

AMNESTY INTERNATIONAL

Public Statement

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United Kingdom: Detainee Inquiry terms of reference and protocol fall far short of human rights standards

Amnesty International remains deeply concerned that an inquiry established to look at credible allegations that the UK was involved in human rights violations of individuals detained abroad in the context of counter-terrorism operations may be fatally compromised by the government's recent decisions over its remit. Crucially, Amnesty International believes that the Detainee Inquiry risks failing in its intended aim to systematically get to the truth of these allegations, and ensure that such abuses never happen again. Of particular concern is that the government will retain the final say with respect to what material can be made public; the alleged victims of abuses have been denied the formal standing necessary for their full and effective participation in the proceedings; and the confirmation that the Inquiry will not be actively seeking material or evidence from overseas.

On 6 July 2011, the UK government issued the long-awaited terms of reference and protocol for the Detainee Inquiry (the Inquiry). On the same day, Amnesty International and other NGOs received a number of letters from the Inquiry, responding to communications dating back to February 2011.

The publication of the terms of reference and protocol comes exactly a year after the UK Prime Minister David Cameron announced to Parliament that there would be an independent inquiry into allegations of UK involvement in torture and other human rights violations with respect to individuals detained abroad in the context of counter-terrorism operations.

Amnesty International welcomed that initial announcement, but called on the UK government to ensure that any inquiry was independent, impartial, thorough and effective, in accordance with human rights standards. The organization warned that an inquiry shrouded in secrecy would fail to deliver genuine truth and accountability, both to those who allege that the UK is responsible for violations against them, and to the public more generally.

Indeed, over the last year Amnesty International, alongside other NGOs, has put forward a number of recommendations, which if fulfilled, would help ensure that the Inquiry was conducted in line with human rights standards; that it would be independent, impartial, thorough and effective. Some of these recommendations have been adopted. For example, Amnesty International welcomes the focus by the Inquiry on government policy and the recognition of the need to learn from past mistakes. However, the organization deeply regrets that the majority of other recommendations have been ignored, compromising the ability of the Inquiry to fulfil its intended aim to systematically get to the truth of these allegations and ensure that such abuses never happen again.

In particular, Amnesty International is deeply disappointed that the UK government will retain the final say regarding what previously undisclosed information the Inquiry may disclose to the public. The protocol does not explicitly provide for any form of judicial review of those decisions, which

will ultimately be taken by the Cabinet Secretary following a process of written correspondence between the Inquiry and the Cabinet Office. Government policy and the involvement of state agents in torture and other serious human rights violations are the primary subjects of the Inquiry. Amnesty International believes that if the government has complete control over what information the Inquiry can disclose, this will profoundly compromise the effectiveness of the Inquiry as a means for providing alleged victims and the public more generally with the truth about what happened. Government control over disclosure of information to the public will undermine the independence and impartiality of its public report and findings.ⁱ

Amnesty International also notes that according to the protocol the starting point for the disclosure process during the Inquiry is that all previously undisclosed material will remain secret and the Inquiry will have to make a specific request in relation to any information or document it wishes to make public. Rather than starting from a position of secrecy, Amnesty International believes that the UK government should, in good faith, sift the material it intends to pass to the Inquiry and determine what material can be safely disclosed without harm to the public interest, applying limited and precisely defined grounds. It should then immediately release that material to the public. If the government were to act in good faith during this exercise this would inevitably leave a much smaller number of documents where the government would claim that disclosure would cause harm or damage to the public interest. With respect to this reduced volume of material, Amnesty International continues to call for the establishment of an independent mechanism for determining whether that material should indeed be withheld from the public and ensure that any such determination properly balances the public interest in disclosure against any public interest in withholding the material in question.

Amnesty International also notes with serious concern that Annex Aⁱⁱ of the protocol sets out very broad criteria as to what may be kept secret on grounds of “protection of the public interest”. Disappointingly there is no reference in the protocol to the importance of the public interest in exposing and addressing in a transparent way wrongdoing by public bodies as a factor that can outweigh other considerations.ⁱⁱⁱ There may be justification for particular items of information to be kept from public view, for example, where the disclosure of a name or other such specific piece of information would demonstrably endanger the life or physical security of an identified individual. However, given the overly broad definition in the protocol as to what might constitute harm or damage to the public interest there is a real concern about the degree to which the government will rely upon vague invocations of “public interest” during the Inquiry as a means of preventing adequate public scrutiny and criticism of the government and its agencies’ human rights record and to prevent alleged victims from having access to the truth about who is responsible for what happened to them. Neither the government nor the Inquiry should be able to invoke secrecy or confidentiality over a fact if to do so would prevent an independent, impartial, and thorough investigation of alleged human rights violations, prevent perpetrators from being held accountable, prevent a victim from receiving an effective remedy and reparation or prevent public disclosure of truth about the violations.

Alongside other NGOs Amnesty International has also repeatedly called on the government and the Inquiry to ensure the effective participation of victims in the Inquiry, to ensure that their right to effective investigation and redress are secured. Amnesty International therefore deeply regrets that the Inquiry’s protocol largely treats the alleged victims the same as other witnesses or members of the public. Victims of human rights violations have a special stake in the conclusions of an inquiry and should have standing that reflects this. However, despite being named “The Detainee Inquiry”, the protocol for the Inquiry makes it clear that former and current detainees who allege UK involvement in their mistreatment will not have any formal standing as interested parties to the Inquiry process. The Inquiry’s failure to provide alleged victims with such standing strips them of full and effective participation in the proceedings.

In particular, Amnesty International is concerned that the alleged victims will only be provided with legal representation for the purpose of preparing witness statements and giving oral testimony. In order to ensure the protection of their legitimate interests, the former and current detainees should be permitted to have legal representation throughout the Inquiry process with standing to address the Inquiry on points of fact or law relevant to their individual cases and the right to have any relevant questions put to government witnesses.

It is also a matter of regret that the Inquiry will not be actively seeking material or evidence from overseas. While it may be difficult to obtain cooperation from agents and officials of foreign states, this should not preclude the Inquiry from actively seeking that cooperation or indeed the UK government from using such means as may be available to it to pursue and fulfil such requests. Further, Amnesty International notes the apparent contradiction between the reason asserted for not seeking evidence from authorities of other countries, namely that the remit of the Inquiry is to examine the actions of the UK, and the fact that the allegations against the UK relate to involvement in human rights violations committed overseas, frequently where the allegation is that agents of foreign intelligence services were also involved and, in effect, several states are responsible in combination for the human rights violations in question.

Amnesty International is also gravely disappointed that the government continues to take the view that the Inquiry was not established “to comply with or respond to any perceived international obligation”. In correspondence received by Amnesty International UK, the Foreign Secretary, William Hague, has also stated that “as mistreatment committed abroad falls outside the UK’s jurisdiction, it is therefore not covered by the provisions of the European Convention on Human Rights”. The UK’s obligation to investigate torture and other serious human rights violations for which its agents may have been responsible within or beyond its borders, is not a question of perception, it is a legal obligation under human rights treaties to which the UK is party. The obligation to investigate possible complicity or other responsibility of UK agents does not arise only from the European Convention, but the UN Convention against Torture and International Covenant on Civil and Political rights as well. The UN Convention against Torture, in particular, explicitly requires the UK to investigate possible complicity, participation, or other responsibility of UK agents in any act of torture anywhere in the world. A proper accountability process into allegations of complicity in torture must uphold the United Kingdom’s international human rights obligations.

Amnesty International further notes the Foreign Secretary’s assurance, in that same correspondence, that the government was “committed to a full and independent inquiry that is consistent with international standards”. In light of the terms of reference and protocol Amnesty International simply cannot see how that commitment will be fulfilled. Amnesty International is deeply concerned that the UK government appears to have squandered the opportunity to effectively address a mounting pile of allegations of involvement of its agents and policy-makers in the torture and ill-treatment of detainees, in a way that ensures public accountability. Instead of establishing an independent, impartial, thorough and effective inquiry, in accordance with human rights standards, it appears that the UK government has done what many feared and set the stage for an inquiry that will be shrouded in secrecy and, as a consequence, cannot possibly promise true accountability.

NOTE: Amnesty International made detailed submissions to the Detainee Inquiry along with eight other non-governmental organizations following its announcement and prior to the publication of the Terms of Reference and Protocol. Amnesty International has also raised its concerns in writing about the scope, purpose and conduct of the Detainee Inquiry with the Prime Minister and Foreign Secretary. To date Amnesty International has not received a substantive response from the Prime Minister.

In light of concerns highlighted above, Amnesty International, alongside nine other NGOs, has written to the Inquiry stating that regrettably if the Inquiry proceeds as currently proposed the organizations do not intend to submit any evidence or attend further meetings with the Inquiry team. In particular, the NGOs believe that as it currently stands the Inquiry simply will not be able to achieve its intended outcome of establishing the truth about allegations that UK authorities were involved in the mistreatment of detainees held abroad.

For further information:

UK: Joint NGO letter to the Solicitor to the Detainee Inquiry, AI Index: EUR 45/010/2011, August 2011, <http://www.amnesty.org/en/library/info/EUR45/010/2011/en>

UK: Joint NGO letter to the Secretary to the Detainee Inquiry, AI Index: EUR 45/003/2011, 25 February 2011, <http://www.amnesty.org/en/library/info/EUR45/003/2011/en>

UK: Joint Submission to Chair of the Detainee Inquiry, AI Index: EUR 45/002/2011, 25 February 2011, <http://www.amnesty.org/en/library/info/EUR45/002/2011/en>

Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention, EUR 01/023/2010, 15 November 2010, <http://www.amnesty.org/en/library/info/EUR01/023/2010/en>

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>

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, <http://www.amnesty.org/en/library/info/EUR45/011/2010/en>

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>

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>

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ⁱ Amnesty International notes the Inquiry Panel's statement of 8 July 2011, responding to concerns about the Inquiry's independence, where they reiterate that the "Inquiry Panel are independent of Government and are determined to be as open as possible". However, this response does not adequately address the concerns with respect to the independence of the Inquiry, which include serious concerns about *structural* independence that are simply incapable of being addressed by a commitment by the individual members to be *personally* impartial and independent, even if that commitment is ultimately fulfilled at the personal level. If the authorities whose actions are being investigated retain the final say as to what the Inquiry ultimately can disclose to the victims and broader public, including which facts and findings can be published in the final report, the Inquiry will fail to meet the standards for independence of such an investigation.

ⁱⁱ According to Paragraph 1(a) of Annex A to the Protocol for the Detainee Inquiry harm or damage to the public interest may include: "harm or damage to national security, economic, defence interests or international relations. This includes respecting the understandings and commitments between HMG and its security and intelligence agencies and the authorities and the agencies of any foreign government concerning the confidentiality, security and protection against disclosure outside the Inquiry of any information to which those understandings and commitments relate".

ⁱⁱⁱ In a statement released by the Panel on 8 July 2011, there will be a balancing of "conflicting interests" by the Panel when considering whether they believe certain material should be made public or not, though no explanation is provided as to what exactly the competing interests are. However, even if the Panel itself understands the importance of considering the public interest in exposing wrongdoing by government authorities, its hands nonetheless remain tied as the final say will rest with the government, and not an independent mechanism. The statement by the panel can be accessed here: <http://www.detaineeinquiry.org.uk/2011/07/terms-of-reference-and-protocol-statement-by-the-panel/>.