UNITED KINGDOM: BRIEFING TO UN COMMITTEE AGAINST TORTURE

50TH SESSION, MAY 2013

AMNESTY INTERNATIONAL

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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) fifth 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 is divided into three parts. The first focuses on universal jurisdiction, extra-territorial application of international human rights law, including the Convention, and the use of force in the removals process. The second part highlights Amnesty International's concerns regarding the UK's "deportations with assurances" programme. Finally, the submission addresses a number of key concerns regarding failures by the UK to ensure accountability for acts of torture and other ill-treatment.

In general terms, Amnesty International would also note its growing concern that the political environment in the United Kingdom appears to be increasingly hostile towards human rights. Set against this background, statements by UK government ministers about their intention to "scrap" the Human Rights Act or reconsider the UK's relation with the European Court of Human Rights, continue to give rise to genuine fears that there may be future attempts to weaken the framework for enforcing human rights in the UK.[1] There has been no progress towards a Bill of Rights for Northern Ireland, tailored to the region's specific circumstances and needs.

LEGISLATIVE, ADMINISTRATIVE, JUDICIAL OR OTHER MEASURES TO PREVENT TORTURE AND OTHER ILL-TREATMENT (ARTICLES 1, 2, 5, 14 & 16)

UNIVERSAL JURISDICTION

ARTICLE 2 – MAINTAINING A PROHIBITED DEFENCE FOR A QUARTER CENTURY

It is a matter of deep concern that a quarter century after its enactment, and despite repeated calls by the Committee against Torture to eliminate such prohibited defences, that the UK still provides in the Criminal Justice Act 1988 that it is a defence to a prosecution for torture based on universal jurisdiction that the conduct was

[1] Simon Walters, "A great day for British justice: Theresa May vows to take UK out of the European Court of Human Rights," *Daily Mail*, 2 March 2013, http://www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html; Patrick Hennessy, "David Cameron answers critics: I will not lurch to the Right", *The Telegraph*, 2 March 2013, http://www.telegraph.co.uk/news/politics/david-cameron/9904880/David-Cameron-answers-critics-I-will-not-lurch-to-the-Right.html; "'Tories should scrap Human Rights Act,' says Grayling," *ITV.com*, 3 March 2013, http://www.itv.com/news/update/2013-03-03/tories-would-scrap-human-rights-act-says-grayling/; Rajeev Syal, "Tory ministers plot Human Rights Act repeal," *The Guardian*, 3 March 2013, http://www.guardian.co.uk/politics/2013/mar/03/tory-ministers-human-rights-act; Steve Robson, "Theresa May pledges Conservatives will scrap Human Rights Act if they win the next election," *Daily Mail*, 9 March 2013, http://www.dailymail.co.uk/news/article-2290802/Theresa-May-pledges-Conservatives-scrap-Human-Rights-Act-win-election.html.

lawful in the place where the torture was committed.[2]

Section 134(4) of this law 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."[3] Section 134(5) further explains that

> "[f]or the purposes of this section 'lawful authority, justification or excuse' means—
>
> [...]
>
> (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.*"[4]

The UK has maintained this provision even though the Committee has called upon it to eliminate this defence, which is contrary to the UK's express obligations under the Convention against Torture. For example, nearly a decade ago, at the conclusion of its examination of the UK's fourth periodic report, the Committee stated:

> "article 2 of the Convention provides that no exceptional circumstances whatsoever may be invoked as a justification for torture; the text of Section 134 (4) of the Criminal Justice Act however provides for a defence of 'lawful authority, justification or excuse' to a charge of official intentional infliction of severe pain or suffering, a defence which is not restricted by the Human Rights Act for conduct outside the State party, where the Human Rights Act does not apply; moreover, the text of section 134 (5) of the Criminal Justice Act provides for a defence for conduct that is permitted under foreign law, even if unlawful under the State party's law[.]"[5]

Therefore, the Committee recommended that

> "the State party take appropriate measures in the light of the Committee's views to ensure, if necessary explicitly, that the defences that might be available to a charge brought under Section 134 (1) of the Criminal Justice Act be consistent with the requirements of the Convention[.]"[6]

The continued presence of this prohibited defence is inconsistent with the Convention, and with the UK's human rights obligations in the European Convention on Human Rights as implemented into UK law by the Human Rights Act 1998 (HRA). The HRA provides that UK legislation should be interpreted in light of the Convention and the jurisprudence of the European Court of Human Rights. Section 134 of the CJA 1988 is clearly inconsistent not only with the Convention, but also the prohibition on torture and inhuman, degrading treatment or punishment under the European Convention on Human Rights.

As of the date of this paper, however, the UK has taken no steps to eliminate this prohibited defence.

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[2] There are similar problems under this law with respect to prosecutions based on active personality jurisdiction.
[3] Criminal Justice Act 1988, s. 134 (4) (http://www.legislation.gov.uk/ukpga/1988/33/section/134) (emphasis supplied).
[4] Ibid., s. 134 (5).
[5] Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, U.N. Doc. CAT/C/CR/33/3, 10 December 2004 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/451/02/PDF/G0445102.pdf?OpenElement), para. 4 (a) (ii).
[6] Ibid., para. 5 (a).

ARTICLE 5 – RESTRICTING THE ABILITY OF VICTIMS TO CONDUCT PRIVATE PROSECUTIONS WHEN PUBLIC PROSECUTORS FAIL TO ACT OR TO ACT PROMPTLY AND EFFECTIVELY

The UK has sent conflicting messages regarding its obligations to ensure that its courts can exercise universal criminal jurisdiction over private prosecutions and over public prosecutions.

First, instead of strengthening private prosecutions by or on behalf of victims with regard to the exercise of universal jurisdiction to buttress the role of public prosecutors, the UK has very publicly gone backwards. It has restricted private prosecutions – including those based on universal jurisdiction – when in 2011 the Police Reform and Social Responsibility Act (the Act) became law.[7] The Act provides that the consent of the Director of Public Prosecutions (DPP) is required before a magistrate (now more commonly called District Judges) can issue an arrest warrant based on evidence in support of a proposed private prosecution in respect of certain offences alleged to have been committed outside the UK.[8] Section 153(1) of the Act adds a new Section 4A to the Magistrates' Courts Act 1980 as follows:

> "Where a person who is not a public prosecutor lays an information before a justice of the peace in respect of an offence to which this subsection applies, no warrant shall be issued under this section without the consent of the Director of Public Prosecutions [DPP] . . ."[9]

Previously, the 1980 Magistrates' Courts Act, along with the 1957 Geneva Conventions Act, gave magistrates' courts the power to issue a warrant for the arrest of a person suspected of war crimes to be brought before a UK court, without requiring the involvement of the DPP or any other official and there was no evidence that magistrates/District Judges were unable to properly determine applications for arrest warrants so received – indeed the numbers of applications are very small (i.e. less than 10 in the 10 years from 2001 to 2011) and more had been refused than were granted.

The 2011 legislative 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.[10] Being able to speedily secure the arrest of a suspect to enable a private or public prosecution to be commenced is a pre-requisite to a effective enforcement of the Convention. Practitioners consider that the change in the law does make it more likely that suspects will evade arrest and prosecution.

Second, the UK has taken several steps to facilitate public prosecutions based on universal jurisdiction, but, unfortunately, these steps fall significantly short of its obligations under Article 5 of the Convention.

One very positive step has been for the Crown Prosecution Service to institute regular meetings of community involvement panels with civil society permitting frank exchanges with civil society and various components of the government involved with the screening of applicants for entry into the UK, investigating crimes under international law, including torture, and in prosecuting such crimes.

In addition, in 2012, the UK government published a paper, *Strategy for the Prevention of Torture 2011-2015*, outlining an ambitious policy designed to ensure that there would be no safe havens in the UK for persons suspected of torture.[11] Sadly, however, as documented in the Redress briefing submitted to the Committee, the

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[7] Police and Social Responsibility Act 2011 (PSA) c.13, available at: http://www.legislation.gov.uk/ukpga/2011/13/contents/enacted/data.htm. The relevant sections of the Act referred to here became law upon the passing of the Act, although not all the provisions of the bill came into force at that time.
[8] Police and Social Responsibility Act 2011, s. 153.
[9] Magistrates Act, 1980 as amended by the PSA, s. 4A (See http://www.legislation.gov.uk/ukpga/2011/13/section/153/enacted).
[10] The adverse implications of the 2011 legislative changes with respect to the UK's obligations under the Convention were extensively documented before they were enacted. See, for example, Article by D. Machover, "Arrest warrant plans make a mockery of universal jurisdiction," *The Guardian*, 30 March 2011, http://www.guardian.co.uk/commentisfree/2011/mar/30/coalition-criminal-justice-universal-jurisdiction; Joint letter : "Arrest warrants for war crimes," *The Guardian*, 2 December 2010, http://www.guardian.co.uk/law/2010/dec/02/arrest-warrants-for-war-crimes; and Aegis, Human Rights Watch, Justice and Redress, Police Reform and Social Responsibility Bill Joint briefing for House of Lords Committee stage, Clause 154 – Changes to arrest procedure for international crimes, 14 June 2011, (http://www.redress.org/downloads/publications/Joint_briefing_HLCS.pdf).
[11] Foreign and Commonwealth Office, *FCO Strategy for the Prevention of Torture 2011-2015*, October 2011 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-tortureprevention.pdf), p. 6.

number of investigations and prosecutions in the UK for torture in the past few decades has been extremely limited.[12]

A third initiative, coupled with the establishment of UK investigation teams to investigate rape and other crimes of sexual violence in armed conflict, focussing initially on Bosnia and Herzegovina and Syria, has been the UK's proposal, endorsed by the G8, for a new protocol to the 1949 Geneva Conventions defining rape and other crimes of sexual violence in international armed conflict as grave breaches of those Conventions over which each state party must exercise universal jurisdiction.[13]

ARTICLE 14 – FAILING TO PROVIDE FOR CIVIL UNIVERSAL JURISDICTION

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.

As noted below, in recent years, civil society has pressed various UK governments, without success, to enact legislation providing national courts with civil universal jurisdiction. These efforts – and the need for the flaws in UK legislation and practice – have been thoroughly documented in the report, *Closing the Impunity Gap: UK law on genocide and related crimes*, published by the UK Human Rights Joint Committee in 2009.[14] The Human Rights Joint Committee noted that "[t]he UK has established universal criminal jurisdiction over acts of torture committed abroad after 1988, but there is no such provision for universal civil jurisdiction."[15] It observed that "[t]he state of UK domestic law means that UK citizens and residents who suffer torture abroad cannot sue the foreign governments responsible[,]" and that the only avenue open to such victims was the ineffective system of diplomatic protection.[16] Therefore, after considerable pressure from civil society and the Human Rights Joint Committee, Parliament considered draft legislation, the Torture (Damages) (No. 2), that would have filled some of the gaps in UK law by providing universal civil jurisdiction over some civil claims.[17] However, as of the date of this paper, Parliament had not enacted this legislation and the government had not endorsed the bill, so its fate remains uncertain.

EXTRA-TERRITORIAL APPLICATION OF HUMAN RIGHTS PROTECTIONS

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. For example, with respect to military operations overseas, the UK has emphasized that although its armed forces are required to comply with the absolute prohibition against torture as set out in the Convention, it has denied that the broader obligations and protections under the Convention, such as those in Article 2 to prevent acts of torture, apply extraterritorially.[18]

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[12] Redress, Submission to Committee against Torture on its list of issues for consideration of the UK's 5th state party report, 19 April 2013 (discussion of issue 19).

[13] Foreign and Commonwealth Office, Declaration on preventing sexual violence in conflict, London, 11 April 2013

[14] Human Rights Joint Committee, *Closing the Impunity Gap: UK law on genocide and related crimes* (http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/15306.htm).

[15] Ibid., para. 79.

[16] Ibid., para. 83.

[17] Ibid., paras. 85 to 92.

[18] For example, Amnesty International notes that in the UK's report to the Committee Against Torture, received by the Committee on 6 September 2011, the UK explicitly stated in reference to the application of Articles 2 and/or 3 to transfers of a detainee within UK custody to the custody (whether de facto or de jure) of any other State that it "does not consider that the Convention Against Torture applies extra-territorially" (CAT/C/CGBR/5, page 27 para. 119).
Amnesty International also notes the UK's recent rejection of a recommendation by Nicaragua during the UPR process that the UK "Recognize the extra-territorial application of the CAT, according to its jurisprudence" The UK government's rejection of the recommendation was on the grounds that "The Committee Against Torture is not a judicial body and consequently neither its Reports or General Comments have the status of jurisprudence." And that "the UK takes an Article by Article approach to the Convention Against Torture, given that there is no single jurisdictional provision". Amnesty International is disappointed that the UK interpreted the recommendation in such a narrow and technical manner, rather than accept recommendation to recognize the extraterritorial application of the

Similarly, the UK has attempted to limit the extent to which the European Convention on Human Rights applies to the actions of its armed forces abroad, arguing strenuously in two cases heard by the European Court of Human Rights – namely *Al-Skeini*[19] and *Al-Jedda*[20] - that protections of the Convention should not apply to UK forces in Iraq. These arguments were rejected by the Court, which in both cases found that the individuals concerned were within the UK's jurisdiction under Article 1 (obligation to respect human rights).[21]

The UK has also indicated that it neither recognises nor intends to observe its duties to ensure UK companies and members of UK-based corporate groups respect human rights when operating abroad; for example, the UK Government's 2009 Business and Human Rights Toolkit states that "the UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas."[22]

This position is inconsistent with international law. The scope of states' obligations to prevent third parties – such as multinational companies headquartered in their country – from violating human rights in other countries has been recognised by human rights expert bodies. [23] Amnesty International has documented a number of cases in which companies headquartered in the UK have caused or contributed to human rights abuses in other countries, and where the UK has both legal and political means to take legitimate action to prevent and sanction such abuse, but has failed to do so.[24] In each of these cases national regulators in the host state have faced serious challenges in holding powerful foreign companies to account. By failing to take legitimate and legally permissible action to

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Convention, as interpreted by the Committee in its general comments and concluding observations. (See "The UK's Universal Periodic Review – Annex document - September 2012" UN Doc A/HRC/21/9 Add.1)

[19] *Al-Skeini and others v United Kingdom* [Grand Chamber], application no. 55721/07, 7 July 2011.

[20] *Al-Jedda v United Kingdom* [Grand Chamber], application no. 27021/08, 7 July 2011.

[21] Concerns that the government will continue to take a narrow view of its extra-territorial obligations despite the judgment in *Al-Skeini and others v UK* can perhaps be reflected in the following document, published in September 2012 by the Ministry of Justice, Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12 which states that "The Government takes the view that the Al Skeini judgment relates to the particular circumstances of the past operations in Iraq and it has no implications for its current operations elsewhere, including in Afghanistan, where the legal basis for UK operations is materially different from that which pertained in Iraq."
http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf

[22] In this regard we would draw the Committee's attention to the concluding observations of the Committee on the Elimination of Racial Discrimination (CERD), UN doc CERD/C/GBR/CO/18-20, paragraph 29 which raises concern regarding the Legal Aid, Sentencing and Punishment of Offenders Act which restricts the rights of foreign claimants seeking redress against transnational corporations before the domestic courts. The Bill is now an Act of Parliament, having received Royal Assent in 2012. The CERD goes on to recommend that "the State party to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention [on the Elimination of All Forms of Racial Discrimination]" and further "that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party's courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate." The Foreign and Commonwealth Office's Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009, page 4, states that: "The UK takes a more nuanced view than John Ruggie about the State's duty to ensure that companies act compatibly with the States' human rights obligations. The UK's view is that this is not a blanket obligation but depends on the wording of the treaty obligation in question. To the extent that there is a legal duty to protect, it only applies in respect of a States' own inhabitants. The UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas". See also the UK's comments on Ruggie's Guiding Principles published in January 2011, page 3, General Point C, available at: http://www.business-humanrights.org/media/documents/uk-comments-guiding-principles-2011.pdf

[23] See: UN Committee on Economic, Social and Cultural Rights, General Comment 15 on the right to water at para 33 and General Comment 14: The right to the highest attainable standard of health at para 15. In this regard we would also draw the Committee's attention to the concluding observations of the Committee on the Elimination of Racial Discrimination (CERD), UN doc CERD/C/GBR/CO/18-20, paragraph 29 which raises concern regarding the Legal Aid, Sentencing and Punishment of Offenders Act which restricts the rights of foreign claimants seeking redress against transnational corporations before the domestic courts. The Bill is now an Act of Parliament, having received Royal Assent in 2012. The CERD goes on to recommend that "the State party to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention [on the Elimination of All Forms of Racial Discrimination]" and further "that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party's courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate." The Foreign and Commonwealth Office's Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009, page 4, states that: "The UK takes a more nuanced view than John Ruggie about the State's duty to ensure that companies act compatibly with the States' human rights obligations. The UK's view is that this is not a blanket obligation but depends on the wording of the treaty obligation in question. To the extent that there is a legal duty to protect, it only applies in respect of a States' own inhabitants. The UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas". See also the UK's comments on Ruggie's Guiding Principles published in January 2011, page 3, General Point C, available at: http://www.business-humanrights.org/media/documents/uk-comments-guiding-principles-2011.pdf.

[24] See, for example, Amnesty International, Nigeria: The true 'tragedy': Delays and failures in tackling oil spills in the Niger Delta, AI Doc. AFR 44/018/2011, 10 November 2011, http://www.amnesty.org/en/library/info/AFR44/018/2011; , Amnesty International, Don't mine us Out of Existence: Bauxite Mine and Refinery Devastate lives in India, February 2010, AI Index: ASA 20/001/2010, http://www.amnesty.org/en/library/asset/ASA20/001/2010/en/0a81a1bc-f50c-4426-9505-7fde6b3382ed/asa200012010en.pdf; , Amnesty International, Petroleum, Pollution and Poverty in the Niger Delta, June 2009, Index: AFR 44/017/2009, www.amnesty.org.uk/uploads/documents/doc_19492.pdf; Amnesty International and Greenpeace, The Toxic Truth, AI Index: AFR/31/002/2012, September 2012.

prevent UK companies from causing or contributing to human rights abuses in countries outside the UK - or to sanction such abuse when it occurs - the UK government is facilitating a situation where multinational companies operate to lower standards in countries where the rule of law or national enforcement mechanisms are weak.

RECOMMENDATIONS TO THE UK GOVERMENT:

- 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.

THE USE OF FORCE DURING THE REMOVALS PROCESS

Amnesty International has documented allegations of excessive use of force and the dangerous and unsuitable use of control and restraint techniques by Private Security Contractors during the forced removals process over a number of years.[25] The Human Rights Act 1998 (HRA), makes it unlawful for "public authorities" to act in a way which is incompatible with the articles of the European Convention on Human Rights set out in the HRA, including Article 3 prohibiting torture and inhuman or degrading treatment or punishment. While the HRA applies only to "public authorities", the UK government has previously stated that Private Security Contractors carrying out enforced removals would be covered by the HRA, although the UK Parliamentary Joint Committee on Human Rights has called for legislative clarification of this point.[26]

Reports of similar cases alleging ill-treatment by private contractors during forced removals have continued despite a number of reports critical of government, which highlighted deficiencies over the accountability, training and techniques employed by these contractors.[27] A report published by the House of Commons Home Affairs Select Committee in January 2012 regarding the treatment of people being deported, found that potentially lethal head-down restraints may still be being used, even though they are not authorized. The Committee recommended that urgent guidance be given by the Home Office to all staff involved in forced removals about the dangers of seated restraint techniques in which the subject is bent forward.

Amnesty International remains concerned that widespread and fundamental problems remain regarding the use of Private Security Companies in the forced removals process. Sources with direct working experience of forced removals have told Amnesty International about serious failings in the training of private contractors conducting forced removals. Staff are trained in control and restraint techniques that are unsuitable for use on aircraft; there is no mandatory training in the safe use of handcuffs and restraints; and there is no watertight system in place to ensure that those accredited to conduct removals have received the required level of training. The reportedly widespread use of sub-contractors to fill staff shortages also raises further serious concerns about training and accountability.

RECOMMENDATIONS TO THE UK GOVERNMENT:

- 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;

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[25] See *Out of Control: The case for a complete overhaul of enforced removals by private contractors*, a briefing by Amnesty International UK, July 2011, http://www.amnesty.org.uk/uploads/documents/doc_21634.pdf

[26] Joint Committee for Human Rights: The Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006–07, HL Paper 77 HC 410, 28 March 2007, esoecially para. 72.

[27] For example, report to the United Kingdom Border Agency on 'Outsourcing Abuse' by Baroness Nuala O'Loan, March 2010. See also reports by the HM Inspectorate of Prisons, August 2009 and October 2012.

- Ensure that enforced removals are regularly monitored by independent supervisory bodies including, for example, by boarding aircraft (including incognito) and monitoring the deportee and escort until arrival at the destination.

DIPLOMATIC ASSURANCES (ARTICLE 3)

The UK has sought and is continuing to seek diplomatic assurances from foreign governments in its attempts to deport a number of individuals, alleged to pose a threat to the UK's national security, to states where in ordinary circumstances they could not be deported because of the real risk of torture and other ill-treatment they would face upon being returned. To date the UK has concluded 'memorandums of understanding' (MoUs) with the governments of Lebanon, Jordan, Libya[28], Ethiopia and Morocco. After the UK tried and failed to secure a MoU with the Algerian authorities, the UK and Algerian government agreed to negotiate bilateral assurances for humane treatment and fair trial on a case by case basis.

Diplomatic assurances are a dangerous and unreliable mechanism that allows a sending government to circumvent the absolute prohibition on sending a person to a place where he or she risks torture or other ill-treatment.[29] Amnesty International's opposition is two-pronged: first, it is based in principle on the need to maintain respect for the existing legally-binding international machinery of human rights protection; second, on a more practical level, it is based on inherent deficiencies with respect to the reliability, efficacy and sufficiency of diplomatic assurances against torture and other ill-treatment.

Firstly, the absolute ban on torture and other cruel, inhuman and degrading treatment or punishment requires that all governments take positive steps toward the global eradication of such abuses. Under international customary and treaty law, all states have a legal interest, both jointly and individually, in ensuring that torture and ill-treatment practised by other states are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places. Implicit in such a legal interest is a general obligation to cooperate in and utilize the machinery of international enforcement and remedy in good faith towards these ends. Indeed states and global civil society have endeavoured for decades to establish this international system, based on the consensus that torture is one of the most abhorrent human rights violations. That system is, however, fundamentally undermined when states seek to circumvent it with non-binding, bilateral promises not to torture. Reliance on such promises allows states to neglect and evade their legal obligations, including by avoiding accountability and effective remedy for breaches of the absolute ban on torture and other ill-treatment and bypassing the prohibition against transferring people to places where they risk such violations.

Secondly, the particular dynamics that arise in cases of torture and other ill-treatment lead to inherent deficiencies in assurances that prevent them from effectively and reliably mitigating against such risks. In particular, governments that practise torture and similar abuse routinely deny it, create administrative structures to support "plausible deniability", develop techniques of abuse designed to avoid detection, and conceal evidence of it. Torture is usually practised in secret, with the collusion of law enforcement and other government personnel, and often in an environment of impunity, as states, particularly where torture is widespread, routinely fail to investigate allegations of torture and bring those responsible to account. Those subject to torture and other ill-treatment are also often afraid to recount their abuse to their lawyers, family members and monitors for fear of reprisals against them or their families.[30] Alongside these features of secrecy, deniability, and impunity in states where torture and

[28] In April 2007 the Court of Appeal of England and Wales upheld a prior decision of the SIAC allowing the appeals of two Libyan nationals against their deportations on the grounds that the assurances from the Libyan government were not sufficient to protect the men from a real risk of torture or other ill-treatment. See DD and AS v Secretary of State for the Home Department, [2008] EWCA Civ. 289, 9 April 2008.

[29] For further information regarding Amnesty International's position on diplomatic assurances, see Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture, AI Index: EUR 01/012/2010, April 2010. The Committee has taken a position against the use of diplomatic assurances in previous concluding observations, see for example CAT/C/CAN/CO/6, 25 June 2012, para.9 and CAT/C/CZE/CO/4-5, 13 July 2012, para. 8.

[30] An example of the limitations of assurances in this regard can be seen in a document recently disclosed during the case of Serdar Mohammed v Secretary of State for Defence [2012] EWHC 3454 (Admin). The document is a witness statement made by the Head of Legal Policy within the Operations Directorate in the Ministry of Defence that had initially been submitted in the case of Maya Evans v Secretary of State for Defence, but only in a closed session (see discussion further below regarding the Justice and Security Bill) – so was not seen in full by the claimants in that case or the public. The witness statement refers to the

other ill-treatment are practised, is the fact that such assurances are not legally binding and lack enforcement mechanisms.

Amnesty International also notes that 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), published on 6 July 2010, relies on the use of assurances in situations where there is a real possibility of torture or other ill-treatment in order "to effectively mitigate that risk to below the threshold of a serious risk".[31] However, for the reasons outlined above diplomatic assurances do not mitigate these risks as they are an ineffective safeguard against torture or other ill-treatment. 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.

POST-RETURN MONITORING

The UK government has posited that the provision of post-return monitoring ensures that the diplomatic assurances regime is compatible with the UK's international human rights obligations.[32] Amnesty International considers that no system of post-return monitoring of individuals will render assurances an acceptable alterative to rigorous respect for the absolute prohibition of transfers to risk of torture or other ill-treatment. Such ad hoc monitoring schemes necessarily omit the broader institutional, legal and political elements that can make certain forms of system wide monitoring of all places of detention in a country just one way, in combination with other measures, of potentially reducing the country-wide incidence of torture over the long term. Moreover, a series of post-return visits to a particular individual or just a few people would also put the detainee in an untenable position: the person is forced to choose between staying silent or reporting abuse in a situation where he or she will be clearly identifiable as the source of the report, and which may therefore heighten the risks such a person faces.

Post-return monitoring under bilateral agreements for diplomatic assurances bears little resemblance to system-wide monitoring protocols that seek to reduce the overall incidence of torture or other ill-treatment in detention. The process of monitoring a single person returned pursuant to diplomatic assurances has few, if any, of the safeguards built into system-wide protocols for monitoring all detainees in all places of detention in a given country and distorts the aims and claimed potential of such systems of visits. System-wide monitoring can over time gradually reduce the general incidence of ill-treatment in a country, but only if it takes place in a national setting where effective legal and policy frameworks against torture already exist and where the actors involved have the necessary determination, capacity, and incentives to act against torture. Among the elements recognised as being essential for a system-wide monitoring scheme to be effective include: independence and expertise of the monitors; monitors having a legal right to unhindered and unannounced access to all places of detention and the right to speak to all detainees in the country without witnesses;[33] and monitors imbued with the authority and

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transfer of a detainee to the Afghan intelligence service, the National Directorate of Security (NDS), in Kabul after the UK authorities sought assurances for his humane treatment. In a visit with UK officials the individual concerned subsequently alleged that he had been mistreated, however, he refused consent for this information to be provided to Afghan Officials, the ICRC or AIHRC to investigate as he would be easily identifiable as the source of the allegations and feared reprisals.

[31] Amnesty International noted the publication of the "Consolidated Guidance" as an important step toward ensuring transparency and accountability in relation to the actions of UK personnel operating overseas and their relationships with foreign intelligence services. However, ambiguities in the guidance nevertheless still gives rise to human rights concerns. For example, the guidance implies considerable discretion at the ministerial level to instruct officials to proceed with action which they know or believe will result in cruel, inhuman or degrading treatment or punishment, or in the face of evidence that there is a serious risk that UK action will result in torture.

[32] The assurances negotiated between the UK and Algerian governments do not provide for formal arrangements for post-return monitoring. However, in a number of judgments the Special Immigration Appeals Commission (SIAC) has reasoned that the Algerian assurances given to the United Kingdom are nonetheless capable of being verified through informal means, including indirectly by international NGOs, such as Amnesty International. See for example, 'U' and others v the Secretary of State for the Home Department, [20130 UKSIAC, 25 January 2013, paragraph 42 and Mouloud Sihali v Secretary of State for the Home Department, [2010] UKSIAC 26 March 2010, paragraphs 68 & 73. Amnesty International has vigorously rejected any suggestion that it can be relied upon to verify or monitor assurances, even indirectly. To assume so misrepresents the type of work Amnesty International undertakes and the conditions, frequency, privacy, and degree of access the organization has to detainees returned in such circumstances. Further it undermines international legal principles of state responsibility pursuant to which states must uphold their international obligations, and not rely on non-governmental organizations to do so for them.

[33] Any post-return monitoring of particular returnees, by definition, will lack a key prerequisite of proper system-wide monitoring, i.e. ensuring that a large number of detainees is visited in sufficiently private conditions to ensure that the authorities do not know which individuals provided which information – thereby helping

influence to ensure that if torture and other ill-treatment are detected an impartial and independent investigation of those allegations will be conducted, perpetrators held accountable and victims afforded a remedy. Some or all of these elements are markedly absent from the monitoring mechanisms contemplated by the assurances the United Kingdom has sought and procured.[34]

Furthermore, system-wide monitoring of this nature represents just one of the necessary conditions required to reduce the overall incidence of torture and other ill-treatment over the long term in a country. In particular, monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but also consistently bringing all perpetrators fully to justice and immediately stopping all further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive or deterrent effect. As the European Court of Human Rights has acknowledged, even in cases where there is system-wide monitoring and where the International Committee of the Red Cross does monitor detainees under a universal access principle, these measures cannot exclude the risk of subjection to treatment contrary to the prohibition on torture and other ill-treatment and guarantee the humane treatment of the detainee.[35] Also, critically, nothing in any post-return monitoring mechanism, no matter how rigorous, can possibly change the irreparable nature of the harm caused by torture.

SECRET EVIDENCE AND SAFETY ON RETURN

The absolute prohibition on deporting, extraditing or otherwise transferring any person to a country where he or she will face a real risk of being subjected to torture or other ill-treatment, incorporates the obligation to provide individuals with access to a fair and effective procedure, originating with or including judicial review, in which they may raise a claim of such risks and have it adjudicated.

Amnesty International has repeatedly expressed concerns that the reliance on secret evidence in appeal proceedings against orders for deportation on "national security" grounds, which take place before the Special Immigration Appeals Commission (SIAC), renders the process profoundly unfair. SIAC has ruled that where diplomatic assurances are relied upon by the government, those assurances must be public and open to scrutiny.[36] However, SIAC permits the government to rely on secret evidence, including intelligence material, to support its argument that the assurances will be effective and the individual concerned would not be at risk on return; such material can include further detail regarding the government's assessment about conditions prevailing in the country in question or possibly relate to the personal circumstances of the individual concerned which may affect risk on return.

The use of secret information, considered in secret sessions of the court from which they and their legal representatives have been excluded, is particularly concerning when individuals are deported in the context of a possible risk of torture or other ill-treatment on return. The use of such evidence in the safety on return aspect of national security deportation cases essentially ties the hands of the person subject to deportation; an individual cannot challenge effectively the government's claim that there is no risk because that person cannot review all the relevant evidence. [37] The UK's reliance on secret evidence with respect to risk on return and the use of unreliable and unenforceable diplomatic assurances as counter to the principles of a fair, transparent and open judicial

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to protect detainees and their families and associates against reprisal and better reassure detainees that they can safely provide critical information. The absence of any enforcement or remedial mechanism for the individual in the event of a breach of the assurances only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly reparable.

[34] In this respect see the recent Court of Appeal judgment J1 v Secretary of State for the Home Department, [2013] EWCA Civ 279, 27 March 2013, which highlights some of the deficiencies of the Ethiopian Human Rights Commission as a monitoring mechanism.

[35] Ben Khemais v Italy, Application No. 246/07, 24 February 2009.

[36] Abid Naseer and Others v Secretary of State for the Home Department, [2010] SC/77/80/81/82/83/09, paragraph 36.

[37] Amnesty International has spoken with numerous lawyers who represent individuals subject to national security deportation proceedings who have made it clear that they face profound difficulties in representing their clients effectively in SIAC proceedings. For example, one lawyer provided Amnesty International with the following example of the challenge he faced in dealing with secret evidence in relation to safety on return "The key evidence we provided was a lawyer, but he himself had not seen any closed material, and it was difficult for him to express a clear view on risks of prosecution and therefore the consequential risks on detention. This is also not a gap that can be filled by Special Advocates37 – they don't in practice have access to security cleared evidential resources on these issues". For further information regarding the use of secret evidence in national security deportation cases see Amnesty International's report: Left in the Dark: The use of secret evidence in the United Kingdom, AI Index: EUR 45/014/2012, October 2012.

process as required under the Convention.[38]

RECOMMENDATIONS TO THE UK GOVERNMENT:

- Cease seeking, using and relying on unreliable diplomatic assurances against torture and other ill-treatment diplomatic assurances against torture and other ill-treatment to forcibly return persons to places where they are at risk of such violations.

- Reform the procedures of the SIAC to ensure that people who face deportation to their country of origin are granted access to the evidence on which the UK authorities assert that they can be safely deported to the country in question; and, pending this reform, to stop relying on secret evidence with respect to safety on return in cases before the SIAC.

ACCOUNTABILITY (ARTICLES 5, 12, 13, 14 & 16)

ALLEGATIONS OF TORTURE AND OTHER ILL-TREATMENT BY ARMED FORCES IN IRAQ

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 Basra.[39] To date, however, only one low-ranking soldier is known to have been convicted by the UK authorities for inhuman treatment of detainees.[40] The UK government still faces hundreds of legal claims by Iraqis who allege that they were subject to abuses by British troops and has reportedly paid out millions of pounds to settle claims made by Iraqi complainants, although often without admitting liability.[41] Allegations also continue to persist about UK special forces personnel handing over detainees into US custody at Camp Nama notwithstanding having witnessed or otherwise being personally aware of torture and ill-treatment there.[42]

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

[38] Amnesty International notes that in 2012, the European Court of Human Rights, in the case Othman v UK, (App. No. 8139/09), 17 January 2012, found that SIAC's procedures and the use of closed material with respect to the question of safety on return was compatible with article 13 of the European Convention on Human Rights (the right to an effective remedy) on the facts of that case. However, this ruling appears to leave, for the moment at least, European jurisprudence concerning the UK's obligations under the European Convention on Human Rights at odds with the UK's obligations under the ICCPR as interpreted by the Human Rights Committee in the 2004 case of Ahani v Canada UN Doc CCPR/C/80/D/1051/2002 (2004), see especially paragraphs 10.6 to 10.8. The difference between the result of the European Court of Human Rights judgment in Othman and that of the decision of the Human Rights Committee in Ahani may be explained in part by the fact that the United Kingdom to date remains the only European state to have neither signed nor ratified the 1984 Protocol no 7 to the European Convention on Human Rights, article 1 of which closely resembles article 13 of the ICCPR (which otherwise has no direct parallel in the European Convention on Human Rights) and concerns "the procedural safeguards relating to the expulsion of aliens".

[39] 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.

[40] At least four other members of the UK armed forces were court-martialed and convicted of offences in connection with the so-called Breadbasket incident of May 2003 involving mistreatment and photographs of Iraqi looters. See: http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GBR.5.doc)

[41] Ian Cobain, "MoD pays out millions to Iraqi torture victims," *The Guardian*, 20 December 2012, http://www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims and Rosa Silverman, "MoD pays out £14m in compensation to Iraqis over torture claims," *The Telegraph,* 21 December 2012, http://www.telegraph.co.uk/news/uknews/defence/9759919/MoD-pays-out-14m-compensation-to-Iraqis-over-torture-claims.html

[42] Ian Cobain, "Camp Nama: British personnel reveal horrors of secret US base in Baghdad", The Guardian, 1 April 2013, http://www.guardian.co.uk/world/2013/apr/01/camp-nama-iraq-human-rights-abuses

recommend measures, including reparations, to provide effective redress to victims and to prevent future repetition of such violations.

To date, however, the UK authorities have responded in an incremental and individualized manner to attempts to secure accountability for alleged human rights violations by British forces in Iraq. This has been largely through settling civil claims (without admitting liability) made by individual victims, their families and legal representatives who have sought to obtain remedy through action before the courts, requests made under the Freedom of Information Act by NGOs and campaigners, and other means.[43]

AL-SKEINI AND OTHERS V THE UNITED KINGDOM

Throughout the period that British armed forces were present in Iraq, the UK government contended that it was not bound by the UK's obligations under the European Convention on Human Rights (the Convention) because its forces were operating outside the UK's territory. The UK courts accepted this argument, but in July 2011 the Grand Chamber of the European Court of Human Rights rejected the UK's contentions. In a landmark judgment (*Al-Skeini and Others v the United Kingdom)*, that Court ruled that as an occupying power the UK had exercised effective authority and control over individuals killed in the course of security operations in Iraq and thus was bound by the Convention. It ruled also that the UK authorities' failure to conduct independent and effective investigations into five of the six killings of civilians by UK soldiers in Iraq in 2003 and 2004 [44] that were the focus of the *Al-Skeini* case amounted to a breach of article 2 of the Convention (right to life). The case was brought by relatives of six Iraqi civilians: four, including one woman, who had been shot dead by British troops; one, a boy of 15, who had drowned after troops allegedly beat him and forced him into a river; and the sixth individual, Baha Mousa, who had died after British troops detained and tortured him.[45] In Baha Mousa's case, the European Court did not find a violation of the procedural obligation to investigate under article 2, noting that Baha

[43] The need for a comprehensive assessment of human rights violations set out in this document is distinct from the task taken up by the Iraq Inquiry, chaired by Sir John Chilcot, announced in June 2009 by former UK Prime Minister Gordon Brown, and established in July 2009. The Iraq Inquiry's terms of reference are extremely broad, and are more centrally focused on UK foreign policy vis-à-vis Iraq and the decision to enter the conflict in 2001 rather than focusing on the UK's human rights obligations: "It will consider the period from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, the military action and its aftermath. We will therefore be considering the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country" (http://www.iraqinquiry.org.uk/about.aspx). The Iraq Inquiry concluded its public hearings in February 2011, and was expected to have published its report by July 2012, although that date has now been postponed. The clearest summary of the issues addressed by the report are set out in an annex to a letter from the Inquiry's Chair to the UK Prime Minister on 13 July 2012 (http://www.iraqinquiry.org.uk/media/54266/2012-07-13%20chilcot%20cameron.pdf).

[44] For further detail on the Al-Skeini case, see: UK: European Court criticizes UK for violating human rights in Iraq, AI Index: EUR 45/009/2011, http://www.amnesty.org/en/library/info/EUR45/009/2011. See also: Law Lords hear key case on detention without charge or trial by UK forces in Iraq, AI Index: EUR 45/017/2007, 26 October 2007, http://www.amnesty.org./en/library/info/EUR45/017/2007/en; United Kingdom: Amnesty International's reaction to Law Lords' judgment in the Al-Skeini & Other case, AI Index: EUR 45/008/2007, 13 June 2007, http://www.amnesty.org./en/library/info/EUR45/008/2007/en; UK: Eleven organisations intervene before House of Lords in case considering the role of UK military in torture and killings of Iraqi civilians, AI Index: EUR 45/007/2007, 16 April 2007, http://www.amnesty.org./en/library/info/EUR45/007/2007/en. The issue of whether or not rights guaranteed by the European Convention applied to territory where a signatory to the convention was an occupying power and was exercising public powers, has not solely been confined to the allegations of torture, other ill-treatment and unlawful killing by UK forces; it has also included internment and transfers of detainees to a situation in which they risked facing the death penalty and execution. Notably, in another judgement (Al-Jedda v the United Kingdom) issued on the same day as Al-Skeini, , the European Court of Human Rights found that the prolonged internment of the applicant, Hilal Abdul-Razzaq Ali Al-Jedda, for more than three years in a detention centre in Basra, Iraq, run by UK forces, violated his right to liberty and security (Article 5) under the European Convention. Hilal Al-Jedda, was arrested by US soldiers in Iraq, apparently acting on information provided by British Intelligence services, on 10 October 2004. He was taken to Sha'aibah Divisional Temporary Detention facility in Basra city, a detention centre run by British forces, and held there, without charge or trial until his release on 30 December 2007 over three years later. This type of detention, sometimes called "internment", is prohibited by the European Convention on Human Rights (save for where a state has made a valid derogation, which the UK did not seek to do in relation to detentions in Iraq). The UK had claimed that Hilal Al-Jedda was not entitled to the protection of the European Convention on Human Rights at all. It argued that the United Nations alone was legally responsible for the detention, since, it argued, UK forces were acting as part of the Multi-National Force (MNF) in Iraq, under a specific mandate from the UN Security Council. The UK also argued that, even if it was legally responsible for the detention, the relevant UN Security Council resolutions authorized internment and this would override any contrary obligations the UK had under the ECHR. The European Court rejected the UK's arguments, finding that the UK was indeed legally responsible for the internment by its forces of Hilal Al-Jedda, and that nothing in the UN mandate disentitled him to the protections of the ECHR. The Court therefore found his internment to violate Article 5 of the European Convention. In an earlier case, in March 2010, the European Court of Human Rights found that the UK had violated Article 3 of the European Convention on Human Rights in the case of Al-Saadoon and Mufdhi. Faisal Attiyah Nassar Al-Saadoon and Khalaf Hussain Mufdhi, two Iraqi nationals, were arrested and detained in 2003 in Iraq in UK-run detention facilities; and subsequently transferred in December 2008 to Iraqi custody despite substantial grounds for believing that they would risk facing the death penalty and execution, and nothwithstanding interim measures from the European Court of Human Rights indicating that the UK government should not transfer them to the Iraqi authorities until further notice from the Court.

[45] They were named: Hazim Jum'aa Gatteh Al-Skeini, 23; Muhammad Abdul Ridha Salim, 45; Hannan Mahaibas Sadde Shmailawi, 33; Waleed Sayay Muzban, 43; and Ahmed Jabbar Kareem Ali, 15.

Mousa's father had accepted there was no such violation following the establishment of a public inquiry into Baha Mousa's death in detention between the lodging of the Al-Skeini case and the Court's delivery of its judgment.

BAHA MOUSA INQUIRY

Baha Mousa, 26, a hotel worker, died on 15 September 2003 the day after British troops in Basra detained and tortured him and a number of other Iraqis. They tortured and otherwise ill-treated him over 36 hours; a post-mortem examination revealed 93 separate injuries on his body and concluded that he had died from asphyxiation.

Three and a half years later, the UK authorities court-martialled seven British soldiers, including a colonel and a major, in connection with his death. One entered a guilty plea to a charge of inhuman treatment of detainees, a war crime, and was sentenced to 12 months' imprisonment. His six co-defendants were acquitted. The court martial proceedings confirmed that Baha Mousa had sustained multiple injuries due to ill-treatment by British soldiers at the time of his arrest and during his subsequent detention. The Judge Advocate hearing the case observed that many individuals had been responsible for inflicting "unlawful violence" on Baha Mousa but had escaped identification and could not be "charged with any offence simply because there is no evidence against them as a result of a more or less obvious closing of ranks". [46]

The UK Ministry of Defence paid compensation to Baha Mousa's family and the other men in 2008 following the acceptance of liability.

Following litigation in the UK courts, in May 2008 the UK government agreed to hold a public inquiry into Baha Mousa's death under the Inquiries Act of 2005. Headed by Sir William Gage, a retired Court of Appeal judge, the inquiry was conducted from July 2009 to October 2010 and issued its final report on 8 September 2011.[47] It concluded that Baha Mousa's death was a result of both his vulnerability due to heat; rhabdomyolysis[48]; renal failure; lack of food and water; exertion, exhaustion and multiple injuries; and the violent assault and dangerous restraint techniques to which he was subjected by British soldiers. The Inquiry also found that nine other Iraqis detained with Baha Mousa had been subjected to human rights violations by British soldiers who could not be identified but who had beaten, kicked, punched and verbally abused them, hooded them for long periods of time, held them in stress positions, and deprived them of food and water while holding them in unsanitary conditions in extreme heat.

The public inquiry report named 19 individuals as responsible for the violations of the Iraqi detainees' rights and criticised both the "lack of moral courage to report abuse" of others who must have been aware of what had occurred and senior military officers whose command failures had allowed the torture and other ill-treatment of detainees to go unchecked.

The inquiry report also pointed to a "corporate" and "systemic failure" of the Ministry of Defence to provide British armed forces with clear and consistent guidelines on the proper treatment of detainees, as a result of which interrogation techniques banned by the UK government in 1972, such as hooding of detainees, had been used by British soldiers in Iraq.

The report made 73 separate recommendations, including that a system of independent inspection of places of detention should be developed and that each military unit should appoint a detention review officer, 72 of which the Ministry of Defence accepted, rejecting only the recommendation to impose a blanket ban on the 'harsh' technique or shouting in the face of the detainee during 'tactical questioning'.[49]

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[46] R v Payne Sentencing Hearing Transcript, 30 April 2007, http://www.publications.parliament.uk/pa/ld200607/ldlwa/070327wa1.pdf.

[47] For further information, see United Kingdom: Justice must follow as Baha Mousa Inquiry makes damning findings against UK armed forces, AI Index: EUR 45/016/2011, 9 September 2011, http://www.amnesty.org/en/library/info/EUR45/016/2011/en

[48] The destruction of muscle fibres leading to muscle fibres entering the bloodstream and in turn causing kidney damage or failure

[49] MOD Announcement, Publication of the Baha Mousa Inquiry Report, 8 September 2011, https://www.gov.uk/government/news/publication-of-the-baha-mousa-inquiry-report; Liam Fox, "There can be no excuses for Baha Mousa's death," The Guardian, 8 September 2011, http://www.guardian.co.uk/commentisfree/2011/sep/08/baha-mousa-death-sir-william-gage; and Sam Marsden and John Fahey, "Liam Fox rejects key inquiry finding," The Independent, 8 September 2011, http://www.independent.co.uk/news/uk/home-news/liam-fox-rejects-key-inquiry-finding-2351154.html.

The day after publication of the public inquiry report, it was widely reported that the British Army had suspended an unspecified number of soldiers believed to have been involved in the events leading to Baha Mousa's death and the torture and other ill-treatment of the other detainees, pending consideration of whether to prosecute them.[50] More than a year later, however, Amnesty International is not aware of any subsequent decisions having been announced with regard to prosecutions. Separately, in December 2012, a disciplinary body of the General Medical Council ruled that an army doctor who had attended Baha Mousa and his co-detainees had been "repeatedly dishonest" and should be removed from the UK's medical register.[51]

AL-SWEADY INQUIRY

Following protracted judicial review litigation brought by or on behalf of victims of torture, other ill-treatment and unlawful killing, the UK government announced on 25 November 2009 that a separate public inquiry under the Inquiries Act of 2005 would be held into the killing of Khuder al-Sweady and allegations of torture and other ill-treatment of five other Iraqi men by British troops during the so-called Battle of Danny Boy near Majar al Kabir in 2004.[52] By then, the High Court had expressed concern about the failures of the Ministry of Defence to disclose material relating to permissible limits of the techniques of tactical questioning and its failure to comply with procedures for putting Ministerial Public Interest Immunity Certificates and Schedules before the Court, which the Court believed had the effect of misleading it.[53] In a withering passage, the High Court judge, LJ Scott Baker, identified "both systemic and individual failures within the MOD on a substantial scale in this case. Put bluntly, the left hand did not know what the right hand had done, or was doing, and even when it did, nothing was done to seek to correct the situation, and in particular to inform the court, until very late indeed in the day". [54] In a related judgement, in October 2009, LJ Scott Baker was even more withering in his criticism of the repeated failures around disclosure of documents by the Ministry of Defence and misleading evidence from the Ministry of Defence's key witness on the investigation into the events of 2004 by the Royal Military Police.[55] In short, given its repeated failures and the adverse publicity generated by the Court decisions, the Ministry of Defence was left with little option other than to announce an inquiry, although the Minister continued to maintain that the Ministry of Defence had "found no credible evidence to support [the] allegations".[56]

Chaired by Sir Thayne Forbes, a retired High Court judge, the Al-Sweady Inquiry's terms of reference are:

> To investigate and report on the allegations made by the claimants in the Al- Sweady judicial review proceedings against British soldiers of (1) unlawful killing at Camp Abu Naji on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base between 14 May and 23 September 2004, taking account of the investigations which have already taken place, and to make recommendations. [57]

The inquiry was formally established in December 2009 and held a preliminary hearing in March 2010 prior to undertaking extensive fact-finding. The inquiry commenced oral hearings in March 2013, following a statement to this effect by its Chairman in December 2012. In July 2012, it was reported that lawyers for the victims in the Al-Sweady case still believed that the Ministry of Defence was withholding relevant evidence, notably due to the

[50] See, for example, Richard Norton-Taylor and Owen Bowcott, "Army suspends Baha Mousa soldiers as more prosecutions are considered," The Guardian, 9 September 2011, http://www.guardian.co.uk/world/2011/sep/08/army-suspends-baha-mousa-soldiers.
[51] Fitness to Practice Panel of the Medical Practitioners Tribunal Service, Case Ref 4509417, 21 December 2012, http://www.mpts-uk.org/static/documents/content/Keilloh.pdf. Local media reports indicated that Derek Keilloh has chosen not to appeal the decision. See Joe Willis, "Family of struck-off Northallerton GP Derek Keilloh launch fresh campaign", The Northern Echo, 24 January 2013, http://www.thenorthernecho.co.uk/news/10183887.Family_of_struck_off_doctor_launch_new_campaign/.
[52] Hansard, 25 November 2009, Column 82WS, http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091125/wmstext/91125m0001.htm.
[53] For a wider discussion of the obstacles to accountability and remedy arising from non-disclosure in UK courts for reasons of national security, see Left in the dark: The use of secret evidence in the United Kingdom, AI Index: EUR 45/014/2012, 15 October 2012, http://www.amnesty.org/en/library/info/EUR45/014/2012/en.
[54] Al-Sweady & Ors, R (on the application of) v Secretary of State for Defence [2009] EWHC 1687 (Admin) (10 July 2009), para 23.
[55] Al-Sweady & Ors, R (on the application of) v Secretary of State for the Defence [2009] EWHC 2387 (Admin) (02 October 2009), para 30.
[56] Hansard, 25 November 2009, Column 82WS, http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091125/wmstext/91125m0001.htm.
[57] Further details about the Al-Sweady Inquiry and key documents can be accessed via the Inquiry's website: http://www.alsweadyinquiry.org/.

complete absence of witness statements from any military interrogators.[58]

ALI ZAKI MOUSA AND THE IRAQ HISTORIC ALLEGATIONS TEAM (IHAT)

A group of over 120 Iraqi nationals, known by the name of the lead claimant Ali Zaki Mousa, began legal proceedings in the courts of England and Wales seeking a single public inquiry into allegations that they were tortured or otherwise ill-treated by UK armed forces in detention facilities in Iraq between April 2003 and December 2008. They argued that, in order to discharge the UK's obligation under Article 3 of the European Convention on Human Rights (ECHR), the government must establish a prompt, thorough, independent and effective investigation into the allegations. The claimants' lawyers argued that there was a pattern of abuse, involving a variety of techniques, rather than isolated incidents requiring investigation. The High Court's summary of the techniques in question follows below:

> (1) techniques on sensory deprivation (including hooding, sight deprivation by the wearing of blackened goggles or other means, forced silence, sound deprivation by the use of ear muffs and prolonged solitary confinement); (2) techniques on debility (including food or water deprivation, sleep deprivation, stress techniques such as prolonged kneeling, forced exertion such as forced running, temperature manipulation such as detention in unbearably hot locations or dousing with cold water and sensory bombardment or use of noise); (3) other excessive techniques (including forced nakedness or exposure of genitals, threats or rape/violence, running/dragging in a zigzag, prolonged and direct shouting, other 'harshing' techniques, restrictions on access to toilets and prolonged cuffing); (4) sexual acts (including forced watching/listening of pornographic videos, sexual intercourse or other sexual acts between soldiers in front of detainees, masturbation by soldiers in front of detainees, attempted sexual seduction of detainees, and no privacy on toilet or in shower; (5) religious/cultural humiliation (including urinating on detainees, not allowing detainees to pray, and taunting at prayer or other interferences); (6) other abuse (including mock executions, beatings with weapons or fists or feet, punching, slapping, kicking, spitting and dragging along the ground).[59]

In March 2010, the UK government opted to create the IHAT rather than establish a public inquiry to investigate alleged criminal wrongdoing arising from abuse of Iraqi nationals by British military forces. The government made it clear that this should not be seen as "an admission of fault" but rather a means "to deal with these unproven allegations once and for all."[60] The government said in November 2010 that the IHAT, "led by a retired senior civilian policeman and consist[ing] of military and ex-civilian police detectives" had begun and should complete its work within two years,[61] although two and a half years later it remains unclear when IHAT's work will be completed.[62]

The IHAT is designed in principle to work in coordination with a separate panel (the Iraq Historic Allegations Panel-IHAP) which is tasked with examining material from IHAT investigations. Both the IHAT and IHAP report to the Provost Marshal, the most senior officer in the Royal Military Police (RMP) and had, initially, staff drawn from the RMP and civilians, primarily ex-police officers.

In December 2010, the High Court rejected an application by the then 141 Iraqi claimants to require the Ministry of Defence to establish immediately a public inquiry into the allegations, opting instead to endorse the government's "wait and see" approach – that is, assessing the need to establish an inquiry after the conclusion of the IHAT's work and the work of the other public inquiries.[63]

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[58] Richard Norton-Taylor, "MoD accused of withholding evidence of 'shocking' treatment of Iraqi civilians", The Guardian, 19 July 2012, http://www.guardian.co.uk/uk/2012/jul/19/mod-accused-evidence-iraqi-civilians

[59] Mousa, R (on the application of) v Secretary of State for Defence & Anor [2010] EWHC 3304 (Admin) (21 December 2010) http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html, para 11.

[60] Hansard, Written Ministerial Statement, 1 March 2010, Column 94WS, http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100301/wmstext/100301m0001.htm#10030110000093.

[61] MOD Announcement, "Iraq Historical Allegations Team starts work", 1 November 2010, https://www.gov.uk/government/news/iraq-historic-allegations-team-starts-work.

[62] Amnesty International wrote in December 2012 to the IHAT seeking a meeting to discuss its work. To date, the organization has not received any response.

[63] Mousa, R (on the application of) v Secretary of State for Defence & Anor [2010] EWHC 3304 (Admin) (21 December 2010)

The claimants appealed to the Court of Appeal that the IHAT was not a sufficiently independent mechanism, as it included RMP personnel who had been involved in operations in Iraq. On 22 November 2011, the Court of Appeal allowed the appeal finding the "practical independence of IHAT [to be], at least as a matter of reasonable perception, substantially compromised."[64] As a result of finding the IHAT to be insufficiently independent to satisfy the UK's obligation to investigate under the European Convention on Human Rights, the Court of Appeal ruled that the "wait and see" approach was no longer tenable.

Rather than ordering a wide-ranging public inquiry, the Ministry of Defence announced in March 2012 that it would reconfigure the composition and staffing of the IHAT to address the issue of 'practical independence'. Nick Harvey, the Minister for the Armed Forces, said that the RMP would be replaced by the Royal Navy Police within the IHAT by 1 April 2012, and announced that additional teams would be established within the IHAT to follow up on the Baha Mousa Inquiry and the Al-Skeini judgment.[65] In October 2012, the media reported that a "whistleblower" within IHAT had alleged that RMP personnel had remained in place within IHAT long after the April restructuring date announced by the Minister.[66]

In January 2013 the High Court heard a further judicial review application brought on behalf of now many hundred Iraqi claimants, seeking a single public inquiry into their torture and other ill-treatment, challenging the independence of the reconfigured IHAT and arguing that an inquiry needed to be established immediately. The Court's judgment is pending.

RECOMMENDATIONS TO THE UK GOVERMENT:

- Establish a single, independent, public inquiry to investigate allegations of torture, other ill-treatment and unlawful killing during the period UK armed forces were present in Iraq

- Ensure that any such inquiry must, among other things, be able to assess independently the degree to which these violations were systemic; apportion responsibility at all relevant levels; and recommend measures to prevent repetition of such violations.

- Ensure that all victims of human rights violations by UK forces in Iraq are provided access to an adequate, effective and comprehensive remedy and reparations including restitution, fair and adequate financial compensation, measures of satisfaction and appropriate medical care and rehabilitation.

ALLEGATIONS OF UK COMPLICITY IN TORTURE

The UK government and intelligence agencies have faced a growing number of allegations, including through revelations in claims brought in domestic courts by individual victims and as a result of investigative work by NGOs and journalists, about their involvement in human rights violations of people detained overseas since 11 September 2001.[67] The allegations include involvement in torture or other ill-treatment, arbitrary detention, enforced disappearance of individuals detained overseas in the context of counter-terrorism operations.

On 6 July 2010, UK Prime Minister David Cameron confirmed that he would establish an inquiry into the allegations of involvement of UK officials and members of the intelligence services in torture and other human

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http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html, paras 114 and 134.

[64] Mousa, R (on the application of) v Secretary of State for Defence & Anor [2011] EWCA Civ 1334 (22 November 2011), http://www.bailii.org/ew/cases/EWCA/Civ/2011/1334.html, para 38.

[65] Minister of State for the Armed Forces (Nick Harvey MP), Iraq Historical Allegations Team, 26 March 2012, http://www.parliament.uk/documents/commons-vote-office/March_2012/26-03-12/4-Defence-Iraq-Historic-Allegations-Team.pdf.

[66] Ian Cobain, "Iraq abuse inquiry little more than a whitewash, says official," The Guardian, 11 October 2012, http://www.guardian.co.uk/uk/2012/oct/11/iraq-abuse-inquiry-whitewash-claim, and Ian Cobain, "Inquiry into British abuse of Iraqi prisoners faces fresh allegations," The Guardian, 12 October 2012, http://www.guardian.co.uk/uk/2012/oct/12/inquiry-british-abuse-iraqi-prisoners

[67] See United Kingdom: Disclosed documents further demonstrate urgent need for an effective inquiry into the UK's role in the torture and ill-treatment of detainees held in overseas custody, EUR 45/011/2010, 15 July 2010, http://www.amnesty.org/en/library/info/EUR45/011/2010/en and United Kingdom: Time for an inquiry into the UK's role in human rights violations overseas since 11 September 2001, EUR 45/001/2010, 23 March 2010, http://www.amnesty.org/en/library/info/EUR45/001/2010/en

rights violations.[68] The government subsequently appointed Sir Peter Gibson, a retired judge and the former Intelligence Services Commissioner, to lead the three-member inquiry panel.

Exactly one year later, on 6 July 2011, the UK government confirmed the terms of reference and protocol for the Detainee Inquiry, as the inquiry was then named.[69]

Amnesty International considers that the Detainee Inquiry, headed by Sir Peter Gibson, was never fit for purpose, and fell significantly short of the UK's international human rights obligations to fully and independently investigate allegations of UK involvement in torture and other ill-treatment. The most concerning aspects of its design were that the terms of reference and protocol did not provide the inquiry with sufficient independence from the government in order for its work to be effective; the government retained final say on what material could be disclosed to the public, and could decide to keep material secret on extremely broadly defined grounds; and the protocol did not provide for an independent mechanism to decide on disclosure of national security material.[70]

Amnesty International worked closely with a group of leading UK and international NGOs in following developments on the Detainee Inquiry. [71] Nine NGOs submitted a joint letter to the Inquiry in September 2010 and participated in a meeting with the Inquiry panel in January 2011. In February 2011, the NGO group made further submissions to the Chair of Inquiry Panel.[72] Later that month, the Inquiry informed the NGOs by letter that it considered that its process need not comply with procedural requirements under Article 3 of the ECHR; in essence, then, it would not be a human rights compliant inquiry. In response, the NGOs submitted a letter to the panel reiterating that the UK has an absolute legal obligation to ensure that an investigation into the allegations is conducted in conformity with the UK's legal obligations under the ECHR, International Covenant on Civil and Political Rights (ICCPR) and the Convention, and given that the Inquiry seemed to be the only body established to satisfy this obligation, it was crucial to meet those requirements.[73]

On 3 August 2011, Amnesty International and nine other NGOs wrote a letter to the Detainee Inquiry stating that, given the inquiry's shortcomings, they did not intend to submit further evidence to the inquiry team or to attend further meetings with them.[74] Lawyers acting for the individuals who have alleged that they were tortured or otherwise ill-treated also wrote to the inquiry's legal team on the same day stating they would be forced to advise their clients that it was not appropriate to participate in the inquiry in the current circumstances.

The then UK Justice Secretary, Kenneth Clarke, announced on 17 January 2012 that the UK government decided to conclude the work of the Detainee Inquiry, pending ongoing criminal investigations into allegations of UK involvement in torture and other ill-treatment.[75] The Chairman of the Detainee Inquiry, Sir Peter Gibson, confirmed the news shortly thereafter, stating that the Inquiry would produce a report for any future judicial inquiry.

On 17 July 2012 the Inquiry submitted to the government an interim report laying out its preparatory work. To date, nine months after submission to the government, the report's contents remain unknown and there has been no indication of when it will be published.

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[68] For further information see: NGOs call for effective UK torture inquiry, 14 September 2010, http://www.amnesty.org/en/news-and-updates/ngos-call-effective-uk-torture-inquiry-2010-09-14; UK: Joint letter re: Inquiry into alleged UK involvement in the mistreatment of detainees held abroad, EUR 45/016/2010, 14 September 2010, http://www.amnesty.org/en/library/info/EUR45/016/2010/en and UK torture inquiry must be independent and thorough, 7 July 2010, http://www.amnesty.org/en/news-and-updates/uk-torture-inquiry-must-be-independent-and-thorough-2010-07-07
United Kingdom: Proposed torture inquiry must be independent, impartial and thorough, EUR 45/005/2010, 24 May 2010, http://www.amnesty.org/en/library/info/EUR45/005/2010/en

[69] The Detainee Inquiry is sometimes referred to publicly as the 'Gibson Inquiry'. For further detail regarding the protocol for the Detainee Inquiry see, United Kingdom: Detainee Inquiry terms of reference and protocol fall far short of human rights standards, EUR 45/011/2011, August 2011, http://www.amnesty.org/en/library/info/EUR45/011/2011/en

[70] Detainee Inquiry, Terms of Reference, http://www.detaineeinquiry.org.uk/key-documents/terms-of-reference/ and Protocol, http://www.detaineeinquiry.org.uk/key-documents/protocol/

[71] The group of NGOs included the AIRE Centre, Amnesty International, British Irish Rights Watch, Cageprisoners, Freedom from Torture (formerly the Medical Foundation for the Care of Victims of Torture), Human Rights Watch, Justice, Liberty, Redress and Reprieve.

[72] UK: Joint NGO Submission to Chair of the Detainee Inquiry, EUR 45/002/2011, February 2011, http://www.amnesty.org/en/library/info/EUR45/002/2011/en

[73] UK: Joint NGO letter to the Secretary to the Detainee Inquiry, EUR 45/003/2011, February 2011, http://www.amnesty.org/en/library/info/EUR45/003/2011/en

[74] UK: Joint NGO letter to the Solicitor to the Detainee Inquiry, EUR 45/010/2011, August 2011, http://www.amnesty.org/en/library/info/EUR45/010/2011/en

[75] United Kingdom: Detainee Inquiry closure presents an opportunity for real accountability, EUR 45/005/2012, 18 January 2012, http://www.amnesty.org/en/library/info/EUR45/005/2012/en

In March 2013, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism called on the UK government to "publish without further delay, and to the fullest extent possible, the interim report of the Gibson Inquiry." [76] The Special Rapporteur further sought clarification on the timetable for any future inquiry and recommended that any new inquiry be designed to satisfactorily address the many shortcomings in the terms of reference for and powers of the Detainee Inquiry, in line with the report of the Special Rapporteur on torture on best practice for commissions of inquiry into allegations of this nature.[77]

Amnesty International is further concerned by suggestions by the UK that an inquiry into these allegations need not be conducted in a human rights complaint manner, because allegations of complicity and involvement in torture do not necessarily give rise to the same investigatory obligations, as would be the case if UK personnel were alleged to have directly committed the acts in question.[78] Amnesty International has reminded the government that under the Convention, obligations to investigate arise in relation not only to acts of torture in which the state's agents directly inflicted the pain and suffering, but also wherever the pain and suffering was inflicted "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" on behalf of the state.[79] Indeed, the Convention expressly covers any "act by any person which constitutes complicity or participation in torture." Accordingly, any future inquiry must be fully compliant with human rights standards in order to discharge the UK's obligations under the Convention.

RECOMMENDATIONS TO THE UK GOVERMENT:

- Establish a human rights compliant inquiry on alleged UK involvement in human rights violations, including torture and other ill-treatment of detainees held overseas, that ensures real accountability, and that conforms with and fully discharges the UK's obligations under international human rights law

- Publish the interim report of the Detainee Inquiry without further delay;

- Begin meaningful consultation with victims, lawyers and NGOs on the terms of reference and protocol for the promised inquiry.

ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES AND VIOLATIONS IN NORTHERN IRELAND

Amnesty International notes that the Committee's list of issues includes reference to the "investigation into deaths by lethal force that occurred during the conflict period in Northern Ireland". Over the past year the organization has been carrying out research with respect to accountability for past human rights abuses and violations in Northern Ireland. As part of this research Amnesty International have spoken with families and victims, lawyers and NGOs who all have experience of engaging with the mechanisms that currently exist to carry out historical investigations, including the Historical Enquiries Team, the Police Ombudsman of Northern Ireland, inquests and inquiries. The full findings of the research will be published later in the year and a copy will be provided at that time to the Committee. However, the initial research conducted by the organization indicates that although in some cases the mechanisms which exist are delivering redress, in many others they are proving inadequate and appear unable to deliver fully independent, effective, prompt and thorough investigations.[80]

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[76] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf, paragraph 53 (d).

[77] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf, paragraphs 47-49 and 53 (d).

[78] In correspondence between the Detainee Inquiry and a group of ten NGOs, on 08 February 2011, the Secretary of the Inquiry highlighted that it was examining allegations of complicity in torture and mistreatment, not allegations that UK Personnel were themselves directly involved. The Secretary to the Inquiry suggested that the same investigative duty does not apply to these allegations of involvement or complicity and, as such, seemed to conclude that the Inquiry need not be conducted in a manner capable of satisfying the UK's obligations under Article 3 of the European Convention on Human Rights. Likewise in correspondence from the Treasury Solicitor to Reprieve on 28 July 2010 which states that the Inquiry "has not been set up in order to comply with any alleged investigative duty under the ECHR." This reference to an "alleged" duty to investigate has been repeated in meetings, correspondence and public statements by UK authorities.

[79] See for example, UK: Joint NGO letter to the Secretary to the Detainee Inquiry, EUR 45/003/2011, February 2011, http://www.amnesty.org/en/library/info/EUR45/003/2011/en

[80] Some of these concerns are reflected in the following documents: "Joint Submission by the Committee on the Administration of Justice (CAJ) and the Pat

More generally, however, Amnesty International is concerned that the narrow and particular remit of these mechanisms means that they are simply not able to secure accountability for past human rights violations and abuses. In particular, they do not allow for a broader and more thorough examination of the systemic nature or patterns of the violations and abuses that occurred, the policies, practises and institutional culture of both state agencies and armed groups or the responsibility and role of high-level decision makers. Amnesty International accordingly believes that steps urgently need to be taken to find a way to systematically and comprehensively address the outstanding abuses and human rights violations of Northern Ireland's past in order to ensure accountability is finally secured.

THE JUSTICE AND SECURITY BILL

Amnesty International is concerned that a number of provisions in the Justice and Security Bill, expected to be enacted shortly, will undermine the right to an effective remedy and will limit the ability of victims of human rights violations to seek disclosure of material pertaining to those violations in domestic courts on national security grounds. In this regard, Amnesty International would also highlight to the Committee that the Bill was introduced as a direct response to the civil claims, described above, brought by a number of individuals alleging UK involvement in torture and other ill treatment, rendition and unlawful detention.

The Justice and Security Bill extends the use of closed material procedures throughout the ordinary civil justice system, for use in cases which the government claims give rise to national security concerns. A closed material procedure allows a court or tribunal to consider closed material during a closed (i.e. secret) hearing, from which one party to the litigation and their lawyer is excluded. The party's interests would instead be represented by a Special Advocate who is not permitted to communicate with the individual concerned (except in very exceptional circumstances) once they have seen the closed material. 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.[81]

Amnesty International has long criticized the use of closed material procedures in the UK, as they undermine basic standards of fairness and open justice.[82] Lawyers who have spoken with Amnesty International have made it clear that they face profound difficulties in representing their clients effectively where a closed material procedure applies; raising serious questions about how such procedures can achieve any meaningful equality of arms between the parties.[83] Special Advocates – who sit at the heart of this secret justice system – have also publicly stated that closed material procedures "are inherently unfair; they do not 'work effectively', nor do they deliver real procedural

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Finucane Centre (PFC) in relation to the supervision of cases concerning the action of the security forces in Northern Ireland, February 2012; Committee on the Administration of Justice report, "Human Rights and Dealing with Historic Cases – A Review of the Office of the Police Ombudsman for Northern Ireland", June 2011; "An inspection of the Office of the Police Ombudsman for Northern Ireland", report by the Criminal Justice Inspectorate, September 2011 and its follow-up report: "The independence of the Office of the Police Ombudsman for Northern Ireland: A follow-up review of inspection recommendations", January 2013. It should also be noted that in November 2012, following concerns regarding the work of the Historical Enquiries Team, Her Majesty's Inspectorate of Constabulary began a review of the work of the Historical Enquiries Team (HET), focusing on whether its investigations into cases involving the army are compliant with human rights and policing standards. Amnesty International draws the Committee's attention to the failure to deliver on the promised public inquiry into the case of Patrick Finucane, for further information see Amnesty International press release "De Silva report makes strongest case yet for full inquiry into Finucane killing", 13 December 2012, and public statement, "United Kingdom/Northern Ireland: Deplorable government decision to renege on promise of public inquiry into Finucane killing" AI Index EUR 45/017/2011, 13 October 2011.

[81] Where a closed material procedure applies in a case, the court may also issue a closed judgment alongside an open one – that secret judgment is never given to the individual, her/his lawyer and remains entirely hidden from public view.

[82] 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.

[83] Difficulties raised by lawyers include: how to meaningfully respond to general allegations against your client; how to represent your client effectively when you simply do not have access to much of the evidence that underpins the government's case; problems developing legal strategy for the same reasons; the fear that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing; challenges in maintaining the trust of their clients; difficulties properly advising their clients as to the likelihood of success in their case; a large disparity in terms of their ability, compared with the government lawyers, to effectively cross-examine witnesses; challenges instructing their own expert witnesses who are unable to access the secret evidence; not always understanding the reasons why a case has been lost because much of the reasoning is given in a closed judgment; and challenges in effectively appealing a case if part of the judgment is closed.

fairness."[84]

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. In this way, the Justice and Security Bill and the use of Special Advocates in such proceedings is wholly inconsistent with the Convention, in particular Article 14. Once a court has found evidence to be probative of the claimed human rights violation then there should be no circumstances in which the claimant or his or her counsel can be totally deprived of meaningful access to that evidence (at least so long as the government contests the claim and fails to provide a full remedy). This would not necessarily preclude more precise measures short of keeping the evidence entirely secret from the claimant and/or his or her counsel, such as concealing the identity of a witness where there was clear evidence that to reveal his or her identity would put his or her life directly at risk. The right to an effective remedy also means that claimants and their 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.

Amnesty International is, therefore, deeply concerned that by allowing the government to rely on secret evidence during a civil claim for damages, the Justice and Security Bill fundamentally undermines the right of victims of torture or other ill-treatment to have access to a fair and effective procedure for establishing their claims and obtaining an effective remedy. In short, neither the concealment of evidence of human rights violations on purported grounds of national security, or reliance by the government on secret evidence of any kind, has any legitimate place in proceedings in which a remedy for such violations is sought.

The Justice and Security Bill will also bring to an end the ability of UK courts to order the disclosure of certain information under the so called *Norwich Pharmacal* jurisdiction, a civil law action available in English courts under which individuals can currently bring proceedings against the UK government seeking disclosure of information which would assist them in a case against a third party. In many cases, the information sought in *Norwich Pharmacal* applications concerns evidence of human rights violations such as secret detention, torture or other ill treatment in which the UK is alleged to have been involved or received information about.[85] The most notable of these cases is that of Binyam Mohamed, a former Guantanamo detainee, who brought an action against the Foreign Secretary in order to obtain material which, he argued, was necessary for his defence in a military commission trial in the United States where, at the time, he was facing the death penalty.[86] The case resulted in the disclosure of a seven-paragraph summary of documents provided by the US to MI5 and MI6 which described reports of Binyam Mohamed's mistreatment at the hands of the US, demonstrating that the UK had knowledge of that mistreatment.

The Justice and Security Bill, however, will prevent a court from ordering disclosure in a *Norwich Pharmacal* action, where that information is 'sensitive', defined as any information held or originating from an intelligence service. There is also provision for the Secretary of State to certify other information as 'sensitive' if disclosure would cause damage to the interests of national security or international relations.

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. The organization recognises that in principle there may be genuine national security reasons for not disclosing all information, for example, where it will endanger the lives or safety of identifiable individuals. However, this cannot justify the provision of a

[84] Special Advocates submission to the Justice and Security Green Paper, January 2012.

[85] It should be noted that there are five elements that a claimant must satisfy in order to successfully bring a Norwich Pharmacal claim:1) there must be arguable wrongdoing on the part of a third party; 2) the defendant must be mixed up in that wrongdoing, however innocently; 3) it must be necessary for the claimant to receive the information by making a Norwich Pharmacal application; 4) the information sought must be within the scope of available relief, it should not be used for wide-ranging disclosure or evidence-gathering and it is to be strictly confined to necessary information; 5) the court must be satisfied that it should exercise discretion to make the order sought.

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

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 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.

RECOMMENDATIONS TO THE UK GOVERMENT:

- Withdraw the Justice and Security Bill currently before Parliament

Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW

www.amnesty.org

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