



UNITED KINGDOM

SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

66TH SESSION, 23 APRIL-23 MAY 2019

AMNESTY
INTERNATIONAL



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First published in 2019

by Amnesty International Ltd

Peter Benenson House, 1 Easton Street
London WC1X 0DW, UK

Index: EUR 45/0096/2019

Original language: English

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1. INTRODUCTION

Amnesty International submits this briefing for consideration by the United Nations ('UN') Committee against Torture ('the Committee') at its examination of the United Kingdom's ('UK') sixth periodic report on its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention'). This briefing summarizes Amnesty International's current concerns about the UK's failure to comply with some of its obligations under the Convention.

This submission addresses a number of areas, from universal jurisdiction, to access to abortion, to accountability mechanisms for the large numbers of still outstanding allegations of abuse in Iraq. Regrettably, in several of these areas the Committee has previously made recommendations to the UK which are yet to be fulfilled.

Generally, Amnesty international has particular concerns that the progression over the past five years of negative comment about the Human Rights Act 1998 ('the HRA') to concrete political commitments to repeal, combined with growing opposition among politicians and the press to accountability for historic or future abuses by the military, are indicative of an increasingly hostile attitude among public officials to human rights enforcement in the UK. This is a trend which the government should urgently take steps to address, starting with its own approach to rights protections. Action on the recommendations below would represent an excellent place to start.

2. LEGISLATIVE, ADMINISTRATIVE, JUDICIAL OR OTHER MEASURES TO PREVENT TORTURE AND OTHER ILL- TREATMENT

2.1 THREATS TO THE HUMAN RIGHTS ACT 1998 AND EU PROTECTIONS (ARTICLES 2 AND 4)

As the Committee noted in its Concluding Observations of 2013, the UK government has not yet incorporated all the provisions of the Convention against Torture ('the Convention') into domestic law¹. Incorporation would enable individuals to invoke its provisions directly before the Courts. Instead, the government relies on its incorporation of the European Convention on Human Rights ('ECHR') through the Human Rights Act ('HRA') as sufficient to provide effective protection. Article 3 of the HRA therefore remains the primary mechanism for enforcing torture and other ill treatment related rights in domestic law. The HRA, however, is at risk of repeal and replacement with a weaker protective framework.

Since 2013, the frequent negative criticisms of the HRA by public figures have escalated into concrete threats from the current governing party to repeal the Act. In 2014, a purported plan to replace the HRA with a 'British Bill of Rights' was published by the Conservative Party². This would have substantially weakened the domestic rights framework. It specifically included proposals which would reduce the scope and application of existing ECHR protections against torture and other ill treatment afforded by article 3. The Plan included an intention to "reflect a proper balance of rights and responsibilities" in the law. It outlined proposals, inter alia, to "clarify" the real risk test for deportations in article 3 cases, remove extra-territorial jurisdiction, introduce a "threshold test" in order to "limit the use of human rights laws to the most serious cases", and to write into the law "a more precise definition" of terms "such as 'degrading treatment or punishment'", which the paper claimed had "arguably been given an excessively broad meaning by the ECtHR in some rulings". In 2015, the party was elected on a manifesto commitment to '*scrap the HRA*' and '*break the link*' with the European Court of Human Rights³. These developments led to significant protest

¹ The High Court has recently noted that the UK has not incorporated, for example, article 16 of UNCAT, something which the government relied on in defending its decision not to seek comprehensive assurances that the death penalty would not be imposed, in the case of *El Gizouli* [2019] EWHC 60 (Admin) at [90]

² "Protecting human rights in the UK: the conservatives' proposals for changing Britain's human rights laws" 2014.

³ <https://www.conservatives.com/manifesto2015>

from civil society organisations and others, including the Welsh and Scottish governments⁴. While no firm proposals for a British Bill of Rights have materialised, threats have continued, with the current government saying that it will not replace or repeal the HRA while the process of EU exit is underway, but that it will reconsider the framework once that concludes⁵. There remains a lack of clarity over why a commitment to the ECHR in the draft of the Political Declaration setting out the future relationship between the EU and the UK published on 14 November 2018 referred to a “*reaffirmation of the UK’s commitment to the ECHR*” and “*continued adherence to the ECHR and its system of enforcement*” whereas the final draft of 22 November instead committed the UK only to “*respect the framework of the ECHR*” and “*giving effect to it*”. The government has claimed it is committed to the ECHR and that the dilution is not significant, but Amnesty International considers that this, combined with a reluctance to speak of a commitment beyond the next parliament, raises questions about the UK’s long-term membership⁶.

As part of the process of leaving the EU, the EU (Withdrawal) Act 2018 specifically excluded the EU Charter on Fundamental Rights from domestic law after withdrawal. This therefore removed the further protections of article 4 of the Charter⁷ from the UK legal framework. The Act also conferred significant law-making powers on the Executive, including the ability to amend certain categories of primary legislation, in order to ‘*correct deficiencies*’ that Ministers may decide exist after exit. Similar powers are also in the Trade Bill 2017-2019. This has led to concerns that there may be negative change made to rights protections, without proper parliamentary scrutiny⁸.

2.2 EXTRA-TERRITORIAL APPLICATION OF HUMAN RIGHTS PROTECTIONS (ARTICLE 2 AND 5)

Amnesty International is concerned that the UK continues to take a narrow view of the extraterritorial application of the Convention, as well as other international and regional human rights treaties, thereby undermining human rights protection and obstructing efforts by victims to obtain an effective remedy for human rights violations. Nothing has changed in this respect since the strenuous arguments made by the UK government in the cases cited to this Committee for its last review⁹. Indeed, statements made recently have confirmed this approach.

In 2016, the Prime Minister and Defence Secretary announced that as a result of Court judgments extending, as they saw it, the extraterritorial jurisdiction of the ECHR, the UK intended “*to derogate from the ECHR, if possible in the circumstances that exist at that time*”, in future conflicts, specifically to “*protect*” British troops from human rights claims¹⁰. This policy - that in future a presumption of derogation would exist – was roundly condemned by human rights groups¹¹. An Inquiry was launched by the Joint Committee on

⁴ “*Scottish Government will block Human Rights Act repeal for the whole UK, says Nicola Sturgeon*” 23 September 2015 <https://www.independent.co.uk/news/uk/politics/scottish-government-will-block-human-rights-act-repeal-for-the-whole-uk-says-nicola-sturgeon-10514015.html> and “*Welsh Government will do ‘everything it can’ to block repeal of the Human Rights Act*” 18 May 2015 <https://www.walesonline.co.uk/news/wales-news/welsh-government-everything-can-block-9279496>

⁵ Lords EU Justice Sub-Committee, ‘*Committee concerned about future of Human Rights Act post-Brexit*’ (18 January 2019) <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2017/cttee-correspondence-hra-post-brexit/>.

⁶ See exchange of letters between the government and the above Committee on this subject at <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/EAtoLB-PolDeclarationReferencetoECHR040119.pdf>

⁷ Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁸ See Amnesty International UK and Liberty’s Joint Briefing on the EU (Withdrawal) Bill for Report Stage in the House of Lords 18 April – 8 May 2018 <https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%20and%20Amnesty%20International%20-%20Joint%20EU%20%28Withdrawal%29%20Bill%20Brief%20Lords%20Report%20Stage%20-%20April%202018.pdf>

⁹ Amnesty International briefing to UN Committee Against Torture, May 2013

¹⁰ Statement of 4 October 2016 <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>

¹¹ *Plan for UK military to opt out of European convention on human rights*, Bowcott and Walker, 4 October 2016, Guardian, <https://www.theguardian.com/uk-news/2016/oct/03/plan-uk-military-opt-out-european-convention-human-rights>

Human Rights¹² after the policy was confirmed in a written statement to Parliament¹³. The Inquiry was closed without report as a result of the dissolution of the Committee for the general election of 2017. In a letter to the Committee, however, the government confirmed its view that the “*extension of jurisdiction to any extraterritorial exercise of force is not consistent with the essentially regional character of the Convention*”, relied on claims relating to violations in Iraq (including of article 3) as evidence of the problem, and declined to set out any detail of the kind of circumstances in which it might decide to derogate. It stated that any such decisions would be made in light of actual circumstances at the time¹⁴.

It is not, of course, possible to derogate from Article 3 of the ECHR. Further, any derogation would be open to scrutiny and have to conform with other international obligations. Nevertheless, while the status of this policy remains unclear¹⁵, its announcement gives rise to serious concerns as to the government's commitment to its obligations under the Convention and other instruments, and to accountability for abuses perpetrated by its armed forces and others overseas.

2.3 CLOSED MATERIAL PROCEDURES (ARTICLE 12, 14, 15 AND 16)

Amnesty International is concerned that the closed material procedures (‘CMP’) introduced by the Justice and Security Act 2013 are undermining the right to an effective remedy and the ability of victims of human rights violations to seek and secure disclosure of material pertaining to those violations in domestic courts on national security grounds¹⁶. In this regard, Amnesty International would also highlight to the Committee that the Bill was introduced as a direct response to the civil claims brought by a number of individuals alleging UK involvement in torture and other ill treatment, rendition and unlawful detention.

Where CMPs are applied for and accepted, all or part of the case is held in a closed forum from which the Claimant is excluded. Instead, they are represented by a Special Advocate, who is unable to take instructions or communicate with their client (other than in very exceptional circumstances) after seeing the closed material, and thus cannot, in Amnesty's assessment, provide effective representation. Closed material – essentially a form of secret evidence – is material which the government claims would be damaging to national security if it were to be disclosed. This material is withheld for the entire case (and indeed perhaps forever) from the individual(s) whose interests are at stake in the case, her/his lawyer of choice, and the public, none of whom has access to the closed hearing. Whilst Amnesty International recognises that the government may be required to classify some particularly sensitive information, it should never negate the rights of victims of human rights violations to disclosure of the truth about what happened to them and to an effective remedy for such violations. Evidence that would tend to prove allegations of torture or other cruel, inhuman or degrading treatment should never be kept secret from a person who alleges he or she was a victim of the human rights violations or his or her legal counsel of choice in civil proceedings in which a remedy for the violation is sought. 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). The right to an effective remedy also means that claimants and their

¹² Letter of 14 December 2016 from the Committee https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/161214_Letter_from_Rt_Hon_Harriet_Harman_to_SoS_Defence.pdf

¹³ Written Statement made by Michael Fallon, Commons HCWS168 (10 October 2016) available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-10-10/HCWS168/>

¹⁴ Letter of 28 February 2017 from Michael Fallon to the Committee https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301_SoS_to_Chair_re_Derogation.pdf

¹⁵ A Private Members' Bill was introduced to parliament under the Ten Minute Rule in January 2019 that its proposers claim would “*require Her Majesty's Government to derogate from the European Convention on Human Rights in its application to the conduct of members of the armed forces participating in combat operations overseas; and for connected purposes.*”. Bills introduced in this manner do not represent government policy and rarely become law. However, as at the date of this submission, the Bill awaits its second reading in Parliament and its fate is unknown. Documents are available at <https://services.parliament.uk/Bills/2017-19/armedforcesderogationfromeuropeanconventiononhumanrights/stages.html>

¹⁶ For further information regarding Amnesty International concerns about the increasing use of secret evidence in the UK see *Left in the Dark: The use of secret evidence in the United Kingdom*, AI Index: EUR 45/014/2012, October 2012

counsel must similarly have an effective means of challenging government evidence that is intended to deny allegations that the government has been responsible for human rights violations.

CMPs are now used in a variety of forums beyond civil proceedings, including employment tribunals, planning inquiries and financial restriction proceedings, and even in proceedings for judicial review¹⁷. The latest quarterly report on their use indicates that in the year Jun 2017-June 2018, eleven applications were made by the government for CMPS, of which not all were accepted¹⁸. This is a significant increase from the five sought in the first year of use¹⁹.

Indeed, the UK has sought to extend the use of these procedures to further forums, including an attempt to introduce CMP in a judicial review brought by torture victim Mr Belhaj against the decision of the Director of Public Prosecutions in 2016 not to prosecute an official for their involvement in his abuse. The application for CMPs was rejected, with the Supreme Court rejecting their use in judicial reviews of decisions made in a criminal cause or matter²⁰. The UK has therefore failed to take any steps to meet the Committee's 2013 recommendation that it ensure CMP provisions conform with the Convention, and indeed sought once more to extend their use to a case in which a torture victim sought accountability and justice for involvement in his abuse.

Amnesty International is concerned that these provisions essentially allow the government to avoid scrutiny and criticism of its human rights record by limiting the ability of victims of human rights violations to seek disclosure of material pertaining to those violations in domestic courts on national security grounds. There is no justification for the provision of a blanket claim to secrecy for the intelligence agencies, as the Bill provides. All measures used to restrict fair trial guarantees based on national security grounds must be provided for in law and must be necessary and proportionate, they must be fully compliant with other human rights obligations. 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 such as secret detention, torture or other ill treatment.

2.4 RECOMENDATIONS

Amnesty International recommends that the United Kingdom:

- incorporate all the provisions of the Convention against Torture in its legislation and raise awareness of its provisions among members of the judiciary and the public at large;
- abandon its stated intention to review the Human Rights Act 1998 after Brexit, and commit to its continued effect, in order that the current protections against torture and other ill treatment are not further diminished in domestic law;
- commit to membership of the European Convention on Human Rights, without time limit or other restriction.
- ensure continued application of the EU Charter on Fundamental Rights in domestic law after Brexit, and place a legislative limit on delegated powers in Brexit related legislation being used to roll back rights and equality protections;

¹⁷ Such as in a judicial review challenging the legality of a search warrant – in *R. (on the application of Haralambous) v St Albans Crown Court* [2018] UKSC 1 the Supreme Court concluded that judicial review had to accommodate CMPS where that had been authorized in the court whose decision was under review.

¹⁸ Report on use of closed material procedure (from 25 June 2017 to 24 June 2018), December 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763751/moj-report-use-of-closed-material-procedure-2017-18.PDF

¹⁹ Report on use of closed material procedure (from 25 June 2013 to 24 June 2014), July 2014, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf

²⁰ *Belhaj & Ors v Director of Public Prosecutions & Ors* [2018] UKSC 33

- recognize fully the extraterritorial application of human rights obligations, including the Convention, to the UK under international law;
- recognize the extraterritorial application of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in line with the General Comments and Concluding Observations of the UN Committee Against Torture;
- commit to seeking derogations from its international human rights commitments only where genuinely necessary and not as a means to avoid accountability for abuses perpetrated overseas;
- repeal the provisions of the Justice and Security Act 2013 which deal with Closed Material Procedures, and all related legislation.

3. UNIVERSAL JURISDICTION

3.1 BARRIERS TO THE APPLICATION OF UNIVERSAL JURISDICTION (ARTICLES 2, 5, 6)

UK law does specifically provide for universal jurisdiction, under section 134 of the Criminal Justice Act 1988 ('CJA'). In 2016, Colonel Kumar Lama, who had been arrested while visiting the UK in January 2013, was acquitted on one count of torture following a landmark trial in the UK courts under the CJA. The jury was unable to reach a verdict on a second count under the same provision. The Crown Prosecution Service ('CPS') decided not to seek a retrial on the second count.

Consistent with the current position under s.135 of the CJA, the Attorney General had given consent to the prosecution. Significant work had had to be done in advance by others to present a plan to the police for dealing with witnesses, before they agreed to a preliminary investigation. This followed an initial refusal by the Metropolitan Police to take the case, citing concerns over whether the Nepali government would cooperate, and risks to the victims²¹. Moreover, before the trial could proceed, the defence sought to argue that Lama had functional and personal immunity at the time of his arrest and detention, since the alleged abuses happened while he was a serving army official and he had been arrested when serving as an expert with the UN mission in South Sudan. This claim was rejected²².

Commentators have noted several problems with the criminal trial itself, including the lack of proficient interpreters and poor quality of the translation done (resulting in postponement of the first trial in 2014)²³, and the impact of the unfamiliar adversarial and CPS system and cultural differences on the confidence and

²¹ See "The Curious Case of Colonel Kumar Lama: Its origins and impact in Nepal and the United Kingdom, and its contribution to the discourse on Universal Jurisdiction", Sneha Shrestha, TLI Think! Paper 2/2018, 6 February 2018 at [2.3].

²² *R v Lama* [2014] EWCA Crim 1729 [2017] Q.B. 1171. The Court of Appeal noted that if *immunity ratione materiae* was available for such cases, that "would be incompatible with the Convention against Torture and would defeat its purpose", and ruled it was not available in any case of official torture as defined by the Convention [30, 49]. It further observed that the "rule granting immunity from jurisdiction is not a derogation from the prohibition on torture. It cannot be characterised as condoning or authorising such conduct, nor can it absolve those responsible from liability" at [37]. Any immunity *ratione personae* had been waived, with retroactive effect, by the UN. The court also rejected the defendant's claim of *autrefois convict*.

²³ Shrestha, per fn 8, p.17.

understanding of the witnesses²⁴. There were difficulties with the evidence, and the gap between the first and second trial has been said to have led to threats in Nepal to the victims²⁵. Moreover, the Nepali government refused to assist the prosecution with matters like access to primary evidence in Nepal, but offered access and assistance to the defence, undermining the viability of the prosecution²⁶. These are concerns which Amnesty International considers require urgent attention to avoid their recurrence in future cases.

That is particularly pressing because unlike in Denmark, the Netherlands and Norway, there is no specialised investigative unit to deal with universal jurisdiction cases in the UK. There is therefore a serious lack of dedicated resource for such prosecutions. As Redress documents in its joint civil society briefing, lack of resources continues to unjustifiably delay investigations for universal jurisdiction.

Charges have however recently been brought in the UK against Agnes Taylor, wife of Charles Taylor, for torture in Liberia. Her trial was postponed in February 2019 and is currently pending.

Further complicating efforts to secure accountability in such cases is the UK's continued grant of special mission immunity to certain individuals visiting the UK with the approval of the foreign office. This is done without providing reasons or indeed any public information about the beneficiaries of such grants. In 2015, Lt General Mahmoud Hegazy, who is suspected of torture and other ill-treatment following former president Mohamed Morsi's removal from power by a military-led coalition in 2013, made an official visit to the UK. Members of Morsi's Freedom and Justice Party notified the Metropolitan Police of General Hegazy's likely presence in the UK and requested his arrest on the allegations of torture. However, the Metropolitan Police claimed that they had been advised by the FCO and the Crown Prosecution Service that Hegazy had "*special mission immunity*" and therefore could not be arrested. This was challenged by those same individuals in the domestic Courts, with Amnesty International and Redress intervening to argue that there is no rule of customary international law requiring states to secure personal inviolability and immunity from criminal jurisdiction for the members of the special mission, and that any such rule should not be considered part of the common law given its incompatibility with the UK's obligations under the Convention²⁷. Regrettably, the Court of Appeal did not agree²⁸. Amnesty International considers both the ruling (that there is no tension between the UK's obligations under the Convention to secure universal jurisdiction for crimes of torture and the existence of a common law obligation to grant special mission immunity) and the UK practice to be deeply concerning.

3.2 MAINTAINING A PROHIBITED DEFENCE FOR A QUARTER CENTURY (ARTICLES 2, 5, 6)

The UK continues to maintain in legislation a prohibited defence to any prosecution for torture based on universal jurisdiction under section 134 of the Criminal Justice Act 1988 ('CJA'). Section 134(4) expressly provides that "*[i]t shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.*" Section 134(5) further explains that "*[f]or the purposes of this section 'lawful authority, justification or excuse' means—*

²⁴ Ibid see also '*Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case*' Ingrid Massage and Mandira Sharma, *Journal of Human Rights Practice*, 2018, 1–19 doi: 10.1093/jhuman/huy020

²⁵ Shrestha, per fn 8, p.19.

²⁶ Ibid p.20.

²⁷ <https://www.amnesty.org.uk/press-releases/court-appeal-consider-whether-suspected-torturers-visiting-uk-can-be-given>

²⁸ *R. (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719; [2019] 2 W.L.R. 578. The Court concluded, inter alia, that given the silence of the State Immunity Act 1978 on this topic, it was intended by parliament "*to be left to the general common law, informed by and developed in line with customary international law*" at [124]. Further, it expressed the view that there was an obligation under customary international law, and the common law, to secure just immunity, even in cases of jus cogens crimes such as Torture. It observed that this was an immunity regime which dependent upon decisions of the executive, in that it was for them to decide whether or not to confer such immunity on those individuals the sending state wishes to include in the mission.

[...]

(b) in relation to pain or suffering inflicted outside the United Kingdom—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.”

The existence of this defence means that it may be possible for individuals charged with torture to avoid prosecution or conviction on the basis that their actions were lawful in the state where the offence occurred. However, despite repeated recommendations from this Committee in its Concluding Observations that the UK ensure any defences to a charge under s.134 are compatible with the Convention and (in 2013) to repeal s.134(4) and (5), no steps have been taken to do so.

3.3 RESTRICTING THE ABILITY OF VICTIMS TO CONDUCT PRIVATE PROSECUTIONS (ARTICLE 5)

As the Committee observed in its concluding observations of 2013, the Police and Social Responsibility Act 2011 made the pursuit of private prosecutions – including those based on universal jurisdiction – harder, by requiring the consent of the Director of Public Prosecutions before an arrest warrant can be issued for certain offences alleged to have been committed outside the UK. These changes have seriously undermined the ability of victims through private prosecutions to implement the Convention against Torture in England and Wales and should be amended to eliminate these restrictions so that victims can effectively enforce the Convention. Despite the observations of the Committee in 2013, no steps have been taken to repeal these provisions.

3.4 FAILING TO PROVIDE FOR CIVIL UNIVERSAL JURISDICTION (ARTICLE 14)

According to General Comment No. 3 adopted by the Committee, states parties to the Convention have been obliged since ratification to implement Article 14 by providing that their courts can exercise universal jurisdiction over civil claims – whether in civil cases or in civil claims in criminal cases. However, the UK has failed to fulfil its obligations to do so for a quarter century. There have been no steps to improve the position in this respect despite the Committee’s recommendation to close the impunity gap in 2013.

3.5 RECOMMENDATIONS

Amnesty International recommends that the United Kingdom:

- strengthen the capacity of the police and CPS to investigate and prosecute crimes under international law (including torture), including through creating specialized dedicated and independent international crimes units within the Metropolitan Police and Crown Prosecution Service to investigate and prosecute universal jurisdiction crimes including torture;
- devote sufficient resources to ensure that universal jurisdiction investigations and prosecutions are carried out swiftly, and that the current unjustifiable delays are prevented. This should include consideration of how to overcome practical barriers such as refusal of foreign states to cooperate

effectively, poor interpretation services and any cultural differences that may inhibit the ability of witnesses to participate effectively;

- repeal the prohibited defences under s.134 of the CJA 1988 and ensure that its legislation reflects the absolute prohibition of torture, in accordance with article 2, paragraph 2, of the Convention, which states that no exceptional circumstances whatsoever may be invoked as a justification of torture;
- remove the requirement for consent of the Director of Public Prosecutions to issue private arrest warrants;
- publish its policy on granting special mission immunity and ensure that special mission immunity is not granted to individuals where there is credible evidence that they have committed torture, other ill treatment or other international crimes;
- introduce legislation to fill the gap and ensure universal civil jurisdiction for relevant claims.

4. GUIDANCE AND PRACTICE IN DEALING WITH A REAL RISK OF TORTURE AND OTHER ILL TREATMENT

4.1 CONSOLIDATED GUIDANCE (ARTICLES 2 AND 11)

The primary public document governing the UK's policy in dealing with risks of torture and other ill-treatment arising in dealings with foreign entities is the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (the 'Consolidated Guidance'). In its Concluding Observations of 2013, the Committee noted with concern the reliance in the 2010 draft on the use of assurances where a real risk of torture or other ill-treatment was identified, and the ambiguity there contained concerning the absolute prohibition of torture and ill-treatment²⁹. Amnesty International notes that the latest draft of the Guidance, and the government's approach to it, not only continues to rely heavily on the use of unwritten, unverifiable assurances, but in fact allows for the possibility that Ministers may authorise action in the face of a real risk of ill treatment falling short of torture, contrary to the UK's obligations under international law.

Following pressure from civil society and in the wake of the publication of the Intelligence and Security Committee's ('ISC') report into current issues arising from its Detainee Inquiry (which identified myriad

²⁹ Concluding Observations at [11].

problems with that draft³⁰) the government finally invited the Investigatory Powers Commissioner ('IPCO') to recommend improvements to the Guidance. IPCO subsequently launched a public consultation³¹.

Amnesty International raised several concerns with IPCO about the current Guidance, which we do not believe is consistent with the government's commitments under international law. Those concerns have only intensified during the consultation, particularly in relation to continuing debate over the role of 'balancing' in the context of risk of ill treatment³². Our concerns include the following:

- I. It only applies to certain listed UK government agencies, rather than the actions of all public officials engaging with foreign entities in relevant situations. To provide appropriate protection, it should expressly apply to all public agents engaging with those detained abroad, receiving information from such detainees or providing information which could lead to detention.
- II. It is said to apply to working with foreign liaison services. It should expressly apply to engagement with any foreign state service and non-state actor, and to joint units and other situations where the UK's responsibility under international law is engaged by the action proposed.
- III. It remains unclear whether the Guidance is a statement of policy or an operational guide, or something else³³. It currently only applies to actions of UK officials and does not include any criteria for actions taken and decisions made by Ministers. This leaves doubt and ambiguity over how that discretion may be exercised. It should include a clear statement that torture and other ill treatment are prohibited under domestic law and that Ministers will never authorise an action where there exists a real risk of either arising, regardless of the location of the individual in question.
- IV. The underlying policy and guidance document are currently secret, meaning there is little transparency and ability to hold individuals to account. They should be made public.
- V. The Guidance refers to a standard of 'serious risk' of torture instead of the more widely used 'real risk' standard. The former implies a higher threshold and is confusing to officials. It should be amended.
- VI. The Guidance states that there are different legal principles when considering whether to proceed where there is a serious risk of torture, and where the risk is of other ill treatment (see para 7). That is a dangerous distinction in the context of state responsibility and implies that there may be scope for some kind of balancing of risks in the case of other ill treatment. The Guidance should make clear that there is no distinction between torture and other ill treatment for the purposes of state responsibility and decision making in this sphere.
- VII. There is no guidance as to the meaning of 'serious risk' of torture or other ill treatment. Further language is needed to assist with its application.
- VIII. The Guidance continues to place significant weight on the use of assurances to 'mitigate' an identified serious risk below that threshold. The ISC report noted that in almost all cases of assurances it had assessed, those were verbal rather than written, and no instructions existed to officials to send a record of that verbal assurance to the partner in question. Nor was there any routine tracking of adherence to such assurances. Nor were any statistics collected on the number of assurances obtained³⁴. That is a bleak picture. Amnesty agrees with the Committee's assessment in its 2013 concluding observations that diplomatic assurances are unreliable and ineffective. Promises of humane treatment given by governments which carry out such practices

³⁰ Intelligence and Security Committee of Parliament, '*Detainee Mistreatment and Rendition: Current Issues*' (2018) available at: <https://bit.ly/2HsE7bJ> and press release available here <https://bit.ly/2UcKZvq>. Summary of the ISC's findings and recommendations is available at pp. 2-4 of the 'Current Issues' report available here: <https://bit.ly/2HsE7bJ>

³¹ Public Consultation document august 2018 available at <https://www.ipco.org.uk/docs/IPCO%20Consultation%20on%20the%20Consolidated%20Guidance.pdf>

³² That this remains a live debate can be seen from the summary of a Chatham House rules consultation meeting posted by IPCO here: <https://www.ipco.org.uk/docs/IPCO%20Statement%20on%20the%20Chatham%20House%20discussions%2012%20Dec%202018.pdf>

³³ Clarity over its intent and purpose would assist in advising on the appropriate content.

³⁴ ISC report at 133, 138, 56-57, fn 82 and Recommendation X

are not capable of providing an effective safeguard against abuse³⁵. When those assurances are verbal, unrecorded and generally unevaluated, that is even more striking. That the Consolidated Guidance relies so heavily on assurances in so many areas (detention, interviewing, passing and receiving information) therefore seriously weakens its potential to ensure UK agents' actions are consistent with the UK's international human rights obligations. The UK should no longer rely on the use of assurances or caveats as a way to 'mitigate' an otherwise serious risk of torture or cruel, inhuman or degrading treatment (CIDT).

- IX. The Guidance does not make clear that following its provisions does not shield individuals from criminal responsibility. It should do so.
- X. Better and more robust oversight of the implementation and content of the Guidance is essential.

It is not yet known at the date of this submission whether and when IPCO will publish its findings and recommendations for the Guidance, although it is expected in spring 2019. The Prime Minister is not obliged to accept any recommendations that may be made.

4.2 DIPLOMATIC ASSURANCES (ARTICLES 3 AND 13)

It is abundantly clear from the Intelligence and Security Committee's review of the Consolidated Guidance that reliance on diplomatic assurances continues to be at the heart of the UK's approach to forcible transfers of individuals and the risk of torture and other ill-treatment on return.

Despite the Committee's recommendation that the UK refrain from seeking and relying on diplomatic assurances, arrangements remain in place with several countries for their continuing use. A review in 2017 of the UK's use of such assurances in deportation cases concluded, however, that the practice had diminished in recent years (though Amnesty International considers it likely that negative court judgments played a part in this trend, i.e. in the case of deportations to Algeria and Ethiopia in particular).

Since the Committee's last UK review in 2013, the UK's Mutual Legal Assistance Treaty (MLAT) with Jordan has come into force, and in July 2013 Abu Qatada was deported under its provisions. While he was subsequently tried and acquitted in Jordan, evidence of a confession extracted under torture from a witness was in fact admitted in evidence in 2014, in direct breach of the assurances in the MLAT³⁶. Several proceedings to deport individuals to Ethiopia using assurances were withdrawn by the government in 2014. Notably, in 2016 the Special Immigration Appeals Commission concluded that assurances relied upon by the UK in seeking six deportations to Algeria – in circumstances where it was conceded a real risk of mistreatment existed absent those assurances – were inadequate, given the lack of a robust verification system³⁷. Proceedings to deport one individual to Jordan were withdrawn in July 2016 after Jordan repeatedly declined to provide assurances³⁸.

4.3 DEATH PENALTY ASSURANCES (ARTICLE 3 AND 16)

The UK practice of seeking comprehensive assurances over the use of the death penalty has been seriously undermined in 2018 by the approach taken to the case of the ISIS "Beatles". In 2015, the US authorities had requested legal assistance from the UK government in respect of an investigation that they were conducting into the activities of a group of British individuals operating in Syria. These individuals were

³⁵ See Amnesty International's report 'Dangerous Deals: Europe's reliance on diplomatic assurances against torture, 2010 EUR 01/012/2010

available at <https://www.amnesty.org/download/Documents/36000/eur010122010en.pdf>,

³⁶ As reported by Human Rights Watch in July 2014: <https://www.hrw.org/news/2014/07/11/abu-qatada-trial-showed-uk/jordan-torture-treaty-worthless>

³⁷ *BB, PP, W, U, Y and Z v SSHD*, Judgment of 18 April 2016, Appeal Nos. SC/39/2005, SC/34/2005, SC/54/2005, SC/32/2005, SC/36/2005, SC/37/2005 available at <http://statewatch.org/news/2016/may/uk-siac-judgment-w-others-deportation-with-assurances-18-4-16.pdf>

³⁸ Details of the above cases are set out in David Anderson QC's review of the deportation with assurances policy of 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630812/59541_Cm_9462_Print.pdf

suspected of being involved in the murder of US citizens in Syria and have been colloquially labelled as the ISIS “Beatles”. US demands for assistance became more pressing after the apprehension of one of the men, Mr El Sheikh, in 2018, by which time a new US administration had come to power. UK Central Authority³⁹ concluded such assistance might directly or significantly contribute to the death penalty and noted that the Foreign and Commonwealth Office (FCO) had recommended the usual comprehensive assurances were sought, warning that if this were not done, the UK risked undermining attempts to seek assurances in other cases and with other countries in future.

Despite this, in direct conflict with its normal policy, the UK government decided not to seek any assurances at all in the men’s case. An attempt to challenge that decision failed in the domestic courts⁴⁰ but is currently expected to be heard on appeal. Amnesty International considers this change in position, apparently taken to accommodate concerns about the likely reaction from the current US administration, to be wholly unacceptable. Moreover, it places future attempts to secure death penalty assurances from the US and other countries at risk, as was advised by the FCO⁴¹.

4.4 STATELESSNESS AND DEPRIVATION OF CITIZENSHIP (ARTICLES 2, 3, 16)

Amnesty International agrees with Redress and other organisations⁴² that citizenship stripping can be understood as an attempt by the UK Government to divest itself of responsibility for an individual, by a decision which can expose that person to a real risk of torture and other ill-treatment in another country but is not always considered against that risk.

Section 66 of the Immigration Act 2014, commenced in July 2014, amended the British Nationality Act 1981 to extend the powers of the Home Secretary to deprive a person of her, his or their British citizenship.⁴³ In particular, the provision permits a British citizen by naturalisation to be deprived of their citizenship in circumstances where to do so will make her, him or them immediately stateless. This is permitted where the Home Secretary is satisfied that it is conducive to the public good to do so and two further conditions are satisfied. Firstly, that the person’s conduct has been seriously prejudicial to the vital interests of the United Kingdom. Secondly, that the Home Secretary reasonably believes the person will be able to acquire another nationality. This extension of the power to deprive does not require judicial approval, which Amnesty International considers particularly striking given the decision in practice may have the consequence of abandoning the individual in the face of a real risk of torture or other ill treatment.

This power and its effect has recently been highlighted in the discussion of the decision by the Home Secretary to deprive Shamima Begum of British citizenship. She is a British citizen who left the UK at age 15 to join ISIS. On the available evidence, Amnesty International considers it likely that the extension has not lawfully been applied to her, as she is not a British citizen by naturalisation. At the time of deprivation, she was either pregnant or had just given birth to a British child, in circumstances of effective detention in an IDP camp. Her case therefore also raises further questions about the UK’s use of powers to deprive, particularly (not solely) in relation to its international obligations to children, and including the obligation to prioritise a child’s best interests and to facilitate a child’s rehabilitation and reintegration.⁴⁴ Within weeks of the deprivation decision, her child had died in the appalling conditions of the camp in which she then

³⁹ The Home Office body which deals with MLA requests in England, Wales and Northern Ireland (except tax and fiscal customs matters), see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf

⁴⁰ *El Gizouli v Secretary of State for the Home Department* [2019] EWHC 60 (Admin). It should be noted that while the claimants conceded the question of ECHR jurisdiction in this case, Amnesty International considers that concession to have been regrettable. The question of ECHR jurisdiction in such cases, where the UK exercises significant influence over the fate of the individual, is one which is also likely to arise in the context of the review of the Consolidated Guidance, and the position the UK takes as to its legal obligations.

⁴¹ *El Gizouli* at [19]

⁴² See Civil society alternative report to the UN Committee against Torture, March 2019

⁴³ Section 66 of the Immigration Act 2014 introduced section 40(4A) to the British Nationality Act 1981, commenced by SI 2014/1820

⁴⁴ Article 40 of the 1989 UN Convention on the Rights of the Child

lived⁴⁵. It has since been reported that two further British women have had their citizenship revoked, widows who are effectively detained in such Syrian camps, with five children between them⁴⁶.

These decisions are consistent with a trend of an ever increasing number of decisions to deprive individuals of citizenship, in a wide variety of circumstances. In the last year for which official figures are available, 2017, 104 people were deprived, an increase from just 14 people in the equivalent period of 2016⁴⁷. There are particular concerns about whether individuals who are deprived while overseas are thereby exposed to a real risk of torture and ill treatment. The UK government does not consider that ECHR jurisdiction is engaged by decisions in such circumstances⁴⁸, thus enabling it to evade the responsibility under article 3 properly to assess whether its decision will have such consequence, in contrast with decisions to deport from the UK. Amnesty International considers this to be a highly dubious interpretation of jurisdiction under the ECHR and this Convention, consistent with the government's hostility to extraterritorial jurisdiction outlined above.

Further in relation to statelessness, Amnesty International wishes to draw the Committee's attention to the charging of £1,012⁴⁹ – £640 of which is in excess of the administrative cost of registration⁵⁰ – for a stateless child or young person to exercise her, his or their entitlement to register as a British citizen under paragraph 3 of Schedule 2 to the British Nationality Act 1981 in accordance with the UK's obligations under the 1961 UN Convention on the reduction of Statelessness.⁵¹ Whereas the Committee has identified the UK's statelessness determination procedure within its list of issues, those procedures concern the UK's immigration rules and are distinct from UK nationality law.

4.5 RECOMMENDATIONS

Amnesty International recommends that the United Kingdom:

- rewrite the Consolidated Guidance to ensure it complies with obligations under international law, including an explicit statement that no actions will be authorised by Ministers or officials where there exists a real risk of torture or other ill treatment;
- end its practice of seeking diplomatic assurances to enable removal of individuals in the face of an identified real risk of torture or other ill treatment. It should further remove from the Consolidated Guidance the possibility of it having recourse to assurances where a real risk of torture or ill-treatment has been identified;
- reverse its decision to provide legal assistance to the USA in the case of the ISIS Beatles without seeking comprehensive death penalty assurances, and never again offer assistance without such assurances in other cases;
- not exercise its powers to deprive British citizens where this would render them stateless, or at real risk of torture or other ill treatment. Deprivation of citizenship should only ever be used as a last resort, and only exercised where lawful, necessary and proportionate. Particular attention should be given to the best interests of any children affected by such decisions;

⁴⁵ *Shamima Begum: baby son dies in Syrian refugee camp*, Guardian, Chulov Parveen and Rasool, 9 March 2019 <https://www.theguardian.com/uk-news/2019/mar/08/shamima-begum-confusion-after-reports-newborn-son-may-have-died>

⁴⁶ *Rescuing Begum's baby would have been too dangerous, says Hunt*, Guardian, Quinn, 10 March 2019 https://www.theguardian.com/world/2019/mar/10/two-more-isis-women-reema-and-zara-iqbal-syrian-camps-stripped-of-british-citizenship?CMP=Share_iOSApp_Other

⁴⁷ HM Government Transparency Report 2018: Disruptive and Investigatory Powers, July 2018 at [5.9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCSO_418538240-1_Transparency_Report_2018_Web_Accessible.pdf

⁴⁸ See Report of David Anderson QC, "Citizenship removals resulting in statelessness", April 2016, at [3.7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL__web_.pdf

⁴⁹ SI 2018/330

⁵⁰ See: <https://www.gov.uk/government/publications/visa-fees-transparency-data>

⁵¹ Paragraph 3 of Schedule 2 to the British Nationality Act 1981 is intended to give effect to the Convention (in particular Article 1 and 2) as confirmed by Ministers during the passage of the Act through Parliament: see e.g. *Hansard* HC, 6 May 1981: Col 1726 & 1735; 3 June 1981: Col 986.

- remove the fee altogether; or restrict it to no more than the administrative cost of registration and provide a waiver for any person who is unable to pay the administrative cost.

5. FORCED REMOVALS AND IMMIGRATION DETENTION

5.1 FORCED REMOVALS AND HARM IN DETENTION (ARTICLES 2, 12 AND 13)

While Amnesty International has not revisited the use of force during forced removals – a matter to which we drew the Committee’s attention in April 2013⁵² when we referred to *Out of Control*, our July 2011 briefing⁵³ – our concerns remain. Those have only heightened following recent revelation of significant abuse in immigration removal centres, particularly in Brook House (in 2017)⁵⁴ and Harmondsworth (in 2018);⁵⁵ and the protest by women held in Yarl’s Wood (in 2018)⁵⁶ and the finding of the High Court of unlawful use of powers of segregation against a woman in Yarl’s Wood in 2016.⁵⁷ These recent events suggest that training, guidance and supervision made available to officials and private contracted staff and/or legal safeguards, access to legal remedies and independent, including judicial, oversight are inadequate to deter, constrain and prevent abuse.

Amnesty International is not in a position to assess relevant training, guidance and supervision. Nonetheless, the filmed abuse that has been put in the public domain also indicates profound inadequacies in relation to training, guidance and/or supervision.

However, we draw the Committee’s attention to measures to remove or reduce access to legal representation including cuts to legal aid from April 2013⁵⁸ and statutory exemption from giving effective notice of a person’s planned removal from the UK introduced by the Immigration Act 2014⁵⁹. These are, in our view, likely to have substantial impact in increasing the vulnerability to abuse of detained people.

⁵² See briefing to the UN Committee against Torture, April 2013, EUR 45/002/2013

⁵³ See: <https://www.amnesty.org.uk/resources/out-control-report>

⁵⁴ See <https://www.bbc.co.uk/programmes/b094mhsn>

⁵⁵ See e.g. <https://www.theguardian.com/uk-news/2018/oct/11/home-office-agrees-inquiry-immigrant-abuse-claims-detainees-removal-centres>

⁵⁶ See e.g. <https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-43306966>

⁵⁷ *Muasa v Secretary of State for the Home Department* [2017] EWHC 2267 (Admin)

⁵⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012, as commenced by SI 2013/453

⁵⁹ Section 1, as commenced by SI 2014/2771; SI 2014/2928 and SI 2015/371. The Home Office policy introduced following the commencement of this provision is currently the subject of litigation. It is reported on 14 March 2019 by Medical Justice, the NGO litigant, that the policy has been suspended by the High Court.

5.2 IMMIGRATION DETENTION (ARTICLES 2, 3, 11 AND 16)

Immigration detention powers continue to be used in the UK routinely and excessively, including where to do so is unnecessary or disproportionate. Amnesty International has emphasised the routine use of these powers following publication of its research in *A Matter of Routine*, December 2017 report.⁶⁰ Amnesty's findings are consistent with the conclusions of a joint all-party parliamentary inquiry in 2015 into immigration detention,⁶¹ the findings of a Government-appointment independent reviewer of the use of immigration detention powers⁶² and the results of forensic inquiry by the Joint Committee on Human Rights into the detention of two members of the Windrush generation – the latter published as the Committee's *Windrush generation detention*, June 2018 report.⁶³

The number of people taken into immigration detention each year reached a peak in 2015, during which year 32,447 entered detention.⁶⁴ This number has reduced year on year to 2018, during which year 24,748 people were taken into detention.⁶⁵ However, Amnesty International does not consider this decline to constitute a fundamental change in the routine and excessive use of these powers. The number of people suffering immigration detention each year remains in the tens of thousands. In 2018, only 44% of the people who left detention were removed from the UK compared to 47% during 2017.⁶⁶ Home Office immigration statistics indicate that there is an even more marked disparity between the use of these powers and the attainment of a lawful purpose for their use. For example, in 2018, fewer than one third of people of Chinese or Nigerian nationality were removed when their detention came to end; fewer than a quarter of people of Indian, Pakistani or Bangladeshi nationality were removed; and fewer than 10% of people of Iraqi nationality. The number of people of these nationalities who left detention during that year ranged between 955 and 1,948.⁶⁷

While calls for a statutory time limit on the exercise of the power to detain have grown, the UK remains without a time limit on immigration detention except where the powers are used to detain children. Parliamentary scrutiny of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill is ongoing at the time of writing and gives an opportunity for wide and cross-party criticism of the continued absence of a time limit. It remains to be seen whether Parliament will insist on the introduction of a time limit or the Government will introduce one. It also remains to be seen, if either eventuality is realised, whether any such time limit will be applied equally and to all subjected to immigration detention and/or whether it will be sufficiently short as to effectively constrain the use of these powers.⁶⁸ Amnesty International remains concerned that if a time limit is introduced, which we continue to call for, it must apply to everyone detained regardless of, in particular, any history of offending and that immigration detention powers must be reserved for and properly directed to immigration (not criminal justice) purposes. Amnesty International has not specified a particular time period to which the use of the power should be limited but we have expressed our view that 28 days, which has received a significant degree of attention as proposed limit, is itself a long period of time for any person to be detained for immigration purposes.⁶⁹

⁶⁰ See: <https://www.amnesty.org.uk/resources/matter-routine-use-immigration-detention-uk-0>

⁶¹ See: <https://detentioninquiry.com/report/>

⁶² See: <https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons> and also: <https://www.gov.uk/government/publications/welfare-in-detention-of-vulnerable-persons-review-progress-report>

⁶³ See: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf>

⁶⁴ Home Office quarterly immigration statistics

⁶⁵ Home Office quarterly immigration statistics

⁶⁶ Home Office quarterly immigration statistics

⁶⁷ Home Office quarterly immigration statistics

⁶⁸ See second reading and public bill committee debates (and evidence sessions):

<https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal.html>

⁶⁹ Amnesty's oral evidence is available here: [https://hansard.parliament.uk/commons/2019-02-14/debates/79f7f454-ad3b-4668-8bb4-2e14d92e2bb8/ImmigrationAndSocialSecurityCo-Ordination\(EUWithdrawal\)Bill\(ThirdSitting\)](https://hansard.parliament.uk/commons/2019-02-14/debates/79f7f454-ad3b-4668-8bb4-2e14d92e2bb8/ImmigrationAndSocialSecurityCo-Ordination(EUWithdrawal)Bill(ThirdSitting)) and written evidence here: <https://publications.parliament.uk/pa/cm201719/cmpublic/Immigration/memo/ISSB25.pdf>

5.3 RECOMMENDATIONS:

Amnesty International recommends that the United Kingdom:

- ensure that all allegations of harm on removal from the UK are subject to a prompt, thorough, effective and transparent investigation by an impartial and independent body;
- ensure that all staff involved in forced removals are selected with the utmost care and receive appropriate, specific training designed to minimise the risk of ill-treatment;
- end all detention of children under immigration powers;
- introduce a statutory time limit which applies equally to all persons subjected to immigration detention powers. That time limit should be sufficiently short to effectively constrain the use of detention powers to circumstances and timeframes that are necessary and proportionate to achieving a lawful purpose.

5.4 INCREASED VULNERABILITY TO EXPLOITATION AND ABUSE (ARTICLE 2)

Amnesty International is concerned that several legislative and other measures since May 2013 have significantly increased the vulnerability of migrants to human trafficking and related exploitation and of migrant women, in particular, to domestic violence. These include the removal of appeal rights by the Immigration Act 2014;⁷⁰ the extension of immigration checks and gatekeeping in access to public and private services and opportunities including access to healthcare,⁷¹ police services⁷² and rented accommodation⁷³ (including by the Immigration Acts 2014 and 2016); and the introduction by the Data Protection Act 2018 of sweeping exemptions to the immigration authorities (and other public and private bodies carrying out or facilitating immigration functions) from data protections.⁷⁴ As the Health and Social Care Select Committee has highlighted in its *Memorandum of understanding on data-sharing between NHS Digital and the Home Office*, April 2018 report,⁷⁵ in relation to healthcare in particular, data-sharing for immigration purposes has a significant deterrent effect on people. People who fear, rightly or wrongly, that they may face prosecution, detention or expulsion at the hands of the immigration authorities are especially vulnerable to the control of traffickers and other abusers and deterred from accessing even vital services or protection from abusers.

5.5 ASYLUM DECISION MAKING (ARTICLE 3)

Amnesty International remains concerned that asylum decision-making does not appropriately reflect the conditions in relevant countries of origin; and may be influenced by irrelevant policy considerations such as a desire to deter applications. Our reports into asylum decision-making *A question of credibility* (April 2013)⁷⁶ and *Get it Right* (2004)⁷⁷ raising concerns about asylum decision-making are at least consistent with this concern. Of more direct relevance is the sudden and dramatic rise in refusal of Eritrean asylum claims in 2015,⁷⁸ which was a repeated cause for concern to the Home Affairs Select Committee including in its *The*

⁷⁰ Section 15, commenced by SI 2014/2771; SI 2014/2928 and SI 2015/371

⁷¹ As implemented by SI 2015/238 (and as subsequently amended); and by provisions in the Part 9 (grounds for refusal) of the immigration rules for refusing immigration applications made by persons with outstanding NHS debts.

⁷² As e.g. confirmed by report in *The Telegraph*: <https://www.telegraph.co.uk/news/2018/12/07/police-told-not-take-action-against-illegal-immigrants-victims/>

⁷³ See *JCW v Secretary of State for the Home Department* [2019] EWHC 452 (Admin)

⁷⁴ Paragraph 4 of Schedule 2, commenced by SI 2018/625

⁷⁵ See: <https://publications.parliament.uk/pa/cm/cm201719/cmselect/cmhealth/677/677.pdf>

⁷⁶ See: <https://www.amnesty.org.uk/resources/question-credibility-why-so-many-initial-asylum-decisions-are-overturned>

⁷⁷ See: <https://www.amnesty.org.uk/resources/get-it-right-home-office-decisions-making-fails-refugees>

⁷⁸ Home Office quarterly immigration statistics

work of the Immigration Directorates (Q1 2016), July 2016 report (see paragraph 31).⁷⁹ More generally, high success rates on appeal,⁸⁰ particularly in relation to certain countries of origin, continue to call into question the reliability of decision-making on asylum claims; as do the country situations of many of the countries to which this decision-making relates. For example, as success rates on appeal by people seeking asylum from Afghanistan have risen to over 50% since 2014, refusals of asylum claims by Afghans remain high.⁸¹

5.6 REDRESS FOR VICTIMS OF THE WINDRUSH SCANDAL (ARTICLE 14 AND 16)

The Committee may wish to inquire into the Home Office Windrush compensation scheme. The intention to establish the scheme was announced with a consultation⁸² in response to the public exposure in April 2018⁸³ of years of wrongful treatment and suffering of people who had come and settled in the UK from the Caribbean and other parts of the Commonwealth. That had occurred at the hands of immigration officials and other public servants and private parties as a direct result of immigration policy and practice. That treatment and suffering included detention and exile, destitution, homelessness and denial of access to healthcare or any means of livelihood and, in at least one reported instance, suicide. More information is available from reports of the Home Affairs Select Committee, *The Windrush generation*, July 2018⁸⁴ and Joint Committee on Human Rights, *Windrush generation detention*, June 2018⁸⁵ and Amnesty's response to the Home Office Windrush lessons learned review.⁸⁶ The compensation scheme is yet to be launched. It remains unknown how many people have suffered injustice and harm that is relevant to this scheme; and the severity of that injustice and harm will differ in nature and severity as between people affected. Nonetheless, the exile, deprivation of liberty and/or degradation of life and personhood suffered by at least some people affected is, in the view of Amnesty International, likely to have reached or crossed the threshold of what constitutes degrading treatment. That some people may continue to be exiled in contravention of statutory exemptions⁸⁷ from the deportation powers exercised against them is a further matter of concern given that the Home Office maintains a policy of not reviewing any deportations it has carried out on grounds of criminality.⁸⁸

5.7 OVERSEAS DOMESTIC WORKER VULNERABILITY (ARTICLE 16)

In considering the impact of changes to immigration rules and policy concerning migrant domestic workers, the Committee may wish to consider the December 2015 report of the Government appointed independent reviewer of the overseas domestic workers visa.⁸⁹ The protection provided by the immigration rules to migrant domestic workers remains significantly reduced following changes made to those rules in 2012

⁷⁹ See: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf>

⁸⁰ Home Office quarterly immigration statistics

⁸¹ Home Office quarterly immigration statistics

⁸² See:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747908/Windrush_Compensation_Consultation_Web_Accessible_Final_11_Oct.pdf

⁸³ See e.g. <https://www.bbc.co.uk/news/uk-politics-43944988>

⁸⁴ See: <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/990/990.pdf>

⁸⁵ See: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf>

⁸⁶ See:

<https://www.amnesty.org.uk/files/Resources/AIUK%20to%20Home%20Office%20Windrush%20Lessons%20Learned%20Review.pdf>

⁸⁷ Section 7 of the Immigration Act 1971 and section 33(1)(b) of the UK Borders Act 2007

⁸⁸ As confirmed by Home Office update to the Home Affairs Select Committee, November 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755675/2018112_-_Monthly_HASC_update.pdf

⁸⁹ See:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWW_Review_-_Final_Report_6_11_15_.pdf

providing these workers less freedom to escape abusive conditions by taking alternative employment. Amnesty International, therefore, remains concerned about the circumstances of these workers as we shared with the independent reviewer during the consultation which preceded his report. Additionally, these workers' vulnerability is increased by the various policy measures introduced since 2013 to which we have referred in relation to Article 2 and, in particular the circumstances of migrant victims of human trafficking and migrant survivors of domestic violence.

5.8 TRAINING OF OFFICIALS OVERSEAS (ARTICLES 10, 12 AND 13)

Amnesty International is also concerned about the role of UK officials in training the Libyan coastguard to intercept, detain and return people at sea to Libya. The coastguard has been repeatedly exposed for directly violating human rights and complicity with other human rights abusers. Those violations are well documented, by UN bodies⁹⁰ and international human rights organisations including Amnesty International,⁹¹ as including abuses that are life-threatening and/or constitute torture, cruel, inhuman and degrading treatment.

5.9 RECOMMENDATIONS

Amnesty International recommends that the United Kingdom:

- reinstate vital safeguards including appeal rights, and the reversal of the legal aid cuts made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012; and remove the general exemption from data protection laws for immigration purposes;
- ensure access to vital services such as social assistance, police protection and healthcare are not dependent on immigration status, and that access to these and other public and social provision does not involve or permit data being passed to immigration authorities for immigration purposes;
- amend its immigration rules to ensure all migrant victims of domestic abuse have access to the means to escape their abuser and regularise their immigration status independent of that abuser;
- ensure that asylum decision-making is accurately and specifically focused on the assessment of risk to the claimant if returned to their country of origin. Credibility and country assessments need to be improved to ensure there is correct focus on risk and that claims are not rejected for want of certainty about the future or particular aspects of a claimant's history;
- review deportations and exclusions of Commonwealth citizens who came to the UK before 1 January 1973 to ensure nobody is unlawfully denied their statutory rights of exemption from deportation under section 7 of the Immigration Act 1971 and section 33 of the UK Borders Act 2007;
- restore the immigration rules relating to migrant domestic workers to their pre-2012 position;
- make continuing cooperation with the Libyan authorities conditional on concrete and verifiable steps towards: a. the prompt release of all refugees, asylum-seekers and migrants being arbitrarily detained, and the end of the system of automatic detention; b. the full and formal recognition of UNHCR, in the form of a memorandum of understanding that guarantees the organization's full access to people of concern across the country and the possibility to carry out its full mandate, irrespective of the nationality of beneficiaries; c. the adoption and enactment of new legislation and policies on migration and asylum, providing for the decriminalization of irregular entry, stay and exit; an end to automatic detention; and the creation of an asylum system.

⁹⁰ See e.g. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393>

⁹¹ See e.g. <https://www.amnesty.org/en/latest/news/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/>

6. ACCOUNTABILITY FOR TORTURE

6.1 ALLEGATIONS OF TORTURE AND OTHER ILL-TREATMENT BY ARMED FORCES IN IRAQ (ARTICLES 1, 12, 14 AND 16)

British armed forces were responsible for torture and other ill-treatment of detainees and other violations of international human rights and international humanitarian law during their six-year presence in Iraq, from March 2003 to May 2009, when they were largely based in and around the southern city of Basra⁹². Amnesty International does not believe that there has yet been a human rights compliant inquiry or alternative accountability and redress measures for these abuses⁹³.

Amnesty International considers the many claims of torture, other ill-treatment and unlawful killing that Iraqis have made against the British military to be sufficiently numerous and credible to warrant the establishment of a single, independent, public inquiry by the UK government. Such an inquiry should be tasked to investigate the alleged violations, assess the degree to which they were systemic, apportion responsibility at all relevant levels and ensure accountability, including through criminal prosecutions. It should allow for meaningful victim participation and recommend measures, including reparations, to provide effective redress to victims and to prevent future repetition of such violations.

The various mechanisms through which the abuses committed in Iraq have been progressed to date have instead occurred in a piecemeal fashion, including through instance-specific public inquiries⁹⁴, civil claims, judicial review challenges, and investigations by the military, and special investigation units.

The most prominent of those mechanisms was perhaps the Iraq Historic Allegations Team ('IHAT'), established in March 2010 as a response to the instigation of numerous court cases, as an alternative to the investigations and full public inquiry there sought. IHAT was intended by the government to “*deal with these unproven allegations once and for all*”. It was strongly criticised by civil society who considered it incapable of carrying out an independent and effective inquiry, a position shared by Amnesty International⁹⁵. It was also criticised by those who believed its investigations harmed the UK military, with the House of Commons Defence Committee claiming that “*the focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK’s flag*⁹⁶” and recommending it be closed down.

⁹² The UK was recognized as an occupying power in Iraq from May 2003 until June 2004, but UK combat troops remained in the country with the agreement of the new Iraqi authorities until May 2009.

⁹³ In 2017, the High Court described these claims as “*still unfinished business*” *Alseran&Ors v MoD* [2017] EWHC 3289 (QB) [1]. As at the date of that hearing in December 2017, 331 civil claims brought by Leigh Day solicitors against the Ministry of Defence on behalf of Iraqi citizens for compensation -including for violations of article 3 and/or 5 ECHR - had been settled, but 632 remained unresolved.

⁹⁴ The *Al-Sweady* inquiry was concluded in 2014, with a determination that while some of the allegations made with respect to treatment in British custody in 2004 were true, many of the other allegations made, including the most serious, were not. Sir Thayne Forbes, ‘*The Report of the Al Sweady Inquiry*’, HC 818-I, 17 December 2014, paras. 5.196-5.199.

⁹⁵ IHAT remained under the leadership of the Provost Marshal (Navy) and under the statutory framework of the armed forces act 2006. House of Commons Defence Committee sixth report of session 2016-2017, 10 February 2017 available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>

⁹⁶ *Who Guards the guardians?* House of Commons Defence committee Sixth Report of Session 2016-2017, 10 February 2017, <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>

Research has indicated that there existed real or perceived interference in IHAT decisions made to close investigations⁹⁷. Not a single prosecution for war crimes resulted from IHAT investigations, and there have not been any prosecutions for torture. Indeed, only four cases appear to have been referred to service prosecutors at all, and only one individual fined by his commanding officer as a result⁹⁸.

Following the Defence Committee report, in April 2017 the government announced it would close down IHAT in June 2017, before it had concluded its ongoing investigations, apparently due to the pressures placed upon it and claims by those opposed to its work⁹⁹. Those investigations remaining were handed to the service police, where the new Service Policy Legacy Investigations Unit was charged with concluding them. Most were discontinued in 2017-18, with 88% discontinued as of June 2018¹⁰⁰ and its latest quarterly report setting out that the majority of 'public-facing' work was due to complete by the end of 2018¹⁰¹. In a report from 2018, the Systemic Issues Working Group of the Ministry of Defence, established to identify and act on any systemic issues arising in Iraq and now also Afghanistan, noted that some of those investigations were discontinued because of a lack of evidence, but others because the service police decided that they were lower or middle end severity and that further investigations would be disproportionate¹⁰². That same group accepted that assaults in detention had occurred, and "may" have been systemic, but decided this was not a current issue following changes to policy and training¹⁰³. The group does not carry out its own investigations. Since the discontinuation of service police investigations, it was not therefore able to form a proper view of whether lower level ill treatment had in fact occurred¹⁰⁴. It has also focussed on clusters rather than individual allegations and largely appears from its latest report to have focussed on whether changes have been made to training and policy since abuses were reported. It is deeply troubling to Amnesty International that there does not appear to have been any attempt to engage with responsibility for and existence of systemic issues, with these largely being treated as a historical problem¹⁰⁵. Moreover, we note the research cited by Redress in its submission to this Committee that indicate UNCAT duties were not properly considered by the Ministry of Defence. We agree that the large number of settled cases strongly suggests a pattern of conduct requiring investigation of remaining cases, rather than their closure.

In January 2014, a Communication was submitted to the Prosecutor of the International Criminal Court detailing additional information about abuses from 2003-8 by the British in Iraq, which led her to re-open the preliminary examination that had been closed in 2006. The focus of the investigation is on two forms of war crimes, abuse of detainees (including torture and other ill treatment, rape and sexual violence) and unlawful killings. In November 2017, the Prosecutor concluded there is reasonable basis to believe war crimes within the jurisdiction of the court were indeed committed against individuals in British custody, and the admissibility assessment is ongoing¹⁰⁶.

The patchwork of inconsistent accountability mechanisms demonstrates an attempt by the UK government to avoid the kind of unified, systematic investigation capable of discovering what happened, identifying individual criminal responsibility, and lessons to be learned. Responses have been characterised by an apparent reluctance to comply with its duties under the Convention and other IHRL instruments.

⁹⁷ *The UK Military in Iraq: a discussion paper*, Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, 1 October 2018, available at

https://pure.ulster.ac.uk/ws/portalfiles/portal/12694027/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf, page 8

⁹⁸ *Ibid* p.16

⁹⁹ *Ibid* p.12

¹⁰⁰ See quarterly report

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733658/20180630-SPLI_QTR_REPORT_Apr-Jun18.pdf

¹⁰¹ Quarterly report of 30 September 2018

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758500/20181120-SPLI_FINAL_QTR_REPORT_Jul-Sep18.pdf

¹⁰² Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018, Page 3 fn 3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737152/20180830-Review_of_systemic_issues_arising_from_military_operations_overseas_Fourth_Report.pdf

¹⁰³ *Ibid* at 7.1.6

¹⁰⁴ *Ibid* at [3.4]

¹⁰⁵ Something noted by the office of the prosecutor for the ICC at 203 of her December 2018 report <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>

¹⁰⁶ *Ibid* at [213]

6.2 ALLEGATIONS OF UK COMPLICITY IN TORTURE (ARTICLES 1, 12, 14 AND 16)

In its concluding observations of 2013, the Committee expressed concern that the UK had not yet set a timeline for the establishment of the promised independent judge-led inquiry into allegations of involvement in torture and other ill-treatment of detainees held by other countries in counter-terrorism operations overseas since 2001. Regrettably, that is still the case some six years later.

In June 2018, the parliamentary Intelligence and Security Committee prematurely closed its own review of detainee mistreatment and rendition as a result of government failure to provide necessary access to key evidence and its own lack of powers to compel that to be provided¹⁰⁷. Amnesty International, together with a number of other key civil society organisations, had strongly opposed the decision to task the ISC with that Inquiry at the outset in 2014. The decision to do so had been made by the Prime Minister despite him having specifically ruled out that approach out in 2010, recognising that an inquiry fully independent of “*parliament, party and government*” was necessary. Amnesty International made clear that it would not participate in the ISC inquiry, since it was not capable of carrying out the necessary independent, effective inquiry: the Prime Minister held an absolute veto over its membership, the evidence it was allowed to examine, and the information it was allowed to publish¹⁰⁸.

When the ISC published its work in progress report in 2018 and closed its inquiry, it explained that it had decided that “the terms and conditions imposed were such that we would be unable to conduct an authoritative Inquiry and produce a credible Report. The Committee has therefore concluded – reluctantly – that it must draw a line under the Inquiry. This is regrettable”. It went on to describe its conclusions as “necessarily provisional” and its Report as in places indicating areas necessitating “further exploration”¹⁰⁹.

However, the ISC did make several disturbing findings, all of which indicate that the UK was indeed complicit in cases of torture and other ill treatment. Those include:

- I. That senior UK agency staff were briefed by US agencies after 9/11 and those briefings clearly showed US intent with respect to torture and rendition, but were dismissed.
- II. 13 incidents where UK personnel witnessed mistreatment first hand and should have acted, but did not.
- III. 25 incidents where UK personnel were told by detainees they had been mistreated by others. Investigation of these reports was not consistent.
- IV. 128 incidents where UK agencies were told by liaison services about detainee mistreatment.
- V. 232 cases where UK personnel continued to supply questions or intelligence to liaison services after they knew, suspected or should have suspected that a detainee had been or was being mistreated.
- VI. 198 cases where UK personnel received intelligence from liaison services obtained from detainees whom they knew or ought to have suspected had been mistreated.

¹⁰⁷ As is explained in the report and the executive summary, the prime minister directly imposed restrictions on access to key witnesses. “*The Committee considered that the terms and conditions imposed by the Prime Minister were such that it would be unable to conduct an authoritative Inquiry and produce a credible Report*” at [14]. [Detainee Mistreatment and rendition 2001-2010](https://b1cba9b3-a-5e6631fd-sites.googlegroups.com/a/independent.gov.uk/isc/files/20180628_HC1113_Report_Detainee_Mistreatment_and_Rendition_2001-2010), 28 June 2018, https://b1cba9b3-a-5e6631fd-sites.googlegroups.com/a/independent.gov.uk/isc/files/20180628_HC1113_Report_Detainee_Mistreatment_and_Rendition_2001-2010.pdf?attachauth=ANoY7coJs78No63006kn4Yio6PHuxB99_DtUAxjhZoHXPMOvXuaxSOZr48Omgx-iOoljyHAPejbCHugSJaUkEdK7O7nbKgFkotUjYVivDK89S3LJzfUQI7uDg9X329ao9L4hjVjMiiQkcxOwTr0KFwo9tiS1Mh40mjvfa--RH9NjJqwiCiTN9nGZ75dMjec1-aWHNzx6WuFOaDbzOpG20PkndNEmV25AGFfPne58kpQ7WZpXkAM6iDRLbOJo44jNwl260eQpEOjGbh20xsdnEaEUP_hU238VNdW2kXvEkyON2WCAPx04nLY%3D&attredirects=0

¹⁰⁸ See letter to the ISC of 30 October 2014, available at <https://www.amnesty.org/download/Documents/8000/eur450112014en.pdf>

¹⁰⁹ Report at fn 78, Executive Summary p.1

- VII. Three cases where UK agencies made or offered to make payments to others to conduct extraordinary rendition operations where there was a real risk of torture or other ill treatment, a “*simple outsourcing of action they knew they were not allowed to undertake themselves*”.
- VIII. 28 cases where the UK suggested, planned or agreed to rendition operations proposed by others. A further 22 cases where intelligence was provided to enable a rendition operation to take place, and 23 where the UK failed to take action to prevent a rendition, including of British nationals or residents.
- IX. That the agencies failed to consider whether it was appropriate to pass intelligence about a detainee to the detaining authority where mistreatment was known or reasonably suspected.
- X. The Agencies failed to recognise that secret detention is, in and of itself, a form of Mistreatment.
- XI. Defence Intelligence failed to understand its potential involvement in mistreatment of detainees through the supply of intelligence.

The UK government has wholly failed to engage properly with these or other findings from the Report. It has not properly answered why access to key witnesses was denied. Nor has it meaningfully engaged with the findings of involvement in abuse, relying heavily in its official response of 22 November 2018 on the existence of the Consolidated Guidance and the possibility of IPCO recommendations as evidence of improvement for the future¹¹⁰.

Despite a promise to make an announcement on this point within 60 days of publication of the ISC report, at the time of preparing this submission, the UK government has not yet announced whether it will now, finally, announce a proper independent judge-led inquiry as promised.

Concerningly, in correspondence with Amnesty International on this point, the Minister referred to any such inquiry as “*another*” judge led inquiry, although there has not yet been any such inquiry. Neither the Gibson inquiry nor the ISC review can sensibly be considered to amount to an independent, judge-led, comprehensive investigation in compliance with the UK’s international obligations. Further, there are a number of cases which were not included in the ISC review, such as that of Abdulhakim Belhaj and his wife Fatima Boudchar, where the UK shared intelligence with the CIA that led to their rendition and torture, something which the UK government has since apologised for but has never been properly examined¹¹¹.

On 20 August 2018, the Council of Europe Commissioner for Human Rights took the rare step of writing to the UK government to urge it to initiate a judge-led inquiry on detainee mistreatment and rendition following the terrorist attacks of 11 September 2001, publishing that letter after the Prime Minister replied on 10 September 2018 assuring the Commissioner that the issue was being given due consideration¹¹². Nothing has changed since that date, and no announcement has yet been made.

It is notable that the UK has strenuously resisted any attempts to seek justice for complicity through other means. That includes its position in the civil cases of Mr Belhaj and his wife Ms Boudchar, who alleged that UK Government officials were complicit in the couple’s kidnap and rendition to Gaddafi’s Libya, where they were arbitrarily imprisoned and tortured, and of Yunus Rahmatullah, who was detained by UK forces in Iraq before being handed over to US forces and alleged he had been tortured and imprisoned without charge for over ten years. The Government argued before the Supreme Court that the claimants’ cases should be dismissed because, under the doctrines of sovereign immunity and foreign act of state, the UK courts were not permitted to rule on the legality of acts by foreign governments¹¹³. This would have created a serious accountability gap. Amnesty international was one of the organisations which intervened in the case.

¹¹⁰ Response of 22 November 2018 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758224/HMG_ResponseToISCDetaineeReports.pdf

¹¹¹ ‘*Britain apologises for ‘appalling treatment’ of Abdel Hakim Bellhaj*’, Guardian, 10 May 2018

<https://www.theguardian.com/world/2018/may/10/britain-apologises-for-appalling-treatment-of-abdel-hakim-belhaj>

¹¹² Letters available at <https://www.coe.int/en/web/commissioner/-/commissioner-urges-the-uk-to-initiate-an-independent-judge-led-inquiry-into-counterterrorism-abuses>

¹¹³ *Belhaj and Others v. Jack Straw & Others and Rahmatullah v. Ministry of Defence and Another*, [2017] UKSC 3; [2017] A.C. 964

The Supreme Court found unanimously in favour of the claimants and dismissed the Government's appeal. It ruled that the doctrine of sovereign immunity did not apply because the foreign governments were not parties to the cases and their legal interests were not affected by the claims put forward. In respect of foreign act of state, while the judges differed in their reasoning, they agreed that the doctrine could not be invoked for such serious violations of law as torture, unlawful detention and enforced disappearance. The cases were permitted to proceed. Indeed, the UK subsequently issued an unprecedented, unreserved apology for the role it played in the ordeal Mr Belhaj and his wife suffered¹¹⁴.

However, it is a matter of serious concern that the UK government sought to prevent the courts from hearing these cases. No government should be able to escape judicial scrutiny of its possible role in torture and other ill treatment because doing so could implicate another country, and the attempt to argue otherwise represents a concerning approach to the UK's accountability under the Convention.

6.3 ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES AND VIOLATIONS IN NORTHERN IRELAND (ARTICLES 12 AND 14)

In September 2013, Amnesty International published a report entitled Northern Ireland: Time to Deal with the Past¹¹⁵. The report concluded that the patchwork system of investigation—made up of the Historical Enquiries Team (now defunct), the Office of the Police Ombudsman for Northern Ireland, coroner's inquests, public inquiries and criminal investigations by the Police Service of Northern Ireland (PSNI)—that has been established in Northern Ireland is not fit for the purpose of comprehensively and systematically addressing past human rights violations and abuses, including violations of the right to life.

The report called on the UK government to establish a mechanism capable of ensuring that all allegations of human rights violations and abuses committed in the past are investigated in a prompt, impartial, independent, thorough and effective manner; and to ensure that any such mechanism is able to investigate overall patterns of abuse, policy and practice of state and non-state actors, identify those responsible at all levels and issue recommendations aimed at securing victims' right to an effective remedy, including full reparation.

Such a mechanism should provide truth, justice and reparation for all those who suffered torture or other ill-treatment or were seriously injured during the three decades of political violence, and who have to date been largely excluded from the mandates of existing accountability mechanisms.

On 23 December 2014 the UK government published the Stormont House Agreement¹¹⁶, which contained proposals on a number of political issues in Northern Ireland, including on how to deal with the past. The Stormont House Agreement and a subsequent proposed Bill contain proposals for the establishment of two primary mechanisms to investigate the past: a Historical Investigations Unit (HIU) and an Independent Commission for Information Retrieval (ICIR).

The proposed remit of the HIU – and by extension the provisions included in the draft Bill – is restricted to conflict-related deaths and does not include other matters such as attempted murders, torture, or serious injuries. It does not, therefore, adequately discharge the UK's obligation under the Convention, or indeed articles 2 and 3 ECHR. Whilst these investigations would not necessarily have to be undertaken by the HIU, the obligation must be fulfilled. The current situation leaves a significant gap around such cases. The UK government should clarify how it intends to discharge its obligations in this area.

The ICIR proposals recognize the need of victims to know as much as possible about the circumstances of their case and with this in mind, propose the establishment of an Independent Commission for Information Retrieval (ICIR) to contribute to truth recovery. The proposals further envision an internal unit within the ICIR

¹¹⁴ I Cobain, O Bowcott, PCrerar & K Shaheen, 'Britain apologises for 'appalling treatment' of Abdel Hakim Bellhaj', The Guardian (10 May 2018) <https://www.theguardian.com/world/2018/may/10/britain-apologises-for-appalling-treatment-of-abdel-hakim-belhaj>

¹¹⁵ Available at <https://www.amnesty.org.uk/dealing-past>

¹¹⁶ Available at <https://www.gov.uk/government/publications/the-stormont-house-agreement>

to analyse particular patterns or themes of importance arising from the political violence. Amnesty International recommends that there should be a specific thematic investigation into sexual abuse and other gender-based violence, looking at broader patterns of sexual violence related to the Troubles, failures to report, investigate, and provide victims with access to remedy. An examination of torture and other ill-treatment of detainees, and whether state policy or state-sanctioned practices deliberately or indirectly gave rise to such unlawful conduct, would require robust investigation, including the possibility to compel witnesses and the production of documents. The lack of powers of compulsion for the ICIR contrasts with the previous proposals put forward by the Independent Consultative Group on the Past, which allowed for the use of protected statements, but proposed that the unit charged with thematic analysis would have powers of compulsion.

6.4 RECOMMENDATIONS

Amnesty International recommends that the United Kingdom:

- establish a single, independent, public inquiry into the allegations of abuses by the British military in Iraq in 2003-2009. This should be tasked to investigate the alleged violations, assess the degree to which they were systemic, apportion responsibility at all relevant levels and ensure accountability, including through criminal prosecutions. It should allow for meaningful victim participation and recommend measures, including reparations, to provide effective redress to victims and to prevent future repetition of such violations;
- ensure that all victims of torture, cruel, inhuman or degrading treatment, including of abuses by the British military in Iraq, obtain redress and are provided with an effective remedy and reparations, including restitution, fair and adequate financial compensations, measures of satisfaction and appropriate medical care and rehabilitation in accordance with GC3;
- establish the promised independent judge-led inquiry into allegations of complicity in detainee abuse, and ensure the Inquiry is sufficiently resourced and powered to enable it to carry out a Convention compliant investigation;
- commit to refining the Stormont House proposals to ensure full human rights compliance and that the establishment of effective mechanisms to deal with the legacy of the past becomes a reality.

7. ACCESS TO ABORTION IN NORTHERN IRELAND (ARTICLES 2, 3, AND 16)

In Northern Ireland, abortion is only lawful in extremely limited circumstances. In theory, it is lawful where there is a risk to a woman or girl's life or the risk of real and serious long-term or permanent damage to her physical or mental health, but in no other cases. That makes the legal regime governing abortion in Northern Ireland one of the most restrictive in Europe. It also carries the harshest criminal penalties. The laws have been repeatedly found by UN treaty monitoring bodies to be in significant violation of the various human rights treaties the UK is state party to. In February 2018 the UN Committee on the Elimination of

Discrimination against Women (CEDAW) found that abortion law in Northern Ireland constitutes grave and systematic violation of women's rights and recommended that the UK Government decriminalise abortion in Northern Ireland.¹¹⁷ The UK has been continually criticised for its failure to meet its international obligation with regard to abortion.

The practical result of the legal regime is that women who require an abortion have to travel to obtain one, or buy medical abortion pills online, which is illegal and puts them at risk of prosecution.

In 2017 the United Kingdom Supreme Court heard an appeal by the Northern Ireland Human Rights Commission on the incompatibility of current Northern Ireland abortion law with article 3 and article 8 of the ECHR specifically in instances of fatal foetal abnormality and sexual crime. The majority concluded in June 2018¹¹⁸ that the Commission did not have the standing to bring such a case. Strictly speaking that should have been an end of the matter but the case was considered so important that the judges nevertheless provided judgments on the substantive issue of human rights breaches. Whilst the lack of standing meant those views did not lead to a remedy being provided, Lord Mance was clear that they could not be safely ignored going forwards¹¹⁹.

Importantly, the majority ruled that Northern Ireland's abortion law breaches Article 8 of the European Convention on Human Rights (ECHR), by not allowing abortions in cases of sexual crime (rape and incest) and fatal foetal abnormalities. All five judges were unanimously of the view that abortion law in Northern Ireland could be incompatible with article 3 in both those instances. In essence what divided them was whether it necessarily did so. The basis of that difference lay in the absolute nature of the article 3 right not to be subjected to torture or inhuman or degrading punishment. Three judges considered that required an *'intense focus on the facts of the individual case'*¹²⁰. All three considered there may be women whose article 3 rights were violated but that possibility did not mean the legislation should *'axiomatically be regarded as involving such a breach'*¹²¹. Significantly one of those three, the President Lady Hale, nonetheless expressed sympathy with the view of the other two that *"the risk of acting incompatibly with article 3 rights is such as to engage the positive obligation of the state to prevent that risk from materialising"*. The remaining two Judges expressed their views in the strongest of terms that Northern Ireland abortion law was incompatible with article 3 as the legislation of 1861 and 1945 requires women to *"cede control of their bodies"* to the edict of that legislation and asked: *"If, as well as the curtailment on their autonomy which this involves, they are carrying a foetus with a fatal abnormality or have been the victims of rape or incest, they are condemned, because legislation enacted in another era has decreed it, to endure untold suffering and desolation. What is that, if it is not humiliation and debasement?"*¹²².

Amnesty International is supporting Sarah Ewart, a woman who was forced to travel to England for an abortion after receiving a diagnosis of fatal foetal abnormality, in a subsequent judicial review brought in her own name seeking a declaration of incompatibility. The case was heard by Belfast High Court in January 2019 and judgment is pending.

In its landmark decision of *K.L. v. Peru*, the HRC deemed the denial of a therapeutic abortion in a case of an anencephalic pregnancy that put the petitioner's (K.L.) physical and mental health at risk a violation of her fundamental rights to be free from cruel, inhuman and degrading treatment, as recognized under Article 7 of the ICCPR.¹²³ In two other cases of fatal foetal abnormality - *Mellet v Ireland* and *Whelan v Ireland - the UN Human Right Committee held that prohibiting and criminalizing abortion in situations of fatal foetal impairment, subjected these women to "conditions of intense physical and mental suffering"*, and that no justification can be invoked or extenuating circumstance to excuse such harm.¹²⁴ The assessment of the

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https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fOP.8%2fGBR%2f1&Lang=en

118 *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27

119 *Ibid* at 135

120 *Ibid* at [34, 100, 354].

121 *Ibid*

122 *Ibid* at [261]

123 *K.L. v. Peru*, Communication No. 1153/2003, Human Rights Committee, para. 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

124 *Mellet v Ireland*, Human Rights Committee, Communication no. 2324/2013, para 7.4, and 7.6 (2016); *Whelan v Ireland*, Human

suffering inflicted by Ireland's abortion law was confirmed by the UN Committee against Torture also expressed concern "at the severe physical and mental anguish and distress experienced by women and girls regarding termination of pregnancy as a result of the State's policies."¹²⁵

The CAT Committee has repeatedly expressed concern about laws that restrict or ban access to abortion. The Committee noted in its concluding observations to Peru that the state's restrictive abortion law "severely restricts access to voluntary abortion, even in cases of rape, leading to grave consequences, including the unnecessary deaths of women."¹²⁶ The Committee also expressed concern that the Peruvian government had failed to prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment,¹²⁷ and urged the Peruvian government to "take whatever legal and other measures are necessary to effectively prevent acts that put women's health at grave risk, by providing the required medical treatment. . . ."¹²⁸ The Committee has also expressed concern about the absolute bans on abortion in Nicaragua and El Salvador and noted the grave consequences the legislation poses to women's lives and health.¹²⁹ The Committee called upon the government of Nicaragua to review its restrictive legislation with an eye toward providing exceptions to the ban in cases where the pregnancy was the result of rape or incest.¹³⁰ The Committee also recommended that the government of El Salvador "take whatever legal or other measures are necessary to effectively prevent, investigate and punish crimes and all acts that put the health of women and girls at grave risk, by providing the required medical treatment."¹³¹

Other treaty monitoring bodies have also addressed the issue of the harmful impact of abortion criminalization on women's rights. The CRC has urged States parties to decriminalize abortion in "all circumstances."¹³² Furthermore, in its general comment 20 on the implementation of the rights of the child during adolescence, the CRC urged States parties "to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services."¹³³ The CEDAW has also said that laws that criminalize medical procedures only needed by women are barriers to health care and "when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion."¹³⁴ Furthermore, in its general recommendation 35 on gender-based violence against women, the CEDAW recognized criminalization of abortion, as well as denial or delay of safe abortion and post-abortion care, not only as violations of women's sexual and reproductive health and rights, but also as "forms of gender-based violence that... may amount to torture or cruel, in human or degrading treatment."¹³⁵ It also called for states to decriminalize abortion.¹³⁶

Rights Committee Communication No. 2425/2014 (2017), para. 7.7; See also, P. and S. v. Poland, No. 57375/0 Eur. Ct. H.R.

(2012); R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., paras. 159-160 (2011); Mellet v. Ireland, Human Rights Committee, Communication No. 2324/201, para 7.4 (2016); L.M.R. v. Argentina, Human Rights Committee, Communication No. 1608/2007,

(2011), K.L. v. Peru, Human Rights Committee, Communication No. 1153/2003, (2005); Human Rights Committee, Concluding

Observations: Ireland, para. 9, (2014); Human Rights Committee, Concluding Observations: Malta, para. 13, (2014); Human

Rights Committee, Concluding Observations: Nicaragua (2008); CAT Committee, Concluding Observations: Poland, para. 23,

(2013); CAT Committee, Concluding Observations: Peru, para. 15, (2013); CAT Committee, Concluding Observations: Nicaragua,

para. 16, (2009); CAT Committee, Concluding Observations: El Salvador, para. 23, (2009);

¹²⁵ CAT Committee, Concluding Observations: Ireland, para. 31, UN. Doc. CAT/C/IRL/CO/2 (2017).

¹²⁶ CAT, Concluding Observations: Peru, para. 23, U.N. Doc. CAT/C/PER/CO/4 (2006)

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ CAT Committee, Concluding Observations: Nicaragua, U.N. Doc. CAT/C/NIC/CO/1 (2009), para. 16; El Salvador, U.N. Doc. CAT/C/SLV/CO/2

(2009), para. 23.

¹³⁰ CAT Committee, Concluding Observations: Nicaragua, U.N. Doc. CAT/C/NIC/CO/1 (2009), para. 16

¹³¹ El Salvador, U.N. Doc. CAT/C/SLV/CO/2 (2009), para. 23.

¹³² CRC Committee, *Concluding Observations: Peru*, para. 56(b), U.N. Doc. CRC/C/PER/CO/4-5 (2016); *Kenya*, para. 50(b), U.N. Doc. CRC/C/KEN/CO/3-5 (2016); *Haiti*, para. 51(c), U.N. Doc. CRC/C/HTI/CO/2-3 (2016); *Senegal*, para. 54(d), U.N. Doc. CRC/C/SEN/CO/3-5 (2016); *Ireland*, para. 58(a), U.N. Doc. CRC/C/IRL/CO/3-4 (2016).

¹³³ CRC Committee, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, U.N. Doc. CRC/C/GC/20 (2016)

¹³⁴ CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 10, para. 31(c).

¹³⁵ EDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, para. 18, U.N. Doc. CEDAW/C/GC/35 (2017)

¹³⁶ *Id.*, para. 31(a).

Regarding medical providers, this Human Rights Committee has noted, in its general comment on the equality of men and women, that States parties should take measures to eliminate and protect against interference related to women's reproductive functions. It specifically referenced the imposition of a legal duty on doctors or other health personnel to report cases of women who have undergone abortion as an example of such an interference, acknowledging that such an imposition jeopardizes women's right to life, as well as their right to be free from torture or other cruel, inhuman or degrading treatment.¹³⁷ Furthermore, this Committee has explicitly recommended that a state should "avoid penalizing medical professionals in the conduct of their professional duties" in relation to abortion and the right to life.¹³⁸ The CEDAW has also noted that it is critical for physician-patient confidentiality to be maintained, especially within the context of laws that require medical personnel to report women who have had abortions.¹³⁹ Moreover, the Special Rapporteur on the right to health has noted the importance of decriminalizing abortion, including the decriminalization of the abetment of abortion.¹⁴⁰ In October 2018, the United Nations Human Rights Committee officially published its "General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life"¹⁴¹ The Committee addressed the issue of abortion and said that "State parties...should not...apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion."¹⁴²

The criminalisation of women is not an abstract issue in the UK. Prosecutions are a reality in Northern Ireland. In April 2016 a woman was given a three-month suspended sentence for self-inducing an abortion because she could not afford the cost of travel to England and the expense of a private procedure.¹⁴³ In January 2017, a man and a woman accepted formal cautions under the Offences Against the Person Act for the same offences. Charges were withdrawn against the pair after a judge imposed a ban on identifying the woman due to the heightened risk of suicide resulting from any publicity surrounding the case¹⁴⁴.

A mother who faces potential prosecution for purchasing abortion pills online for her (then) 15-year-old daughter was recently granted permission to bring a judicial review to challenge the decision of the Public Prosecution Service to pursue a prosecution against her. The daughter had been involved in a relationship which was both physically and verbally abusive. These incidents continued after she informed her boyfriend that she believed that she was pregnant and included threats to "kick the baby out of her" and to "stab the baby if it was born". Having decided she did not want a permanent tie to the person who had abused her, she ended the pregnancy through pills sourced online. Afterwards she sought counselling and support from her GP to aid her recovery from the abusive relationship. She was then referred on to child and adolescent mental health services and social services. During this process her medical records which referred to the termination were passed to the police service without her knowledge or consent. This case was heard in November 2018 and judgment is pending¹⁴⁵. Amnesty is a key intervenor in this case. If the judicial review is unsuccessful the mother faces a criminal trial and up to five years in prison.

¹³⁷ Human Rights Committee, *Gen. Comment No. 28, supra* note 6, para. 20.

¹³⁸ Human Rights Committee, *Concluding Observations: Nicaragua*, para. 13, U.N. Doc. CCPR/C/NIC/CO/3 (2008).

¹³⁹ CEDAW Committee, *Concluding Observations: El Salvador*, para. 37(b), U.N. Doc. CEDAW/C/SLV/CO/8-9 (2017).

¹⁴⁰ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, transmitted by Note of the Secretary-General*, para. 65(h),(i), U.N. Doc. A/66/254 (Aug. 3, 2011) (by Anand Grover).

¹⁴¹ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, UN Doc. CCPR/C/GC/36, 30 October 2018, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

¹⁴² *Ibid.*

¹⁴³ BBC News NI, Woman who bought drugs online to terminate pregnancy given suspended sentence, 4 April 2016 <https://www.bbc.co.uk/news/uk-northern-ireland-35962134>

¹⁴⁴ Irish News, Woman and man receive caution over 'abortion pills', 18 January 2017, <https://www.irishnews.com/news/2017/01/19/news/pair-receive-caution-over-abortion-pills--892355/>

¹⁴⁵ BBC News NI, Abortion pills: Judgement reserved in judicial review, 7 November 2018 <https://www.bbc.co.uk/news/uk-northern-ireland-46127488>

7.1 RECOMMENDATION

Amnesty International recommends that the United Kingdom decriminalise abortion and put in place a human rights compliant framework for access to abortion services in Northern Ireland.

8. PROJECTILE ELECTRIC-SHOCK WEAPONS (TASER) (ARTICLES 2 AND 16)

In its Concluding Observations of 2013, the Committee expressed concern at the increase in use of projectile electric-shock weapons (PESWs or Tasers) in the UK¹⁴⁶. Amnesty International remains concerned that a number of specific risks associated with the misuse of projectile electric-shock weapons (PESWs or Tasers) are still not fully addressed within current Police training and oversight mechanisms. Those mechanisms are in place to ensure PESWs are used in accordance with international human rights laws and standards, particularly as they relate to the right to life, and freedom from torture and other cruel and degrading treatment, and thus to article 16.

As a less lethal, distance control weapon, used in response to imminent threats to life or of serious injury, PESWs can be effective. However, since the last UNCAT review, the UK Police service have continued to roll out PESWs in ever increasing numbers. In line with this increase in availability, there have been significant increases in their use. Official Government statistics show that between 1 April 2017 to 1 March 2018, 147 PESWs were used 17,084 times - a considerable rise from the previous full yearly statistics that showed only 11,302 incidences. Similar patterns have been seen in Scotland, with the use of the device rising from 13 uses to 65. The trend which previously concerned the Committee has therefore continued.

It is also understood that the UK Prison Service is evaluating the use of PESWs to help deal with incidents of serious unrest within Prisons. In custody situations it is very unlikely that a situation meets the threshold of presenting a threat to life or of serious injury. More often than not, simply closing a door and waiting for the person to calm down will be a feasible option. Furthermore, in practice, in custody settings there is a particularly high risk of PESW being used against people who merely refuse to comply with an order. The Committee recommended in its last Concluding Observations that PESW should be inadmissible in the equipment of custodial staff¹⁴⁸.

¹⁴⁶ At [26]

¹⁴⁷ <https://www.gov.uk/government/statistics/police-use-of-force-statistics-england-and-wales-april-2017-to-march-2018>

¹⁴⁸ At [26]

Official usage statistics also show an alarming racial disparity in PESW use, with BAME communities disproportionately being subjected to PESW use. Government figures show that approximately 13% of PESW use was against Black men, despite them making up only 3.3 % of the population.¹⁴⁹

Official UK government medical advice points to the clear risks PESW pose to the functioning of the heart, injuries sustained from falls, injuries to the face from the barbed probes as well as the increased risks of PESW exposure to children and young people or people who may be vulnerable due to mental health or other underlying health conditions. It also points to the psychological impact and harm to these groups and acknowledges that research into this remains underdeveloped¹⁵⁰. Amnesty International remains concerned that these established risks are not reflected sufficiently in official guidance issued on PESW use and the appropriate restrictions put in place to mitigate against the harm the weapon could cause. As such, there are serious concerns as to whether the current approach accords with article 16.

Amnesty International is particularly concerned about the use of the weapon in Drive stun mode, where the weapon is placed directly on the human body. In this mode, the weapon does not cause electro muscular contraction and instead is used as a pain compliance device. We acknowledge that the Police training recognizes the concern over the use of weapon in such mode, but there are still a significant number of drive stun discharges reported. [for some reason I can't insert comment here – if we don't have a number, I think take out this sentence.]

8.1 RECCOMENDATIONS

Amnesty International recommends that the United Kingdom:

- ensures its Guidance on PESW use clearly specifies that the threshold for PESW use is where there are imminent threats to life or of serious injury;
- prohibits the use of PESW in drive stun mode;
- provides clear presumptions against the use of PESW against children and young people – that would recognize extreme circumstances where the use of PESW could be justified in order to save life;
- introduce greater restrictions on use of PESW in mental health settings.

¹⁴⁹ <https://www.theguardian.com/uk-news/2018/dec/13/black-people-more-likely-to-have-force-used-against-them-by-police-data-shows>

¹⁵⁰ <https://www.gov.uk/government/publications/medical-implications-of-the-taser-x2>

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UNITED KINGDOM

SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

66TH SESSION, 23 APRIL-23 MAY 2019

Amnesty International submits this briefing for consideration by the United Nations ('UN') Committee against Torture ('the Committee') at its examination of the United Kingdom's ('UK') sixth periodic report on its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention'). This briefing summarizes Amnesty International's current concerns about the UK's failure to comply with some of its obligations under the Convention.

This submission addresses a number of areas, from universal jurisdiction, to access to abortion, to accountability mechanisms for the large numbers of still outstanding allegations of abuse in Iraq. Regrettably, in several of these areas the Committee has previously made recommendations to the UK which are yet to be fulfilled.