



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# The UN Convention Against Torture (UNCAT)

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**Nineteenth Report of Session  
2005–06**

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

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This Report assesses the UK's compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT), which sets out a number of guarantees against torture as well as positive obligations on states in relation to the prevention of torture. The United Kingdom, which is a party to UNCAT, regularly submits reports to the UN Committee which supervises it, detailing UK compliance with rights under the Convention. This Report takes as its starting point the latest set of Concluding Observations issued by the UN Committee in December 2004, which set out those positive developments which the UN Committee considered had taken place in the UK, as well as identifying areas of concern for compliance with the Convention. The Committee also publishes as an Appendix to this Report the Government's response to various requests for further information made by the UN Committee, which the Government transmitted to the UN in April 2006. The Committee's Report also considers the Government's human rights obligations in relation to extraordinary renditions alleged to have taken place using UK airspace or airfields.

In Chapter 2 the Committee considers the nature of the absolute prohibition on torture in customary international law, UNCAT and the European Convention on Human Rights (ECHR), as given force in UK law by the Human Rights Act. In this context the Committee reiterates its view that the absolute prohibition on deportation of persons to a country where they will face a real risk of torture, established in the ECtHR judgment *Chahal v UK*, precludes any balancing exercise between national security and the risk of torture and is essential to effective protection against torture. The Committee expresses its concern that the Government's intervention in a case pending before the European Court of Human Rights undermines the absolute prohibition on torture.

In a general consideration of UNCAT in UK domestic law and policy (Chapter 3), the Committee recommends early consideration of acceptance by the UK of rights of individual petition under the Convention. It also recommends that the Northern Ireland Human Rights Commission be designated as a monitoring body for places of detention under the Optional Protocol to the Convention. The Committee calls for the Department for Constitutional Affairs, and the Commission for Equality and Human Rights, when it is established, to play an active role in ensuring compliance of Government policy and practice with the Convention. On the question of the use before the Special Immigration Appeals Commission (SIAC) of evidence which might have been obtained by torture, the Committee considers the implications of the House of Lords judgment in *A(FC) v Secretary of State for the Home Department*, saying that the judgment will need to be interpreted and applied in a way which gives meaningful practical effect to the purpose behind Article 15 of UNCAT, that evidence obtained by torture must not be used in legal proceedings. In this Chapter the Committee also considers issues arising from the use of information which may have been obtained by torture, co-operation by the UK security and intelligence services with foreign intelligence agencies, and the defences to the criminal offence of torture contained in section 134 of the Criminal Justice Act 1988.

Chapter 4 of the Report deals with compliance by UK armed forces with UNCAT. The Committee recommends that the Government should expressly accept the application of all the rights and duties under UNCAT to territory abroad under the control of UK forces. The

Committee has reviewed a number of classified documents supplied to it by the Ministry of Defence (MoD) about the training and guidance provided to troops in their obligations under human rights law on the treatment of detainees and civilians and accepts that broadly speaking, but with certain reservations, they provide a basis for human rights compatible action by the armed forces. On the question of alleged bullying at Deepcut barracks, the Committee concludes, in line with the Blake Review and the House of Commons Defence Committee, that there is no need for a full public inquiry into those allegations.

In Chapter 5 the Committee considers, in the light of Article 3 UNCAT, the Government's policy of seeking diplomatic assurances in order to deport people considered to be a national security risk yet who might face torture in the country to which they are returned. Taking into account the terms of the Memoranda of Understanding which have been agreed with Jordan, Libya and Lebanon, the Committee concludes that the Government's policy of reliance on diplomatic assurances against torture could well undermine established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country.

Chapter 6 of the Report deals with the investigations of deaths involving the security forces, particularly in Northern Ireland, and Chapter 7 briefly considers deaths in custody (the subject of a comprehensive report by the previous JCHR) and prison conditions for women in Northern Ireland.

In Chapter 8 the Committee considers allegations of extraordinary renditions taking place through the UK, in the light of the Government's obligations under UNCAT. The Committee concludes that the Government has not adequately demonstrated that it has satisfied the obligation under domestic and international human rights law to investigate credible allegations of renditions, and should take active steps to ascertain more details about certain flights known to have used UK airports and suspected of involvement in extraordinary renditions. The Committee considers that an independent public inquiry would be premature at this stage, with the need for one determined by the outcome of Government investigations along the lines recommended by the Committee. For the future, the Committee makes a number of recommendations to ensure extraordinary renditions do not take place.

In Chapter 9 the Committee considers the question of the use of Attenuating Energy Projectiles (AEPs), the recent replacement for baton rounds, in serious riot situations in Northern Ireland during the summer of 2005. The Committee concludes that the use of AEPs against individual aggressors in riot situations can be justified in human rights terms as a proportionate response to serious violence threatening the lives of police or the public. It calls for clarity and consistency in the guidelines applying to use of AEPs in Northern Ireland by the police and the army.

# 1 Introduction

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## The Convention Against Torture

1. This Report assesses the United Kingdom's compliance with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The prohibition on torture and inhuman or degrading treatment or punishment is at the heart of human rights protection. It is both a fundamental principle of our domestic common law,<sup>1</sup> and a key provision of the principal human rights treaties which bind the UK, including the European Convention on Human Rights (ECHR)<sup>2</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>3</sup> The Convention Against Torture builds on these guarantees of freedom from torture and ill-treatment, reiterating the prohibition on states' involvement in torture or inhuman or degrading treatment, but also specifying a series of positive obligations on states. These include obligations to prevent acts of torture or inhuman or degrading treatment,<sup>4</sup> to criminalise such acts<sup>5</sup> and to prosecute or extradite where there is evidence that they have been committed,<sup>6</sup> to investigate allegations of torture<sup>7</sup> and to provide appropriate redress for victims of torture,<sup>8</sup> and to train and educate officials in light of the prohibition on torture and ill-treatment.<sup>9</sup> The Convention also sets out specific prohibitions on deportations to face a real risk of torture,<sup>10</sup> and on the admission of evidence obtained by torture.<sup>11</sup>

2. The fundamental principle that everyone must be protected against inhuman or degrading treatment must be a guiding principle of all institutions of Government. Most importantly, at a time when the pressures of countering terrorism may challenge the protection of human rights in the UK and in other countries, the provisions of the Convention against Torture must be rigorously applied so as to afford real protection to individuals. The rights protected by the Convention, and their implementation in national legislation, policy and practice, deserve the close attention of Parliament, the Government and the public.

## Background to this Report

3. This inquiry and Report follows on from a programme of work begun by our predecessor Committee in the last Parliament, considering the domestic implementation of each of the UN human rights treaties. In the last Parliament, the Committee considered

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1 *A v Secretary of State for the Home Department* [2005] 3 WLR 1249

2 Article 3, ECHR

3 Article 7, ICCPR restating Article 5 of the Universal Declaration of Human Rights

4 Article 2, UNCAT

5 Article 4, UNCAT

6 Articles 6–9, UNCAT

7 Articles 12 and 13, UNCAT

8 Article 14, UNCAT

9 Article 10, UNCAT

10 Article 3, UNCAT

11 Article 15, UNCAT

the protection of rights under the UN Convention on the Rights of the Child;<sup>12</sup> the UN International Covenant on Economic Social and Cultural Rights;<sup>13</sup> and the UN Convention on the Elimination of Racial Discrimination.<sup>14</sup> We continue this programme of work with this Report.

4. Our starting point in this inquiry is the Concluding Observations of the UN Committee Against Torture (CAT) on the UK's latest periodic report under the Convention Against Torture, published in December 2004.<sup>15</sup> Under the Convention, reports must be submitted every four years to the UN Committee Against Torture, to provide an explanation of the state's compliance with the rights in the treaty.<sup>16</sup> The report is followed by a public hearing where the state's compliance with the treaty is further explored. CAT then issues its Concluding Observations, which highlight both the positive and the negative aspects of the State's level of compliance, and make recommendations for appropriate changes to law or practice.

## The Concluding Observations

5. The 2004 Conclusions and Recommendations of CAT (henceforth "Concluding Observations") raise a series of concerns regarding the compliance of UK law, policy and practice with the Convention. They also note a number of positive developments since the consideration of the previous UK report, including judicial limitations on state immunity for torture, and the UK's ratification of the Optional Protocol to the Convention allowing for inspection of detention facilities. CAT also welcomed the Government's reassurances to the Committee that:

- UK military personnel abroad are subject to English criminal law including the prohibition on torture;
- evidence would be inadmissible if obtained through torture by or with complicity of British officials.<sup>17</sup>

6. The UN Committee also welcomed the fact that plastic bullets had not been in practice used in Northern Ireland since 2002.<sup>18</sup> Subsequent to the Concluding Observations, Attenuating Energy Projectiles (AEPs), the new form of plastic baton round, have been used on several occasions in response to violent rioting in Northern Ireland. We consider this in Chapter 9 below.

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12 Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81

13 Twenty-first Report of Session 2003–04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188

14 Fourteenth Report of Session 2004–05, *The Convention on the Elimination of Racial Discrimination*, HL Paper 88, HC 471

15 Concluding Observations of the Committee against Torture, *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories*, 10 December 2004, CAT/C/CR/33/3

16 Article 19, UNCAT

17 Concluding Observations, op. cit., para 3

18 Concluding Observations, op. cit., para 3(a)



7. The primary issues of concern raised by the UN Committee were:

- The admissibility in UK courts of evidence obtained by torture abroad without the involvement of UK officials, contrary to Article 15 CAT;
- The availability in UK law of a defence of “lawful authority, justification or excuse” to a charge of torture;
- The UK’s position that those provisions of UNCAT dependent on jurisdiction did not apply to UK operations in Iraq and Afghanistan;
- The use of indefinite detention under the Anti-terrorism Crime and Security Act 2001;
- The UK’s reliance on diplomatic assurances that returned asylum seekers would not face torture, and the lack of safeguards and monitoring that applied to such assurances;
- Inadequacies in the investigation of deaths following the use of lethal force;
- Deaths in custody and prison conditions;
- Bullying, self-harm and suicide in the armed forces;
- Excessive use of force in the removal of asylum seekers.

8. A number of the issues relevant to this inquiry have already been considered, or are being considered, by us in the course of other inquiries, and are therefore not dealt with in detail in this Report. As part of our inquiry into counter-terrorism policy and human rights we have given some preliminary consideration to the use of diplomatic assurances,<sup>19</sup> to which further consideration is given in this Report. The Committee in the previous Parliament conducted an extensive inquiry into deaths in custody, which applied the right to life and the right to freedom from torture and inhuman and degrading treatment to deaths in all forms of state custody.<sup>20</sup> We may consider the question of the use of force against asylum seekers during removals as part of a future inquiry into the treatment of asylum seekers, so do not deal with that issue in this Report.<sup>21</sup>

9. Certain recommendations of the UN Committee have now been overtaken by events, and for that reason have not been dealt with in this Report. In particular, the recommendation that alternatives to indefinite detention under Part IV of the Anti-terrorism Crime and Security Act 2001 should be reviewed as a matter of urgency is no longer relevant following the judgment of the House of Lords in *A v SSHD*, and the

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19 Third Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I, HC 561-I, paras 120–146

20 Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15-I, HC 137-I

21 The Report also does not deal with the important issue of whether UK law, and in particular the State Immunity Act 1978, is compatible with the obligation in Article 14 UNCAT to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, on which judgment is pending from the House of Lords in *Jones v The Ministry of the Interior of the Kingdom of Saudi Arabia and Lieutenant Colonel Abdul Aziz*. The Court of Appeal ([2005] QB 699) held that Saudi Arabia was entitled to State immunity in respect of a claim for damages for torture but was not entitled to assert such immunity in respect of civil proceedings brought against its officials for damages for torture. The Secretary of State for Constitutional Affairs intervened in the House of Lords to argue that the Court of Appeal was wrong in holding that State immunity with respect to civil proceedings for torture did not extend to civil proceedings against its officials.

subsequent repeal of the powers of indefinite detention under Part IV of that Act. In our Twelfth Report of this Session we considered the compatibility with Article 3 ECHR of the operation in practice of the system of control orders introduced under the Prevention of Terrorism Act 2005 in place of the Part IV powers of indefinite detention.<sup>22</sup>

10. This Report also covers one issue which was not raised by the UN Committee. Since the review of the UK report by the UN Committee in 2004, allegations that UK airports are being used to facilitate extraordinary renditions of suspects being transported to face torture abroad have generated considerable public concern. Given the potential implications of the allegations made for the protection against torture and compliance with UNCAT, we have also heard evidence on extraordinary renditions as part of this inquiry.

11. Towards the conclusion of our inquiry the Government provided a response to the UN Committee's request for it to provide information in relation to eight of the recommendations contained in the Concluding Observations. We publish that response along with this Report,<sup>23</sup> and comment on it as appropriate.

### Progress of this inquiry

12. We received written evidence from a range of organisations and individuals, and we publish this evidence in the Appendices to this Report. We heard oral evidence from Rt Hon Harriet Harman QC MP, then Minister at the Department for Constitutional Affairs (DCA) with lead responsibility for the Convention, and Baroness Ashton of Upholland, then DCA Minister with responsibility for some of the international aspects of compliance with the Convention; and from representatives of Amnesty International, Human Rights Watch and Redress. We also heard evidence on compliance with UNCAT in Northern Ireland from British Irish Rights Watch (BIRW) and the Committee on the Administration of Justice (CAJ); Shaun Woodward MP, Parliamentary Under-Secretary of State at the Northern Ireland Office, Sir Hugh Orde, Chief Constable of the Police Service of Northern Ireland (PSNI) and two of his Assistant Chief Constables; and from Keir Starmer QC and Jane Gordon, human rights advisers to the Northern Ireland Policing Board. We heard evidence on the armed forces' compliance with the Convention from Rt Hon Adam Ingram MP, Minister for the Armed Forces, Lieutenant General Brims CBE DSO and Dr Roger Hutton. We held an informal meeting with Manfred Nowak, the UN Special Rapporteur on Torture. We are grateful to all those who have assisted us in this inquiry. We have also taken into account information we obtained and matters we observed during our visit to Canada in connection with our inquiry into counter-terrorism policy and human rights, during which we discussed a number of the issues covered in this Report.

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<sup>22</sup> Twelfth Report of Session 2005–06, *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122, HC 915, paras 79–84

<sup>23</sup> Ev 68

## 2 The prohibition on torture

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13. The prohibition on torture and inhuman and degrading treatment is one of a small number of human rights guarantees which are absolute and non-derogable in all circumstances, including in time of war or public emergency. The absolute nature of the prohibition on torture is recognised as a principle of *jus cogens*, the highest form of customary international law, which is binding on all states in all circumstances, irrespective of treaty obligations. The nature of the prohibition is also made clear in Article 2.2 of the Convention Against Torture:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

14. “Torture” is defined in UNCAT Article 1:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

15. The Convention also prohibits in absolute terms treatment which falls short of the deliberate infliction of severe pain or suffering amounting to torture, but which is inhuman and degrading. Article 16 provides:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

16. In UK domestic law, and in particular under Article 3 ECHR given force in UK law by the Human Rights Act, both torture and inhuman or degrading treatment are absolutely prohibited in similar terms to UNCAT. To be considered inhuman and degrading under Article 3 ECHR, treatment must attain a minimum level of severity, which is assessed on the basis of all the circumstances of the case including the sex, age and health of the victim.<sup>24</sup> Inhuman treatment includes at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable.<sup>25</sup> As well as

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<sup>24</sup> *Ireland v UK* 2 EHRR 25

<sup>25</sup> *The Greek case* (1969) 12 YB 1; *Price v UK* (2002) 34 EHRR 53

physical ill-treatment, inhuman and degrading treatment may result from harsh or inadequate prison conditions,<sup>26</sup> or inadequate medical treatment in detention.<sup>27</sup>

17. To amount to torture under Article 3 ECHR, as well as under UNCAT, treatment must be deliberately inflicted. In *Selmouni v France*<sup>28</sup> the European Court of Human Rights (ECtHR), relying on the terms of Articles 1 and 16 UNCAT, distinguished torture as “deliberate inhuman treatment causing very serious and cruel suffering”.<sup>29</sup> The threshold for identifying treatment as “torture” rather than “inhuman or degrading treatment” is a high one: the “five techniques” of interrogation practised in Northern Ireland in the 1970s were, for example, found by the ECtHR not to amount to torture, although they did constitute inhuman and degrading treatment in breach of Article 3 ECHR. However, both the ECtHR and the House of Lords<sup>30</sup> have since suggested that given “the increasingly high standard being required in the area of the protection of human rights”<sup>31</sup> conduct which was previously found to amount only to inhuman and degrading treatment, such as that at issue in *Ireland v UK*, might now be considered to be torture.

18. The definition of the crime of torture under the Criminal Justice Act 1988, and its relationship with the concept of torture set out in UNCAT has been the cause of some uncertainty. Under UNCAT, states are required only to criminalise conduct falling within the Article 1 definition of torture: that is, severe pain or suffering deliberately inflicted for a specified purpose. The crime of torture under section 134 of the Criminal Justice Act appears to go further, however, in encompassing pain not deliberately inflicted. This apparently wide scope is balanced by the availability of defences to the crime of torture under that section. We discuss the law relating to the crime of torture and the defences to it in more detail in Chapter 3 below.

### The principle in *Chahal v UK*

19. In the jurisprudence of the ECtHR, one of the cornerstones of the absolute prohibition on torture, which reflects the absolute prohibition in the Convention Against Torture, is the principle established in the case of *Chahal v UK*.<sup>32</sup> The judgment in that case establishes that a person may not be deported to a country where they will face a real risk of torture or inhuman or degrading treatment. The Court affirmed the absolute nature of the prohibition on torture and inhuman and degrading treatment as applying irrespective of public emergency or terrorist threat.<sup>33</sup> It held that:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to

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26 *Kalashnikov v Russia; Peers v Greece* 28524/95

27 *McGlinchey v UK*

28 (2000) 29 EHRR 403

29 See further, *Ireland v UK*, *op. cit.*; *Aksoy v Turkey*, 23 EHRR 553

30 *A v SSHD*

31 *Selmouni v France*, *op. cit.*

32 (1997) 23 EHRR 413

33 *Ibid.*, para 79

safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.<sup>34</sup>

20. A minority of the Court in *Chahal*<sup>35</sup> adopted a different interpretation of Article 3 ECHR. It found that, in deciding whether to deport, a State can balance, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other hand, the extent of the potential risk of ill-treatment of that person following expulsion.<sup>36</sup> On this approach, where, on the evidence, there is a “substantial doubt” as to whether the person would be subjected to torture or inhuman or degrading treatment on return, the threat to security could be sufficient to justify deportation.<sup>37</sup>

21. The Government has called into question the appropriateness of the principle in *Chahal*, in the circumstances of the terrorist threat currently faced by European states. It considers that the approach of the minority of the Court in that case is the appropriate approach in light of the prevailing terrorist threat.<sup>38</sup> In order to advance this argument before the Court, the Government is intervening, along with the Governments of Lithuania, Portugal and Slovakia, in the case of *Ramzy v The Netherlands*,<sup>39</sup> concerning the proposed deportation of the applicant from the Netherlands to Algeria, where it is alleged that he will face torture.<sup>40</sup> A coalition of NGOs is intervening in support of the principle established in by the majority in *Chahal v UK*.<sup>41</sup>

22. The principle established in the *Chahal* case reflects Article 3 UNCAT which states that no one shall be expelled to a place where there are substantial grounds for believing that he would be in danger of being subjected to torture. Under Article 3.2, this danger is to be assessed both in light of the applicant’s particular circumstances, and where applicable with regard to “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” The terms of Article 3 and the UK’s compliance with them are considered further in Chapter 5 below.

23. The absolute prohibition of deportation to face a risk of torture has been challenged in other jurisdictions, notably in Canada. In *Suresh v Canada*,<sup>42</sup> the Canadian Supreme Court, while acknowledging the clear position under international law prohibiting deportations to

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34 *Ibid.*, para 80

35 Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Freeland, Baka, Gotchev, Bonnici and Levits

36 *Ibid.*, para 1

37 *Ibid.*

38 Rt Hon Charles Clarke MP, Speech to the European Parliament, 7 September 2005

39 Application no 25424/05

40 Registry of the European Court of Human Rights, Press Release, Application lodged with the Court *Ramzy v The Netherlands*, 20 October 2005

41 Application No 25424/05, *Ramzy v Netherlands*, Written Comments by Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interights, The International Commission of Jurists, Open Society Justice Initiative and Redress, 22 November 2005

42 *Manickavasagam Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v Canada)*, 2002, SCC 1, File No. 27790, January 11, 2002. The “*Suresh* exception” has not as yet led to any actual deportations, but is being relied on by the Canadian Government in a number of cases in which it is seeking to deport individuals regarded as a threat to national security notwithstanding that there is a real risk of their being tortured in the destination state. Some of these cases are pending before the Supreme Court of Canada.

face torture, nevertheless stated on an application of section 1 of the Canadian Charter of Rights and Freedoms: “[w]e do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified”.<sup>43</sup> In a case decided by the New Zealand Supreme Court in June 2005, however, *Attorney General v Zaoui*,<sup>44</sup> the Supreme Court of New Zealand distinguished *Suresh* as applying only to the interpretation of the Canadian Charter, and held, interpreting the New Zealand Bill of Rights in light of guarantees under the International Covenant on Civil and Political Rights and the Convention Against Torture, that the right not to be deported to face torture could not be balanced against considerations of national security.<sup>45</sup>

24. The Government has stated that it does not wish to tamper with the absolute nature of the prohibition of torture or deportation to face torture.<sup>46</sup> Such statements sit uneasily, however, with the argument made in the Government’s intervention in *Ramzy*, which advocates the revision of *Chahal* on the grounds that:

If [the *Chahal*] judgment is accepted as currently understood, in a case in which substantial grounds are shown for believing that there is a real risk of ill-treatment in a receiving State, it is not possible to remove a person believed to threaten the Contracting State and its citizens through terrorism.<sup>47</sup>

25. This explicitly advocates the permissibility of deportation to face a real risk of torture. It is an argument which has far-reaching consequences for protection against torture. There must also be concern that any dilution of the absolute prohibition on torture in cases involving national security considerations will have an impact beyond that category of cases, and lead to a further erosion of the absolute nature of the right to freedom from torture, in cases where other pressing policy considerations apply.<sup>48</sup> Indeed, in Canada the *Suresh* exception has been relied on by the federal Government to justify deportation of a convicted criminal on grounds of public safety rather than national security.<sup>49</sup>

**26. Whilst we acknowledge the Government’s right to intervene in any appropriate case before the European Court of Human Rights, we are concerned that the intervention in *Ramzy v Netherlands*, in arguing for deportations of terrorist suspects despite a real risk of torture on their return, may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations. We reiterate our view<sup>50</sup> that the absolute nature of the prohibition on torture precludes**

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43 *Ibid.*, para 78. Section 1 of the Canadian Charter provides that the rights and freedoms set out in it are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” and has been interpreted by the Supreme Court of Canada as involving an assessment of proportionality in its application to all rights, in contrast to Article 3 ECHR and UNCAT.

44 [2005] NZSC 38

45 paras 90–93

46 Third Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-II, HC 561-II, Ev 1–15

47 Observations of the Governments of Lithuania, Portugal, Slovakia and the UK Intervening in Application No 25424/05 *Ramzy v The Netherlands*, Document previously circulated, para 12

48 Human Rights Watch pointed out in oral evidence that the implications of a revision of *Chahal* would be likely to be widely felt, beyond cases involving questions of national security, and extending to deportations of non-nationals in general: Q 37

49 *Dadar v Minister of Citizenship and Immigration*, 2006 FC 382 (24 March 2006). The case concerned the proposed deportation of an Iranian national who had served a 6 year sentence for aggravated assault. The Court found that there was no risk of torture on return and therefore did not have to decide whether the *Suresh* exception applied

50 Third Report of Session 2005–06, *op. cit.*, para 149



any balancing exercise between considerations of national security and the risk of torture. In our view, the principle established in *Chahal v UK* is essential to effective protection against torture, and accordingly should be maintained and respected.

27. We consider it unlikely that the Government will succeed in its attempt to secure a revision of the *Chahal* decision. We note that even if the Government were to succeed, the absolute prohibition on torture, and on expulsion to face a real risk of torture, would in any event remain binding on the Government under the Convention Against Torture, and any expulsion carried out despite a real risk of torture or inhuman or degrading treatment would be likely to breach these obligations

### 3 The Convention in domestic law and policy

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28. That the protection against torture is a fundamental principle of UK law was affirmed in the strongest terms by the House of Lords in *A v Secretary of State for the Home Department*. In affirming the inadmissibility before the courts of information obtained by torture by foreign agents abroad, the House of Lords stressed the domestic historical antecedents of the prohibition on torture, which are reinforced and informed by international human rights law standards, in particular those of UNCAT.

29. The judgments in that case go a significant way to addressing one of the two inconsistencies between domestic law and the Convention which were identified by the UN Committee Against Torture. These were the admissibility of evidence obtained by torture, and the defences available to the criminal offence of torture. The UN Committee recommended that:

the State Party should review, in light of its experience since its ratification of the Convention and the Committee’s jurisprudence, its statute and common law to ensure full consistency with the obligations imposed by the Convention; for greater clarity and ease of access, the State party should group together and publish the relevant legal provisions.<sup>51</sup>

30. Ms Harman told the Committee that in response to the UN Committee and to this inquiry the DCA Human Rights Division had undertaken a further overview of the law against torture.<sup>52</sup> The DCA provided us with a helpful “grid” of relevant legislation, which is appended to this Report.<sup>53</sup>

#### Right of Individual Petition

31. Under Article 22 of the Convention, states may accept a right of individual petition to the UN Committee Against Torture, which can receive written communications from individuals alleging that their rights have been breached by the State Party, and can issue its “views” on the case. The Committee is not a judicial body, and its views on alleged breaches of the Convention, although authoritative, are not binding in either international or domestic law.

32. The UK has not accepted the right of individual petition under Article 22. Rights of individual petition to UN Committees were reviewed by the Government in a comprehensive review of international human rights obligations, which published its conclusions in 2005. The review decided that the UK should accept the right of individual petition under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), on a trial basis for two years, but should not at present accept rights of individual petition under other UN human rights treaties. In its Report on the conclusions

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51 Concluding Observations, *op. cit.*, para 5(b)

52 Q 139

53 Ev 87



of the Review, our predecessor Committee regretted that the remaining rights of individual petition under UN treaties had not been accepted, and recommended that the position in regard to those treaties should be reviewed at an early opportunity, in light of the experience with individual petition under CEDAW.<sup>54</sup> **We support the recommendation of our predecessor Committee that early consideration should be given to accepting rights of individual petition under UNCAT, as well as other UN human rights treaties.**

## Optional Protocol to UNCAT

33. The Optional Protocol to the Convention Against Torture (OPCAT), which the UK became one of the first states to ratify in December 2003, provides for independent inspection of places of detention by national monitoring bodies designated by the State, as well as by a sub-committee of the Committee Against Torture. Under the Protocol, states are required to designate national monitoring bodies (Article 17); to guarantee their independence (Article 18) and to allow them access to places of detention (Article 19). Under the current arrangements for the inspection of places of detention, we understand that Her Majesty's Chief Inspector of Prisons would be a designated national monitoring body under OPCAT. However, the Police and Justice Bill, currently before Parliament, abolishes the office of Chief Inspector of Prisons and merges its functions with those of a number of other criminal justice inspectorates<sup>55</sup> to create a new office of Chief Inspector for Justice, Community Safety and Custody. The new Chief Inspector will retain the duty to inspect places of detention<sup>56</sup> as one of a wide range of functions related to the courts system, criminal justice system and immigration enforcement system.<sup>57</sup> Clause 25 of the Bill makes the Chief Inspector subject to ministerial directions to inspect, report or advise on matters related to the Chief Inspector's remit, and requires the Chief Inspector to have regard to such aspects of Government policy as the responsible Ministers may direct.

34. Baroness Ashton told us that the Government was entirely satisfied that the new Chief Inspector would be sufficiently independent and effective to be a national monitoring body.<sup>58</sup> She pointed out that the new inspector, in common with the current Chief Inspector of Prisons, would be an independent statutory office holder. The inspector would also be under a statutory duty, when staffing the inspectorate, to secure sufficient expertise and experience relating to the inspected systems and organisations.

35. Whilst we welcome these assurances, there is a risk that the new framework may not sufficiently guarantee the independence of the new Chief Inspector from the Government, that the standards used by the new Inspectorate will not be based on adherence to human rights principles and that the current focus of the Chief Inspector of Prisons on the welfare and treatment of prisoners could be diluted in the new broader inspectorate, all of which may have consequences for the effectiveness of the new body as a national monitoring

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54 Seventeenth Report of Session 2004–05, *Review of International Human Rights Instruments*, HL Paper 99, HC 264, para 27. The Government's response to that Report was published in our Eighth Report of Session 2005–06, *Government Responses to Reports from the Committee in the last Parliament*, HL Paper 104, HC 850

55 Her Majesty's Chief Inspector of Constabulary; Her Majesty's Chief Inspector of the Crown Prosecution Service; Her Majesty's Inspectorate of the National Probation Service for England and Wales; Her Majesty's Inspectorate of Court Administration. Clause 29 of the Bill.

56 Clause 23

57 Clause 22

58 Ev 85

mechanism under OPCAT. We are considering separately the overall effects on human rights protections for prisoners of the changes to the inspection system proposed in the Police and Justice Bill and will report in due course.

36. CAT further recommended in its Concluding Observations that consideration should be given to designation of the Northern Ireland Human Rights Commission (NIHRC) as a monitoring body for places of detention in Northern Ireland under the Optional Protocol.<sup>59</sup> The CAJ and BIRW note in their evidence that this has not as yet been done. The NIHRC obtained access to Rathgael juvenile justice centre only after initiating a judicial review of the refusal to allow access.<sup>60</sup> In November 2005, the Northern Ireland Office (NIO) published a consultation paper which, while noting that other bodies already have responsibilities in this area, agreed to allow the NIHRC additional investigatory powers, including access to places of detention, but suggested that such powers could be subject to a number of conditions, such as a requirement to give notice of a visit.<sup>61</sup>

37. Mr Woodward told us that no decisions had yet been taken as a result of the consultation on the precise arrangements for the NIHRC's general power to access places of detention, and conditions which might be placed upon it, nor on whether the Commission would be designated as a monitoring body under the Optional Protocol.<sup>62</sup> **We recognize the importance of ensuring that the NIHRC's functions in these respects take account of the roles of other bodies, such as the Prisoner Ombudsman. At the same time we consider that the Commission should be designated as a monitoring body in Northern Ireland under the Optional Protocol, with responsibilities focusing on compliance of places of detention with the UK's human rights obligations. We also consider that a power of unannounced inspection is important to the effectiveness of such a monitoring mechanism.**

## The prohibition on torture in Government policy development

38. Protecting the freedom from torture is a Government-wide responsibility, involving the Home Office, the Ministry of Defence, the Foreign and Commonwealth Office and the Northern Ireland Office amongst others. It is the Department of Constitutional Affairs, however, which has overall responsibility for compliance with UNCAT; which co-ordinates the periodic reports to the UN Committee Against Torture; and which is responsible for the Government's response to the UN Committee's Conclusions and Recommendations on the UK Report. Ms Harman described the role of the DCA as being to ensure that the substantive law complies with obligations under the Convention, and that the laws and procedures are effectively enforced.<sup>63</sup>

39. Some evidence we received suggested that beyond the negative obligation to refrain from acts of torture, the Government, or parts of Government, might not sufficiently appreciate the *positive* obligations under UNCAT to protect against acts of torture by

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59 Para 5(m)

60 Ev 110

61 Northern Ireland Office, Consultation Paper, *The Powers of the Northern Ireland Human Rights Commission*, November 2005, paras 51–56

62 Ev 90

63 Q 139

others, both within and outside the jurisdiction.<sup>64</sup> Instances cited in support of this include the Government’s argument—rejected by the House of Lords—in *A v Secretary of State for the Home Department*, that the non-incorporation of UNCAT into domestic law allowed for the admittance before SIAC of evidence obtained by torture abroad; the controversial proposals to rely on diplomatic assurances to deport people to countries which practise torture; and the lack of detailed official inquiry into allegations of the use of UK airports in “extraordinary renditions”, all issues which we consider further below in this Report.

40. Ms Harman stated that the DCA was responsible for ensuring that the substantive law complied with human rights obligations, and that procedures to protect rights were enforced effectively.<sup>65</sup> On issues relevant to UNCAT compliance such as, for example, the use of diplomatic assurances against torture, she said she would expect the issues to be discussed at official level between the DCA and other relevant departments, although departments such as the Home Office and Foreign Office would also have their own legal advice on the relevant international standards.<sup>66</sup>

41. In our view, the central responsibility of the DCA for compliance with the Convention against Torture requires it to have a clear role in overseeing compliance with the Convention by all Government Departments. Given the significance, under the Convention Against Torture, of positive obligations to protect against torture, including obligations to train and provide information, to investigate, to enforce laws that protect against torture and to prevent removals to face torture or the use of evidence obtained by torture, it is important, in our view, that the DCA should be proactive in advising and guiding the work of other Government Departments in relation to obligations under the Convention. **We consider that the DCA, as the department with central responsibility for the Convention Against Torture, should be proactive in providing guidance and advice on Convention obligations to other Government Departments, in particular in relation to the positive obligations of departments to take steps to prevent, and to investigate, acts of torture or inhuman or degrading treatment.**

42. **In ensuring that obligations, in particular positive obligations, under the Convention Against Torture, are fully appreciated throughout Government, the proposed new Commission for Equality and Human Rights should also have an active part to play. It will be an important part of the Commission’s function to promote the protection of human rights, to scrutinise Government policy and practice for compliance with both negative and positive obligations under the Convention Against Torture, and to recommend measures to enhance protection of rights under the Convention where appropriate.**

## Evidence obtained by torture

43. Article 15 of UNCAT establishes the prohibition on the use of evidence obtained by torture in legal proceedings. It states:

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64 Qq 1–79

65 Q 139

66 Q 140

Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

44. The Concluding Observations stressed the unequivocal nature of the Article 15 UNCAT prohibition on evidence obtained through torture and expressed concern at the then legal position, which allowed information obtained by torture abroad, without the involvement of British agents, to be admitted in evidence. CAT recommended that the UK should “reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government’s intention as expressed by the delegation not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture”.<sup>67</sup> It further recommended that the UK should provide a means for individuals to challenge, in any proceedings, the legality of any evidence plausibly suspected of having been obtained by torture. In its response to CAT, the Government said it did not consider it necessary to take further legislative or other measures to prevent reliance on evidence which might have been obtained by torture.<sup>68</sup> It also cited the House of Lords judgment in *A(FC)v Secretary of State for the Home Department*<sup>69</sup> as providing that appellants or special advocates before the Special Immigration Appeals Commission (SIAC) could raise the issue of whether evidence might have been obtained by torture and that SIAC was under a duty to investigate this if it considered that there were reasonable grounds to suspect this might be the case.<sup>70</sup>

45. In that case, detainees held under the Anti-terrorism Crime and Security Act, challenging their detention before SIAC, alleged that evidence presented against them had been obtained through the use of torture by officials of foreign states, acting outside of the UK. The Court of Appeal had previously held that evidence obtained through the use of torture by foreign agents without the involvement of UK authorities was admissible. In December 2005 the House of Lords overruled that decision, relying on both the common law tradition, and domestic and international human rights law, to establish that any evidence established to have been obtained by torture was inadmissible. The House of Lords divided, however, on the test to be applied in determining whether evidence was sufficiently tainted to be excluded.

46. The majority view on the latter question was set out in the leading judgement of Lord Hope.<sup>71</sup> He considered that it was the responsibility of the detainee to raise the issue of torture evidence before SIAC, but given the restrictions applying to applicants to SIAC it would be “wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him”. Therefore, once the issue of torture evidence has been raised, the onus should pass to SIAC which, if there are reasonable grounds to suspect that torture has been used, must investigate the matter further.<sup>72</sup> In order to exclude the evidence, SIAC must be satisfied that, on the balance of probabilities, the evidence was obtained by torture. A risk, even a real or substantial risk,

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67 Para 5(d)

68 Ev 68, para 5

69 [2005] UKHL 71

70 Ev 68, para 10

71 Concurred in by Lord Roger, Lord Carswell and Lord Brown

72 Para 116

that the evidence may have been obtained by torture will be insufficient to exclude it, although it may be taken into consideration by SIAC in assessing the weight to be given to the evidence. The majority's concern was that any other approach effectively required the Government to prove a negative: it would be "unrealistic to expect SIAC to demand that each piece of information be traced back to its ultimate source and the circumstances in which it was obtained investigated so that it could be proved piece by piece that it was *not* obtained by torture".<sup>73</sup> In arriving at this test, Lord Hope relied in part on the text of Article 15 UNCAT which requires only that evidence should be excluded where it is "established" that it has been obtained by torture.<sup>74</sup>

47. The minority, led by Lord Bingham,<sup>75</sup> held that, given the procedural handicaps applying to applicants before SIAC, "if SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence." To impose a higher standard would in his view mean that "despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been 'established'"<sup>76</sup> and would undermine the efficacy of UNCAT.<sup>77</sup>

**48. We warmly welcome the House of Lords' affirmation of the prohibition on torture, and the inadmissibility of torture evidence, as fundamental principles of UK law. In affirming this principle, the judgments of the House of Lords have gone a considerable way to addressing our concerns, and those of the UN Committee, that evidence obtained by torture could be relied on in the UK courts.**

**49. The practical implications of the House of Lords' decision on the procedures for establishing that evidence has been obtained by torture have yet to be tested before SIAC. The test established by the judgment carries an obvious risk that lack of information about the provenance of evidence will lead to evidence which has in fact been obtained by torture being admitted before SIAC. For the SIAC duty of inquiry to be meaningful, SIAC must be able to access adequate information on the provenance of the evidence concerned. This means it is vital, in the event of a challenge to evidence before SIAC, that the intelligence services and other Government agencies obtain and supply to SIAC the fullest possible information about the circumstances in which evidence passed on to them by foreign intelligence agencies has been obtained.**

50. Although the effect of the majority judgment is that SIAC is not *required* to exclude evidence even where it is satisfied that there is a substantial risk of it having been obtained by torture, it may retain a *discretion* to exclude such evidence. The judgment of the majority concerns the scope of the exclusionary rule in Article 15 UNCAT. It decides that there is no requirement to exclude where there is a substantial risk of evidence having been obtained by torture, but it does not decide that there is no discretion to exclude.

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73 Para 119

74 Para 121

75 Supported by Lord Nicholls and Lord Hoffman

76 Para 59

77 Para 62



51. We agree that there ought not to be an onus on the Government to prove that evidence was *not* obtained by torture. But where a credible allegation of torture has been raised, and SIAC is satisfied that there is a substantial risk that the evidence was obtained by torture, then SIAC has a discretion not to admit that evidence. In our view, such an approach does not amount to requiring the Government to prove a negative. Rather, it requires the appellant to satisfy SIAC that the allegation that the evidence was obtained by torture is credible. It also requires SIAC to be satisfied that there is a substantial risk of the evidence having been obtained by torture. The judgement will in our view need to be interpreted and applied in a way which avoids imposing an obligation on the Government to prove a negative, and giving meaningful practical effect to the purpose behind Article 15 of UNCAT, namely that evidence obtained by torture must not be used in legal proceedings.

### Use of information obtained by torture

52. In a witness statement sworn in the House of Lords in *A(FC) v Secretary of State for the Home Department*, the Director General of the Security Service, Dame Eliza Manningham-Buller,<sup>78</sup> makes clear that information from dubious sources is, in practice, made use of by the security services, where there is a risk that it may have been obtained by torture. Dame Manningham-Buller states that “where the reporting is threat-related, the desire for context will usually be subservient to the need to take action to establish the facts, in order to protect life.” In other words, the need to act swiftly to protect life precludes the possibility of ascertaining whether the intelligence has been obtained by torture. She gives the example of intelligence received from the Algerian intelligence services, derived from questioning of a detainee, Mohammed Meguerba, to the effect that there existed a plot to use ricin in London “in the next few days”.

53. The judgment of the House of Lords leaves open the possibility that information which may have been obtained by torture or ill-treatment by foreign agents may be used in intelligence or law enforcement operations, in particular to take preventative measures to protect against imminent terrorist attack; though it may not be admitted in evidence in any subsequent legal proceedings.<sup>79</sup> Although the ambit of protection under Article 15 UNCAT is not entirely clear, it appears to draw a similar line in prohibiting the use of evidence obtained by torture in “any proceedings” without any specific reference to intelligence or law enforcement action.

54. We heard oral evidence from Redress, Human Rights Watch and Amnesty International to the effect that the use of information obtained by torture in any law enforcement operation, even to avert an imminent attack, would undermine the absolute prohibition on torture, and would encourage and risk complicity in acts of torture by foreign agents.<sup>80</sup> In supplementary written evidence following that oral evidence session, Redress and Human Rights Watch accepted that where such information was received in the form of a hypothetical tip-off about a major terrorist attack it should be verified in

78 In the course of our inquiry we invited the Director General to meet us informally and in confidence, but she declined our request.

79 Judgment of Lord Bingham, para 47: “I am prepared to accept that ... the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of ... foreign torture evidence ... ”

80 Qq 42–56. Other evidence to the Committee in its inquiry into Counter-terrorism policy and human rights accepted that such information could be used to protect life; Third Report of Session 2005–06, op. cit., Qq 90–152

order to prevent loss of life. They also considered, however, that there was a duty to make inquiries of the foreign intelligence agency concerned as to the circumstances in which the information was obtained and how it came into the hands of UK officials, and to establish whether there has been any complicity by UK officials in an act of torture.<sup>81</sup>

55. We accept that UNCAT and other provisions of human rights law do not prohibit the use of information from foreign intelligence sources, which may have been obtained under torture, to avert imminent loss of life by searches, arrests or other similar measures. We cannot accept the absolutist position on this subject advanced by some NGOs when human life, possibly many hundreds of lives, may be at stake. Indeed, where information as to an imminent attack becomes available to the UK authorities, their positive obligation to protect against loss of life under Article 2 ECHR may require them to take preventative action, even when they suspect that the information may have been obtained by use of torture. However great care must be taken to ensure that use of such information is only made in cases of imminent threat to life. Care must also be taken to ensure that the use of information in this way, and in particular any repeated or regular use of such information, especially from the same source or sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks.<sup>82</sup> Ways need to be found to reduce and, we would hope, eliminate dependence on such information. There is in our view a significant difference between using information from sources suspected of being involved in torture to avert a terrorist act and using it in court proceedings.

56. In our view, the fundamental importance of the obligations on the UK concerning torture makes it incumbent on the intelligence services to move beyond the essentially passive stance towards the methods and techniques of foreign intelligence agencies described in Dame Eliza Manningham-Buller's witness statement. In Canada, the Canadian Security and Intelligence Service ("CSIS") is under a statutory obligation to notify the Government of any arrangements for sharing information with any foreign intelligence agencies. Those liaison arrangements are also subjected to independent scrutiny by the Canadian Security and Intelligence Review Committee, a statutory body external to the intelligence agencies and at arms length from the Government. We do not necessarily suggest this as a model, but we do draw attention to the greater degree of formality in the making of arrangements between domestic and foreign intelligence services and to the fact that such arrangements are subjected to independent scrutiny. **In our view, the need to use information which has or may have been obtained by torture could be significantly reduced if the UK intelligence services took a more proactive approach when establishing the framework arrangements for intelligence sharing with other intelligence agencies, by making clear the minimum standards which it expects to be observed and monitoring for compliance with those standards, and if there were some opportunity for independent scrutiny of those arrangements.**

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81 Ev 17

82 Qq 1-79

## Co-operation with foreign interrogators abroad

57. At the UN hearing on the UK Report under the Convention, questions were raised about the presence of UK officials at interrogations by US officials, in Iraq, Guantanamo Bay, and elsewhere. The Intelligence and Security Committee, in a report issued towards the end of the last Parliament, concluded that the security service personnel deployed to Afghanistan, Iraq and Guantanamo Bay were not sufficiently trained in the Geneva Conventions, nor were they aware which interrogation techniques had been banned in the UK, though it noted that by September 2004, the security services had issued appropriate guidance to staff involved in interrogations.<sup>83</sup> Recent press reports have alleged that British intelligence officials were present at interrogations of terrorism suspects in Greece where it is alleged that the suspects were beaten and threatened with death.<sup>84</sup> The Foreign Secretary has denied the allegations.<sup>85</sup> The High Court recently found that certain intelligence information about two British residents detained in Guantanamo, who were arrested in the Gambia and allege that they were tortured while in U.S. custody in Kabul and Baghram Air Base, was communicated to the authorities of another country by the UK security and intelligence services, and that either directly or indirectly this came into the hands of the U.S. authorities.<sup>86</sup>

58. The UN Committee recommended that the UK:

“ensure that the conduct of its officials, including those attending interrogations at any overseas facility, is strictly in conformity with the requirements of the Convention and that any breaches of the Convention that it becomes aware of should be investigated promptly and impartially ...”

59. Where officials do not attend an interrogation, but supply questions to foreign interrogators, ensuring that such interrogations comply with the Convention is likely to be impossible. In her witness statement before the House of Lords, Dame Eliza Manningham-Buller states that the UK authorities provided questions to the Algerian authorities to put to Mohammed Meguerba, the detainee being questioned about the ricin plot. She states that “because of the potential importance of what he was saying, British police officers sought direct access to him, but that was not permitted by the Algerian authorities. Instead, questions were provided to the judicial authorities in Algeria through a formal letter of request, and Meguerba was formally examined on them at length by the Chief Examining Magistrate in Algiers.”

60. In working co-operatively with foreign intelligence agents, whether relying on information supplied by them, attending interrogations, or providing information to enable their apprehension or to be used in such interrogations, safeguards are required to ensure that UK officials do not support or become complicit in the use of torture or inhuman or degrading treatment. In Canada, one of the central questions for the Arar

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83 Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, Cm 6469, paras 127–128

84 The Observer, 1 January 2006, *British Admit Being at Terror Grilling*; The Independent, 4 January 2006, *Terror Suspects describe alleged torture “in front of MI6 agents”*.

85 Oral evidence taken before the Foreign Affairs Committee on 13 December 2005, HC (2005–06) 768-I, Qq 23 and 32. Our Chairman received similar private assurances on a visit to Athens in January this year.

86 *Al-Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC Admin 972



Commission is to determine precisely what role was played by Canadian security and intelligence officials and police in providing intelligence information to the US authorities which led to Mr Arar being arrested as he passed through the U.S. and rendered to Syria where he was tortured. We note that very similar questions are raised by the recent finding by the High Court that the UK security and intelligence services provided intelligence information about two British residents to the Gambian authorities which then directly or indirectly found its way into the hands of the U.S. authorities, who it is alleged subjected them to torture. **In our view it is essential that the facts about the precise role played by the UK security and intelligence services in analogous cases be authoritatively determined through the oversight of the Intelligence and Security Committee. For the future, the UK security and intelligence services must take all feasible steps to ensure that information exchanged with foreign intelligence services has not been obtained from, and will not be used in, acts which would be regarded as human rights violations.<sup>87</sup> If this is not done, such co-operation is likely to imply active or tacit approval of the use of torture or inhuman or degrading treatment, such as might render the UK complicit in such acts.**

### **The criminal offence of torture: the defence of lawful authority, justification or excuse**

61. One point on which UK legislation has been alleged to conflict with the Convention against Torture is in the defences available to the crime of torture under the Criminal Justice Act 1988. Section 134 of the Criminal Justice Act 1988, which creates the crime of torture, gives effect to the requirement under Article 4 UNCAT to ensure that all acts of torture are offences under the criminal law. Article 2 of UNCAT further requires states to take effective measures to prevent torture and stipulates that no exceptional circumstances may be invoked as a justification for torture. Article 2.3 states that “an order from a superior officer or a public authority may not be invoked as a justification of torture.”

62. Two defences available under the Criminal Justice Act call into question compliance with these standards. Under section 134(2) there is a defence of “lawful authority, justification or excuse” to a charge of torture. Under section 134(5), where the offence of torture is committed outside the UK, such a defence applies if the law of the jurisdiction in which the offence is committed provides lawful authority, justification or excuse for the actions concerned.

63. The Government has suggested in the past that the defences in section 134 are necessary because of the very wide definition of torture under the Criminal Justice Act, which encompasses unintentionally inflicted pain occasioned in the performance of official duties, and is thus wider than the definition of “torture” (as opposed to inhuman and degrading treatment) in the Convention. In presenting oral evidence to the Committee, however, Ms Harman did not consider that the meaning of torture under the 1988 Act differed, or was intended to differ from that in the Convention: “it is supposed to be no wider and no narrower”.<sup>88</sup>

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<sup>87</sup> See above, para 56 for our suggestion that agreements about intelligence sharing with foreign intelligence services contain explicit reference to the minimum standards which information must meet and for independent scrutiny of the content and operation of such agreements

64. The defences under section 134 have further been justified on the basis that the application of the Human Rights Act ensures that they will be applied so as to be human rights compatible. Under section 3 of the Human Rights Act, the courts would be required to interpret section 134 compatibly with the right to freedom from torture (under Article 3 ECHR), if necessary restricting the effect of the defence. Questions have been raised however, as to whether section 3 HRA would allow the courts to read down section 134 as regards crimes of torture committed outside the jurisdiction, for example in Iraq or Afghanistan.<sup>89</sup> Following a recent decision of the Court of Appeal,<sup>90</sup> it is now established that the Human Rights Act does apply to persons outside the jurisdiction who are in the custody of British troops, though it does not apply to civilians killed by British troops whilst at liberty in an occupied territory which is not under effective UK military control. A section 3 interpretation would therefore apply, at least, in criminal proceedings against British soldiers abroad accused of torture crimes against persons in their custody.

65. It is not clear how the courts would approach the interpretation of the defence under section 134, and NGOs critical of the defence accepted that there were to date no cases in which the defence had been applied so as to defeat a prosecution. However, Redress told us that the defence could pose a problem in the future.<sup>91</sup>

66. Ms Harman said that the intention behind the Criminal Justice Act 1988 had been to put into law the precise obligations undertaken the previous year when the UK ratified the Convention Against Torture.<sup>92</sup> In light of the concerns expressed by the UN Committee amongst others that the Act might not sufficiently accord with the terms of the Convention, the Government were reviewing the defences available under section 134, to ascertain whether any form of amendment or clarification of the legislation was required. The Government was committed to ensuring that the letter as well as the spirit of the 1988 Act accorded with the Convention.<sup>93</sup>

**67. We welcome the Government's decision to review the effect of section 134 of the Criminal Justice Act 1988, and the defences to the crime of torture contained in it, in order to seek to reflect the UK's obligations under UNCAT more clearly. We also note and welcome the fact that the Government no longer appears to be relying on the argument that the defences are justified by the greater width of the definition of torture in the 1988 Act than in the Convention.**

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89 *Ibid.*, para 16

90 *R (Al-Skeina) v Secretary of State for Defence* [2005] EWCA Civ 1609

91 Q 12

92 Q 147

93 *Ibid.*

## 4 The armed forces

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68. Our terms of reference state that we may consider “matters relating to human rights in the United Kingdom”. In our view the question of the applicability of UNCAT to the actions of UK troops in territory which is outside the United Kingdom but under UK control falls within those terms of reference. This is because UNCAT applicability relates to the jurisdiction of UK courts and courts martial over military personnel for actions which may be in breach of prohibitions against torture and inhuman or degrading treatment or punishment under UNCAT, the ECHR, and domestic and international law. We also consider that the extent to which the Ministry of Defence puts in place procedures to ensure that British troops are trained in, understand and observe the human rights obligations by which they are bound, is a matter falling squarely within our terms of reference. However, our terms of reference prohibit consideration of individual cases. This precludes us from investigating the circumstances of alleged breaches of human rights by British troops in Iraq or elsewhere outside the UK. It is against that background that we consider human rights matters arising from the conflict in Iraq in the following section of our Report.

### Territorial applicability of UNCAT

69. At the hearing on the UK report before the UN Committee, the Government argued that the obligation to prevent torture or inhuman or degrading treatment under Articles 2 and 16 UNCAT only applied “in territory that is under UK jurisdiction”.<sup>94</sup> The Government did not consider that the UK exercised jurisdiction in Iraq or Afghanistan, which were sovereign states. It followed that the UK considered that neither UNCAT nor Article 3 ECHR applied to transfer of prisoners to Iraqi or US physical custody within Iraq, since prisoners taken into custody in Iraq had at all times been subject to Iraqi jurisdiction. Similar principles applied to transfer of prisoners within Afghanistan.

70. The Concluding Observations emphasised that “the Convention protections extend to all territories under the jurisdiction of a State party and ... this principle includes all areas under the *de facto* effective control of the State Party’s authorities.” The Committee recommended that the UK should ensure the application of Article 2 UNCAT (the duty to take effective measures to prevent torture) and Article 3 UNCAT (the duty of *non-refoulement* to face torture on return) to transfers of detainees from UK custody to either the *de jure* or *de facto* custody of any other state.

71. In December 2005, the Court of Appeal decided the case of *R (Al-Skeini) v Secretary of State for Defence*,<sup>95</sup> in which the families of a number of civilians killed by British forces in Iraq alleged breach of the right to life under Article 2 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998. The Court of Appeal held that the European Convention on Human Rights, and therefore the Human Rights Act, applied where either an individual was under the authority and control of British agents (for example, if he was under arrest) or where a territory as a whole was under the effective

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94 Para 212

95 [2005] EWCA Civ 1609

control of British forces. Therefore, Article 2 ECHR rights could be applied in the case of Baha Mousa, who had died whilst under arrest by British forces, but not in the cases of other applicants, who had been shot by British soldiers on the streets of Basra, which the Court found, on the facts, had not been under the effective control of British forces, despite the British occupation of the city. Although the *Al-Skeini* case did not deal directly with obligations under UNCAT, it appears to follow from this judgment that UNCAT would apply to the treatment of prisoners held by British forces abroad. The case is currently subject to appeal by both the Secretary of State and the unsuccessful applicants.

72. The Minister for the Armed Forces, Adam Ingram MP said that “we accept that UNCAT does apply to our troops overseas because it has been enshrined in British law in section 134 of the Criminal Justice Act 1988 and therefore British soldiers carry it with them”.<sup>96</sup> On the positive obligations imposed by the Convention, the Minister stated that detainees would only be transferred to the custody of another state if UK forces were satisfied that the individual would be treated satisfactorily following transfer. This condition could be met by a Memorandum of Understanding or other arrangement with the receiving state, but where such an arrangement existed, there would be no transfer of prisoners where it appeared that the terms of a Memorandum were not being observed.<sup>97</sup> However, UK forces “could not act as a policeman” of sovereign states.<sup>98</sup> In its response to CAT, the Government reiterated that it did not consider that Articles 2 and 3 UNCAT applied to the transfer of detainees to Iraqi or Afghan custody, though it also stated that if it were not satisfied that detainees would be treated humanely and not tortured it would not transfer them.<sup>99</sup>

73. We are not fully reassured by Mr Ingram’s answers and the Government’s response to CAT. Whilst the application of the Criminal Justice Act 1988 to UK forces in Iraq (subject to the defences available under the Act, which have been considered above) is likely to satisfy the requirement of the Convention for the criminalisation of acts of torture, the Government has not expressly accepted the application of other rights and duties under UNCAT to territory controlled by UK forces abroad, in particular the duty to prevent torture, the duty not to return detainees to face torture, and the duty to investigate allegations of torture. **We recommend that the Government should expressly accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad.**

### Training of troops in human rights obligations

74. Questions remain questions as to the extent to which UK troops have engaged in practices amounting to torture or inhuman or degrading treatment, in Iraq and Afghanistan, and to what extent military orders and directives, and training of military personnel, have been sufficient to prevent such treatment. Under Article 10 UNCAT, State Parties undertake to “ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or

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96 Q 248

97 Q 246

98 Q 247

99 Ev 69

military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.” Article 10.2 provides that : “Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”

75. Under Article 11 State Parties undertake to “keep under review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture” (or, under Article 16, inhuman or degrading treatment). Under Article 12, states undertake to conduct prompt and impartial investigations, where there are reasonable grounds to believe that an act of torture (or, under Article 16, inhuman or degrading treatment) has been committed in any territory under the jurisdiction of the state.

76. Allegations of ill-treatment, amounting to torture or inhuman or degrading treatment, by UK troops operating in Iraq and Afghanistan first came to light in a report of the International Committee of the Red Cross (ICRC) in February 2004. Since then, courts martial have been held. The most widely-reported was in Osnabrück; it resulted in the conviction of three soldiers. Other investigations are under way and there have been further allegations in the press, most recently following the release of a video showing demonstrators being beaten by troops in Southern Iraq.

77. The House of Commons Foreign Affairs Committee in the last Parliament addressed this issue in its report on Foreign Policy Aspects of the War Against Terrorism.<sup>100</sup> **We concur with the conclusions of that Committee that:**

**some British personnel have committed grave violations of human rights of persons held in detention facilities in Iraq, which are unacceptable. We recommend that all further allegations of mistreatment of detainees by British troops in Iraq, Afghanistan or elsewhere be investigated thoroughly and transparently. We conclude that it is essential that wherever there are overseas detention facilities, those responsible for detainees must have adequate training. We recommend that the Government review its training of and guidance to agency personnel, officers, NCOs and other ranks on the treatment of detainees to ensure that there is no ambiguity on what is permissible.**<sup>101</sup>

78. In the last Parliament, following the initial allegations against British troops in Iraq, the previous JCHR wrote to the Ministry of Defence, in order to seek to establish whether the Ministry had put in place sufficient compliance mechanisms to meet both the requirements of the Human Rights Act and other international human rights standards. It sought information about the orders and directives applicable to the treatment and interrogation of prisoners; about the training and information made available to troops on the treatment of prisoners and civilians and on the human rights and humanitarian law standards applicable; on the practice of hooding prisoners; and on the system of investigation of allegations of abuse. At the end of the Parliament, that Committee

<sup>100</sup> Foreign Affairs Committee, Sixth Report of Session 2004–05, *Foreign Policy Aspects of the War Against Terrorism*, HC 36-I

<sup>101</sup> *Ibid.*, para 76



published its exchange of correspondence with the MoD, reporting that the information provided by the Ministry had not enabled it to reach a view on the matter and suggesting that an inquiry into UNCAT by the JCHR in the new Parliament could provide an opportunity for the issues involved to be pursued.<sup>102</sup>

79. In that correspondence, Mr Ingram, in his letter to the Committee of 12 February 2005, stated that: “military personnel are fully informed of their responsibilities and obligations under national and international human rights and humanitarian law, not only through training received prior to deployment, but also through standard operating procedures which are developed in line with legal advice. Annual training aims to impart and revise the key skills required for operational readiness; training staff are encouraged to set role-play scenarios of the sort likely to be encountered on operations ... To aid this training the Army provides a pamphlet and video scenarios for the Small Arms Trainer and Dismounted Close Combat Trainer. ... This is then reinforced during pre-deployment training.” Mr Ingram also referred to *aide memoire* cards issued to all troops before deployment in Iraq, which “clearly states that detainees (which includes security internees) and civilians must be treated with dignity and respect, and must not in any way be subject to abuse, torture, inhuman or degrading treatment.”

80. In the context of this inquiry we requested that further relevant documents be supplied to us. The majority of these documents were provided, on a confidential basis, and in some cases partially redacted, in February 2006. The sole unclassified document amongst those we asked to see was the aide memoire issued to service personnel on deployment to Iraq.<sup>103</sup>

**We have reviewed the documents provided to us on a confidential basis and we accept broadly speaking, but with certain reservations, that they provide a basis for human rights compatible action by the armed forces. However, we note with concern, as it is a matter of public record, that training and guidance documents do not refer to the Convention Against Torture, or to the Convention rights enshrined in the Human Rights Act, but confine their reference to the Geneva Conventions. Irrespective of the Government position on the legal application of UNCAT obligations to territories outside the UK which are under its control, we consider that, as a matter of good practice, training and guidance should contain information on the Convention against Torture and the obligations it imposes.**

81. We put it to Mr Ingram in oral evidence that the training and guidance provided to troops had in practice proved to be insufficient in the military operations in Iraq. Mr Ingram emphasised that there had been considerable efforts made to ensure that armed forces personnel, in particular soldiers operating on the ground, were aware of domestic and international legal obligations.<sup>104</sup> Lieutenant General Brims told us that officers and soldiers were trained both on joining the army, and then annually, with annual career development training being specific to both the individual’s rank and the situation in

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<sup>102</sup> Nineteenth Report of Session 2004–05, *The Work of the Committee in the 2001–2005 Parliament*, HL Paper 112, HC 552, para 145

<sup>103</sup> For the full list of documents we requested, and those supplied to us and the basis on which they were supplied, see Ev 97

<sup>104</sup> Q 237

which he or she was working. There was also specific pre-deployment training. The army was open to learning lessons from mistakes and allegations as well as best practice.<sup>105</sup>

**82. We are grateful to the Ministry of Defence for providing us with sight of a range of documents relating to the training and guidance provided to the armed forces on the treatment of detainees and civilians. We are also grateful to them for drawing to our attention the Joint Service Publication 383: The Joint Service Manual of the Law of Armed Conflict, a public document which has replaced the Manual of Military Law Part III.<sup>106</sup> We regret, however, that the Ministry does not feel able to declassify at least some of the material contained in these documents, so as to inform the debate and provide some reassurance on a matter of significant public interest.**

### Interrogation techniques

83. There has been particular controversy over the use of hooding by UK troops in Iraq. Hooding was one of the “five techniques” held by the European Court of Human Rights to amount to inhuman and degrading treatment in breach of Article 3 ECHR, in a landmark decision of 1978, in *Ireland v UK*.<sup>107</sup> The Court held that the techniques employed in interrogations in Northern Ireland, though they did not amount to torture, did amount to inhuman and degrading treatment contrary to Article 3 ECHR. The five techniques were: wall-standing (forcing detainees to remain for long periods in a stress position against a wall); hooding (during interrogations); subjection to continuous loud noise; sleep deprivation; and deprivation of food and drink. The five techniques were never officially authorised in writing but were taught orally at training seminars.

84. In his letter of 25 June 2004 to the previous Committee,<sup>108</sup> Mr Ingram confirmed that the army directive prohibiting the use of the five techniques, introduced in 1972 following the allegations of ill-treatment in Northern Ireland,<sup>109</sup> remains in force, and stated that it is fully taken into account in training. An internal policy document “Guidance on Interrogation and Tactical Questioning—Support to Operations” states that the five techniques are expressly forbidden, though without specific reference to the *Ireland v UK* case.

85. In oral evidence to us, Lieutenant General Brims asserted that following allegations made in respect of operations in Iraq “very clear direction” had been given that hooding should not take place, either in interrogation, or elsewhere. It was however permissible to use other means to blindfold prisoners in some circumstances, for example during transfer.<sup>110</sup> Lieutenant General Brims was satisfied that troops on the ground would be aware that the five techniques were prohibited, although they might not be able to state this in terms of the judgment in *Ireland v UK*.

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<sup>105</sup> *Ibid.*

<sup>106</sup> Ev 104

<sup>107</sup> (1978) 2 EHRR 25

<sup>108</sup> Nineteenth Report of Session 2004–05, *op. cit.*, p 119

<sup>109</sup> *Ireland v UK*, *op. cit.*, para 135

<sup>110</sup> Q 238

## Investigation of allegations of torture or ill-treatment

86. Evidence from Redress also raises particular concerns about the thoroughness of investigations carried out into allegations of ill-treatment in Iraq.<sup>111</sup> It argues:

- that although trial evidence from the courts martial held at Osnabrück disclosed that three soldiers were involved in acts of ill-treatment likely to amount to torture, none were charged with the crime of torture under section 134 of the Criminal Justice Act 1998;
- that the Osnabrück trials disclosed actions of soldiers other than those brought to trial, which could amount to acts of torture, and which have not been prosecuted, calling into question compliance with Article 12 UNCAT, which requires a prompt and impartial investigation into allegations of torture;
- that investigations conducted by the military had in some cases been slow and “fundamentally flawed”.<sup>112</sup>

87. In oral evidence, Redress told us that there should be a wide ranging inquiry into the responsibilities of the military in the alleged abuses in Iraq.<sup>113</sup> Redress also considered that there should be further inquiry into whether courts martial were sufficiently independent and impartial to provide adequate investigation into allegations of abuse.<sup>114</sup>

88. In November 2005, a court martial judge dismissed, for lack of evidence, charges against a number of soldiers who had been charged with the abuse of civilians in Iraq.<sup>115</sup> The judge suggested that the military investigation into the allegations had been inadequate, and that much of the evidence was unreliable.

89. Mr Ingram stated that very high professional standards were applied in investigations, but stressed the difficulties involved in undertaking criminal investigations in the hostile environment of Iraq, with very limited resources and personnel available to undertake such investigations.<sup>116</sup> A review by Her Majesty’s Inspectorate of Constabulary was under way to assess whether sufficient resources and forensic skills were available to carry out effective investigations.<sup>117</sup>

## Bullying in the armed forces

90. In its Concluding Observations, the UN Committee Against Torture expressed concern at “reports of incidents of bullying followed by self-harm and suicide in the armed forces, and the need for full public inquiry into these incidents and adequate preventive measures”.<sup>118</sup>

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111 Ev 179–80, paras 18–22

112 Q 75

113 *Ibid.*

114 *Ibid.*

115 Statements in both Houses, 7 November 2005

116 Qq 257–259

117 Para 258

118 Para 4(h)



91. Serious incidents of bullying in the armed forces, such as those which are alleged to have led to suicides at Deepcut barracks, may raise issues of inhuman and degrading treatment contrary to Article 16 UNCAT. Four soldiers died at Deepcut between 1995 and 2003. Following an open verdict in one of the cases on 11 March 2006, the Coroner is reported to have stated that the Ministry of Defence should take further steps to restore public confidence in the barracks, including if necessary by a public inquiry.<sup>119</sup> Calls for a public inquiry into the allegations have not been accepted by the Government, but an independent review, led by Nicholas Blake QC, was established in December 2004. Its terms of reference were:

Urgently to review the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002 in light of available material and any representations that might be made in this regard, and to produce a report.

92. The Blake Review reported in March 2006.<sup>120</sup> On the question of whether a full public inquiry into the immediate or broader circumstances surrounding the deaths at Deepcut should be held, the review concluded that this was not necessary.<sup>121</sup> This conclusion accorded with the view previously expressed by the House of Commons Defence Committee,<sup>122</sup> and in his statement to the Commons on 29 March Mr Ingram said that he concurred with it.<sup>123</sup> He also emphasised his intention to deal with the issues raised by the review and to provide a formal written response to its 34 recommendations.<sup>124</sup>

93. We note the Blake Review's conclusion that in only one of the three deaths reviewed, that of Sean Benton, might bullying or over-harsh discipline have played any role in undermining the morale of the trainee, and that there is insufficient reliable evidence to conclude that it did so.<sup>125</sup> On the other hand, we also note the Review's statement that evidence obtained by Surrey Police and the Review suggests that between 1995 and 2002 a number of trainees at Deepcut had experienced, or claimed to have experienced, harassment, discrimination and oppressive behaviour.<sup>126</sup>

**94. From our immediate perspective of examining the Government's compliance with its obligations under UNCAT, we consider that there is no need for a full public inquiry into the circumstances of the deaths at Deepcut in order to meet those obligations, and we therefore agree with the recommendations of the Blake Review and the House of Commons Defence Committee on the matter. We note with interest the recommendation made both by the Review and by the Defence Committee that a Commissioner of Military Complaints (Armed Forces Ombudsman) should be established to provide independent supervision of the discipline and complaints**

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119 The Guardian, *Coroner backs calls for Deepcut public inquiry*, 11 March 2006

120 *The Deepcut Review: A Review of the Circumstances Surrounding the Deaths of Four Soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002*, Nicholas Blake QC, HC 795

121 *Ibid.*, para 12.114

122 Defence Committee, Third Report of Session 2004–05, *Duty of Care*, HC 63-I

123 HC Deb., 29 March 2006, col 854

124 *Ibid.*, col 856

125 *Op cit.*, para 12.23

126 *Ibid.*, para 12.24

**system, and we will consider this matter further when we scrutinise the Armed Forces Bill currently before Parliament.**

## 5 Diplomatic assurances against torture

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### Obligations under the Convention

95. Article 3 UNCAT sets out the obligation not to return anyone to a state where they face torture. It states:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

96. This obligation mirrors that established in the jurisprudence of the European Court of Human Rights, notably in the case of *Chahal v UK*, which we have already discussed above.<sup>127</sup>

97. The Concluding Observations expressed concern regarding the UK’s use of diplomatic assurances and recommended that the UK should provide it with the number of cases of extradition or removal subject to diplomatic assurances, since 11 September 2001, with details of the UK’s minimum contents for such assurances, and of the subsequent monitoring it had undertaken in respect of such assurances.

98. Since that time, the Government has made it its policy to develop a system for the use of diplomatic assurances against torture in cases involving national security considerations. The system is to be based on “Memoranda of Understanding” with a number of countries to which people are to be deported. The Government accepts that, because of the widespread use of torture and ill-treatment in these countries, it would be precluded by Article 3 ECHR from deporting people to them in the absence of diplomatic assurances. The impossibility of such deportations was one of the bases for the institution of detention without trial for non-nationals under the Anti-Terrorism Crime and Security Act 2001, which necessitated derogation from Article 5 ECHR, and for the subsequent system of control orders under the Prevention of Terrorism Act following the declaration of incompatibility made in respect of the 2001 Act.

99. Amnesty International stated in oral evidence that:

the Government for nearly four years has recognised—indeed asserted—that the deportation of those individuals would be contrary to its international obligations and the *non-refoulement* prohibition. What has changed since then is the assertion of the Government that by relying on diplomatic assurances they will be able to ensure

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<sup>127</sup> (1996) 23 EHRR 413; See also *Soering v UK*, para.88. The principle is also reflected in the application of Article 7 ICCPR by the UN Human Rights Committee: *Ng v Canada*, CCPR/C/49/D/469/1991: a state “would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place.” See also Human Rights Committee General Comment 20, A/47/40 (1992) States Parties “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”

that those individuals will not suffer the risk that the Government has itself recognised all along.<sup>128</sup>

100. A number of cases, cited in evidence to us, point to the unreliability of diplomatic assurances to protect against torture. In *Agiza v Sweden*,<sup>129</sup> the UN Committee Against Torture concluded that the rendition of the applicant from Sweden following written assurances provided by a senior representative of the Egyptian government breached Article 3 UNCAT. The assurances in that case provided that the applicant would not be subjected to torture or other inhuman treatment, that he would not be sentenced to death or executed, that the Swedish embassy would be permitted to monitor his trial and to visit him both before and after his conviction. Despite this, the Human Rights Committee found that the Swedish authorities knew or ought to have known of the risk of torture to the complainant in Egypt. It held that “the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk”.<sup>130</sup>

101. A Canadian commission of inquiry is currently investigating the case of Maher Arar, a dual national of Canada and Syria, deported from the US to Jordan, where he was handed over to the Syrian authorities, on foot of assurances to the US from the Syrian Government that he would not be tortured.<sup>131</sup> The first fact-finding report of the Commission has concluded that Mr Arar was tortured whilst in detention in Syria.<sup>132</sup>

102. As Human Rights Watch also notes in its evidence, diplomatic assurances have in some cases been found by courts, including in extradition cases before the UK domestic courts, to be an insufficient guarantee of the safety of an individual to allow their transfer from the UK.<sup>133</sup> This contrasts with the courts’ approach to diplomatic assurances against the imposition of the death penalty, where assurances have often been found to be sufficient to permit extradition.

103. As is made clear by these cases, diplomatic assurances are not by any means a phenomenon which is exclusive to the UK.<sup>134</sup> They are increasingly used both by the United States and by other European countries, as a basis for the transfer of terrorist suspects, either to the state of the suspect’s nationality, or to a third state.<sup>135</sup>

104. The nature of diplomatic assurances may of course vary, from the briefest of formal assurances that an individual will not be ill-treated,<sup>136</sup> to relatively detailed provision,

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128 Q 19

129 CAT/C/34/D/233/2003

130 Para 13.4

131 Ev 145–153

132 *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, Report of Professor Stephen J Toope, Fact-finder, 14 October 2005, [www.ararcommission.ca](http://www.ararcommission.ca)

133 *Singh and Singh v Home Secretary* (July 2003); *Akhmed Zakev* (November 2003, refusing extradition to Russia), Human Rights Watch, *Empty Promises: Diplomatic Assurances no Safeguard Against Torture*, April 2004, pp. 29–30

134 Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005; *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, April 2004

135 Statement of Mr Manfred Nowak Special Rapporteur, the UN Special Rapporteur on Torture, expressing concern that the plan of the UK to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture.

136 Such as that at issue in the case of *Chahal v UK*, *op. cit.*, para 37

including for monitoring of the assurances. The question addressed in much of the evidence on this aspect of our inquiry is whether more detailed guarantees and monitoring can render diplomatic assurances a practical and effective safeguard against torture, or whether such assurances will remain ineffective to protect individuals transferred to states where torture is routine or widespread.

## Memoranda of Understanding already concluded

105. The UK has concluded Memoranda of Understanding with Jordan, Libya and Lebanon.<sup>137</sup> The Government has said that negotiations to conclude similar memoranda with states including Algeria, Morocco and Egypt are well advanced, though according to a recent press report, a Foreign Office civil servant has given evidence to SIAC to the effect that the Government has failed to get written assurances from the Algerian Government, which has also refused to agree to any independent monitoring of the fate of the men after their return.<sup>138</sup> The existing Memoranda specify that, if detained following deportation, the deported person will be “afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.” None of the Memoranda contain express references to torture. Each provides for prompt and regular private visits from representatives of an independent body nominated jointly by both states, though the minimum frequency of the visits is different in each Memorandum.<sup>139</sup> Whilst the Libyan and Lebanese Memoranda provide for medical examinations to assess any ill treatment, the Jordanian memorandum does not. None of the Memoranda make clear that the medical personnel involved will be independent of the detaining authorities, or whether the medical examination will take place privately without representatives of the detaining authorities being present, or to whom if anyone it will report.

106. The Memoranda are essentially framework documents, which are to form the basis for individual diplomatic assurances as to the safety of individual detainees. Many of the details which would be crucial in establishing the independence and efficacy of the monitoring mechanisms for the assurances remain to be resolved.

107. In none of the Memoranda is the monitoring body specified. It would appear that a UK body, an independent organisation from the receiving state, or an international body would be permissible under the Memorandum. Under the Jordanian Memorandum, the monitoring body reports to the authorities of the sending state, whilst under the Libyan memorandum the report is to be made to both states. A Jordanian national NGO, the Al Adaleh Human Rights Centre, has been identified as a monitor for the Jordanian Memorandum,<sup>140</sup> and negotiations are under way to identify monitors for the other Memoranda already agreed. In light of the reciprocal nature of the Memoranda,

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137 Ev 78–83

138 The Guardian, *UK fails to secure deal on Algerian deportees*, 2 May 2006

139 The Jordanian Memorandum stipulates visits once a fortnight, whether or not the person has been convicted. Although the visits must be “prompt”, it is not specified how soon after arrest the first visit must take place. The Libyan Memorandum requires a visit within one week of arrest, detention or imprisonment, then at least once every three weeks pending trial, and at unspecified “regular” intervals thereafter. Under the Lebanese Memorandum, a detained person is entitled to contact the monitoring body within 48 hours of arrest, and is entitled to once weekly visits pending trial.

140 No information is currently available to us about, for example, the funding of this NGO, to enable us to assess its independence or likely effectiveness as a monitor.

negotiations are also understood to be ongoing to identify organisations to monitor the treatment of persons deported from Jordan, Libya or Lebanon to the UK.

108. We raised with Baroness Ashton the question of the variation in the protection offered by each of the Memoranda of Understanding. She considered that the Memoranda should not be expected to be in the same terms in relation to each country, since the situation in each country should be considered separately, and the guarantees appropriate to the situation in that country sought.<sup>141</sup> Baroness Ashton accepted, however, that it was a matter for the courts to decide if deportations on the basis of diplomatic assurances should be allowed to proceed.<sup>142</sup>

109. The Home Secretary, giving oral evidence in our separate inquiry into counter-terrorism policy and human rights, said, in reply to concerns that the monitoring mechanisms for diplomatic assurances would be ineffective in practice, that:

[t]he broad functions to be performed by any monitoring body, for example, practical arrangements for dealing with the situation immediately on arrival and for contacting the monitor will be dealt with in conjunction with the body selected and the government concerned ... The monitoring body would need to have available to it the expertise and experience necessary to effectively monitor the arrangements. That is what we will work to achieve.<sup>143</sup>

### The reliability of diplomatic assurances

110. Much of the written evidence we received<sup>144</sup> concerning diplomatic assurances argues that the Government's current efforts to conclude such Memoranda will lead to breaches of the UK's obligations under Article 3 UNCAT, as well as other domestic and international human rights obligations. There is the further, wider concern from several organisations,<sup>145</sup> that the use of diplomatic assurances may erode the absolute nature of the legal prohibition against torture, as affirmed in the case of *Chahal v UK*.<sup>146</sup> Submissions from Liberty and JUSTICE, and from Human Rights Watch, as well as reports submitted by Amnesty International, detail the poor human rights record of the countries to which it is proposed to deport under diplomatic assurances, in particular Jordan, Egypt, and Algeria.<sup>147</sup> The Immigration Law Practitioners' Association (ILPA) comment that: "what is surprising is that the UK government should regard as credible assurances on torture offered by any government that routinely violates its international obligations in respect of torture".<sup>148</sup>

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141 Q 159

142 *Ibid.*

143 Third Report of Session 2005–06, *op. cit.*, Q 53

144 ILPA (Ev 150), Amnesty International (Ev 105), Human Rights Watch (Ev 145), the Kurdish Human Rights Project (Ev 169), The Medical Foundation for the Care of Victims of Torture, JUSTICE and Liberty (Ev 153), the Law Society (Ev 170), the 1990 Trust (Ev 180), Michelle Pratley (Ev 189)

145 ILPA (Ev 150), Human Rights Watch (Ev 145), Amnesty International (Ev 105)

146 (1996) 23 EHRR 413

147 Qq 1–79; Ev 153

148 Ev 150



111. The point has been made, by both the Council of Europe Commissioner for Human Rights, Mr Alvaro Gil-Robles,<sup>149</sup> and the UN Special Rapporteur on Torture, Mr Manfred Nowak<sup>150</sup> that it is in the nature of diplomatic assurances against torture that they will be sought from states only where it is judged that the returned individual would otherwise be likely to be subject to torture, given the widespread or systematic use of torture in that state either in general, or against particular classes of individuals. Such torture will be carried out in breach of the State's existing international legal obligations; since the state's compliance with these obligations cannot be relied upon, it is argued that it is equally unlikely to comply with assurances in particular cases.<sup>151</sup>

112. Baroness Ashton was clear in her evidence to us that the system of diplomatic assurances depended on mutual good faith between Governments. She considered it inappropriate to look behind that good faith, and stressed that such agreements should not be entered into on the presumption that they were unlikely to be complied with. This approach was questioned by NGO evidence which pointed out that, even assuming that diplomatic assurances were honestly provided by Governments, it was in practice often the case, in states where torture was systematic, that the Government was not in a position to provide an effective guarantee against its use in a particular case, as it would lack sufficient control over regional or local authorities, or police officers on the ground.

113. Human Rights Watch stated that in countries where torture was practised, including countries with which Memoranda of Understanding had been concluded, it would be impossible for the Government to honour a diplomatic assurance made in good faith because there would not be sufficient control of the actors on the ground to ensure that torture did not take place, since "where the practice of torture is systematic it means that it is routine in the conduct of the operations of the security forces, it is not that an order is given that a particular person should be subject to ill-treatment".<sup>152</sup> ILPA cautioned that "the reality is that reliable assurances are simply not within the gift of highly placed officials where security services and those charged with the day to day care of those detained are able in practice to perpetrate torture with impunity".<sup>153</sup>

114. A similar conclusion was arrived at by the European Court of Human Rights in the *Chahal* case, where it held that notwithstanding the acknowledged good faith of the Indian government in providing an assurance that the applicant would not be ill-treated following return to India, there was insufficient state control of individual officers on the ground to ensure the applicant's safety. Relying on evidence provided in the US State Department report on India, the Indian National Human Rights Commission's Report on Punjab, and reports by Amnesty International, the Court found a "recalcitrant and enduring problem"

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149 Report by the Commissioner for Human Rights on the UK, 8 June 2005

150 Press Release, "Diplomatic Assurances" Not an Adequate Safeguard for Deportees, UN Special Rapporteur Against Torture Warns, 23 August 2005

151 See also the comments of the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K Goldman, February 2005, "the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated" UN Commission on Human Rights, E/CN.4/2005/103, 7.2.05, p.19, para.56.

152 Q 29

153 Ev 150

of human rights violations by the security forces, which persisted despite the efforts of the Government.<sup>154</sup>

115. In assessing the reliability of diplomatic assurances, it is significant that they are never legally enforceable, and afford no remedy or sanction if, in violation of the assurance, a returned individual is in fact tortured or subjected to inhuman or degrading treatment. Baroness Ashton stated that if there appeared to be a problem of compliance, then “the normal routes” could be used to seek information and review of the situation, and further steps could be considered, depending on the nature of the alleged breach. However she stated that : “it would be wrong for me to come up with a list of things we might do at this stage when our principal desire is to make sure those engaging with us through a memorandum absolutely understand that we are expecting their obligations to be fulfilled”.<sup>155</sup>

### Monitoring mechanisms

116. The efficacy of monitoring mechanisms for diplomatic assurances was questioned in evidence to the inquiry.<sup>156</sup> Human Rights Watch argued that “torture and ill-treatment are practised in secret and occur within a highly sophisticated system specifically designed to keep abuses from being detected. As a result, even if a sending government sought to engage in serious post-return monitoring, it would come up against the reality that those who use torture are adept at hiding it”.<sup>157</sup> Furthermore, a number of respected international organisations, including the International Committee of the Red Cross (ICRC), Amnesty International and Human Rights Watch, have stated that they would not act as independent monitors for diplomatic assurances.<sup>158</sup> JUSTICE and Liberty considered it unlikely that any credible body would be willing to undertake the independent monitoring role envisaged in the memoranda of understanding with Jordan and Libya.<sup>159</sup>

117. Baroness Ashton argued that domestic human rights organisations were capable of providing effective independent monitoring of diplomatic assurances, pointing to their understanding of the country concerned. She emphasised that ultimately it would be for the courts to judge whether the monitoring arrangements for diplomatic assurances were sufficiently independent and effective to allow for deportations to proceed.<sup>160</sup>

118. The House of Commons Foreign Affairs Committee, in its Human Rights Annual Report, recorded its “strong concerns that the monitoring arrangements [under the Memoranda of Understanding] are not adequate” and concluded that the Memoranda should only be used where the Government could be sure that the monitoring mechanisms in place were entirely effective. The Committee cautioned that Memoranda “must not be used as a fig leaf to disguise the real risk of torture for deported terrorism suspects”. It

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154 Para 105

155 Q 162

156 Ev 145 and Ev 169

157 Ev 145

158 Qq 1–79

159 *Op. cit.*

160 Q 161



recommended that the Government provide further information on how monitoring would work, in its response to the Committee's report.<sup>161</sup>

119. In its response, the Government states that it has no intention of using MoUs as a fig leaf to disguise a real risk of torture for deported terrorism suspects. In its view, MoUs provide an additional level of protection over and above that contained in international human rights instruments. It explains that in selecting and appointing monitoring bodies, both governments work closely together to establish the monitoring body's suitability, taking into account several factors, including capacity, independence and access to expertise. The Jordanian Government has agreed to the appointment of the Al Adelah Human Rights Centre as the monitoring body in Jordan and has approved its terms of reference. The Centre, whose aims are to enforce human rights values, democracy and justice in Jordan and the region through capacity building for NGOs and activists, has agreed to act as a monitoring body.

120. To be effective in monitoring assurances it is essential that any NGO is independent from government and that its staff are properly trained. Maintaining independence from government in the countries where diplomatic assurances are needed is likely to be difficult for NGOs.

### Comparison with death penalty assurances

121. It was argued by a number of witnesses that diplomatic assurances to prevent torture cannot be compared to similar assurances that the death penalty will not be imposed. Amnesty International pointed out that, unlike torture, the death penalty, though outlawed by protocols to the ECHR to which the UK is party, is not absolutely prohibited in customary international law. Therefore "diplomatic assurances with respect to the death penalty simply acknowledge the different legal approaches of two states and make an exception to one state's declared policies to accommodate the concerns of the other." Secondly, whilst the death penalty is practised openly by many states under the authority of their domestic law, torture is almost always unacknowledged and practiced in secret, in breach of both domestic and international law. Unlike the death penalty, torture will already be practised in breach of binding guarantees, and therefore guarantees against its use in a particular case are unreliable.

122. The relative reliability of assurances concerning the death penalty and assurances concerning torture was considered by the Supreme Court of Canada in the case of *Suresh*, which we referred to above.<sup>162</sup> The Court said:

"124 It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the

<sup>161</sup> *Op. cit.*, paras 65–66

<sup>162</sup> *Suresh v Minister of Citizenship and Immigration*, 2002 SCC 1 at paras 124–125

impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

125 In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces.”

### Wider implications of diplomatic assurances

123. In addition to questions of effective protection of individuals, a system of diplomatic assurances against torture also raises important general issues of principle. The absolute prohibition on torture is one of the central elements of international human rights legal protection. The *jus cogens*, or higher international law, prohibition on torture which is binding on all states in all circumstances represents a powerful, universal condemnation of torture by all states. There have been concerns that the negotiation of individual assurances against torture implies a dilution of this absolute legal prohibition. To negotiate for protection from torture on a case by case basis implies an understanding that a state does use torture sufficiently regularly for the assurance to be necessary in the individual case. It may further be read as implying acceptance of that state of affairs, and an understanding that the universal international legal prohibition on torture is not to be taken seriously, or at least not as seriously as the terms of an individual bilateral assurance. It may thereby encourage states which routinely practise torture in the belief that such practices are tolerated, at least in some cases.

124. Manfred Nowak, the UN Special Rapporteur on Torture, with whom we met informally in the course of this inquiry, voiced this general concern. He further considered that the use of diplomatic assurances against torture had an impact beyond the prohibition on torture, in that it served to undermine multilateralism in the international protection of human rights. In his view, such bilateral agreements did not serve to put general pressure on the receiving state to enhance its protection against torture, but undermined the more general protection offered by treaties such as UNCAT.

125. On the other hand, it may be argued that the negotiation of Memoranda of Understanding or similar bilateral arrangements present an opportunity to engage with states which violate the right to freedom from torture, and to drive up standards of protection more generally in the process of negotiating protection for an individual. We discussed this issue in oral evidence with representatives of NGOs. Amnesty International did not consider that there would be any value for NGOs in participating in the “flawed” process of monitoring diplomatic assurances.<sup>163</sup> Similarly, Human Rights Watch were clear that they would not further their objectives by engaging with a mechanism which was “not a tool for improving human rights ... [but] a tool for circumventing the *non-refoulement* obligation”.<sup>164</sup>

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163 Q 20

164 Q 24

## Conclusions on diplomatic assurances

126. In our Third Report of this Session, we concluded that states were entitled to seek diplomatic assurances against torture from other states, and that in principle such assurances were capable of satisfying the State's obligation not to return an individual to a real risk of torture. Assurances would be considered by the courts as one of the relevant factors in assessing the risk of torture in the particular circumstances of each case. We considered however that in practice such assurances should be treated with great caution so as not to undermine the absolute nature of the prohibition on torture, but that the content of each assurance should be examined in the context of each particular case. We deferred until this report consideration of whether the particular Memoranda of Understanding recently agreed by the UK were likely to be human rights compliant.<sup>165</sup>

127. The analysis which follows represents our conclusions on the general human rights issues raised by these MoUs: it does not relate to individual cases of proposed deportation on the basis of assurances. The assessment of the risk of torture following removal is a matter for the courts and is dependent on the individual circumstances of each case, including the circumstances of the country to which deportation is proposed, the circumstances of the applicant and the nature of the protection offered by the terms of the assurance in the case. In *Chahal v UK*, for example, all of these circumstances were considered by the Court, and it was a combination of the prevalence of torture of terrorist suspects such as the applicant, and the inability of the government to ensure his safety in practice, which grounded the Court's decision that the assurance in that case was insufficient to allow deportation compatibly with Article 3 ECHR. Nevertheless the Court in that case accepted the good faith of both Governments in negotiating the diplomatic assurance. In the case of *Agiza v Sweden*, the UN Committee Against Torture's assessment that the diplomatic assurance was insufficient to prevent torture was also based on the terms of the particular assurance in that case, and did not go so far as to rule out any reliance on diplomatic assurances.

128. The Venice Commission on Democracy through Law, in a recent legal opinion, has taken the view that, although in principle the acceptance of diplomatic assurances is "the expression of the necessary good faith and mutual trust between friendly States"<sup>166</sup> in practice, recent experience has shown that assurances against torture may be breached, and therefore "where there is substantial evidence that a country practises or permits torture in respect of certain categories of prisoners, guarantees may not satisfactorily reduce [the risk]".<sup>167</sup> The Commission concluded that in such circumstances Council of Europe states should not rely on assurances against torture.<sup>168</sup>

**129. The evidence we have heard in this inquiry, and our scrutiny of the Memoranda of Understanding agreed between the Government and the Governments of Libya, Lebanon and Jordan, have left us with grave concerns that the Government's policy of reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of redress.**

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<sup>165</sup> Third Report of Session 2005-06, *op. cit.*, paras 144–145

<sup>166</sup> Para 141

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, para 159(g)

We are very concerned that reliance on the good faith of Governments which are known to use, tolerate or be unable to prevent torture in breach of international obligations, is simply not a sufficient guarantee to protect against torture, which of its nature is a clandestine practice, takes place often without official authorisation and may be very difficult to detect. In our view, the recent cases of Ahmed Agiza and Maher Arar demonstrate this danger: both were tortured, one in Egypt, the other in Syria, following their deportation to those countries on the basis of assurances that they would not be tortured. As those unfortunate cases show, the consequences for the individuals concerned are so grave that this is a risk which the UK should not be prepared to take.

130. Reliance on diplomatic assurances also has a second, less immediate, but nonetheless deeply corrosive effect. The pursuit of bilateral agreements in relation to torture undermines the multilateral framework of the UN and other treaty bodies concerned with the eradication of torture. At a time when the universal and absolute prohibition on torture needs more than ever to be supported and reaffirmed, the use of diplomatic assurances against torture undermines that universal legal prohibition, and presupposes that the torture of some detainees is more acceptable than the torture of others. In thus undermining the universal legal prohibition on torture, it risks damaging the validity and effectiveness of international human rights law as a whole.

**131. We therefore agree with the UN Special Rapporteur on Torture, the European Commissioner for Human Rights and others that the Government's policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT, as well as Article 3 ECHR. We are also concerned that Memoranda of Understanding lack enforceable remedies in an event of a breach of the terms of the Memoranda.**

## **Detention of those being held pending deportation**

132. A further serious issue arising from the policy of seeking deportations with assurances is the continuing detention of individuals while lengthy negotiations are being pursued with other Governments. Deportation action against thirty persons on grounds of national security was commenced in 2005, including nine of those originally detained under Part IV of the Anti-terrorism Crime and Security Act 2001, with all of them initially being detained under immigration powers pending negotiation of diplomatic assurances. By the end of that year, six people had been released, 3 had been remanded in custody on criminal charges, 6 released on bail, 3 granted bail on principle and 12 remained in immigration detention.<sup>169</sup> As we noted in our recent Report on the renewal of the control orders regime,<sup>170</sup> it appears that those released on Immigration Act bail have been released on conditions amounting to “full house arrest”, in other words, subject to restrictions which

169 Ev 73, para 60

170 Twelfth Report of Session 2005–06, *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122, HC 915, para 43

would amount to a derogating control order if imposed under the control orders legislation.

133. In addition to our concern that such detention, or house arrest, pending the conclusion of memoranda of understanding is likely to be or become incompatible with Article 5 ECHR,<sup>171</sup> because there must be a realistic prospect of deportation within a reasonable time,<sup>172</sup> there is a risk that such continued detention (whether in custody or under house arrest) may, for some of the detainees, amount to inhuman and degrading treatment if it is of indeterminate and prolonged duration.<sup>173</sup> As we noted in our Report on the renewal of control orders, the Council of Europe's Committee on the Prevention of Torture (CPT), in a visit to the UK in November 2005, visited certain individuals being detained with a view to being deported, as well as others subject to control orders.<sup>174</sup> We remain concerned. However we understand that the CPT will report imminently on that visit and we look forward to the Government promptly requesting the publication of the Committee's Report.

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171 *Ibid.*, para. 44. Lord Carlile, the reviewer of the operation of the Prevention of Terrorism Act 2005, has similarly expressed "a real concern about the detention under deportation procedures (even where bail has been granted) of persons who in practice cannot be deported at present and are unlikely to be capable of legally compliant deportation within a reasonable time. It would have been far preferable for Memoranda of Understanding to have been reached before the deportation detentions took place": *First Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, 2 February 2006, at paras 27–28

172 Article 5(1)(f) ECHR, as interpreted by the European Court of Human Rights

173 The Council of Europe Committee on the Prevention of Torture, in its Report published in June 2005, had serious concerns about the mental state of many of those detained under the Part IV ATCSA 2001 powers as long ago as March 2004, and found that for some of them their situation could be considered to amount to inhuman and degrading treatment.

174 Twelfth Report of Session 2005–06, *op. cit.*, para 82

## 6 Investigation of deaths involving the security forces

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### Duty to investigate allegations of torture or inhuman or degrading treatment in Northern Ireland

134. Under Article 12 of UNCAT there is a duty of prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed. In its Concluding Observations, the Committee Against Torture expressed concern that the investigation of deaths by lethal force in Northern Ireland had in a number of cases failed to meet the UK's international human rights obligations.<sup>175</sup> It recommended that the UK should take steps to review investigations of deaths by lethal force in Northern Ireland that remained unresolved.<sup>176</sup>

#### *In re McKerr*

135. In a series of cases against the UK heard between 2001 and 2003, *McKerr*,<sup>177</sup> *Shanaghan*,<sup>178</sup> *Jordan*,<sup>179</sup> *Kelly*,<sup>180</sup> *McShane*, and *Finucane*,<sup>181</sup> all of which concerned deaths in Northern Ireland which were allegedly either caused, or involved collusion by, the security forces, the European Court of Human Rights found the UK to be in breach of the obligation under Article 2 ECHR (the right to life) to institute independent, prompt and thorough investigations of the deaths. The CAJ represented a number of the applicants in these cases. In respect of several of the cases, the Government has stated that it does not intend to conduct a new inquiry into the deaths, since too great a time has now elapsed for a new inquiry to be conducted.

136. This decision was challenged before the domestic courts in *In re McKerr*,<sup>182</sup> where the House of Lords found that the rule that the Human Rights Act does not apply retrospectively, meant that there was no domestic law obligation on the State to institute a new inquiry into a pre-October 2000 death, despite the ruling of the Strasbourg Court.

137. We and our predecessor Committee have registered our concern on a number of occasions about the delays in implementing the ECtHR judgements in respect of these cases, and about the impact of the *In re McKerr* judgment. Most recently we drew attention to them in a progress report on implementation of Strasbourg judgments.<sup>183</sup> **We reiterate those concerns here.**

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175 Concluding Observations, *op. cit.*, para 4(f)

176 Concluding Observations, *op. cit.*, para 5(k)

177 (2002) 34 EHRR 20

178 App No 37715/97

179 (2003) 37 EHRR 2

180 App No 300054/96

181 App No 29178/95

182 [2004] UKHL 12

183 Thirteenth Report of Session 2005–06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133, HC 954, paras 10 and 16 to 18. We also recently considered the Article 2 ECHR procedural obligation in our



### *Inquests in Northern Ireland*

138. The Strasbourg judgments in the cases referred to above also criticised the inquest system in Northern Ireland as being insufficient to comply with the Article 2 duty on the state to investigate unnatural deaths. Inquests in Northern Ireland may not reach verdicts, such as “unlawful killing”: they issue findings. As the previous JCHR said in its report on deaths in custody,<sup>184</sup> some widening of the scope of these findings has resulted from the Northern Ireland Court of Appeal judgment in *In Re Jordan*,<sup>185</sup> which held that, though coroners in Northern Ireland remain unable to reach a verdict of “unlawful killing”, inquests may consider the background circumstances of a death and make findings of fact on the actions of agents of the state. Aideen Gilmore of the Committee on the Administration of Justice told us that there remained uncertainty as to whether this broader scope was applicable in relation to current inquests into deaths occurring before 1998, and that there was a danger that a two-tier system of inquests would develop, depending on whether they related to deaths before or after 1998.<sup>186</sup>

139. The 2003 Luce Report<sup>187</sup> made a number of recommendations for reform of the coroners system in England, Wales and Northern Ireland, including recommendations bearing on the capacity of inquests to fulfil the obligations on the state to comply with the Article 2 ECHR investigatory duty. In response the Government produced a position paper,<sup>188</sup> and a draft Coroners Bill is currently expected to be published this spring.

140. We note that the NIHRC published a report in February 2006 examining the extent to which the inquest system in Northern Ireland meets the state’s Article 2 obligations in respect of deaths resulting from use of lethal force.<sup>189</sup> That report stated that future inquests in Northern Ireland would need to be “significantly different creatures from their predecessors”, and also noted that implementation of the Luce recommendations could meet many of the requirements of the ECtHR judgments.<sup>190</sup> Administrative reorganisation and modernisation of the coronial system in Northern Ireland is under way following consultation by the Government,<sup>191</sup> but this process of reform does not directly address the compliance of the system with Article 2 ECHR. We would hope that the draft Coroners Bill expected shortly will seek to align the coronial system in Northern Ireland with that in England and Wales, as recommended by the Luce Report, particularly in relation to the fulfilment of the Article 2 duty.

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consideration of the human rights compatibility of the Northern Ireland (Offences) Bill of this Session, following the withdrawal of the Bill: Seventh Report of Session 2005–06, *Legislative Scrutiny: Fourth Progress Report*, HL Paper 98, HC 829

184 Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15-I, HC137-I, paras. 297–301

185 [2004] NICA 30

186 Qq 108, 120

187 *Death Certification in England, Wales and Northern Ireland, Report of a Fundamental Review*, Cm 5831, 2003

188 *Reforming the Coroner and Death Certification Service, A Position Paper*, Cm 6159, March 2004, Home Office

189 *Investigating Lethal Force Deaths in Northern Ireland: the Application of Article 2 of the European Convention on Human Rights*, Fiona Doherty and Paul Mageean, Northern Ireland Human Rights Commission, February 2006

190 *Ibid.*, p 20

191 *Modernising the Coroners Service in Northern Ireland: The Way Forward*, Northern Ireland Court Service

### **The Inquiries Act 2005**

141. At least two of the most controversial conflict-related deaths, that of the solicitor Patrick Finucane; and the loyalist Billy Wright, are to be the subject of inquiries under the Inquiries Act 2005. The Inquiries Act provides a new legal framework for public inquiries. During the passage of the Inquiries Bill, the previous JCHR reported its view that inquiries held under the Bill would be insufficiently independent to satisfy the requirements of Articles 2 and 3 ECHR.<sup>192</sup> In particular, it was concerned that independence was undermined by ministerial powers:

- to bring an inquiry to an end before the publication of its report;
- to issue restriction notices limiting attendance at the inquiry, or limiting the disclosure or publication of evidence or documents provided to the inquiry;
- to withhold publication of the inquiry’s report, unless the duty of publication is specifically allocated to the chair of the inquiry;
- to withdraw funding from an inquiry which the Minister believes to be operating outside its terms of reference.<sup>193</sup>

142. There is also concern that the Inquiries Act allows for private hearings, and the Secretary of State for Northern Ireland has indicated that much of the *Finucane* inquiry would be likely to be held in private, because of national security considerations.<sup>194</sup> We remain to be convinced that in these and other controversial and sensitive cases inquiries held under the Inquiries Act will discharge the UK’s responsibilities under UNCAT and the ECHR to hold effective investigations into deaths by use of lethal force in Northern Ireland.

### **The Historical Enquiries Team**

143. The Police Service of Northern Ireland (PSNI), on the initiative of the Chief Constable, has recently established an Historical Enquiries Team, to investigate unsolved deaths related to the conflict in Northern Ireland, between 1968 and the conclusion of the Good Friday Agreement of 1998. The head of the team has described its purpose as to “offer answers and a greater level of resolution to families, and to identify and explore any remaining or new evidential opportunities that exist.” One of the HET’s investigations teams will be staffed by officers from external police forces, and will inquire into cases where independence from the PSNI is seen to be necessary. The other is to be staffed by serving and former officers the PSNI.

144. Shaun Woodward MP told us that the team had been allocated £32million and would be given “every tool available” so that it could bring closure to families of victims,<sup>195</sup> and the Chief Constable of the PSNI said that it would operate under the “principle of maximum

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<sup>192</sup> The human rights compatibility of the Inquiries Bill, now the Inquiries Act 2004 is analysed in the Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224; and the Eighth Report of Session 2004–05, *Scrutiny: Third Progress Report*, HL Paper 47, HC 333

<sup>193</sup> *Ibid.*

<sup>194</sup> Ev 145

<sup>195</sup> Q 230

disclosure”. While the team would consider any new lines of inquiry in relation to any of the 2,000 or so unresolved deaths, Sir Hugh Orde assessed that the effectiveness of the team’s work would mainly be achieved by providing information to families rather than through resulting prosecutions. **We welcome the establishment of the Historical Enquiries Team, which we consider will play an important part in enabling people in Northern Ireland to come to terms with the Province’s recent history, thus improving the prospects for reconciliation in the years to come.**

## 7 Deaths in custody and prison conditions

145. The previous JCHR conducted a comprehensive inquiry into the human rights implications of deaths in custody in the last Parliament. That Committee's principal recommendation was that a cross-departmental expert task force on deaths in custody should be established to undertake various functions to ensure best practice in preventing deaths across all custodial institutions.<sup>196</sup> In response, the Government announced that in addition to existing groups co-ordinating policy on deaths in custody, a new multi-agency group initiated by the IPCC was being established.<sup>197</sup> We welcomed the establishment of this group, while noting that the previous Committee's recommendation had not been accepted, and we have undertaken to keep the matter under review.

146. The Concluding Observations, which expressed general concerns about prison conditions and deaths in custody in the UK, raised a particular concern about conditions of detention for women prisoners at Hydebank Wood prison, Northern Ireland.<sup>198</sup> These concerns arose out of research conducted by the Northern Ireland Human Rights Commission into the conditions of detention in Northern Ireland women's prisons,<sup>199</sup> which found, amongst other things, that conditions in the segregation block in the women's unit at Maghaberry prison were inhuman and degrading and risked breach of Article 3 ECHR; that segregation in punishment cells was being used inappropriately; that women at the unit were subject to routine sexual harassment from male prisoners and staff; that healthcare was grossly inadequate and that suicide prevention was insufficient. In response to criticism of Maghaberry women's unit from the NIHRC and the Chief Inspector of Prisons, women prisoners were transferred to Hydebank Wood, a male young offender's unit, in 2004. Both the NIHRC, and the Criminal Justice Inspectorate for Northern Ireland,<sup>200</sup> concluded however that conditions for women at Hydebank Wood were not substantially better than at Maghaberry, and that Hydebank Wood was an unsuitable environment for women prisoners. The Criminal Justice Inspectorate recommended that a separate prison should be provided for women in Northern Ireland.

147. In evidence Shaun Woodward MP pointed to a number of developments within the Northern Ireland Prison Service to establish gender-specific policies and programmes which would benefit women prisoners.<sup>201</sup> Alternative accommodation for women prisoners in a separate prison was being actively considered, and the NIHRC was due to publish further research on conditions of detention for women.<sup>202</sup> Further details of action being taken by the Northern Ireland Prison Service to address the needs of women

196 Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15-I, HC 137-I, para 376

197 Second Report of Session 2005–06, *Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05*, HL Paper 60, HC 651

198 Paras 4(g) and 5(l)

199 NIHRC, *The Hurt Inside: the Imprisonment of Women and Girls in Northern Ireland*, October 2004 (second edition June 2005); Report on the transfer of women from the Mourne House Unit, Maghaberry Prison, to Hydebank Wood Young Offenders Institute, June 2004

200 Report of June 2005 following an inspection in January 2005

201 Q 233. See also Ev 90

202 Ev 90. Such matters have also been dealt with in Council of Europe, Committee of Ministers, Recommendation No. R 87(3) European Prison Rules (adopted on 14th February 1987) and Recommendation No. R (98) 7 Concerning the Ethical and Organisational Aspects of Health Care in Prison (adopted on April 8th 1998)

prisoners have been given in the Government's response to the UN Committee.<sup>203</sup> **From the evidence we have received it seems that the Government and the prison authorities in Northern Ireland may well now be seized of the urgent need to provide decent conditions for women in detention. If this is the case we expect the new approach to have been translated into significant improvements by the time the UK's next periodic report to CAT is due.**

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203 Ev 77, paras 99–104

## 8 Extraordinary Renditions

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148. Growing concerns about the phenomenon of extraordinary rendition, and in particular, allegations that British airports are being used for stopovers by CIA chartered aircraft operating renditions of suspects to jurisdictions where they will be interrogated under torture, led us to extend our inquiry to consider the obligations of the UK under UNCAT in respect of these allegations.<sup>204</sup> We heard oral evidence on the issue and sought and received additional written evidence on extraordinary renditions from a number of NGOs.

149. The existence of a practice of rendition to face torture is disputed. In a recent statement, the US Secretary of State, Condoleezza Rice, denied that the US transported detainees to other jurisdictions “for the purpose of interrogation using torture” or that it sent suspects to jurisdictions where it “believed” they would be tortured.<sup>205</sup> She nevertheless acknowledged and justified the extra-legal “renditions” process, and left open the possibility that suspects were being rendered to countries where torture is routinely practised, or where they may be subjected to inhuman or degrading treatment, or to other practices which fall short of the US Government’s definition of torture, but which may nevertheless be prescribed by UNCAT.

150. At a European level, investigations into allegations of extraordinary rendition and of the complicity of European governments in such renditions are still ongoing. Some preliminary findings have emerged, however: the Interim Memorandum by Senator Dick Marty of Switzerland, Rapporteur to the Council of Europe Parliamentary Assembly on Allegations of Secret detentions in Europe, found clear evidence to establish that individuals were being abducted, detained and transported within Europe, and handed over to countries where they faced torture.<sup>206</sup> A European Parliament Temporary Committee of Inquiry into the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners began work in February and expects to produce its first interim report in May 2006. A number of European states including Germany, Italy and Spain are now undertaking official investigations into the possible use of their airports in extraordinary renditions.<sup>207</sup>

151. In the UK, Government Ministers have repeatedly stated their belief that renditions to torture are not taking place through UK airports or airspace.<sup>208</sup> These assertions are based on the assurances given by the US authorities, and by the absence of any formal requests from the US authorities to render suspects through the UK. The Foreign Secretary has stated that there have been no requests from the US government to effect renditions

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204 The Guardian, 12/9/20005, *Destination Cairo: Human Rights fears over CIA flights*, 12 September 2005; The Herald, *Britain to be Hub for CIA Terror prisoner flights*, 16 November 2005. Amnesty International, *Rendition and “Disappearances” in the “War on Terror”*, <http://web.amnesty.org/pages/stoptorture-renditions-eng>

205 Ev 92

206 Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, Information Memorandum II AS/Jur (2006) 03 rev, 22 January 2006. See also *Alleged existence of secret detention centres in Council of Europe member states*, statement by Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights, Strasbourg, 13.12.2005

207 Ev 181

208 The Rt Hon Jack Straw MP, Oral evidence taken before the Foreign Affairs Committee on 13 December 2005, HC (2005–06) HC 768i, Q23; Baroness Ashton of Upholland, Qq 137–180; Rt Hon Adam Ingram MP, Qq 236–270



through UK airspace since 1998. In that year, two requests relating to renditions of suspects to face trial in the US were granted.<sup>209</sup> Also in 1998, one request to refuel an aircraft carrying two detainees to the US was denied.<sup>210</sup> In a letter to us, Mr Straw stated:

I have no reason to believe that suspected terrorists have been renditioned through UK territory or airspace during the Bush Administration. None of the information published recently has demonstrated otherwise ... we see no value and have no intention of checking every flight transiting the UK which may have some connections with the US Government<sup>211</sup>

152. Evidence has emerged, however, that aircraft believed to have been involved in previous renditions have passed through the UK, stopping for refuelling purposes en route, to countries known to practise torture.<sup>212</sup>

153. Evidence to us questioned the sufficiency of the inquiries undertaken by the Government. Liberty and JUSTICE considered it unrealistic to expect that the United States Government would have sought specific permission to use the UK for extraordinary rendition and argued that a proactive investigation was needed to establish whether UK airspace or airports are being used in the practice of extraordinary rendition.<sup>213</sup>

154. We note the conclusions of the House of Commons Foreign Affairs Committee, which on 15 February published its views on extraordinary renditions in its Human Rights Annual Report. It regretted the Government's unwillingness to request information from the US Government concerning rendition flights,<sup>214</sup> and concluded that:

the Government has a duty to inquire into allegations of extraordinary rendition and black sites under the Convention Against Torture, and to make clear to the USA that any extraordinary rendition to states where suspects may be tortured is completely unacceptable.<sup>215</sup>

155. There has been pressure to take action to investigate renditions at operational as well as diplomatic levels. We note that the Chief Constable of Greater Manchester Police opened an inquiry into extraordinary rendition flights on behalf of the Association of Chief Police Officers (ACPO),<sup>216</sup> and we understand that this inquiry is still open.

## Human rights compliance

156. In regard to extraordinary renditions, as elsewhere, compliance with the Convention against Torture and other human rights standards requires more than passive non-

209 HC Deb., 12 December 2005, cols 1652–3W

210 HC Deb., 10 January 2006, Col 5WS

211 Ev 91

212 In a letter of 6 March 2006 to Sir Menzies Campbell, Mr Ingram disclosed that aircraft known to have been chartered by the CIA landed on 14 occasions at two RAF bases, RAF Brize Norton and RAF Northholt: *The Guardian, Minister Admits Rendition flights used RAF bases*, 7 March 2006

213 Ev 159–169

214 Foreign Affairs Committee, First Report of Session 2005–06, *Human Rights Annual Report 2005*, HC 574, para 51

215 *Ibid.*, para 52

216 Ev 160, para 6

cooperation in torture; it requires active investigative and law enforcement action to prevent torture or inhuman and degrading treatment. Credible allegations that UK airports or airspace is being used to render suspects to face torture engage the UK's positive obligations to prevent and investigate acts of torture under UNCAT, as well as under Article 3 of the European Convention on Human Rights, given force in domestic law by the Human Rights Act,<sup>217</sup> and under the customary international law prohibition on torture.

157. Under Article 3 of UNCAT, there is an obligation not to return anyone to a country where there are substantial grounds to consider that they will face a real risk of torture; this is reflected by similar obligations under Article 3 ECHR<sup>218</sup> and Article 7 ICCPR.<sup>219</sup> This obligation is also likely to apply where an individual is “rendered” through the UK by foreign intelligence agents, to face such a risk of torture outside the UK.<sup>220</sup>

158. Liberty and JUSTICE further suggest that extraordinary renditions may in themselves amount to torture, since “detaining someone where the detainee is aware that the purpose of the detention is to bring him to a place where he will be subjected to physical torture might in itself amount to torture as it will undoubtedly inflict severe mental suffering on the detainee”.<sup>221</sup> This argument relies on an analogy with the case of *Soering v UK*, where it was held that the prolonged wait for the death penalty known as the “death row phenomenon”, amounted to inhuman and degrading treatment in breach of Article 3 ECHR.

159. The Convention places a number of specific duties on states to investigate allegations of torture, both within the jurisdiction, and elsewhere. Under Article 12, there is a duty to investigate wherever there are reasonable grounds to suspect that an act of torture has been committed in the jurisdiction. Under Article 6, where persons alleged to have committed offences of torture or complicity in torture are present in the territory of the State, there is an obligation to take the suspect into custody or otherwise secure his presence in the territory, and make a preliminary inquiry into the facts, with a view to either prosecution or extradition in accordance with Article 7.<sup>222</sup> Therefore, the effect of UNCAT is that where there are credible allegations that an aircraft present at a UK airport is involved in the transport of a suspect to torture, or that persons present on the aircraft are involved in the transfer of suspects to torture, there is an obligation to conduct a preliminary investigation into its involvement in any possible offences of torture. Where this preliminary investigation unearths sufficient information to justify arrests, there is an obligation to prevent the aircraft from leaving UK territory, and to arrest any suspects present on the

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217 *Soering v UK* (1989) 11 EHRR 439; *Chahal v UK* (1997) 23 EHRR 413;

218 *Chahal v UK*, *op. cit.*

219 Liberty, JUSTICE and REDRESS argue in their evidence that this obligation will be breached where the UK permits a transfer to torture by foreign agents through the UK.

220 See the comments of the Venice Commission (The Council of Europe Commission on Democracy through Law, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, 17 March 2006, CDL-AD (2006) 009

221 Ev 159–169

222 Article 5.2 UNCAT provides for universal jurisdiction over crimes of torture, stipulating that states must establish jurisdiction over offences of torture, including complicity and participation in torture, and attempted torture, where the alleged offender is present within the jurisdiction, irrespective of where the offence has occurred.

aircraft. Where there is sufficient evidence, the suspects must be either prosecuted, or extradited.

## The Chicago Convention

160. The principal international treaty which regulates civil aviation is the Chicago Convention on International Civil Aviation 1944 (The Chicago Convention). Under the Convention, if extraordinary rendition aircraft are identified as state aircraft, then in order to fly through UK airspace, or land at UK airports, they require prior authorisation, and must abide by the terms of such authorisation (Article 3(d)). If extraordinary rendition aircraft are identified as civil aircraft, then under Article 5 of the Chicago Convention, they must be permitted to fly through UK airspace and to stop for refuelling or other similar (“non-traffic”) purposes at UK airports, without obtaining prior permission. However, the Chicago Convention expressly permits State authorities to search the aircraft on landing or departure, and to inspect relevant certificates and other documents relating to the aircraft (Article 16). Under Article 23, these include the journey log book of the aircraft, a list of passengers, their names and places of embarkation and destination, and a detailed description of any cargo. There is therefore nothing in the Convention which would prevent a police search of a civil aircraft stopped for refuelling at a UK airport, or the arrest of persons aboard the aircraft who were suspected of crimes of torture.

161. Furthermore, Article 4 of the Chicago Convention stipulates that states must not use civil aviation for any purpose inconsistent with the overall aims of the Convention.<sup>223</sup> Civil flights established to be transporting suspects to torture would be likely to be considered inconsistent with the aims of the Convention, and therefore outside its protection, in particular given the need to interpret and apply the Convention in light of the UK’s obligations under UNCAT and under customary international law. Given the status of the prohibition on torture as a norm of higher international law or *jus cogens*, an interpretation of the Chicago Convention which permitted free passage to aircraft known to be involved in renditions to torture would be likely to render the relevant provisions of the Chicago Convention inapplicable, since under the Vienna Convention on the Law of Treaties, a treaty which conflicts with a norm of *jus cogens* is void.<sup>224</sup>

## Status of Aircraft

162. The status of aircraft alleged to be used in extraordinary renditions, as either State or civil aircraft, is unclear. The question is significant, since a State aircraft, though it will require permission to land in the UK, will not be subject to search by UK authorities, except by agreement. Whether an aircraft is classified as State or civil may depend on the nature of the aircraft. Where it is a military aircraft or lands at a military base for example, its status as a civil aircraft may be open to question. The Venice Commission on Democracy through Law, in its recent legal opinion on renditions, considered that where an aircraft, chartered by agents of a foreign State, represents itself as a civil aircraft, then it forfeits the right to claim State aircraft status under the Chicago Convention as well as the

<sup>223</sup> The Preamble to the Convention notes that development of international civil aviation can “create and preserve friendship and understanding among the nations and peoples of the world” whilst its abuse can “become a threat to the general security” and states the Convention’s aim to develop international civil aviation in a “safe and orderly manner.”

<sup>224</sup> Vienna Convention on the Law of Treaties, Article 53 and Article 64

right to state immunity.<sup>225</sup> It nevertheless considered that aircraft presenting themselves as State aircraft would enjoy immunity and could not be searched.<sup>226</sup> The Secretary General of the Council of Europe, in a recent Report on these matters, recommended clarification of the law on human rights exceptions to State immunity, and co-operation between the Governments of Council of Europe states to achieve this.<sup>227</sup>

### **The Government view**

163. Although there has been some confusion as to the effect of international civil aviation law on the Government and police powers to investigate allegations of extraordinary rendition, it now appears to be accepted that the current law creates no barrier to investigation. Initial Government suggestions that the Chicago Convention prevented investigation of the matter<sup>228</sup> were later withdrawn. At report stage debates on the Civil Aviation Bill in the House of Lords, in response to amendments tabled by Baroness D’Souza which would have provided for express powers to require aircraft to land, and to board and search aircraft where they were suspected of involvement in extraordinary rendition, Lord Davies of Oldham argued that the amendments were unnecessary since such powers already existed under international civil aviation law. He stated:

The Chicago Convention is clear on this. We certainly have the right to investigate an aircraft, but, of course, we have to have good grounds for doing so. If credible intelligence of serious illegal activity comes to light regarding an aircraft in flight, the Government can certainly require the aircraft to land. Article 3 of the Chicago Convention allows states to require aircraft to land if there are reasonable grounds to conclude that the aircraft is being used for any purpose that is inconsistent with the aims of the Convention.

If the aircraft is on the ground the control authorities—police, Customs and immigration—have a variety of powers to enter, take evidence and make arrests.<sup>229</sup>

164. In evidence to us, Ms Harman accepted there was an obligation to investigate allegations of flights transporting individuals to torture. She further accepted that the Chicago Convention should not “be a shield behind which acts preparatory to torture should take place”.<sup>230</sup> She considered that the primary duty of investigation lay with the police, rather than with central government.<sup>231</sup> **We welcome the Government’s acceptance that international civil aviation law permits thorough investigation of civil flights alleged to be involved in extraordinary rendition.**

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225 Venice Commission legal opinion, *op. cit.*, para 103 and para 148

226 *Ibid.*, para 149

227 Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, 28 February 2006, SG/Inf (2006) 5, para 71

228 HL Deb., 12 October 2005, col 376

229 HL Deb, 8 March 2006, col 844

230 Q 165

231 Q 168

165. The Government's position has been that whilst in principle it would be willing to investigate where there is evidence of extraordinary renditions passing through the UK, at present there is no such evidence.<sup>232</sup> It does not consider information that aircraft landing in the UK can be demonstrated to have been previously involved in extraordinary renditions, to be sufficient in itself to warrant further investigation. Mr Ingram stated, in respect of the aircraft disclosed to have landed at RAF bases: "there is no evidence to show that any of those aircraft were carrying any passengers of the type [alleged to be transported in renditions]".<sup>233</sup> Baroness Ashton of Upholland confirmed the Government's view that there was "no basis for further action".<sup>234</sup>

## Conclusions

166. One obstacle to obtaining clear evidence that a particular flight is transporting a detainee as part of a rendition is the current lack of a requirement for chartered civil aircraft passing through the UK to provide lists of passengers on board. Ms Harman confirmed that such information was not required or recorded.<sup>235</sup> We note, however, that there is nothing in the Chicago Convention which would prevent the UK from requiring transiting civil aircraft to provide such information. Given the potential for abuse of free passage for civil aircraft under the Chicago Convention, by aircraft involved in extraordinary renditions, **we recommend that the Government should take steps to require staff and passenger lists to be provided to the UK authorities when chartered civil aircraft land at UK airports, or transit UK airspace. In the long term, if effective unilateral Government action is not taken, there would be a case for amendment of the Chicago Convention, to require the provision of passenger lists.**

167. In relation to the question of whether there have been extraordinary renditions in the past few years using UK airspace or airports, and the extent to which the Government should initiate an investigation, we note that the Government has recently rejected the view of the House of Commons Foreign Affairs Committee that it is under a duty to enquire into the allegations of extraordinary rendition and black sites under the Convention against Torture. In its response to the Foreign Affairs Committee's Annual Report on Human Rights for 2005, the Government states that a "search of all relevant records" has not found any evidence of detainees being rendered through UK airspace since 11 September 2001, and that in the absence of such evidence it does not consider that there is a requirement under Article 12 UNCAT for it to carry out a further investigation.<sup>236</sup> This accords with the Government's view expressed in evidence to us, as described above.

168. We consider that there is now a reasonable suspicion that certain aircraft passing through the UK may have been carrying suspects to countries where they may have faced torture, or to have been returning from rendering suspects to such countries. This reasonable suspicion is in our view sufficient to trigger the duty to investigate, and to look

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232 Lord Davies of Oldham, report stage debate on Civil Aviation Bill, *op. cit.*; Rt Hon Adam Ingram MP, Qq 236–270; DCA Qq 137–180

233 Q 251

234 Ev 85–88

235 Q 180

236 Response of the Secretary of State for Foreign and Commonwealth Affairs to the First Report from the Foreign Affairs Committee, Session 2005–06, *Annual Report on Human Rights 2005*, Cm 6774, paras 27 and 28

behind the assurances received from foreign Governments. It follows that we do not accept the Government's view that, by the means described in its response to the Foreign Affairs Committee, it has adequately demonstrated that it has satisfied the obligation under domestic and international human rights law to investigate credible allegations of renditions of suspects through the UK to face torture abroad. In order to satisfy the obligation to investigate in relation to possible renditions to face torture which may already have taken place, we believe the Government should now take active steps to ascertain more details about the flights which it is now known used UK airports, including, in relation to each flight, who was on them, and their precise itinerary and the purpose of their journey. If evidence of extraordinary renditions come to light from such investigations, the Government should report such evidence promptly to Parliament.

169. We recognise that there are growing calls for an independent public inquiry into alleged use of UK airports in extraordinary renditions, and that the piecemeal way in which information has so far reached the public domain does not inspire confidence in the Government's willingness to investigate, but nevertheless we consider that such an inquiry would be premature. Whether a public inquiry is necessary should be determined in light of the extent to which inquiries by the Government leads to the publication of the detailed information required.

170. For the future, in addition to the steps which the Government has taken to make its position on extraordinary renditions clear to the United States authorities,<sup>237</sup> we believe the Government should establish a clear policy as to the action to be taken in cases where aircraft alleged to have been previously involved in renditions transit the UK. Where there are credible allegations arising from previous records that a particular civil aircraft transiting UK airspace has been involved in renditions, and where the aircraft is travelling to or from a country known to practise torture or inhuman or degrading treatment, it should be required to land. Where such an aircraft lands at a UK airport for refuelling or similar purposes, it should be required to provide a full list of all those on board, both staff and passengers. On landing, it should be boarded and searched by the police, and the identity of all those on board verified. Wherever appropriate, a criminal investigation should be initiated. Where an aircraft suspected of involvement in extraordinary renditions identifies itself as a state aircraft, it should not be permitted to transit UK airspace, in the absence of permission for UK authorities to search the aircraft. We consider that these steps are not only permitted by the current law, but required to ensure full compliance with the Convention Against Torture.

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237 *Ibid.*, para 29



## 9 Use of AEPs in Northern Ireland

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171. In its Concluding Observations in 1998<sup>238</sup> on the UK's third periodic report the UN Committee raised a concern about the use of plastic bullet rounds as a means of riot control and recommended that such use be discontinued. The latest Concluding Observations noted as a positive aspect the fact that they had not in practice been used since September 2002.<sup>239</sup> Since those Concluding Observations were issued, however, the latest version of the baton round, the Attenuating Energy Projectile (AEP), has been fired by both the police and the army in response to serious rioting on a number of occasions. The police fired 21 AEPs on 12 July and 11 on 4 August 2005. In a series of incidents between 10 and 13 September 2005, the police fired 249 AEPs and the army 140.<sup>240</sup> The Chief Constable said that AEPs had only been fired against individual aggressors and in accordance with strict authorisation procedures.<sup>241</sup> The PSNI's human rights advisers confirmed this in oral evidence

172. The weapon popularly known as the plastic bullet has undergone continuous development over the past 30 years. Rubber bullets were first used in Northern Ireland as a means of crowd control in 1970. The plastic bullet, also known as the plastic baton round, was introduced in 1974. A new form of plastic bullet called the baton round was introduced in 2001. Most recently, AEPs were introduced in June 2005. Although these developments in the weapon have been presented as reducing its potential for injury, their claims to provide less lethal alternatives have been disputed.

173. Since they were first used in Northern Ireland, rubber and plastic bullets have caused 17 deaths,<sup>242</sup> and a large, though undetermined, number of injuries. Injuries documented as a result of plastic bullets include brain damage, loss of eyes, fractured jaws, multiple bone fractures, spinal injuries, and post-traumatic stress disorder.<sup>243</sup> There has been a particularly high rate of injury of children.<sup>244</sup> There is clearly a potential for injury caused by baton rounds to amount to inhuman and degrading treatment.

174. It is not clear how many injuries resulted from the firings of AEPs during the summer of 2005, though BIRW states that a large proportion of those involved in the riots were children, and cites press reports of child injuries. Figures have been released for the number of people hit by AEPs fired by the police (but not by those fired by the army): police AEPs hit 12 people on 12 July; 12 on 4 August; and 187 between 10 and 13 September.

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238 Concluding Observations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, 17 November 1998, A/54/44

239 Concluding Observations, *op. cit.*, para 3(a)

240 Plastic Bullets: A human rights perspective, page 13

241 Q 204

242 Ev 110–138, *Plastic Bullets: A human rights perspective*, Sept 2005, table pp. 3–5

243 *Ibid.*, pp. 5–11

244 NIHRC/Omega Foundation Report for the NIHRC, March 2003

## Human Rights Advisers' Report

175. The report of the human rights advisers to the Northern Ireland Policing Board on the policing of the Ardoyne and Whiterock Parades in July and September 2005 was published in December 2005.<sup>245</sup> It concluded that the issue, deployment and use of AEPs in the Ardoyne Parades in July were within PSNI guidance and compliant with the Human Rights Act.<sup>246</sup> AEPs had been deployed only after rioters were seen throwing blast bombs from nearby roofs, and when it was clear that officers could not control the situation by (a) taking cover (b) withdrawing or (c) dealing with the situation using other less lethal methods of control. In relation to the Whiterock parade the report found that the issue, deployment and use of AEPs following petrol and blast bomb attacks against the police was, in general terms, within the PSNI guidance and compliant with the HRA, given the serious and sustained attack faced by the police.<sup>247</sup> In everything the human rights advisers had observed, they considered that the PSNI's procedures ensured that in general proportionate responses were made to the level of violence encountered by the police.<sup>248</sup>

## AEP guidance

176. Plastic bullets have not been used as a means of crowd control anywhere in the UK outside Northern Ireland. Both ACPO guidance, and the PSNI's own guidance makes clear that AEPs are not suitable for crowd control. The PSNI guidance states that: "The AEP has not been designed for use as a crowd control technology but has been designed for use as a less lethal option in situations where officers are faced with individual aggressors whether such aggressors are acting on their own or as part of a group".<sup>249</sup> It goes on to acknowledge however that AEPs may in practice be used in crowd control situations: "The issue, deployment and use of AEPs in a public order situation will be subject to authority levels and command measures of the highest integrity".<sup>250</sup> Wherever AEPs are used, "The AEP is intended for use as an accurate and discriminating projectile, designed to be fired at individual aggressors".<sup>251</sup>

177. The PSNI Code of Practice on the Use of AEPs states that: "every effort should be made to ensure that children are not placed at risk by the firing of an AEP. This is particularly relevant in public order situations where children may be amongst a crowd and be placed in danger should an AEP miss its intended target."

178. A number of concerns have been raised in evidence about the army and PSNI guidance on the use of AEPs, in particular that whilst police guidance accepts that AEPs are not suitable for use in riot control, army guidance considers AEPs to be "public order control equipment". BIRW also pointed out that there is an apparent discrepancy concerning the part of the body at which AEPs may be aimed. Police guidance states that

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245 Northern Ireland Policing Board, Report on the Policing of the Ardoyne Parades 12 July 2005 and the Whiterock Parade 10 September 2005, Keir Starmer QC and Jane Gordon, December 2005

246 *Ibid.*, paras 82–83

247 *Op cit.*, para 249

248 Q 188

249 Para 2(4)(a)

250 Para 2.(4)(b)

251 *Ibid.*

AEPs should be aimed at the belt buckle, whilst army guidelines state that AEPs should be fired below the ribcage.

179. The PSNI told the Committee in oral evidence that on the latter point there was no practical difference between the police and army guidance. Assistant Chief Constable McCausland pointed out that both the police and the army worked on the principle that no more force should be used than was absolutely necessary and stated that in any case: “any difference that exists ... between the ACPO guidance and the military guidance is a difference in relation to how the two organisations work. The Committee must remember that the Army guidance applies throughout the world.” He emphasised that: “If the military are deployed in support of the police, there is a very, very good liaison” between the two.<sup>252</sup>

180. Lieutenant General Brims informed us that outside the UK the army used baton rounds, not AEPs, for public order purposes.<sup>253</sup> Generic rules of engagement, which did not alter depending on the theatre, governed the use of these baton rounds outside the UK. The generic guidance has been modified for the army’s use of AEPs in Northern Ireland to alter the distances from which it is safe to fire them, and if AEPs were to be authorised for use in other theatres the guidance could be expected to change accordingly.<sup>254</sup> In all theatres, the MoD told us, baton rounds could only be used where there was no other less forceful alternative to prevent violent disorder.<sup>255</sup> We were also told that trials had yet to be conducted to confirm acceptable performance of AEPs in climatic extremes outside the UK.<sup>256</sup> **Given the evidence we have heard about the diminished risks of injury arising from the use of AEPs in comparison with previous versions of baton rounds, we recommend that the army should actively consider switching to a practice of use of AEPs in public order situations outside the UK.**

181. **The use of AEPs in Northern Ireland raises clear human rights concerns in principle. We are of the view that use of AEPs against individual aggressors in riot situations, but not for riot control purposes, can be justified in human rights terms as a proportionate response to serious violence which threatens the lives of police or the public. Use of AEPs, both generally and in individual cases of firing, should continue to be subject to close scrutiny to ensure that these conditions are met. It is important that there is clarity and consistency in the guidelines which apply to use of AEPs in Northern Ireland by the police and the army. We also consider that there is a case to strengthen the guidelines to clarify that AEPs should only be used in circumstances where live fire could otherwise be used.**

## Investigations into use of AEPs by the army

182. A further issue relates to the accountability of the army for the use of AEPs in Northern Ireland. The Police Ombudsman for Northern Ireland investigates every use of AEPs by the PSNI in Northern Ireland, but the remit of the Police Ombudsman does not

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252 Q 221

253 Q 263

254 Ev 105

255 *Ibid.*

256 Ev 105

extend to the actions of the army in Northern Ireland and there is no equivalent body which routinely investigates each use of AEPs by the army, although an Independent Assessor of Military Complaints Procedures has been appointed and has published a report on the firing of plastic bullets by the army.<sup>257</sup> Members of the public may complain to the independent assessor where they feel that their complaint has not been adequately dealt with through the army's internal procedures, but in practice it appears that complaints have not been brought.<sup>258</sup>

183. Shaun Woodward MP in oral evidence considered that there was an arguable case for the remit of the Police Ombudsman to be extended to investigate the use of AEPs by the army in Northern Ireland,<sup>259</sup> while acknowledging that ultimately this was a matter for the MoD to consider. **We recommend that consideration be given to extending the Police Ombudsman's remit in this way.**

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257 NIHRC/Omega Foundation report, December 2001, *op cit.*, p 37

258 *Ibid.*, p 38. No complaints had been brought to 2003

259 Q 224

# Formal Minutes

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**Thursday 18 May 2006**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Campbell of Alloway	Mary Creagh MP
Lord Judd	Dr Evan Harris MP
Lord Lester of Herne Hill	
Baroness Stern	

Baroness Stern declared a non-pecuniary interest in that her husband is a panel member of the Billy Wright inquiry.

Draft Report [The UN Convention against Torture (UNCAT)], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 25 read and agreed to.

Paragraph 26 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 4

Not Content, 2

Lord Campbell of Alloway	Mary Creagh MP
Dr Evan Harris MP	Mr Andrew Dismore MP
Lord Judd	
Baroness Stern	

Paragraphs 27 to 128 read and agreed to.

Paragraphs 129 to 131 read, as follows:

“129. As we have previously stated, although diplomatic assurances are capable, in principle, of satisfying the State’s obligation not to return an individual to torture, in practice they should be treated with great caution in case they undermine the absolute nature of the prohibition on deportation to torture. The adequacy of each diplomatic assurance will be a matter for consideration by the courts, and we welcome the clear statements from both the Home Secretary and Baroness Ashton that the adequacy of a diplomatic assurance to prevent a risk of torture is a matter for assessment by the courts

alone, rather than the executive. Whether a diplomatic assurance will be sufficient to allow deportation will depend on the circumstances of the case, including the nature and extent of the risk of torture and the degree to which the terms of the assurance, including monitoring mechanisms, are sufficient to dispel that risk. The value of the assurance in practice will depend on all the circumstances, including, as the Supreme Court of Canada said in *Suresh*, the human rights record of the government giving the assurances, the government's record in complying with its assurances in the past, and the capacity of the government to fulfil the assurance, including its ability to control its security forces and other agents when dealing with individuals such as the would-be deportee.

**130. The evidence we have heard in the course of this inquiry, and our analysis of the Memoranda of Understanding already agreed, has confirmed our view in our earlier report that diplomatic assurances should be treated with great caution, and should not be presumed to provide any additional safeguard against the risk of torture.** Assurances are the products of diplomacy, and as such are no substitute for binding, enforceable legal guarantees. Their agreement is the product of diplomatic negotiation, the demands of which will often preclude precise prohibitions on and safeguards against ill treatment. The Government's response to the Foreign Affairs Committee Report confirms that the main sanction for breach of an MoU will be the serious damage done to diplomatic relations between the two States. Even more worrying, diplomatic considerations are likely to take precedence in the monitoring of assurances following deportation. As Baroness Ashton made clear to us, the Government would be very reluctant to question the good faith of another Government with which it had agreed an assurance. Furthermore, diplomatic assurances do not contain any enforcement mechanism, which would allow for redress or sanctions in the event of their breach. In the absence of a mechanism of enforcement, assurances against torture from states that are known to practise torture in breach of their obligations in international treaty law as well as customary international law, are unlikely to be reliable.

131. Whilst, therefore, in principle there could be cases in which a diplomatic assurance against torture could be adequate to alleviate the risk of torture, in our view these cases will be rare. Where, as will normally be the case, a diplomatic assurance against torture is sought from a state where torture is widespread or systematic, then detailed and precise guarantees, as well as intensive, frequent and scrupulously independent monitoring mechanisms would be the minimum necessary for the diplomatic assurance to carry any significant weight in the assessment of whether the person to be deported would face a real risk of torture. **In regard to the particular Memoranda of Understanding which have already been agreed by the Government with the Governments of Lebanon, Libya and Jordan, we note that the human rights records of those and other states with which Memoranda are currently being negotiated, are such as to necessitate clear safeguards against ill-treatment, backed up with effective, transparent and independent monitoring mechanisms. We are not as yet satisfied that those mechanisms are in place in relation to Lebanon and Libya. In our view, the Memoranda of Understanding so far agreed by the Government with those two countries therefore do not yet provide a sufficient basis for alleviating a real risk of torture, to permit deportation in compliance with Article 3 UNCAT and Article 3 ECHR. In the case of Jordan, as we have noted above, a Jordanian human rights NGO has been appointed as the monitoring body. We recommend that the Government should make available further**



**information about this NGO to enable judgments to be made about its likely independence and effectiveness in this role.”**

Motion made, to leave out paragraphs 129 to 131 and insert the following new paragraphs:

**“129A. The evidence we have heard in this inquiry, and our scrutiny of the Memoranda of Understanding agreed between the Government and the Governments of Libya, Lebanon and Jordan, have left us with grave concerns that the Government’s policy of reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of redress.** We are very concerned that reliance on the good faith of Governments which are known to use, tolerate or be unable to prevent torture in breach of international obligations, is simply not a sufficient guarantee to protect against torture, which of its nature is a clandestine practice, takes place often without official authorisation and may be very difficult to detect. In our view, the recent cases of Ahmed Agiza and Maher Arar demonstrate this danger: both were tortured, one in Egypt, the other in Syria, following their deportation to those countries on the basis of assurances that they would not be tortured. As those unfortunate cases show, the consequences for the individuals concerned are so grave that this is a risk which the UK should not be prepared to take.

129B. Reliance on diplomatic assurances also has a second, less immediate, but nonetheless deeply corrosive effect. The pursuit of bilateral agreements in relation to torture undermines the multilateral framework of the UN and other treaty bodies concerned with the eradication of torture. At a time when the universal and absolute prohibition on torture needs more than ever to be supported and reaffirmed, the use of diplomatic assurances against torture undermines that universal legal prohibition, and presupposes that the torture of some detainees is more acceptable than the torture of others. In thus undermining the universal legal prohibition on torture, it risks damaging the validity and effectiveness of international human rights law as a whole.

**129C. We therefore agree with the UN Special Rapporteur on Torture, the European Commissioner for Human Rights and others that the Government’s policy of reliance on diplomatic assurances against torture is an attempt to circumvent the well established international obligation not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT, as well as Article 3 ECHR.”—(Lord Judd.)**

Motion made, and Question put, That the paragraphs be read a second time.

The Committee divided.

Content, 4	Not Content, 2
Lord Campbell of Alloway	Mary Creagh MP
Dr Evan Harris MP	Mr Andrew Dismore MP
Lord Judd	
Baroness Stern	

Proposed new paragraph 129A.

Amendment proposed, in line 1, at the beginning, to insert the words “Following the case-law of the European Court of Human Rights, **in our view diplomatic assurances are, in principle, capable of satisfying the State’s obligation not to return an individual to torture, and cannot be regarded as irrelevant to an assessment of the risk of torture. States are entitled both to seek such assurances from other states and to take them into account when deciding whether the individual concerned will be exposed to a real risk of torture if deported.** We disagree with the views of the human rights NGOs whose evidence suggested that it is wrong in principle to seek bilateral diplomatic assurances about torture, and who declared that they would not be willing to take part in monitoring of assurances. We find this view defeatist. In our view, the human rights NGOs should be striving to make diplomatic assurances work in practice, by agreeing to assume the independent monitoring role envisaged by the memoranda of understanding.”—(*Mary Creagh MP.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2	Not Content, 3
Mary Creagh MP	Dr Evan Harris MP
Mr Andrew Dismore MP	Lord Judd
	Baroness Stern

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 4

Not Content, 2

Lord Campbell of Alloway  
 Dr Evan Harris MP  
 Lord Judd  
 Baroness Stern

Mary Creagh MP  
 Mr Andrew Dismore MP

Paragraph accordingly agreed to (now paragraph 129).

Proposed new paragraph 129B.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 4

Not Content, 2

Lord Campbell of Alloway  
 Dr Evan Harris MP  
 Lord Judd  
 Baroness Stern

Mary Creagh MP  
 Mr Andrew Dismore MP

Paragraph accordingly agreed to (now paragraph 130).

Proposed new paragraph 129C.

Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 4

Not Content, 2

Lord Campbell of Alloway  
 Dr Evan Harris MP  
 Lord Judd  
 Baroness Stern

Mary Creagh MP  
 Mr Andrew Dismore MP

Paragraph, as amended, accordingly agreed to (now paragraph 131).

Paragraphs 132 to 183 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Nineteenth Report of the Committee to each House. —  
 (*The Chairman.*)

Several Papers were ordered to be appended to the Report.

*Ordered*, That the Chairman do make the Report to the House of Commons and Baroness Stern do make the Report to the House of Lords.

*Ordered*, That the provisions of House of Commons Standing Order No 134 (Select committees (reports)) be applied to the Report.

[Adjourned till Monday 18 May at 4pm.]

# Witnesses

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## Monday 21 November 2005

**Mr Ben Ward**, Special Counsel, Human Rights Watch  
**Ms Carla Ferstman**, Director, REDRESS and  
**Mr Livio Zilli**, Researcher, Amnesty International

Ev 1

## Wednesday 7 December 2005

**Ms Jane Winter**, Director, British Irish Rights Watch and  
**Ms Aideen Gilmore**, Research and Policy Officer, Committee on the Administration of Justice

Ev 19

## Monday 6 March 2006

**Ms Harriet Harman QC MP**, Minister of State  
**Baroness Ashton of Upholland**, Parliamentary Under-Secretary of State and  
**Mr John Kissane**, Head of Human Rights Compliance and Delivery,  
 Department for Constitutional Affairs

Ev 30

**Mr Keir Starmer QC** and **Ms Jane Gordon**, Human Rights Advisers to  
 the Northern Ireland Policing Board

Ev 40

## Wednesday 8 March 2006

**Mr Shaun Woodward MP**, Parliamentary Under-Secretary of State, Northern Ireland Office  
**Chief Constable Sir Hugh Orde**, **Assistant Chief Constable Peter Sheridan** and  
**Assistant Chief Constable Duncan McCausland**, Police Service of Northern Ireland (PSNI)

Ev 45

## Monday 27 March 2006

**Rt Hon Adam Ingram MP**, Minister of State for the Armed Forces  
**Lieutenant General R V Brims CBE DSO**, Commander Field Army and  
**Dr Roger Hutton**, Director, Joint Commitments Policy, Ministry of Defence

Ev 60

# List of Written Evidence

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## Government & Public Bodies

1	Response by the United Kingdom to Recommendations by the United Nations Committee Against Torture following its examination of the United Kingdom's 4 <sup>th</sup> Periodic Report on 17/18 November 2004 dated 20 April 2006	Ev 68
2	Letter from the Chair to Rt Hon Harriet Harman QC MP, Minister of State for Constitutional Affairs, Department for Constitutional Affairs	Ev 83
3	Letter from Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs	Ev 85
4	Evidence to JCHR from DCA	Ev 87
5	Letter from the Chair to Chief Constable Sir Hugh Orde, Police Service of Northern Ireland, re Use of AEPs	Ev 88
6	Letter from Chief Constable Sir Hugh Orde, Police Service of Northern Ireland, re Use of AEPs	Ev 88
7	Letter from Keir Starmer QC, Doughty Street Chambers, re Use of AEPs	Ev 89
8	Letter from Mrs Nuala O'Loan, Police Ombudsman for Northern Ireland, re Use of AEPs	Ev 89
9	Letter from the Chair to Shaun Woodward MP, Parliamentary Under Secretary of State, Northern Ireland Office	Ev 90
10	Letter from Mr Shaun Woodward MP, Parliamentary Under Secretary of State for Northern Ireland, Northern Ireland Office	Ev 90
11	Letter from the Chair to Rt Hon Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs, re Extraordinary Renditions	Ev 91
12	Letter from Rt Hon Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs, re Extraordinary Renditions	Ev 91
13	Letter from the Chair to Rt Hon Adam Ingram MP, Minister of State for the Armed Forces, Ministry of Defence	Ev 95
14	Letter from Rt Hon Adam Ingram MP, Minister of State for the Armed Forces, Ministry of Defence	Ev 96
15	Further letter from Rt Hon Adam Ingram MP, Minister of State for the Armed Forces, Ministry of Defence	Ev 103
16	Further letter from Rt Hon Adam Ingram MP, Minister of State for the Armed Forces, Ministry of Defence	Ev 104
17	Memorandum from Rt Hon Adam Ingram MP, Minister of State for the Armed Forces, Ministry of Defence, further to oral evidence session of 27 March 2006	Ev 104

## Other Organisations

18	Submission from Amnesty International	Ev 105
19	Submission from British Irish Rights Watch	Ev 110
20	Further submission from British Irish Rights Watch, re Extraordinary Renditions	Ev 138
21	Submission from the Committee on the Administration of Justice	Ev 141
22	Submission from Human Rights Watch	Ev 145
23	Submission from Immigration Law Practitioners' Association (ILPA)	Ev 150
24	Joint submission from JUSTICE and Liberty on UNCAT	Ev 153



25	Further joint submission from JUSTICE and Liberty on UK involvement in Extraordinary Renditions	Ev 159
26	Submission from Kurdish Human Rights Project	Ev 169
27	Submission from the Law Society	Ev 170
28	Submission from the Redress Trust	Ev 177
29	Further submission from the Redress Trust on the alleged use of UK airports in extraordinary renditions	Ev 181
30	Submission from The 1990 Trust	Ev 185

### Individuals

31	Submission from Peter Kinderman, Professor of Clinical Psychology, University of Liverpool, re Psychological Torture	Ev 188
32	Submission from Michelle Pratley	Ev 189

# Reports from the Joint Committee on Human Rights in this Parliament

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## The following reports have been produced

### Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989

Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial Order 2006)	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098