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SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS: THE JUSTICE AND SECURITY GREEN PAPER

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INTRODUCTION

Amnesty International is concerned by certain proposals in the Justice and Security Green Paper which, if enacted, would fail to ensure respect for the right of anyone whose human rights have been violated to receive an effective remedy.[1] This includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated and, if established, an effective remedy granted. These rights are entrenched in a range of human rights treaties to which the United Kingdom is subject, including:

- The European Convention on Human Rights article 13, as well as the procedural aspects of articles 2 and 3 as elaborated by the jurisprudence of the European Court of Human Rights.[2]

- The International Covenant on Civil and Political Rights article 2(3).

- The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14.

The UN General Assembly has also adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on the Right to a Remedy and Reparation), which further elaborates on the some of the rights described above.[3] These principles affirm unequivocally that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization".[4]

The consistency of the proposals in the Green Paper with the right more generally of all persons to a "fair and public hearing" in any "determination" of a person's "civil rights and obligations" (as provided for by article 14 of the ICCPR and article 6 of the European Convention on Human Rights), is also of concern. Principles of open and natural justice forming a fundamental part of the UK's common law have traditionally helped ensure that UK civil proceedings meet or exceed international fair trial standards, but it is precisely those elements of UK law that the Green Paper proposes radically to weaken.

In light of the wide-ranging and serious implications that some of these proposals would

have, Amnesty International considers that the government has not sufficiently demonstrated that the measures would be compatible with its international human rights obligations.

In scrutinizing proposals in the Green Paper the context in which they have been brought forward must also not be forgotten. The cases identified as demonstrating the need for change, ones in which "sensitive information is at their heart", are those which concern allegations that the UK has been involved in serious human rights violations, including torture and other ill-treatment, rendition and unlawful detention. Amnesty International recognizes that there may be circumstances in which the government could in some proceedings lawfully restrict disclosure of certain information, for example in some cases where disclosure would put the lives or safety of identifiable individuals at risk. However, the need for sensitive material to be handled appropriately does not negate the right of victims of human rights violations to disclosure of the truth. It is of great concern, therefore, that the proposals in the Green Paper are directed at those very cases where principles of transparency, openness and fairness should be of the utmost importance – where there is credible evidence of involvement in human rights violations by the state.

The invocation of secrecy on grounds of national security, or the public interest, has repeatedly been one of the central obstacles in preventing victims of human rights violations from securing their right to remedy and reparation and obstructing efforts in achieving genuine accountability for those violations.[5] International law does not provide states with unfettered discretion as to what can be kept secret in the name of national security. Numerous international and regional experts and bodies have emphasized that "information and evidence concerning civil, criminal or political liability of the state's representatives for serious human rights violations are not and must not be considered worthy of protection as state secrets."[6] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Special Rapporteur on counter-terrorism and human rights) has stated that if exceptional circumstances exist where information concerning human rights violations is truly impossible to extrapolate from material genuinely harmful to national security, human rights standards require that an "appropriate mechanism" be found.[7] The proposals contained in the Green Paper, however, would allow information to be kept secret in a far wider range of circumstances, and would not constitute an "appropriate" mechanism from a human rights perspective.

CLOSED MATERIAL PROCEDURES

In light of Amnesty International's particular expertise this submission focuses on the proposal to introduce closed material procedures (CMPs) into civil claims for damages where the state is alleged to have been involved in or committed serious human rights violations. Amnesty International does not believe that the government has made the case that the introduction of CMPs in such cases would be fully compatible with respect for human rights and that it is a strictly necessary and proportionate means by which to respond to any legitimate security concerns that the government may have with respect to threats to the life or safety of the general population or particular individuals.

The right to an effective remedy and reparation for victims of human rights violations is enshrined in all major human rights treaties. International law requires that remedies are available not only in law but are accessible and effective in practice[8] and includes the right to the following: 1) equal and effective access to justice and fair and impartial proceedings,

2) adequate, effective and prompt reparation for harm suffered and 3) access to relevant information concerning those violations.[9] Inherent to this is the right of victims and society as a whole to know the truth about the violations that they have suffered.[10]

Allowing the government to rely on secret evidence in cases where the claimant's only effective means of seeking a remedy for human rights violations is through civil litigation, as the Green Paper proposes, would be inconsistent with a range of aspects of this right. Notably the introduction of CMP into civil claims for damages undermines the right to effective access to justice by potentially denying victims of human rights violations access to a meaningful procedure in which their claim can be *fairly* adjudicated and if established reparation granted. It will also restrict the ability of victims of human rights violations to access information about the circumstances of the violations they have suffered, as they are entitled to under international law.[11]

When considering the necessity of such drastic changes to the justice system, attention should be drawn once again to the fact that the cases which are the focus of the proposals are ones in which the UK is credibly alleged to have been involved in serious human rights violations, including torture or other cruel, inhuman or degrading treatment and enforced disappearance. Clearly the primary response of the UK government should be to ensure that the actions of UK authorities always comply with the highest human rights standards. This includes by ensuring effective, impartial, thorough and independent investigations into all credible allegations of UK involvement in serious human rights violation that provide the alleged victims with key findings and access to facts about their claims, and other forms of redress and guarantees of non-repetition. The repeated failure to ensure such investigations and results must be seen as contributing to occurrence of the civil litigation cases with which the Green Paper is concerned, and yet the Green Paper focuses only on establishing new latitude for the government to keep information secret without recognizing the failures of investigation and remedy as an underlying cause that must itself be addressed.[12]

Further, as emphasized earlier, respect for the right of access to an effective remedy for violations of international human rights standards requires that evidence concerning the civil, criminal or political liability of the state's representatives for serious human rights violations is not subject to secrecy provisions. Amnesty International believes that there is no legitimate reason why a civil case for damages where the UK is alleged to have been involved in or committed human rights violations cannot proceed fairly and have its merits properly adjudicated under the current system.[13] As such the government's argument that CMPs must be introduced in the interests of justice because otherwise these types of cases will either be settled or struck-out is misleading. Indeed it should be noted that to strike out a civil case for damages where the state is alleged to have been involved in serious human rights violations would itself be manifestly incompatible with the right to an effective remedy and reparation. Leaving aside whether such a scenario would actually be likely to occur,[14] the government should not rely on invoking the spectre of an alternative that would contravene international human rights law, as a justification for the introduction of measures that would themselves infringe the same rights.

It is Amnesty International's view that evidence that would tend to prove allegations of human rights violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial executions or other unlawful killings, should never

be capable of being kept secret from a person who alleges he or she was a victim of the human rights violations (or family members claiming on behalf of an alleged victim) or his or her legal counsel of choice, in civil proceedings in which a remedy for the violation is sought.[15] Proceedings might in some circumstances be taken before a court ex parte in order to allow the government to argue whether particular evidence not only is relevant to national security, but is also *not* relevant to the claim of human rights violations. However, once a court has found evidence to be probative of the claimed human rights violation then there should be no circumstances in which the claimant or his or her counsel can be totally deprived of meaningful access to that evidence (at least so long as the government contests the claim and fails to provide a full remedy). This would not necessarily preclude more precise measures short of keeping the evidence entirely secret from the claimant and/or his or her counsel, such as concealing the identity of a witness where there was clear evidence that to reveal his or her identity would put his or her life directly at risk. Claimants and their counsel must also always have an effective means of challenging government evidence that is intended to deny allegations that the government has been responsible for human rights violations.

Though it is the case that under the current Public Interest Immunity (PII) system it is possible that evidence concerning human rights violations may also be withheld from the alleged victim and his or her lawyer,[16] a CMP will in practice lead to considerably less disclosure than exists under the current system. There are two central reasons for this, firstly, the extremely broad definition of "sensitive material" which is used and, second, that the proposals appear to bring an end to the Wiley balancing test currently employed in the PII process.[17]

The definition used in the Green Paper for "sensitive material" is as follows:

Any material/information which if publically disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily 'sensitive', but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.[18]

Amnesty International fears that the use of such a broad definition of the kinds of information which if disclosed would be deemed to constitute harm to the public interest will in practice result in large amounts of material being placed into closed and so never disclosed to the individuals or their lawyer, which in turn will increase the degree of secrecy surrounding these claims. Of particular concern, is the provision of what appears to be a de-facto claim to secrecy for the Security and Intelligence Services by allowing all material originated or handled by them to be automatically defined as "sensitive" and so presumably placed into a closed session. Blanket claims to secrecy represent a very real impediment to securing genuine accountability for human rights violations given that it is often the actions of these very agents under scrutiny in these cases.

The "Wiley balance" for testing disclosure in the current PII system allows the court to "hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice."[19] This test recognizes that sometimes maintaining secrecy of sensitive information

would on balance not be in the public interest. That recognition is crucial in cases where the state is alleged to have been involved in human rights violations, as the interest of the actual public in seeing violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial execution brought to light, and in ensuring victims have access to a fair procedure for obtaining a remedy, should be no less compelling than the possible interest of a government keeping such information confidential.[20] In a CMP, as proposed in the Green Paper, there is no balance of competing public interests.[21] Instead material falling within the very broad definition of "sensitive material" set out above (whether because it is "secret intelligence" or "secret information" or because it is any other kind of information and the Secretary of State has identified a likely harm to the public interest) could potentially be indefinitely withheld from the claimant, however, slight the putative harm that might be caused by its disclosure and even if it were clearly evidence of the human rights violations alleged in the proceedings.[22] The government has argued that Special Advocates will be able to play a role in ensuring as much material is disclosed as possible; however, it is important to note that Special Advocates themselves have stated that because of the nature of a CMP, their ability to secure substantive disclosure by challenging the government's argument on national security grounds in these types of proceedings remains severely limited – leading one Special Advocate to state that they are simply "not in a position to do it".[23]

As a consequence there is a real concern that the introduction of CMPs into civil cases for damages where the state is alleged to be involved in serious human rights violations will lead to greater secrecy and less transparency – allowing the government to more easily avoid proper scrutiny of its human rights record. Accordingly the introduction of such measures cannot be described as a valid response to the national security challenges the government may face.

Further to these concerns, the right to an effective remedy includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated.[24] More broadly, everyone has the right to a fair trial in the determination of any of his or her civil rights and obligations.[25] The government claims throughout the Green Paper that CMPs have been proven to work effectively and are capable of delivering procedural fairness.[26] Amnesty International believes this claim is inaccurate and misleading. CMPs have been the subject of substantial litigation which remains on-going. Concern about CMPs has been raised by human rights organizations[27], international human rights bodies[28], parliamentary committees[29], media organizations[30] and senior lawyers.[31] They have been described variously in the UK courts as "inherently imperfect" and as containing "inherent frailties".[32] Special Advocates themselves have also publicly criticized CMPs stating that "they do not work effectively" and "do not deliver real procedural fairness".[33]

In allowing the government not only to withhold information from the claimant (as might be the case in some contexts under the existing PII framework[34]), but also then rely on it as secret evidence during the proceedings, a CMP can undermine the right to a fair and public hearing, especially with regard to the respect for an adversarial process and equality of arms.[35] The UN Human Rights Committee explains that "the right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on

objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant" and further that "the principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."[36]

In the UK, in addition to the application of the European Convention on Human rights via the Human Rights Act, these features of fair trial are also secured by longstanding rules under common law as recognized in the UK's domestic jurisprudence.[37] A CMP, where one party to the case cannot see all the evidence being relied upon by the court and cannot directly cross-examine the witnesses in a case, represents a radical departure from the normal principles of fairness that currently apply in civil trials. The use of Special Advocates has not been demonstrated to sufficiently mitigate this unfairness, indeed the Joint Committee on Human Rights has in the past concluded that Special Advocates are simply "not capable of ensuring the substantial measures of procedural justice that is required".[38]

It should also be noted that the argument that CMPs will necessarily lead to a fairer outcome because the judge is able to consider more material is by no means clear. As Lord Kerr states in the case of *Al-Rawi*, "The central fallacy of the argument lies in the unspoken assumption because the judge sees everything he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."[39]

Finally, one of the central pillars of a fair hearing is the open administration of justice.[40] The principle of open justice acts as an essential safeguard of the fairness and independence of the judicial process, ensuring that the administration of justice is open to public scrutiny, which in turn provides a means of protecting and maintaining public confidence in the justice system.[41] By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[42] Though international human rights law allows for the exclusion of the press and public in certain circumstances for reasons of national security, this is permissible only to the extent strictly necessary.[43] The relevant articles make no similar explicit provision for the exclusion of litigants or their counsel for any reason or any period of time.[44]

The right to a fair and public hearing also requires that "the judgment, including the essential findings, evidence and legal reasoning must be made public".[45] The use of a CMP, however, invariably leads to the issuing of a closed judgment alongside an open judgment, which elaborates on the reasoning for the decision of the court and which relies on the secret evidence. The issuing of closed judgments has the potential to undermine public confidence in fair administration of justice in cases where the state is involved in or has committed human rights violations and that those responsible for violations will be held to account. The implications of this were well recognized by the Court of Appeal in *Al-Rawi* which emphasized that:

"[i]f the court was to conclude after a hearing, much of which had been in closed session attended by the defendants but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants but not the

claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater".[46]

Amnesty International would emphasise that the onus is always on the state to demonstrate that any restrictions it wishes to impose on human rights, including restricting the right to a fair trial (in the limited range circumstances for which such limitations permitted), are necessary and proportionate to the pursuance of legitimate aims. Even where restrictions are allowed they may not "be applied or invoked in a manner that would impair the essence of a Covenant right."[47] While the European Court of Human Rights has held that national security can be a legitimate aim that could justify certain restrictions on the ordinary rules for disclosure of evidence to a litigant, any such restrictions must still satisfy all of the other requirements in the circumstances of the case, namely proportionality, not impairing the essence of the right to fair trial and sufficient counterbalancing of any restrictions within the judicial process.

Amnesty International believes that the introduction of a CMP in a civil claim for damages where the state is alleged to have been involved in serious human rights violations risks substantively impairing both the right to an effective remedy and reparation and the right to a fair trial in such cases and as such cannot be considered a valid measure to address any legitimate national security concerns.

RESTRICTION TO "EXCEPTIONAL CIRCUMSTANCES"?: In this submission we have focused on the introduction of CMPs into civil trials for damages where the state is alleged to have been involved in serious human rights violations. However, it is clear that the introduction of legislation to allow for a CMP in any civil proceeding would have far-reaching consequences. Amnesty International is concerned that even though the government has stated that its intention is that this procedure should only be used in exceptional circumstances, the Green Paper includes no thorough examination of the human rights implications of a CMP in different types of civil trials, for example, civil actions against the police, civil proceedings between private parties, habeas corpus claims, claims brought by public authorities against individuals. Even leaving aside the more fundamental objections to any application of CMPs in certain proceedings as outlined above, there is no description or analysis in the Green Paper of what actual safeguards would or could be put in place to ensure that invocation of a CMP did not in fact become the norm wherever "sensitive information" might be involved in a proceeding. We note that in fact the initial introduction of CMPs by the government in response to the *Chahal* judgment[48] and in the particular context of national security deportation cases was also, at the time, said to be restricted to that exceptional context. However, subsequently CMPs have leached across the civil justice system, and can now be used in a range of different contexts including control order hearings, terrorist asset freezing and financial restrictions proceedings, appeals before the Proscribed Organisations Appeal Commission, employment tribunal hearings and parole board hearings amongst others. The Green Paper proposals are themselves part of a process of expanding the role of just such so-called "exceptional" procedures far beyond their original stated scope.

NORWICH PHARMACAL

The proposal put forward in the Green Paper is to legislate to remove the jurisdiction of the courts to hear Norwich Pharmacal applications where disclosure of the material in question would cause damage to the public interest.[49] There would be an absolute exemption from liability to disclosure for material held by or originating from one of the intelligence agencies; other material would be exempted from disclosure on a case-by-case basis by Ministerial Certificate. This second category (non-agency material) could be challenged by way of judicial review with the use of CMP for consideration of the nature of the material and the potential damage caused by disclosure. The Green Paper argues that this proposal is necessary to "reduce the potentially harmful impact of such court-ordered disclosure".

The Green Paper argues that "the UK's critically important and hard earned secrets and those of our intelligence partners may be obtained by individuals though a recent development in our justice system. It is crucial that we rebuild the trust of our foreign partners in order to ensure that they can be satisfied that the range of sensitive material they share with us, and the communications on diplomatic channels, all of which take place with an understanding of confidentiality, will indeed remain confidential." This refers to the so-called 'control principle', used in intelligence-sharing relationships under which the originator of the intelligence material should retain control over the dissemination of that material. The government has claimed that the intelligence-sharing relationship with the US is already being negatively impacted by the risk that US originated intelligence material could be made public by the courts as a result of future *Norwich Pharmacal* actions.

Amnesty International would take this opportunity to emphasise that the information involved in these cases has often concerned allegations of serious human rights violations, including torture and/or other deliberate cruel, inhuman or degrading treatment, in respect of which the UK is alleged to have been involved in or in receipt of information about. The most notable of these cases is that of Binyam Mohamed, a former Guantanamo detainee, who brought a *Norwich Pharmacal* action against the Foreign Secretary, in order to obtain material he argued was necessary for his defence before a Military Commission in the United States, where he faced potential capital charges.[50] The lengthy litigation around Binyam Mohamed's case resulted in the disclosure of seven-paragraphs – contained in the initial Divisional Court's judgment but which had been redacted on the government's request -summarizing reports provided by US authorities to MI5 and MI6. The paragraphs describe reports of mistreatment faced by Binyam Mohamed at the hands of the US which the Court said "could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities", and demonstrated that the UK had knowledge of that mistreatment. It should also not be forgotten that it is a requirement of a *Norwich Pharmacal* action that the defendant, who holds the information sought, must have been mixed up in the wrong-doing concerned. It is, therefore, only because the Court found that the UK was sufficiently involved in Binyam Mohamed's mistreatment that his case could be brought.

Information relating to torture and other serious human rights violations should not be protected, either by resort to national security arguments or by diplomatic principle. The UK has international and domestic legal obligations to prevent and prosecute the commission of torture and the prohibition of torture is a jus cogens obligation under international law which takes precedence over any diplomatic protocol. The Green Paper asks "what role should the courts play in determining the requirement for disclosure of sensitive material?", the answer – in line with international human rights standards – is that in all cases where serious human

rights violations are at stake, judges must be the ultimate arbiters in assessing the merits of a claim to secrecy by the state over information potentially relevant to a claim for serious violation of human rights. The proposals by the government in the Green Paper seek to arrogate the power of judges to be the final arbiter in cases which the government deems as sensitive. In so doing an avenue by which victims of human rights violations are able to seek and obtain information about these violations in such cases would be closed to them.

It is also deeply problematic that the proposals seek to provide a complete exemption for any material held or originated by the intelligence agencies from disclosure. Amnesty International recognizes that in principle there may be genuine national security reasons for not disclosing information which will endanger the lives or safety of individuals or the general population. However, this cannot justify the provision of a blanket claim to secrecy for the intelligence agencies. Intelligence material, as with other types of sensitive material, must be subject to possible disclosure if a court determines that it contains evidence of human rights violations.

It may also be noted that the UN Human Rights Committee has pointed out that the obligation of each state party to the Covenant to respect human rights is not owed only to individuals but to every other state party as well. As such, the Committee emphasizes that "To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."[51] This principle should be taken into account in evaluating claims that restrictions on disclosure in cases claiming for violations of human rights can be justified on the basis of the desire to preserve diplomatic relations or intelligence-sharing arrangements with other states.[52]

It is also Amnesty International's view that the arguments set out the Green Paper in favour of limiting the *Norwich Pharamcal* jurisdiction are overstated. In the Binyam Mohamed case the Divisional Court made it clear that "there is nothing secret or of an intelligence nature in the seven paragraphs redacted from the first judgment. In providing the summary of the treatment of BM in those seven redacted paragraphs we are not in the judgment 'giving away the intelligence secrets of a foreign country' or making public 'American secrets'…of itself, the treatment to which BM was subjected could never be properly described in a democracy as 'a secret' or an 'intelligence secret' or 'a summary of classified intelligence'".[53] In fact, what is clearly demonstrated in Binyam Mohamed is that in *Norwich Pharmacal* cases, as with most litigation involving national security, the courts are particularly deferential to the government in the decision as to whether material is sensitive and whether disclosure would harm national security, and will tend only to order disclosure where the evidence of serious human rights violations is particularly compelling – certainly no fear of sweeping disclosure of a 'fishing expedition' nature can be said rationally to be raised by the cautious approach of the Court in Binyam Mohamed.

1 Justice and Security Green Paper, CM 8194 October 2011.See Amnesty International UK: Response to the Justice and Security Green Paper, January 2012, for Amnesty International's full response to the government's proposals in the Green Paper, http://www.amnesty.org.uk/uploads/documents/doc_22264.pdf.

2 See, e.g., *Giuliani and Gaggio v Italy* [Grand Chamber], (App No 23458/02), 24 March 2011; *Kaya v Turkey*, (App No 22729/93), 19 February 1998; *Ilhan v Turkey* [Grand Chamber], (App No 22277/93), 27 June 2000; *Assenov and Others v. Bulgaria*, (App No 24760/94), 28 October 1998.

3 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

4 Basic Principles on the Right to a Remedy and Reparation, 60/147, para 24.

5 For further information see the following Amnesty International reports; *Open Secret: Mounting evidence of Europe's complicity in rendition and secret detention,* (Index: EUR 01/023/2010); *State of Denial: Europe's Role in Rendition and Secret Detention*, (Index: EUR 01/003/2008); *USA: Guantanamo: A decade of damage to human rights and 10 anti-human rights messages Guantanamo still sends*, (Index: AMR 51/103/2011); *USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror',* (Index: AMR 51/151/2008); *Germany: Briefing to the UN Committee against Torture,* (Index: EUR 23/002/2011); *Lithuania: Unlock the truth in Lithuania: Investigate secret prisons now*, (Index: EUR 53/002/2011).

6 See Parliamentary Assembly of the Council of Europe, Resolution 1562 (2007) and Recommendation 1801 (2007). See also report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), paras 58-63, 75; also the 'Johannesburg Principles' on national security, freedom of expression and access to information - developed in 1995 by a group of experts in international law, national security and human rights which states that "a restriction sought to be justified on the ground of national security is not legitimate if it genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest" (principle 2).

7 Report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), para. 75.

8 See UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) which says that states "must ensure that individuals also have accessible and effective remedies to vindicate" the rights protected by the ICCPR (paras 14 and 15). The Committee has noted even when the legal systems of States parties are formally endowed with powers to grant an appropriate remedy, this will be insufficient if the remedy procedures fail to function effectively in practice (para 20) . See also UN Human Rights Committee, General Comment no 20, concerning prohibition of torture and cruel treatment or punishment (10 March 1992), paragraphs 14 and 15. See similarly European Court of Human Rights *Aydin v Turkey* [Grand Chamber], (App No 57/1996/676/866), 25 September 1997, para 103 and similar jurisprudence.

9 Basic Principles on the Right to a Remedy and Reparation, 60/147; UN Human Rights Committee General Comment no 31, para 16.

10 The United Nations has also formally recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", see UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005; Basic Principles on the Right to a Remedy and Reparation, 60/147, article 22(b).

11 Basic Principles on the Right to a Remedy and Reparation, 60/147, articles 11(c) and 24. Restrictions on the rights of alleged victims of human rights violations to receive information pertinent to their claim may also raise issues in relation to their rights of access to information of a personal nature as protected for instance under article 8 of the European Convention on Human Rights ((App no 32555/96), 19 October 2005, paras 155 -169) and article 19 of the ICCPR.

12 The Detainee Inquiry, established by the UK government to examine UK involvement in serious human rights violations, including torture and other ill-treatment, unlawful detention and rendition, of individuals detained abroad in the contest of counter terrorism operations fell short of the human rights standards requiring an effective, impartial, independent and thorough investigation into such allegations. For further information see, *United Kingdom: Detainee Inquiry terms of reference and protocol fall far short of human rights standards*, (Index EUR 45/011/2011). On 18 January the Justice Secretary announced that the UK government has decided to conclude the work of the Detainee Inquiry in light of the commencement of new criminal investigations, but that it still intended to hold a judge-led inquiry into the allegations in the future. In light of this announcement Amnesty International hopes that that this future inquiry will be fully compliant with international human rights standards and law. See *UK: Detainee Inquiry closure presents an opportunity for real accountability* (Index EUR 45/0052012).

13 It is disappointing that there is little examination in the Green Paper of other mechanisms which could be employed alongside PII to ensure that legitimately sensitive evidence is protected from unnecessary disclosure, whilst still allowing for as fair and transparent a procedure as possible, such as the use of confidentiality rings, targeted disclosure, redactions, in camera hearings and so forth.

14 The case referred to by the government in this regard is *Carnduff v Rock* [2001] EWCA Civ 680, which was a contractual claim brought by a police informant. A number of submissions to the Justice and Security Green Paper consultation have questioned the use of *Carnduff* as a precedent to justify

the proposals. See for example, *JUSTICE, Justice and Security Green Paper Consultation Response*, p.20 and *Bingham Centre for the Rule of Law*, Response to the Justice and Security Green Paper, para.22. See also Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.50 who states "cases such as Carnduff are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned".

15 The exception to this is perhaps in cases where the government is willing to acknowledge the facts of the violation to the degree of specificity required by the right of a victim of human rights violation to the truth about the violation.

16 It should be noted that Amnesty International considers the scope for such withholding under the current PII process itself raise issues in relation to the right to effective remedy of those alleging to be victims of human rights violations.

17 Several senior lawyers and judges have also emphasized that the current PII process essentially incentivizes the government to disclose as much as is possible. As Lord Kerr notes in *Al Rawi v Security Service* [2011] UKSC 34, "At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make", para 96.

18 Justice and Security Green Paper, October 2011, p.71.

19 *R(Wiley) v Chief Constable, West Midlands* [1995] 1 AC 274.

20 The value of this balancing exercise in cases where the state is accused of involvement in human rights violations is perhaps exemplified in the Divisional Court's fourth decision in the Binyam Mohammed case which states "the issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place. . . It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability." *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 18.

21 See Lord Kerr in *Al Rawi v Security Service* [2011] UKSC 34 (para 92) "[t]his seemingly innocuous scheme proposed by the appellant would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellant would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said … has been established for more than three centuries."

22 It should be noted in control order hearings, following the House of Lords decision in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, Special Advocates can secure further disclosure in order to satisfy article 6 requirements even if that material is considered as sensitive – that is if disclosure is likely to result in harm to the public interest. For further information regarding the ongoing challenges in securing disclosure in such a way see *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation 2010*, HL 64/HC 395 and *Justice and Security Green Paper: Response to consultation from Special Advocates.*

23 *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders*, 3 February 2010 Qu.46 (Helen Mountfield).

24 See the Basic Principles on the Right to a Remedy and Reparation which recognizes the right of victims of serious human rights violations to have "equal access to an effective judicial remedy" and that the "the right to access justice and fair and impartial proceedings" is to be reflected in domestic laws.

25 See for instance article 14 ICCPR and article 6 ECHR.

26 See for example paragraph 2.2 of the Justice and Security Green Paper.

27 For example, Liberty, Justice, Reprieve and Human Rights Watch have all criticized the use of CMP.

28 See the concluding observations of the Human Rights Committee UN Doc CCPR/C/GBR/CO/6, 30 July 2008, calling on the UK to "ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made".

29 For example, the *Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111; *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation 2010*, HL 64/HC 395; and the Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, 3 April 2005, HC 323-II.

30 For example, see the intervention of the BBC, Guardian News and Media Limited and the Times Newspapers in the case of *Al Rawi v Security Service* [2011] UKSC 34.

31 For example, Dinah Rose QC, delivering the Atkin Lecture on 10 November 2011 said: "A common law trial is designed to enable facts to be found on the balance of probabilities through an open adversarial process.. ,If you bolt a closed procedure on to that, what you have is a process that is not adversarial, and not judicial. It may look and sound like a trial, but in fact it is nothing of the sort". See also the evidence given by Gareth Peirce to the Joint Committee on Human Rights, Uncorrected Transcript of Oral Evidence HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and

Human Rights: Control Orders, 3 February 2010 and Lord Bingham, formerly the Senior Lord of Appeal in the Ordinary, who said, with regard to disclosure in control order proceedings: "[T]he right to a fair trial is 'fundamental and absolute'; where a conflict arises between the use of material not disclosed to a party and the right of that party to a fair hearing his right to a fair hearing must prevail." Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, p. 108.

32 See *Al Rawi v Security Service* [2011] UKSC 34 and *Tariq v Home Office* [2010] EWCA Civ 462. See also Lord Woolf in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 (at [59] and [67]), that the involvement of a special advocate "[must] not be used to justify a reduction in the protection available to the person affected by the non disclosure....the appointment of [such an advocate] should not be used as a justification for reducing the rights that [an individual] may otherwise have but only as a way of mitigating the disadvantage he would otherwise suffer if his rights were to be reduced with or without [such an advocate]."

33 *Justice and Security Green Paper: Response to consultation from Special Advocates*, para.15.

34 As noted earlier, the existing PII framework itself is not free from human rights concerns.

35 It should also be noted, in this regard, that the right to a fair trial is broader than the sum of the individual guarantees within article 14, and depends on the entire conduct of the trial. (See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/40) annex X, sect. E: Communication No. 207/1986, *Yves Morael v. France*, para. 9.3).

36 See UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32, 23 August 2007, para 13. See also Communication No. 1347/2005, *Dudko v. Australia,* Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*.

37 For further discussions regarding common law see *JUSTICE, Justice and Security Green Paper Consultation Response*, January 2012; *Bingham Centre for the Rule of Law, Response to the Justice and Security Green Paper.*

38 *The Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111 paragraph 90.

39 *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.93.

40 See *Malhous v Czeck Republic,* (App No 33071/96) 12 July 2001; *Bakova v Slovakia*, (App No 47227/99), 12 November 2002; *Pretto and Others v Italy*, (App No 7984/77), 8 December 1983; *Barberà, Messegué and Jabardo v Spain,* (App No 10590/83) 6 December 1988; *Yakovlev v Russia*, (App No 72701/01) 15 March 2005; *B and P v United Kingdom,* (App No 36337/97; 35974/97) 24 April 2001.

41 See in this regard Special Rapporteur on counter-terrorism and human rights report of 6 August 2008, UN Doc A/63/223 and UN Human Rights Committee, General Comment No. 32, para. 67.

42 *Pretto and others v Italy,* (App. No 7984/77), 8 December 1983. This principle was also reflected by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, para.63"If the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust".

43 See UN Human Rights Committee, General Comment no 32, para 29 [only exception is in cases involving children or matrimonial disputes]. See also the judgment in the case of *Romanova v Russia*, (App No 23215/02), 11 October 2011, where the European Court of Human Rights considered a case where an entire criminal trial had been held in camera, with only part of the trial and appeal judgments having been delivered in public (it appears the defendant and her lawyers were not excluded from any part of the trial). In finding the exclusion of the public in the circumstances to have violated article 6 of the Convention, the Court observed: "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity." Such considerations must apply with even more force when the issue is whether evidence of a government's involvement in serious violations of human rights can be withheld from the public, or even indeed from the very persons who are claiming to be the victims of the violations in question.

44 Nowhere in its discussion in General Comment no 32 of the possibility of excluding the public on grounds of national security does the Human Rights Committee discuss any possibility that litigants or their counsel could be validly excluded. The government has cited the decision in *Kennedy v the United Kingdom*. The particular facts of that case, however, are markedly different from and far narrower than the wide range of courts and tribunal proceedings to which the Green Paper would apply, and the measures the Green Paper proposes. The court also emphasized as relevant its understanding that where the Investigatory Powers Tribunal found there had been wrongful interference it could in fact disclose the otherwise sensitive documents and information to the complainant, even over objections of the government that they should remain secret. Amnesty International does not necessarily agree with the reasoning or conclusions of the Court in the *Kennedy* case.

45 See UN Human Rights Committee, General Comment No 32, para 29 (noting an exception only in cases involving children or matrimonial disputes).

46 *Al Rawi and Others v Security Service and Others* [2010] EWCA Civ 482 para 56. See also *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 54 where the court concluded that "it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture".

47 UN Human Rights Committee, General Comment no 31 para 6. The ECtHR has similarly held that restrictions on the fair trial guarantees ordinarily

required of court proceedings can only be compatible with article 6(1) of the ECHR if they pursue a legitimate aim and the means employed are proportionate to the aim sought to be pursued. Even measures that meet these tests are only valid if the limitations do not have the effect of impairing the very essence of fair trial rights and if any restrictions are sufficiently counterbalanced by the procedures followed by the judicial authorities, *Rowe and Davis v the United Kingdom* [Grand Chamber], (App No 28901/95), 16 February 2001.

48 *Chahal v United Kingdom*, (App No 22414/93), 15 November 1996.

49 The Green Paper rejects as disproportionate the option of scrapping entirely the ability to bring *Norwich Pharmacal* proceedings against any Government Department.

50 *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 2973 (Admin)

51 UN Human Rights Committee General Comment No.31, para 2.

52 See *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 69, stating that it was, in the court's view, "difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing in the public domain such a summary of what its own officials reported as to how a detainee was being treated by them". The court asked why a "democracy governed by the rule of law would expect a court in another democracy to suppress a summary of evidence contained in reports by its own officials…where the evidence was relevant to allegations of torture…politically embarrassing though it may be".

53 *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs [2009] EWHC 2973 (Admin)*, para 13 It can also be noted in relation to the Binyam Mohamed case that by the time of the final judgment of the Court of Appeal the documents originally sought by Binyam Mohamed and his legal team had been disclosed by the US authorities directly to Binyam Mohamed's US counsel, albeit with redactions.

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