Paul Boateng, and his "malign influence".

**Parliamentary debate**

**Prison Education** *Commons* 16.10.00 cols 744-760

## SECURITY & INTELLIGENCE

### Security - new material

**Rounding up the usual suspects? Developments in contemporary law enforcement intelligence**. Peter Gill, Ashgate, 2000, pp290. "A conceptual and empirical map of the local, national and global development of intelligence-led policing". Gill argues that the emerging framework for accountability and regulation for these new technologies and strategies is inadequate in terms of the protection of individual human rights.

**Losing Control: Global Security in the Twenty-first Century**. Paul Rogers, Pluto Press, 2000, pp164 (£12.99). Rogers argues that the post Cold-war security problems are due far more to the gap between rich and poor than the "threats" conjured up strategists. He suggests that the western states' desire to maintain the status quo (backed up by rapid deployment, long-range strikes and counter-insurgency) is not only unjust and ethically unacceptable, but unsustainable in military terms.

## EUROPE

### JHA Council, 30.11.00 - 1 12.00

The French Presidency of the EU left the Justice and Home Affairs Council with major issues on combatting "illegal immigration" still on the table.

The JHA Council held an "exchange of views" on the draft Framework decision to introduce criminal sanctions for those assisting entry to the EU and who gave "illegal" residence to migrants. Alongside this is proposed a directive defining "assistance to entry, movement and illegal residence". A "large majority" of member states are in favour of the penalty being at least eight years in prison. There was no unanimity on whether making money (financial gain) should be a criteria, "we are still far from agreement", said the Presidency. A number of member states led by Belgium are concerning that the new measures should not penalise humanitarian groups who help migrants in the EU, various formulas are being worked on. Sweden expressed a general reservation because it does not have any laws to penalise assistance to "illegal" entry, "illegal" movement or "illegal" residence.

Nor could the Council agree on the draft directive to "harmonise" sanctions against carriers (planes, boats) who brought in third country nationals not in possession of documents authorising them to enter. Again there was an "exchange of views" and three delegations expressed reservations concerning: the level of fines to be imposed - a minimum of 5,000 euros per "clandestine passenger" (about £3,000); respect for procedures where the "clandestine passenger" submit an asylum application; and where the state the person has entered does not have laws to impose fines on carriers.

The Council also adopted "Conclusions" on cooperation

between member states to combat clandestine immigration networks. This covered using the "rapid alert system" (where one member state alerts others as to new networks, techniques and routes); increasing liaison in the countries "producing immigration and allowing liaison officials to represent more than one member state; and, in the future, making available "technical means and/or specialised personnel" to "raise the level of surveillance" and the control of external borders.

### Other issues

Schengen: The JHA Council agreed, after it had been adopted on the Mixed (Schengen) Committee, that the Schengen *acquis* would come into force in Denmark, Finland, Sweden, Iceland and Norway on 25 March 2001.

Eurojust: The Council agreed on proposal to set up EUROJUST, subject a scrutiny reservation by the Netherlands.

Mutual Legal Assistance: the Council adopted the explanatory report on the Convention which is now being considered for ratification by member states' national parliaments.

Second year evaluations: the Council adopted a report from the Multidisciplinary Group on Organised Crime. This report notes that requests for mutual assistance by-pass central units and are made directly between judicial authorities on the ground - it notes that central record keeping is inadequate, or rather "record keeping was not sufficient to enable effective control to be maintained". Some countries's procedures clearly frustrating the evaluation team (in Belgium and Finland), while in France "international requests" are dealt with "without too many formalities and without prior authorisation [and] examining magistrates may decide autonomously which investigative measures are to be taken, such a searches or telephone tapping".

### CZECH REPUBLIC/DENMARK

## Jailed Danish youth bailed

A court has decided that the remaining protester jailed in Prague during protests against the International Monetary Fund and World Bank summit in September, can be released on bail. Mads Trmrup (18), was one of more than 800 people from across Europe arrested during the demonstrations (see *Statewatch* vol 10 no 5). His bail has been set at 170.000 Dkr (£14,000) which has been raised by voluntary donations. Trmrup is charged with attacking a police officer, but he denies the allegations. His case will be heard before a court in February next year. According to Danish newspaper reports, all of those arrested have now been freed, with Trmrup the last to be released. Through his lawyer he has appealed to the Czech president, Vaclav Havel, to be pardoned. No answer has been received from the former political prisoner's office. This is despite protests from the Danish Minister of Foreign Affairs being handed directly to Havel by the Danish ambassador to the Czech Republic and demonstrations supported by MPs outside the Czech Embassy in Copenhagen. The brutal manner in which the Czech police treated the demonstrators during the summit - and especially after the protests had finished - highlighted the deeply authoritarian legal system in force.

## Europe - new material

### Parliamentary debates

Inter-Governmental Conference: EU Report Commons 29.9.00. cols 1055-1122

European Defence Co-operation Lords 22.11.00. cols 852-866

## UK

# The Hillsborough Trial: A case to answer

Extracts from the recently updated book "Hillsborough - the Truth"

On 6 June 2000 at Leeds Crown Court before Mr Justice Hooper, two former South Yorkshire Police officers stood trial for manslaughter. Chief Superintendent David Duckenfield and Superintendent Bernard Murray were the two senior officers responsible for policing the 1989 FA Cup semi-final at Hillsborough, Sheffield. 96 men, women and children were killed, hundreds injured and thousands traumatised as a result of a vice-like crush on terraces behind one of the goals. They were caged in pens with no way out to the front or to the sides.

Just minutes before the scheduled kick-off the police admitted over 2000 fans through an exit gate to relieve serious crushing at a bottleneck by the turnstiles. Unfamiliar with the stadium, they were left to walk unstewarded down a steep tunnel opposite the gate and into the back of the already full central pens. Given the sheer weight of numbers, the tunnel gradient and the confined space there was no way back. Those at the front of the pens, trapped beneath a high meshed fence, had the air compressed from their lungs. A barrier also collapsed bringing scores down in a tangled mass of limbs. At first, and crucially, the police mistook the mayhem for crowd violence. People died where they fell.

The Home Office Inquiry, before Lord Justice Taylor, found the cause of the disaster to be overcrowding and the main reason to be police mismanagement of the crowd. He severely reprimanded senior officers for their part in the disaster and their

subsequent behaviour. Despite Taylor's criticisms, and the force's acceptance of "liability in negligence", the controversial inquests returned verdicts of accidental death. The Director of Public Prosecutions decided there was "insufficient evidence" to prosecute any police officer.

Nine years later, in August 1998, the bereaved families initiated a private prosecution against Duckenfield and Murray. This followed a decade's campaigning both to establish criminal liability and to access key documents, witness statements and the personal files on each of the deceased compiled by the police investigators. On 16 February 2000 Mr Justice Hooper issued a 38-page ruling committing the two officers for trial. Both were charged with manslaughter and with misconduct in a public office. Duckenfield was charged also with misconduct "arising from an admitted lie told by him to the effect that the [exit] gates had been forced open by Liverpool fans". The judge summarised the cases for the prosecution and defence as follows:

*It is the prosecution's case that the two defendants are guilty of manslaughter because they failed to prevent a crush in pens 3 and 4 of the West Terraces [Leppings Lane] 'by failing between 2.40 and 3.06 p.m. to procure the diversion of spectators entering the ground from the entrance to the pen'...that police officers should have been stationed in front of the tunnel leading to the pen to prevent access. It appears, at this stage, to be the defence case that neither of the officers, in the situation in which they found themselves, thought about*

*closing off the tunnel or foresaw the risk of serious injury in the pen if they did not do so. The prosecution submit that they ought to have done. This is likely to be the most important issue in the case. There may well be a further issue: if the risk had been foreseen, would it have been possible or practicable to have closed the tunnel.*

According to the judge, not only were the bereaved left with "an enduring grief", but with "a deep seated and obviously genuine grievance that those thought responsible" had not been prosecuted nor "even disciplined". The judge declined the defendants' submission that the delay in bringing the prosecution was such that a fair trial was not possible although he voiced "reservations about the manner in which the prosecution had been conducted". Both defendants, he noted, "must be suffering a considerable amount of strain" but also were "receiving the best possible legal representation thanks to the South Yorkshire Police". He continued, "the thought of being convicted for a serious offence must be a strain on anybody" yet the "greatest worry" for a police officer was "the thought of going to prison". There, they would run the risk of "serious injury if not death".

While he committed the former officers for trial he took a "highly unusual course" to "reduce to a significant extent the anguish being suffered". If found guilty of manslaughter, he ruled, they would not face a prison sentence. It was an extraordinary decision, influenced by his concern of the threat of violence, solely because of their police officer status. The families and their lawyers were stunned but nothing could be voiced, published or disclosed until after the trial.

The trial date was set for 6 June 2000 at Leeds Crown Court. It was expected to last eight weeks. A sombre mood prevailed in Court 5 as the trial opened. The jury was empanelled a week later and Alun Jones QC, representing the bereaved families, rose to make his opening speech. The case for the prosecution could be "described simply". People died in the crush because they could not breathe. This was the physical cause of death. The crush was due to overcrowding "caused by the criminal negligence of the two defendants ... They had been grossly negligent, wilfully neglecting to ensure the safety of supporters". It was a long and detailed address to the court.

In conclusion Alun Jones stated that the prosecution "does not say that these men's inertia, their abject failure to take action, was the only cause of this catastrophe". The ground was "old, shabby, badly arranged, with confusing and unhelpful signposting...there were not enough turnstiles". There existed a "police culture...which influenced the way in which matches were policed", Yet the "primary and immediate cause of death" lay with the defendants' failures. The prosecution would demonstrate that each defendant "owed the deceased a duty of care", "was negligent", "his negligent actions or omissions were a substantial cause of death" and that the "negligence was of such gravity as to amount to a crime". Each issue was disputed, but collectively they constituted the test for finding Duckenfield or Murray guilty of manslaughter.

As he ended his opening speech there was quiet satisfaction among the many bereaved families who filled the court. For the first time the essence of the case had been articulated in full and in public, without interruption. This was the "day in court" that so many had anticipated for so long. Duckenfield and Murray sat, a few seats apart, impassive throughout. "Whatever happens now" said a bereaved mother, "I have the satisfaction of seeing those men brought to court and listening to Alun Jones because it has been decided that there is a case for them to answer".

The prosecution called 24 witnesses, including three of the bereaved who had attended the match. David Duckenfield did not give evidence but considerable time was devoted to considering his evidence to the Taylor Inquiry. His predecessor, former Chief Superintendent Mole was called by the judge as it was he who had been replaced by Duckenfield just 21 days before the fateful game. He had drafted the police operational

order and he was introduced to the court as an "expert" in crowd safety.

Bernard Murray also gave evidence stating that he had been "haunted by the memory" of Hillsborough. Closing off the tunnel was "something that did not occur to me at the time and I only wish it had". As the kick-off approached Murray had not recognised how packed the central pens had become. In retrospect he "wouldn't have liked it" and he "would not have taken his son there". Responding to the video recording of the crush in the pens after Gate C had been opened, he denied he had been "indifferent to the scenes...I did not see anything occurring on the terrace which gave me any anxiety".

On 11 July, following character witnesses for the defence, the evidence was complete. Mr Justice Hooper turned to the jury and presented them with four questions. First, "Are you sure, that by having regard to all the circumstances, it was foreseeable by a reasonable match commander that allowing a large number of spectators to enter the stadium through exit gate C without closing the tunnel would create an obvious and serious risk of death to the spectators in pens 3 and 47 If "yes" they were to move to question 2, if "no" the verdicts should be "not guilty".

Second, could a "reasonable match commander" have taken "effective steps...to close off the tunnel" thus preventing the deaths? If "yes", they were to move to question 3, if "no" the verdicts should be "not guilty". Third, was the jury "sure that the failure to take such steps was neglect?" If "yes", it was on to question 4, if "no" the verdicts should be not guilty. Finally, was the "failure to take those steps...so bad in all the circumstances as to amount to a very serious criminal offence". If "yes", the verdicts should be "guilty", if "no" they should be "not guilty".

The tests applied to securing a manslaughter conviction, particularly where there exists a range of intervening, mitigating and contributory factors, are necessarily complex and stringent. Each question had to be contextualised "in all the circumstances" in which the defendants had acted. Centrally, did the circumstances of chaos and confusion impede or mitigate the senior officers' decisions? On opening Gate C, was an obvious and serious risk of death in the central pens "foreseeable" by a "reasonable match commander?" Not someone of exceptional experience and vision, but an "ordinary" or "average" match commander. Even if *gross negligence* could be established, question four demanded that it had to be so bad in the *circumstances* that it constituted a serious criminal offence. For, while *gross negligence* might result in death, it does not necessarily amount to a serious criminal act.

In his closing speech Alun Jones argued that the police "mind-set" of "hooliganism" at the expense of crowd safety amounted to "a failure" best illustrated in the word *neglect*. It was not a failure caused by the urgency of a "split-second decision" but "a case of slow-motion negligence". The prosecution had presented witness evidence which drew a "clear, cogent, overwhelming picture from all four corners of the ground": the pens were already dangerously overfull when Duckenfield ordered the opening of the exit gate. If all the witnesses could recognise this fact then Duckenfield and Murray, in the Police Control Box above the terrace, could not miss it. Alun Jones rejected Mole's evidence regarding him "not a "yes" man" but "a stooge".

Not only could Duckenfield and Murray see the "dangerously full pens" but they had adequate "thinking time" to organise sealing the tunnel and redirecting the fans. The failure to take this action amounted to negligence and not postponing the kick-off "intensified the responsibilities of those who had taken the decision to get it right". It was a serious criminal offence because "thousands of people" had been affected by the breach of trust in the officers.

William Clegg, Duckenfield's counsel, denied that Duckenfield and his colleagues "unlawfully killed those 96 victims". The events had been "unprecedented, unforeseeable

and unique". Rather than pursuing a simple explanation of hooliganism he maintained that a "unique, unforeseeable, physical phenomenon", without precedent in the stadium's history, occurred in the tunnel. It projected people forward with such ferocity that it killed people on the terraces. His explanation was that a small minority of over-eager and enthusiastic fans who had caused crushing at the turnstiles *perhaps* were responsible for the explosion of unprecedented force in the tunnel. It was a far-fetched explanation aimed at producing a hidden cause that could not have been anticipated and could not be verified.

Representing Bernard Murray, Michael Harrison argued that what happened was not slow-motion negligence but "a disaster that struck out of the blue". The deaths could not have been foreseen and no reasonably competent senior officer could have anticipated the sequence of events that led to them. While the overall police operation might have "had so many deficiencies" Duckenfield and Murray could not be singled out to "carry the can". The terraces had been authorised as safe, the fans "finding their own level" was accepted. It was "Mole's policy, Mole's custom and practice". To convict would be to make Murray a "scapegoat".

In his summary Mr Justice Hooper took the jury through the evidence and through the questions he had put to them. He emphasised that the case had to be judged "by the standards of 1989" when "caged pens were accepted" and "had the full approval of all the authorities as a response to hooliganism". He told them that the defendants had to be judged as "reasonable professionals"; meaning "an ordinary competent person", not a Paragon or a prophet". When the exit gates were opened, "death was not in the reckoning of those officers". They were responding to a life and death situation" at the turnstiles and the jury had to "take into account that this was a crisis". He instructed them twice that they should "be slow to find fault with those who act in an emergency", a situation of "severe crisis" in which "decisions had to be made quickly".

The judge echoed the defence counsel warning of a "huge difference between an error of judgement and negligence", commenting that "many errors of judgement we make in our lives are not negligent". He continued, "the *mere* fact that there has been a disaster does not make these two defendants negligent". Further, a guilty verdict would mean that the negligence was, "so bad to amount to a very serious offence in a crisis situation". He then presented two crucial questions to the jury: "Would a criminal conviction send out a wrong message to

those who have to react to an emergency and take decisions? Would it be right to punish someone for taking a decision and not considering the consequences in a crisis situation?" Clearly, and the judge repeated the questions later when the jury requested clarification, these were questions of policy rather than evidence.

After 16 hours of deliberation the jury was told that a majority verdict would be accepted. Over five hours later Bernard Murray was acquitted. After a further half-day's deliberations the jury was discharged without reaching a verdict on Duckenfield. Mr Justice Hooper refused the bereaved families' application for a retrial, the case was over. A bereaved father reflected the families' shared feelings: "I never expected a conviction, especially after I heard the judge's direction. But people on that jury held out. The case went all the way ..."

The Judge's direction covered the debates over circumstances, hindsight, foreseeability, negligence, obvious and serious risk, and what constituted a "serious criminal act". Yet it was his comments on the impact of a guilty verdict on the future actions and responses of emergency services' professionals that caused the most surprise and concern. This conflated and confused a policy matter with legal direction. Further, it was his casual remark that the "*mere* fact" that 96 people had died did not necessarily mean that a serious criminal act had been committed, that most deeply offended and distressed the families.

The private prosecution of David Duckenfield and Bernard Murray was possibly the most significant in recent times. It was never a malicious or vengeful prosecution; neither was it about attributing all blame and all responsibility to two men. It was about establishing culpability for their part in the disaster. Given the State's rejection of prosecution and the failure to disclose most of the evidence, the families had little choice. It remains instructive that the inquest jury and the private prosecution jury both requested further direction on negligence. In both courts the relationship between negligence and unlawful killing or manslaughter was central to their mammoth deliberations. The very fact that there was a case to answer and, in the end, the jury remained deadlocked over Duckenfield's culpability, demonstrated that the families' pursuit of limited justice had not been misconceived.

*This much abridged account is taken from Phil Scraton's revised and updated book "Hillsborough: The Truth", published by Mainstream, November 2000, price £9.99.*

## EU

# Where now for accountability in the EU?

## Access to Europol annual report denied and arbitrary decision discontinues Schengen annual reports

Every year since the Europol Drugs Unit (EDU) was set up in June 1993 the Council of the European Union produced an annual report on its activities that was adopted by the Justice and Home Affairs Council and made available to parliaments and citizens. In July 1999, with the completion of the ratification of the Europol Convention by all 15 national parliaments in the EU, Europol formally took over from the EDU and commenced its work. An unannounced change of policy then followed.

In April the Article 36 Committee received the Europol Annual Report after it had been agreed by the Europol Management Board (doc no 7728/00). The report was adopted by the Justice and Home Affairs Council on 29 May as an "A Point" (without debate, doc no 7728/2/00). When *Statewatch* applied to the Council for a copy of the document in May we were told that this version contained "operational" details and that a "public

version" would be made available later in the year when it was sent to the European Parliament - it is not a classified document.

The "public version" did appear on the Europol website in September. However, this version is clearly marked "All rights reserved" under copyright and may not be reproduced in whole or part without the permission of Europol. This version is also punctuated by glossy pictures. It is available on: [www.europol.eu.int](http://www.europol.eu.int)

## How the "secret" version compares with the "public" version

*Statewatch* obtained a copy of the report it was refused by the Council and the report that follows is taken from this version. It opens with a Foreword signed by Mr Jürgen Storbeck, the Director of Europol. This is very general but does express

frustration with the Justice and Home Affairs Council over the delay in setting up the means for exchanging data with non-EU states and agencies: "It is regrettable that the European Union Council has not found itself able to give effect to these aspirations." Europol created the Cooperation Unit to deal with cooperation with third states and organisations. The delay was due to public concern over the nature of the data to be exchanged and the initial list of 23 non-EU countries to be involved which includes Turkey, Colombia and Peru.

At the end of 1999 Europol had 212 staff, 43 of whom were Liaison Officers from EU member states. Europol's budget was 6,452,195 euros in 1998, 18,896,000 in 1999 and 27,446,000 in 2000. The rise is partly due to Europol taking up its full range of activities from July 1999 and partly due to new roles it has been given (terrorism, trafficking in human beings, child pornography and counterfeiting of currency). The Europol HQ in the Hague, Netherlands has national Liaison Officers seconded to it who liaise with Europol National Units (ENUs) and the Heads of ENUs meet regularly. Europol is an international agency, not an EU agency, even though the EU set it up and EU member states pay for it.

The EDU and now Europol is directly engaged in controlled delivery of drugs operations - a role not covered by the Europol Convention which only authorises the gathering and analysis and dissemination of information and intelligence - "during 1999, the Drugs group moved from strategic to operational activities" and gives general details of some operations. In 1999 EU member states carried out 121 controlled deliveries a significant rise from the 46 in 1998. Of these 114 concerned drugs and 7 illegal immigration and trafficking in human beings.

Europol is also involved in trying to combat "illegal immigration" which is a "high priority" and "coordinated actions supported by Europol against.. networks led to several arrests and convictions".

Other tasks Europol undertakes include: combatting car theft and it has started a "second hand car project"; money laundering where it "works in close cooperation with the General Secretariat of the Council" (another example of where the Council - the 15 governments of the EU - is undermining the "separation of powers" in becoming involved in the operation of policy); terrorism where the "number of cases in which Europol.. assisted is, however, still very low"; and organised crime and "high-technology".

There was a decrease "for the second year running" in the number of inquiries lodged by Europol National Units. In 1999 there were 2,180 enquiries initiated by member states (2,298 in 1998). This figure broke down into the following categories: 1,905 cases of information and intelligence exchanges, 192 cases of "special expertise" and 83 cases of "coordination and other support activities". The 2,180 enquiries led to 9,285 answers and further requests (9,782 in 1998, 8,964 in 1997). The 2,180 enquiries divided by type of offence:

- 1,251 (58%) drugs (1998: 1,383, 60%)
- 346 (16%) illegal immigration (1998: 338, 15%)
- 333 (15%) stolen vehicles (1998: 304, 13%)
- 145 (7%) money-laundering (1998: 177, 8%)
- 98 (4%) trafficking in human beings (1998: 96, 4%)

## Conclusion

It appears that the European Parliament is to be sent the "public version" of the 1999 Europol Annual Report. The "secret" (unclassified) version contains more detail and is not geared to public relations, there is no reason why it should not be in the public domain. The danger in future years is that the gap between the so-called "secret" version and the "public" version will grow and with it any public accountability. In this context it is ironic that the report on access to EU documents adopted by

the European Parliament actually suggests that non-EU bodies, like Europol, could be allowed to submit "public" versions of their report.

*Europol Annual Report 1999, Note from the Presidency to the Article 36 Committee, Limité, 7728/00, EUROPOL 10, 13.4.00; Europol Annual Report for 1999 on: www.europol.eu.int*

## No more reports on Schengen

The 1998 Annual Report on the Schengen Convention dated 5 November 1999 will be the last one - in future there will be **no** annual report on the operation of Schengen. Annual reports have been produced since 1995. An informal "decision" has been taken by the Council of the European Union, and the Commission, that as the implementation of the Schengen Protocol in the Amsterdam Treaty meant that "Schengen" was split between Title VI of the Treaty on the European Union (police and legal cooperation, TEU) and Title IV of the Treaty establishing the European Community (immigration and asylum, TEC) there is no requirement to produce an annual report.

This "decision" is all the more astonishing as new measures and practices continue to be adopted under the TEU and TEC under "Schengen" and the Schengen *acquis* grows and grows. The Schengen Information System (SIS) and the SIRENE system is growing apace too - Denmark, Finland and Sweden (together with Iceland and Norway) are due to join under SIS I+ and the countries of central and eastern Europe with SIS II. On top of this proposals are being discussed to extend access to the SIS to: authorities issuing residence permits and visas, credit approval authorities, vehicle registration agencies and to Europol (see *Statewatch* vol 9 no 6 & vol 10 no 5).

The remaining annual report will come from the Joint Supervisory Authority (JSA) which is concerned with data protection. JSA reports are full and illuminating and the authority has had several confrontations with the SIS (refusal of access) and the Council (the demand that it have an independent staff). Its reports now contain the overall figures (see below) for the SIS but contain no details at all (because they do not fall within its remit) on all the other practices - police cooperation (including cross-border surveillance and pursuits), internal border checks, movement of persons, drug trafficking and judicial cooperation.

## SIS, the figures

Annual figures for "alerts" (record entries) entered into the SIS since its launch in March 1995:

1995:	3,868,529
1996:	4,592,949
1997:	5,592,240
1998:	8,826,856 (5.3.98)
1999:	9,748,083 (23.5.00)

(A figure of 8.69 million at the end of 1998 is given in the annual report. The source of the figures for 1995-1998 are the Schengen Annual Reports, the figure for 1999 is from the annual report of the Joint Supervisory Authority).

At present only 10 EU states are part of the SIS - Denmark, Sweden, Finland, Ireland and UK have yet to join (the UK and Ireland will not input or have access to the categories on immigration intelligence).

These figures are simply based on the total number of "alerts" held on the SIS on a single day; they do not reflect the numbers deleted or added during the course of a year. "Alerts" held on the SIS include "persons" (for example, those wanted for arrest, extradition, to be refused entry, to be placed under "discreet surveillance") and "objects" (vehicles, arms, documents including passports, identity cards, bank notes).

*Breakdown of "hits", where an "alert" relates to apprehending or arresting a person, finding a vehicle etc. The figures for "internal hits", in a state in response to an "alert" entered outside that state and "external hits", where there is a hit in another state to the one that entered the data have been combined here. The total number of "alerts" on the SIS is in brackets []:*

**Articles 95-99** deal with **people**, not objects: covering 842,256 names and 482,437 aliases.

#### **Article 95**

Extradition: 2,416 [10,914]

#### **Article 96**

People to be refused entry/deportation: 21,711 [760,347]

#### **Article 97**

Missing persons: 1,595 [28,372]

#### **Article 98**

Witnesses, wanted by court: 3,773 [35,297]

#### **Article 99**

People placed under surveillance: 2,221 [11,126]

Vehicles place under surveillance: 244 [6,210]

#### **Article 100 (Objects)**

Stolen vehicles: 13,917 [990,963]

Firearms: 149 [236,372]

Missing "blank documents": 4,775 [165,477]

Identity documents: 4,228 [6,232,168]

Bank notes: 1 [808,411]

#### **The "last report" for 1998**

The annual report contains sections on Schengen practices under several headings. Under "Abolition of border checks" it notes that Greece was about to fully participate in the SIS subject to evaluations and that France continued "to invoke the derogation provided for" at its borders with Belgium and Luxembourg "on the grounds that Dutch drugs policy jeopardises its ability to guarantee its internal security". Under "Effectiveness of checks on persons at the internal borders" it records that plans were being drawn up for the "deployment of

document advisers at airports and seaports and at consular representations in third countries" and the "secondment of liaison officers to advise and assist with the performance of security and control tasks at the external borders".

"Movement of persons" covers the "harmonisation of the common visa policy", "the abolition of the Grey List" and revision of the "Common Consular Instructions". "Measures to combat drug trafficking" includes guidelines on the "General Principles governing the Payment of Informers" (which should, it says, rule out "informer tourism", whereby an informer shops around between police forces for the best deal).

The largest section is on "Police Cooperation" which includes a reference to the "Project on the Routes used for Illegal Immigration and Immigrant-Smuggling" with the "emphasis on tackling organisations or individuals who aid and abet illegal immigration. Over 5,000 people were detained on "illegal entry, or attempting illegal entry, or when illegally resident" but only "approximately 500 of these were shown to have been smuggled in" - which hardly supports the contention that most "illegal migrants" are smuggled in, this showed over 90% were not.

Schengen states carried out a total of 370 cross-border surveillance operations in 1998 broken down as follows: Netherlands (161), Germany (125), France (40), Belgium (23), Italy (13), Luxembourg (6), Austria (1), Spain (1) and Greece and Portugal none. In addition:

*permission for cross-border surveillance was occasionally not forthcoming due to the fact that the target was not accused of any offence but was a contact of the perpetrator. While this is in keeping with the wording of Article 40.1., it once again shows that the relevant provisions of the Schengen Convention do not fully correspond to the tactical requirements of the police.*

There were also 39 cross-border pursuits: Germany (22), Belgium (13), Austria (2), France (1) and Luxembourg (1). And yet again (as above) the Schengen agencies complain of a lack of powers under the Schengen Convention. The "following technical problems should be highlighted: No right of arrest for pursuing offers in some States".

On "Judicial Cooperation" it is noted that "not all Schengen states kept records" of requests for assistance or for extradition requests.

In future years none of this information is to be made available.

*1998 Annual Report on the implementation of the Schengen Convention, Limité, 10846/1/99, 5.11.99.*

## **EU**

# **Too much information creates confusion**

*"Obliging institutions to divulge internal notes, in many cases, would only cause confusion among citizens.. sometimes an increase in misinformation results from an excess of information."*

Loyola de Palacio, Vice-President of the European Commission, speaking in the European Parliament debate on access to EU documents, 16.11.00.

On 16 November the plenary session of the European Parliament (EP) adopted a report on the proposal put forward by the Commission in January on access to EU documents. The report was adopted by 409 votes to 3 with 44 abstentions (Green MEPs) giving the appearance of unanimity. The media duly reported the EP was backing the rights of citizens: "This vote sends a signal that we are going to deliver something that gives far greater access", said the rapporteur, Michael Cashman MEP. Unfortunately the gap between "spin" and substance is substantial and there are more new "rights" for the EU institutions than for the citizen in the report.

#### **EP vote - an unusual alliance**

In the 1999 election to the European Parliament the PPE group (conservative) became the largest in the EP and the PSE

(Socialist group, social democrat) the second largest party. Historically the position of the PSE (Socialist group) has been an honourable one and it has made significant contributions to the debate on openness and access to documents. In the newly-elected parliament it has been extremely rare for these two groups to act together but on this occasion they did.

Back in August the first two draft reports by Michael Cashman (UK/PSE) and Hanja Maij-Weggen (NL/PPE) both incorporated the now infamous "Solana Decision". By September, embarrassed by the exposure of the effect of the "Solana Decision", these provisions were withdrawn from the reports. But at the same time there emerged a de-facto "common position" between the PSE/PPE (see *Statewatch*, vol 10 no 5).

In the run-up to the vote in the plenary session on 16 November a number of meetings took place behind the scenes

where all the rapporteurs from the six committees involved discussed possible amendments and the Commission gave its reaction (see below). It became apparent that the PSE/PPE alliance was not going to budge on any significant changes and this was reflected in the vote on the floor of the plenary session.

A series of amendments, which would have improved a weak report, were put forward by the Green and the ELDR (Liberal) groups and routinely voted down (eg: 300 votes to 135).

In the debate Michael Cashman (PSE) paid a "special tribute" to "my fellow rapporteur, Mrs Maij-Weggen" and went on to attack critics of the report:

*I regret that the report has been misrepresented by some for short-term political gain. A few cheap headlines, a few inches of print remove such people from reality.*

Critics of the report included on the one hand the Council, Commission, the Green and ELDR groups, and civil society groups like the European Environmental Bureau, the European Federation of Journalists and *Statewatch* who opposed the inclusion of no less than six references to new "rights" for the Brussels-based EU institutions (including a series of interinstitutional agreements) being included - all doubted whether Article 255 of the Amsterdam Treaty to "enshrine" rights for the citizen could be used for this purpose. Most also were against including provisions on an interinstitutional classification system. On the other hand the Green and ELDR groups and civil society groups sought to actually increase the rights of access of citizens and to ensure that existing rights were not cast aside.

Extraordinarily this opposition to the report only served to convince Cashman that the report and his defence of it were right:

*the fundamental problems the Council and Commission foresee with my report are, interestingly enough, the very same differences apparent between the majority of Parliament [PSE/PPE] and some of the smaller groups in this House.*

Who it might be asked is in touch with "reality"?

In the debate Heidi Hautala, leader of the Green/EFA group, said the report did not go far enough and urged support for the amendments on the table. Cecilia Malstrom (ELDR) opposed the automatic withholding of documents concerning security and defence matters and Ole Andreasen (ELDR) also said the report did not go far enough. Jan Joost Legendijk (Green/EFA) said there should be no differentiation, as proposed in the report, between the rights of MEPs and the public.

For the Commission Loyola de Palacio, Vice-President of the European Commission, responded to the debate:

*Obliging institutions to divulge internal notes, in many cases, would only cause confusion among citizens.. sometimes an increase in misinformation results from an excess of information. And, in this sense, I believe that access to preparatory documents would not provide great information. Such an approach would discourage creative thought and provoke purely bureaucratic attitudes within the institutions.*

The Commission indicated, both in the debate and in the preparatory meetings, that there were large sections of the parliament's report it could not accept. Overall they were opposed to 12 new Articles proposed in the report and 19 further clauses. Stranger things have been known to happen in EU negotiations but at this stage it seems unlikely that the Commission and Cashman/Maij-Weggen (PSE/PPE) will reach agreement on a common view by mid-January.

## What the EP report says

There are some positive proposals in the report. First, the proposal that non-EU people should be able to get access to EU documents (this would ensure that those affected by EU policies, the third world, refugees and asylum-seekers can inform

themselves). Second, it proposes that all documents should be automatically accessible subject to the exception laid down (but see below). Third, it propose that "third parties" should not have an automatic right of "veto" over access to documents. Fourth, it rejects the Commission's proposal that applicants who regularly apply for documents (repetitive applications) should be penalised. And, it replaces the Commission proposal that documents cannot be reproduced without permission for "any other economic purpose".

The fundamental failure of the report is that neither it nor the accompanying explanatory report nor the presentation in the plenary session made any reference whatsoever to the existing 1993 Decision on access to documents. There is no indication that the rapporteurs know how the current code works. Nor is there any reference to any of the cases taken to the European Court of Justice (John Carvel/*Guardian*, Swedish Union of Journalists, Heidi Hautala MEP) or the successful complaints taken to the European Ombudsman (*Statewatch*, Steve Peers) and how they greatly improved rights of access. This failure is compounded by fact that the explanatory report says that the draft new measure put forward by the Commission in January represents current practice:

*The parliament has received the proposed Commission regulation implementing Article 255 which in fact only confirms the existing situation as defined in the Council/Commission code of conduct, the jurisprudence of the Court of Justice and the decisions of the institutions before the entry into force of the Amsterdam Treaty.*

Not only is this completely inaccurate - the Commission's draft is far worse than the present practice - it shows a disregard for the struggles by civil society over the past seven years to open up EU institutions (backed by a number of Member States). The rapporteurs (Michael Cashman, PSE and Hanji Maij-Weggen, PPE) presented their report as a major advance over the Commission draft (which is not hard) as if it gave citizens new rights.

For citizens and civil society the best way to evaluate the EP's report is to compare it with the present practice which has been in place since 1993. Only the Council has a public register of documents available on the internet, neither the EP nor the Commission have public registers. The Council register excludes whole categories of documents - not just those on foreign policy, military matters, and "non-military crisis management" under the "Solana Decision" but also thousands of documents which are not even classified (this is subject of two complaints to the European Ombudsman by *Statewatch*).

The EP report supports the creation of registers of documents by the EU institutions but creates so many exclusions as to make complete registers almost meaningless - for example, agreeing that documents which give officials the so-called "space to think" are excluded, by extending the "exceptions" under which access to documents can be refused to include the very broad category of "military matters" and by suggesting that non-EU governments and international bodies can hand over "public" (sanitised) version of reports which can be handed out to EU citizens (see feature in this issue on sanitised "public" reports).

The EP report also responds to the Commission's proposal that the "reproduction of documents", which currently excludes reproduction for "commercial purposes", be extended to include to "exploit for any other economic purpose". The EP report proposes that this provision should be deleted but puts in its place an alternative which is quite unclear as to its effect - an amendment to clarify that public documents should be able to be freely introduced while those of individual authors (eg: playwrights) should be protected was rejected by the EP.

The report proposes that the 1983 Regulation on the creation of EU archives, which place obligations on the institutions to deposit documents, should be repealed. Clearly the rapporteurs have not read the Regulation as their proposal

could in no way replace it. Fortunately, as the Commission has pointed out, a "Regulation" cannot repeal other "Regulations".

The EP report then goes beyond the remit given to it under Article 255 of the Amsterdam Treaty by seeking to introduce a whole series of provisions to protect its own interests and the interests of the Council and the Commission through "interinstitutional agreements" (between the three Brussels-based institutions).

In addition it wants documents to be "classified" by the "authors" (institution officials, police, customs and immigration officers) at the time of writing - such officials are not well-known for believing in openness. The EP report agrees that certain documents, like those under the "Solana Decision", should be permanently excluded from public access - though it wants to set up a special, vetted, EP committee to see them. The danger in these proposals is that they will be a "hostage to fortune" and be picked up by the Council.

The report was also presented as overturning the "Solana Decision" on the exclusion of documents covering foreign policy, military and non-military crisis management. However, by extending the existing "exceptions" (grounds on which access to documents can be refused) to cover the all-embracing category of "military matters" the door has been left open for the "Solana Decision" to be re-introduced (albeit through a different formulation) - which is exactly what the latest draft of the Council's common position does.

Overall the EP report adopted by the parliament has used Article 255 of the Amsterdam Treaty, which was intended to "enshrine" the right of access to EU documents, to put forward more new rights for the institutions (Council, Commission and European Parliament) than for citizens and civil society.

Although the EP adopted the report on access to documents it postponed the vote on the accompanying legislative resolution - which would have meant formally adopting its first reading position to be sent to the Council. The report has been referred back to the originating Committee on Citizens' Freedoms and Rights with a view to taking the legislative resolution at its plenary session on 15-18 January. The delay is intended to allow for negotiations, conducted by Cashman/Maij-Weggen (PSE/PPE), with the Commission to find common ground.

### Draft Council common position

The day after the EP adopts its report on 16 November the French Presidency circulated a new draft of the Council's common position which re-introduced the "Solana Decision". Prior to this Council spokespersons had argued that it was purely a "temporary" decision.

Under the current 1993 Decision applicants can ask for **all** documents subject only to specific and narrow exceptions. Under the Council's draft the list of documents to be excluded from access and from the public registers of documents is growing fast. The following would be excluded:

a. All "Top Secret", "Secret" and "Confidential" documents concerning:

- foreign policy
- military policy
- non-military crisis management (including policing, border controls, trade and aid)
- and any document, or set of documents, which refers to a document in the above categories.

b. "Space to think" for officials documents:

- discussion documents
- opinions of departments
- unfinished documents
- documents in preparation

- text with contents which express personal opinions reflecting views as part of preliminary consultations
- deliberations within the institutions

c. Documents covered by "third parties" with the right of veto:

- EU member states
- non-EU states (eg: the USA)
- international organisations and agencies like NATO and ILETS

*For the full text of the current draft of the Council's common position see: [www.statewatch.org/news/nov00/21newcoun.htm](http://www.statewatch.org/news/nov00/21newcoun.htm)*

*For up to date information see: [www.statewatch.org/secreteurope.html](http://www.statewatch.org/secreteurope.html) and [www.statewatch.org/news](http://www.statewatch.org/news)*

### Conclusion

The process of adopting a new code of access to EU documents is almost at the halfway stage although the European Parliament and the Council still have to formally agree their first positions. Sweden, which takes over the EU Presidency on 1 January 2001, is going to have a difficult job overseeing the completion of the process by the deadline of 1 May. If the EP adopts its first reading position at its session 15-18 January and the General Affairs Council adopts the Council's "common position" at its meeting on 22-23 January it will leave just three months to agree the commitment made in June 1997.

The European Commission and the Council have used the existing 1993 Decision on access to documents as their starting point and both want to set the clock back and remove existing rights. The European Parliament's report bears little or no relation to the existing code. Whether the commitment in the Amsterdam Treaty to "enshrine" the citizen's right of access to EU documents will be borne out is very much in doubt.

### Governments join EP court action

The Netherlands government decided to take the Council of the European Union to the European Court of Justice over the "Solana Decision" on 22 September. They were joined by the Swedish government on 28 September and Finland on 3 November. Three EU governments and the European Parliament (23 October) are thus taking court action over the "Solana Decision".

### Survey of confirmatory applications

A survey carried out by *Statewatch* of the Council's response to confirmatory applications (appeals against the refusal of access to documents) this year shows that the majority of EU governments rarely, if ever, back openness.

Nine governments vote consistently against openness: Germany, France, Italy, Austria, Belgium, Portugal, Spain, Luxembourg and Greece.

Three governments - Denmark, Sweden and Finland - have consistently supported appeals for access and three others - Netherlands, UK and Ireland - have supported them in some cases.

The biggest divisions in the Council occurred over access to documents concerning the "Solana Decision" where they split 8-7 (*Statewatch*), 8-7 (Oscar Waglund Soderstrom) and 9-6 (*Statewatch*) against giving access.

There have been two extraordinary votes on access in which Germany led the forces for secrecy. In the first *Statewatch* applied for five documents concerning "military matters" all of which were refused. On appeal all 15 governments agreed in the Working Party on Information (WPI, where the Brussels-based EU government press officers decide appeals) that all could be released. But days later Germany recorded its opposition, then it got Spain to agree and later Greece. This was a rare 3-12 vote

for openness.

In another case *Statewatch* was refused access to a document submitted to the Council by Germany concerning police cross-border pursuits. The document is on the Council's public register, it is not classified and is a formal response to an initiative taken by the French Presidency of the EU. The document was refused and we were told to apply to the German delegation in Brussels. An appeal was lodged on the above grounds and the fact that no appeal, nor a potential recourse to go to the European Ombudsman would be available. On 20 November the WPI agreed that access should be granted "provided the German delegation agrees" - 14 member states

were in favour of access. But on 27 November this was completely overturned, all 15 member states agreed to refuse access on the grounds that Germany was the "author" of the document and had a right to veto access.

The contention that EU member states are the "authors" of documents with the right to veto access to documents concerning public policy is an undemocratic standard. Increasingly documents are put on the table of EU policymaking by member states and the idea that these should not be in the public domain is quite unacceptable.

For full details on confirmatory applications see: [www.statewatch.org/secret/confirmable.htm](http://www.statewatch.org/secret/confirmable.htm)

# Essays for an Open Europe

The European Federation of Journalists (EFJ) have published "Essays for an Open Europe" with contributions from Tony Bunyan, editor *Statewatch*, Professor Deirdre Curtin, Utrecht University, Netherlands and Aidan White, General Secretary of the EFJ. The full-text is available in "html" and "pdf" formats on: [www.statewatch.org/secret/essays.htm](http://www.statewatch.org/secret/essays.htm) Here's we reproduce the Introduction and the essay by Aidan White

## INTRODUCTION

A new code on the citizens' right of access to documents in the European Union is currently being discussed by the European Commission, the Council of the European Union and the European Parliament. The three EU institutions have to agree a new code by May 2001 to meet the commitment in Article 255 of the Amsterdam Treaty to "enshrine" the right of access to documents.

In the "corridors of power" in Brussels the positions of these institutions indicate that they are heading for more secrecy and less openness. Indeed they seem more concerned with establishing rights for themselves (through so-called interinstitutional "deals") than for the citizen.

These essays have therefore been written to encourage a much wider debate throughout the whole of civil society so that its voice can be heard in a way that cannot be ignored. Access to documents in the EU is not a "gift" from on high to be packaged, sanitised and manipulated, it is a "right" which is fundamental in a democracy.

The reproduction of these essays is positively encouraged.

Tony Bunyan, Deirdre Curtin and Aidan White  
November 2000

## How journalists have spiked NATO's secrecy guns

by Aidan White

Next year European Union leaders face a deadline set by the Treaty of Amsterdam in 1997 to put in place a procedure and policy to guarantee citizens' rights of access to documents of the European Parliament, the Council of Ministers and the Commission. But the co-decision process to agree a new code strengthening peoples' right to know is in chaos.

There have been allegations of skullduggery, court actions and a range of proposals now before the Parliament reflect a failure to reach any sensible consensus on how to break the culture of secrecy that still rules in Brussels. The security chiefs of Europe (and NATO) have, belatedly, plunged into the transparency debate with an uncompromising approach that threatens to halt the march towards open government and may even signal a retreat from an openness policy first agreed seven years ago. But NATO's attempts to shut the door on the peoples' right to know are likely to fail.

The security establishment began their campaign with a "summertime coup" on 14 August, while parliaments and journalists were on holiday, when the Council of Ministers unilaterally amended its own rules of procedure to deny access to certain documents under a new system of classification. For good measure they also excluded access to any category of other documents that might allow someone to deduce the fact a classified document exists.

This approach not only torpedoes the freedom of information traditions of a number of Member States, it undermines the core principles of transparency and

makes a mockery of efforts to agree a new procedure, by May 2001, which is meant to "enshrine" the citizen's right of access to documents under Article 255 of the Amsterdam Treaty.

## Why national standards counter Brussels secrecy

The arrogance of the Council, led by Foreign Policy Chief and former NATO Secretary General Javier Solana, is touched with farce given the response to a request by the magazine *Statewatch* who asked for the papers upon which the decision was taken. They were refused and, as Tony Bunyan explains in his essay, were told that access to a document "could fuel public discussion". Another request for documents, by the European Citizens Advice Service, received a blanket refusal, even though the papers concerned were already in the public domain. But the reality is that NATO's actions are likely to founder following the action taken by journalists in Sweden a few years ago who demonstrated that national laws guaranteeing access to documents take precedence over privileged access to information by political insiders in Brussels.

The Journalists Union of Sweden in May 1995 challenged the Council of Ministers over access to Council documents relating to Europol activities. At that time the Swedish Union asked for 20 documents from the Council and, under Swedish Law, requested the same documents from the Swedish Government.

The Council handed over just two documents, but in Sweden some 18 documents were released in line with the country's long-standing legal commitment to make access the rule of government rather than the exception. The Swedish Union mounted a legal challenge to the Council's action and won their case at the Court of First Instance in Luxembourg.

In its judgement on June 17th 1998 the Court set out the important principles:

First, that according to the 1993 European Union code, access to documents must be the rule;  
Second, any restrictions on access must be narrowly interpreted;  
Third, every document should be tried or examined on its own when deciding if it should be released;  
Fourth, if a document is refused there should be real harm to the interests concerned.

All of these principles are, under NATO's guiding hand, being challenged by the European Union Council of Ministers.

Meanwhile, in the United States security chiefs put before the Senate a proposal to enact an "official secrets act" that make it a criminal offence to leak classified

information to the press. Although Congress has struck down such proposals in the past as unconstitutional, the latest effort, like the action by the Council of Ministers, has taken place without any public debate or review of the proposal.

At the beginning of November President Clinton bowed to widespread protests by US civil liberty and journalists' groups and said he would not support this move. But the fact that it slipped on to the legislative agenda in the first place raises concerns about future attempts to undermine freedom of information policy.

## Europe must take the high ground to open government

The issue at stake, both in Europe and the United States, is one that concerns the fundamental rights of all citizens and is not just in the interests of working journalists indeed, if the truth we know well that the press corps in Brussels and Strasbourg can generally get their hands on information through leaks and off-the-record briefings.

Journalists in membership of the European Federation of Journalists and particularly those in Sweden, the Netherlands and Finland have expressed outrage over the actions by the Council of Ministers. They are supporting a legal challenge over the Solana decision by these governments and the European Parliament.

They do so knowing how journalism has benefited greatly from moves towards freedom of information within member states. Any security service worthy of the name knows, therefore, that secrecy rules within the European Union are constantly under threat from ambush at national level.

As the Swedish case proves, national legal traditions can subvert Codes drawn up in Brussels. The benchmark for openness in Europe is not what Brussels can enforce, but the limits of transparency as defined by those countries with the highest levels of access to documents.

The Council of Ministers, and NATO, will have to recognise, sooner or later, that there are different traditions at work here and, in line with the Amsterdam Treaty commitments, it only makes sense to harmonise openness rules up to the levels of access that operate at the highest level nationally.

The alternative will be to attack the current openness rules that apply in a number of national states, such as the Netherlands and the Nordic countries, in particular. That may happen, but if it does, journalists, like those in Sweden, or John Carvel at *The Guardian* or Tony Bunyan at *Statewatch*, who have also challenged secrecy in Europe, will be among the first to take to the barricades.

# CoE “cybercrime” convention: legitimising internet surveillance

*We believe that the draft [CoE cybercrime] treaty is contrary to well established norms for the protection of the individual, that it improperly extends the police authority of national governments, that it will undermine the development of network security techniques, and that it will reduce government accountability in future law enforcement conduct. Global Internet Liberty Campaign (GLIC)*

In April 2000 the Council of Europe (CoE) released its draft convention on "crime in cyberspace", a legally-binding international treaty aimed at harmonising criminal law and procedural aspects of "offending behaviour directed against computer systems, networks or data" and "other similar abuses". Despite widespread criticism by privacy and civil liberties groups, internet security experts, business representatives and the *International Group on Data Protection in Telecommunications* (comprised of national data protection commissioners), successive drafts of the convention have conceded very little in the face of law enforcement demands.

The CoE Convention can not be considered alone. In the UK, the RIP Bill (see *Statewatch* vol 10 no 1) paved the way for extensive surveillance of all electronic communications. Then last month, the Home Office announced £37 million funding for the integration of all police computer systems and £25 million to set up a cybercrime unit of 46 officers. This was closely followed by an announcement that the UK intelligence services want to oblige all telecommunications and internet service providers to maintain all their traffic data records (every phone call, fax, telex, page, e-mail or internet connection) for at least seven years (see feature on page 1). Meanwhile, the G8, EU, UN and OECD have provided a discreet range of venues to ensure the fight against cybercrime is coordinated internationally.

## The proposed CoE convention

The convention is aimed at "cyber-criminals and cyber-terrorists", "attacks against commercial websites", "hacking", "illegal interception of data", "computer related fraud and forgery", child-pornography and copyright offences. However, what the convention as drafted can achieve in terms of tackling evident cybercrimes such as damaging computer "viruses", child-porn, or (high-profile) hacking has been questioned in some quarters.

Work on the CoE Convention began in 1997 with the accompanying press-release encouraging interested parties to "share their comments with the experts involved in the negotiations before the adoption of the final text". Countries that ratify the convention will have to incorporate its definitions and offences into their domestic criminal law (chapters I and II), and will be bound by mutual legal assistance provisions obliging signatory states to cooperate with one another (chapter III). In June of this year, Justice Ministers from the 41 CoE member-states adopted a resolution to open the convention for worldwide signature.

The draft convention sets out very broad definitions extending its potential scope from internet based "cybercrime" to anything involving a personal computer. A "computer system" means any computer and "computer data" everything that is held on a computer. "Service providers" are "any public or private entity" that provide "the ability to communicate by means of a computer" (covering every system from AOL to an office network). "Traffic data" is an entire chain of communications from any "computer system", including "origin, destination, path or route, time, date, size, duration, or

type". "Subscriber information" means any other data relating to "subscribers of its service" (including visitors to a website or users of a network) which can establish their "identity, address, telephone number" or "location". Most of the powers deferred upon the "competent authorities" of states that adopt the convention can be used for the all-embracing and unlimited "purpose of criminal investigations or proceedings".

## Cyber-criminal offences, illegal devices and liability

Cyber-criminal offences are defined in Articles 2-11. In implementing the convention, domestic legislation will have to accommodate the following criminal offences: hacking ("illegal access", art. 2); illegal interception of private communications (art. 3); "data interference": "damaging, deletion, deterioration, alteration [including "tampering"], or suppression [deletion or preventing access] of computer data" (art. 4); creating viruses or causing damage through hacking ("system interference", art. 5).

Also illegal are "devices", including computer programs, passwords, access codes "or similar data" if "possessed", "produced" or "designed" with intent to commit a defined cybercrime (art. 6). The GLIC suggest that:

*the concept lacks sufficient specificity to prevent it becoming "an all-purpose basis to investigate individuals engaged in computer related activity that is completely lawful."*

According to technical experts it may also have the effect of discouraging the development of new internet security tools, as well as giving national governments an improper role in policing scientific innovation. The burden of proof that the "devices" were intended for illegal purposes was only placed on the *prosecution* in a concession in the second public draft of the convention - it was originally proposed that suspects must prove that their "devices" were not intended for criminal activity.

Computer related forgery, fraud and child pornography offences are defined, as is copyright infringement in cyberspace. Article 11 includes "attempt" and "aiding or abetting" as criminal offences and article 12 introduces corporate liability. This effectively makes service providers criminally liable for the content on their systems - i.e. open to prosecution for "cybercrimes" committed by third-parties using their servers or networks. The extent of the liability is likely to make service providers unwilling to take on "risky" users or content and can be expected to encourage inappropriate monitoring of private communications across their systems.

## On demand access to all data

The convention empowers law enforcement authorities to force service providers to record and preserve data regarding the activities of their customers. This is one of the most controversial provisions, and remains so despite the weakening of law enforcement demands in successive drafts of the convention. The obligation on service providers to preserve "data stored in a computer system" (art. 16) and "traffic data" (art. 17) has been reduced slightly - "for the purpose of criminal investigations or proceedings" was replaced by "in connection with a specific criminal offence". A footnote explaining that the provision "does not mandate retention of all data collected" has also been introduced. However, this is exactly what has been proposed in the UK and discussed in the G8 (see page 1 is this issue).

Article 18 of the draft convention empowers competent authorities to serve "production orders" against service providers

to enact provisions for "search and seizure" of any "computer system", "data" or "storage medium" (art. 19). No reference is made to independent judicial review prior to a search - unlike other types of search warrant. Law enforcement agencies will be able to "seize or similarly secure" equipment and data, "make and retain a copy" of any data and have a choice of "maintain[ing] the integrity of" or "render[ing] inaccessible or remov[ing]" data. They will also have the power to order "any person who has knowledge about the functioning.. or measures applied to protect the computer data" (i.e. encryption keys or privacy software) to "provide all necessary information". This is in blatant breach of individual rights against self-incrimination afforded by the ECHR and ECJ case law.

Articles 20-22 create a framework in which all electronic communications can be intercepted in "real-time". Under the convention, service providers will be obliged to "collect or record" or "co-operate and assist.. in the collection and recording" of "traffic" and "content data of specified communications". The scope of the interception provisions is "the range of serious offences to be determined by domestic law" (when they transpose the definitions and offences from the convention). Legislation to enforce confidentiality obligations on service providers is also required.

### **Disregard for human rights**

The rights of individuals, suspects or defendants are only addressed in a reference to "domestic safeguards" with no explicit reference to any data protection or human rights law, such as the 1981 EC Data Protection Directive or the ECHR. While it may seem incredible that an international convention extending law enforcement powers should not be bound by well-established and fundamental international human rights rules, the convention is simply incompatible with them. Nowhere is this more evident than in its dual effect of making the "interception of private communications" a criminal offence, while providing surveillance and interception powers to law enforcement officials which appear to contravene Article 8 of the ECHR.

In a letter urging the CoE drafting committee to reconsider the convention, the GLIC note that:

*the Universal declaration of Human Rights speaks directly to the obligations of governments to protect the privacy of communication and to preserve freedom of expression in new media. Article 12 states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Article 19 further states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

### **Onelawenforcementcommunity?**

Chapter 3 (arts 24-35) sets out the mutual assistance procedures enabling the authorities of one signatory country to request the use of the "investigative" powers under the convention in another.

Article 25 creates a new legal basis for extradition procedures in relation to the offences in the convention (existing extradition treaties between parties to the convention otherwise apply). The offence for which extradition is sought must be punishable by at least a one year prison sentence in both countries (a very low standard). Mutual legal assistance (MLA) arrangements provide the framework for international cooperation, although again, where international MLA agreements are in force these apply. There are several provisions to allow MLA to take place without "dual-criminality" - the requirement that requests are related to a matter which constitutes a serious criminal offence in both countries.

Article 28 provides for intelligence exchange between

parties to the convention. Authorities in one country can, "without prior request", give authorities in another information that it considers "might assist" in "initiating.. investigations..". Again, there is no explicit reference to any data protection rules or independent supervision, only a note that the providing party "may request" confidentiality. In the absence of any effective rules governing intelligence exchanges, there is nothing to prevent information obtained coercively or unlawfully being transmitted by third states, or the provision of data for political purposes.

Article 27 makes Interpol a lawful communication channel for requests. These are received for approval or rejection by designated national authorities. Concern over Interpol's handling of MLA requests was raised recently in the case of an international arrest warrant issued by Turkey leading to the arrest of extradite a political activist who had been granted political asylum in Switzerland (see *Statewatch* vol 10 no 5).

### **Copyright crimes**

"Offences related to infringements of copyright and related rights" are set out in Article 10. Signatory states are to establish criminal penalties in their domestic law for copyright and related offences (which infringe the international "copyrights" afforded by the international conventions). An opt-out of the criminal liability aspects of art. 10 was introduced in the most recent draft of the convention, presumably due to opposition from countries that do not apply criminal penalties to copyright infringements.

The inclusion of copyright crimes in the convention would seem to be aimed directly at protest websites which have achieved various successes and caused embarrassment to corporations and institutions. A number of websites have been forced to close, and many more are currently threatened with or embroiled in legal proceedings:

- *Reclaim the streets'* "Financial crimes" website which accompanied the September 26 protests against the IMF/World Bank in Prague included a spoof version of the *Financial Times* newspaper and lasted just three days before the UK service provider pulled the site upon threat of litigation.

- Lawyers for *Shell* have concerned themselves with the "Nuclear Crimes" website which alleges that the petrochemical giant secretly tested and dumped nuclear material. The corporation, however, appears wary of getting themselves into a "McLibel" situation (in which *McDonalds* was forced to contest and concede many of the allegations made by campaigners in a lengthy and costly court case).

- *Surrey Police* have informed a retired inspector that since his website [www.policecorruption.co.uk](http://www.policecorruption.co.uk) "may be accessed by the public" and is therefore "processing personal data" - the same can of course be said of nearly all websites - he must register it with the Data Protection Commissioners Office. Failure to do so, they note, is a criminal offence.

- In Germany *Lufthansa* has so far failed to stop a website which criticises the airline's role in deportations. The site carries the "Deportation Class" exhibition featuring posters which lawyers for the company say constitute a breach of copyright and insinuate that Lufthansa is indirectly linked with right-wing extremists. Internet providers from all over the world offered to mirror the site in the name of freedom of artistic expression and the threatened legal proceedings against the organisers (the No-one is illegal campaign) did not materialise.

The GLIC say that "new criminal penalties should not be introduced by an international convention in an area where national law is so unsettled".

*"Draft Convention on Cybercrime", Council of Europe DG I, European Committee on crime problems (CDPC) and Committee of experts on crime in cyber-space (PC-CY), No. 19, 25.4.00, Draft No. 24 rev 2, 19.11.00; CoE press release 27.4.00; [www.privacyinternational.org](http://www.privacyinternational.org); [www.nuclearcrimes.com](http://www.nuclearcrimes.com); [www.deportation-alliance.com](http://www.deportation-alliance.com); [www.gilc.org](http://www.gilc.org).*

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## CONTENTS

UK/EU/G8: The "Agencies" demand.. "in a safe and free society" everyone is a "suspect" ..	1
<b>Civil liberties</b> .....	3
France: Medical records seized at drug treatment centre	
Switzerland: Big Brother Awards	
<b>Immigration</b> .....	4
Germany: Asylum seeker threatened with deportation without court hearing	
Austria: Pilots responsible for deportation deaths?	
Italy: Judge questions constitutionality of immigration law	
<b>Law</b> .....	7
<b>Military</b> .....	7
<b>Northern Ireland</b> .....	8
<b>Policing</b> .....	8
Netherlands: CCTV getting more and more "popular"	
UK: "Shocking" CPS decision allows officers to escape charges	
<b>Racism &amp; fascism</b> .....	9
Germany: Token sentences in migrant death case	
UK: Far right-loyalist links strengthened	
<b>Prisons</b> .....	11
UK: "Shut YOIs" call as racist killer is jailed for life	
UK: Raid on Blantyre House "unjustified"	
<b>Intelligence &amp; security</b> .....	12
<b>Europe</b> .....	12
EU: JHA Council, 30.11.00-1.12.00	
Czech Republic/Denmark: Jailed Danish youth bailed	
<b>FEATURES</b>	
<b>UK: Hillsborough Trial: A case to answer</b> .....	13
<b>EU: Where now for accountability in the EU?</b> Access to Europol annual report denied and Schengen annual reports discontinued .....	15
<b>EU: Too much information creates confusion:</b> The European Parliament report on access to documents, the Council's draft common position and Germany takes the lead in opposing openness .....	17
<b>SpotEurope</b> : essay by Aidan White, General Secretary of the European Federation of Journalists .....	20
<b>CoE "cybercrime convention: legitimising internet surveillance</b> .....	22

## Statewatch website

Statewatch's site carries News online and has a searchable database. The url is: <http://www.statewatch.org>

## Contributors

Statewatch, was founded in 1991, and is an independent group of journalists, researchers, lawyers, lecturers and community activists.

Statewatch's European network of contributors is drawn from 12 countries.

Editor: Tony Bunyan. News Editor: Trevor Hemmings. Reviews Editor: Nadine Finch. Lee Bridges, Phil Collins, Paddy Hillyard, Ben Hayes, Steve Peak, Phil Scraton, Joe Sim, Mike Tomlinson, Frances Webber, Stef Janssen, Ida Koch, Catherine Weber, Dennis Töllborg, Francine Mestrum, Kees Kalkman, Helle Hagenau, Christian Busold, Barbara Forbes, Heiner Busch, Peio Aierbe, Mads Bruun Pedersen, Ciáran Ó Maoláin, Vassilis Karydis, Cristiano Codagnone, Steve Peers, Sonia Routledge, Barbara Melis, Katrin McGauran, Yasha MacCannico. The Centre for Studies in Crime and Social Justice (Edge Hill College, Lancashire), Liberty, the Northern European Nuclear Information Group (NENIG), CILIP (Berlin), Demos (Copenhagen), Omega Foundation, AMOK (Utrecht, Netherlands), Jansen & Janssen (Amsterdam), Kommitie Schluss mit dem Schnuffelstaat (Bern, Switzerland).

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**Statewatch,**  
PO Box 1516, London N16 0EW, UK.

Tel: (00 44) 020 8802 1882  
Fax: (00 44) 020 8880 1727  
e-mail: [office@statewatch.org](mailto:office@statewatch.org)