REDRESS

Seeking Reparation for Torture Survivors

THE UNITED KINGDOM, TORTURE AND ANTI-TERRORISM:

WHERE THE PROBLEMS LIE

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I. INTRODUCTION

REDRESS is an international human rights organisation based in the United Kingdom with a mandate to assist survivors of torture to obtain justice and other forms of reparation for the harm they suffered. We work in the United Kingdom and around the world directly with survivors, their families and communities, and with a range of organisations and other actors that assist torture survivors. We take legal challenges on behalf of survivors, work to ensure that torturers are punished and that survivors and their families obtain remedies for their suffering. We also work with governments and intergovernmental bodies on legal and institutional reform aimed at preventing, prohibiting and redressing torture and advocate for the eradication of the practice of torture in all its forms.

With its base in the United Kingdom, REDRESS has closely followed the development of United Kingdom policies and responses to torture and other cruel, inhuman and degrading treatment and punishment. Many of REDRESS' clients have some connection to the United Kingdom, either as British nationals tortured whilst working or otherwise travelling abroad or as individuals who have arrived in the UK after having fled torture elsewhere, typically in the country of their nationality. Others still, have suffered torture as a direct or indirect result of the actions of UK officials.

The United Kingdom government has been consistent in its stance on torture, which it has unreservedly condemned. This Report seeks to look behind the United Kingdom's clear condemnation of torture – to the range of its policies and practices that have an impact on torture and other cruel, inhuman and degrading treatment and punishment, and asks two main questions:

1. Is the Government's condemnation of torture at odds with its policies and practices?

2. Is the Government doing enough to meet its international obligations in the flight against torture, and if not, what more must be done?

This Report is released on 10 December 2008, the 60th anniversary of the United Nations General Assembly's adoption of the Universal Declaration of Human Rights (UDHR) "as a common standard of achievement for all peoples and all nations." As one of the founders of the United Nations, the United Kingdom voted in favour of this historic document, Article 5 of which sets out the unequivocal prohibition against torture: "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment." Since then the UK has continued in the mainstream of states accepting the total prohibition against torture, most importantly as reflected in the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) which the UK ratified twenty years ago on 8th December 1988. The UK's acceptance of these two key instruments, and others, in the period since the end of World War II, shows its commitment to being part of the solution to the world-wide problem of torture, rather than being part of the problem itself. Indeed, the UK has played a leading role in promoting the Optional Protocol to the UNCAT,[1] and is one of the first jurisdictions to successfully prosecute an individual for torture committed in the territory of another state.[2]

[1] The Optional Protocol establishes a system of regular visits to places of detention in States Parties carried out by complementary international and national independent expert bodies. It also establishes a new international expert body, the UN Sub-Committee on Prevention, for this purpose. The UK ratified the Optional Protocol in 2003, becoming the first country in the EU and third country in the world to do so. It came into force on 22 June 2006.

[2] Faryadi Zardad Sarwar was prosecuted and convicted in the UK in 2005 for conspiracy to commit torture and hostage taking in Afghanistan in the 1990s. He was a mujahedeen military commander who had settled in the UK. He was sentenced to 20 years imprisonment, and an appeal failed.

The year 2008 also marks ten years since the present UK Government launched its anti-torture initiative, not long after New Labour came to power. On 16 October 1998 the then Foreign Secretary, Robin Cook, announced:

> One area where we want to make a difference is to stop torture. That is why we are launching today a major initiative to step up our efforts to fight torture, wherever it occurs in the world. It will be a concerted programme bringing together diplomatic activity, practical projects and funding for research. We will be sure that Britain speaks clearly and acts effectively against torture, and behalf of its victims, wherever they are in the world.[3]

This programme was to include:

- Lobbying around the world to encourage states to ratify the UNCAT (UK embassies to urge host governments to act and to help them identify obstacles and provide technical advice and assistance to get around those obstacles);
- UK posts around the world to report regularly on the use of torture in the countries they cover, raise individual cases with host governments, and maintain contact with medical, legal and others tackling torture;
- A practical handbook commissioned for use by human rights groups, victim support organisations, doctors, lawyers and the families of victims, providing detailed advice these groups need;
- Research on the impact of torture on children to be commissioned, including the psychological damage from the torture of other family members, to identify practical recommendations for the UK and international monitoring bodies and human rights groups;
- Practical work across the world to be stepped, such as targeted support for doctors and lawyers who help torture victims, paying for a database to track individual cases, increasing the UK contribution to the UN Voluntary Fund for Victims of Torture and the OSCE Expert Panel on Torture.[4]

As will be shown in this Report, although there have been important developments of which the UK should be justifiably proud, there are also issues which remain of grave concern, and it is these, arising directly out of the UK's ant-terrorism policies, which are the subject of this Report.

It is now a commonplace that the terrorist atrocities on 11 September 2001 set in motion US policies which have caused huge alarm amongst those individuals, institutions, organisations and even governments committed to a wide range of human rights issues, including the total prohibition against torture and other ill-treatment. REDRESS has monitored and resisted the impact these US policies have generated in the UK. The consequences of terrorist activity in the UK itself, including of course those arising from the London bombings and attempted bombings of July 2005, have added to our growing and on-going concern that in conducting its counter-terrorism programme the UK Government has failed to live up to its professed acceptance of the total prohibition against torture as well its international obligations in these regards, not to mention what is expected from one of the oldest democracies: a moral lead on this most basic of issues.

[3] "Speech of the then Foreign Secretary, Mr Robin Cook, to the Amnesty International Human Rights Festival 16 Oct. 1998, at: http://collections.europarchive.org/tna/20080205132101/http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=kArticle&aid=1013618394614.

[4] *Ibid*.

The Report thus examines three major areas which REDRESS sees as most alarming:

1. Firstly, the use of the UK's territory in the US' 'extraordinary renditions' programme;
2. Secondly, the UK's policies towards UK nationals as well as non-national UK residents who have been caught up in the 'extraordinary renditions' programme;
3. Thirdly, diplomatic assurances for the process of deporting terrorist suspects from the UK to countries which practice torture.

REDRESS has made submissions, prepared reports and issued briefing papers on these aspects over the past few years, and this Report draws together the key developments and brings up to date its current position.

Indeed, since they first arose more and more facts have entered the public domain which have increased the need for the UK to acknowledge that it must change direction when its comes to torture and anti-terrorism so as to prevent future breaches of its obligations, and in addition it must make amends for past breaches where appropriate and possible. While many expect and hope that the impending change of administration in the US will give an impetus to the return to a much more principled US approach to the absolute prohibition against torture, which in turn should positively influence the UK Government to do likewise, a lot of damage in the UK has already been done. It remains for the UK to put its house in order. Until it does so REDRESS will continue to be part of the human rights voice exposing the contradiction, if not hypocrisy, resulting from the UK's professed anti-torture position on the one hand and the reality when it comes to terrorist suspects on the other.

II. THE UK AND 'EXTRAORDINARY RENDITION'

1. BACKGROUND

A major torture-related concern of direct relevance to the UK since the 11 September 2001 attacks is the US Government's programme of moving terrorist suspects around the world outside of any normal, recognised judicial process. The key issue for the UK is the extent to which the Government may be (or may have been) complicit in this programme, especially in regard to US aircraft using any UK territory and airports. That the programme itself is in breach of both US domestic law and international law cannot be seriously disputed. If the UK has been complicit then it is likely that crimes have been committed under UK domestic law and that the UK has also breached its international law obligations. A wider issue is the role the UK has played in responding to the US programme at the bi-lateral and multi-lateral levels, including through various EU mechanisms.

The UK Government strenuously and consistently denies that it has ever co-operated with the US in such extra-judicial practices in any way which breaches UK law and its international obligations. Not only does it deny having done anything wrong but it maintains that it need not do anything differently to ensure that it doesn't do wrong in future. The UK's repeatedly stated position is that it expects the US to seek permission if it wishes to render any detainee through UK territory, and that permission will only be granted if the UK is satisfied that by so doing it is abiding by UK law and its international obligations. Critics, on the other hand, have described this as "hear no evil, see no evil, speak no evil." The revelation in February 2008 that the US had in fact moved two terrorist suspects through the UK territory of Diego Garcia in 2002 without seeking permission seriously undermines the efficacy and credibility of the UK's position. Further allegations concerning the role of Diego Garcia continue to emerge.

2. RENDITION, EXTRAORDINARY RENDITION, RENDITION TO JUSTICE

The terms 'rendition' and 'extraordinary rendition' are not legally defined terms in either UK law or in international law. According to the UK Government:

> '[R]endition'…has been used to describe informal transfers of individuals in a wide range of circumstances, including the transfer of terrorist suspects between countries…'[E]xtraordinary rendition'…has been used to describe 'renditions' where it is alleged that there is a risk of torture or mistreatment. [5]

Although the UK Government says that it does not use 'rendition' to bring terrorist suspects to face legal proceedings in the UK "[t]his does not mean that rendition by other states is unlawful."[6] The lawfulness "will depend on the specific facts of each case individual case, including the domestic law and international obligations of each country."[7] So the UK position

[5] FCO Human Rights Annual Report, 2006, p 181 at: http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/Files/kfile/hr_report2006.pdf.

[6] FCO Human Rights Annual Report 2006, p 181.

[7] *Ibid.*

is that 'rendition' can be lawful but because of the risk of torture 'extraordinary rendition' cannot be.

Initially, the US only acknowledged the existence of what it calls 'rendition to justice', a practice begun in the late 1980s under which its agents apprehended wanted individuals in 'lawless' states (Lebanon at the time is given as an example) for transportation to the US or other states for trial or questioning.[8] US Secretary of State Condoleezza Rice noted:

> One of history's most infamous terrorists, best known as "Carlos the Jackal" had participated in murders in Europe and the Middle East. He was finally captured in Sudan in 1994. A rendition by the French government brought him to justice in France, where he is now imprisoned. Indeed, the European Commission of Human Rights rejected Carlos' claim that his rendition from Sudan was unlawful.[9]

She asserted, however, that the US does not transport detainees from one country to another for the purpose of interrogation using torture, and neither does it use the airspace or airports of any country in connection with that purpose.[10]

However, in a clear reference to this and other attempts to legitimise the US programme, the European Parliament in February 2007 adopted a resolution which included the following:

> …[N]otwithstanding intended confusion created by some US representatives in private and public speeches… extraordinary rendition is a wholly different practice from one that has been used by some European countries, in very exceptional circumstances only, namely the detention or reception into custody in third countries of individuals formally accused of very serious crimes, in order to transfer them to European soil to face criminal charges before a court with all the legal guarantees of a judicial system.[11]
>
> REDRESS believes that any attempt to legitimise the movement of persons outside the framework of well-established and clear legally defined procedures such as extradition, deportation and prisoner transfer is inherently dangerous and can and does undermine the rule of law.

The European Parliament's February 2007 resolution[12] note that the practice "involve[s] numerous violations of human rights, in particular violations of the right to liberty and security, the freedom from torture and cruel, inhuman or degrading treatment, the right to an effective remedy, and, in extreme cases, the right to life... [and] in some cases, where rendition leads to secret detention, it constitutes enforced disappearance."[13]

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[8] Research note by the EP Legal Service on international law concerning the prohibition of torture: its applicability in the European Union Member States and its interpretation by the United States government, April 2006, p 26 para 92.

[9] The case referred to is *Illich Sanchez Ramirez v France*, Application No 287780/95, Commission Decision of 24 June 1996.That this is authority for "renditions" being lawful is an over-simplification, if not misleading. The case was "essentially…about the deprivation of [Ramirez's] liberty by the French authorities", the Commission stating that "in so far as the application concerns the circumstances in which the applicant was allegedly deprived of his liberty in the Sudan, it is outwith the jurisdiction of the Commission, *ratione personae*, since the European Convention on Human Rights does not bind that State, and would, therefore, have to be rejected as being incompatible with the provisions of the Convention" – see p 161of the decision.

[10] The policy was re-iterated by Secretary of State Condoleezza Rice on 5 December 2005 on the eve of her departure for Europe, see www.state.gov/secretary/rm/2005/57602.htm.

[11] Resolution P6_TA(2007)0032, para 38; adopted on 14 Feb. 2007 (MEPs voted 382 to 256, with 74 abstentions.

[12] Loc cit.

[13] Para F.

3. THE US PROGRAMME

That the US secretly detained individuals outside the US was finally officially admitted in September 2006 when President George W Bush announced:

> In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. … Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged.[14]

President Bush also said that the persons captured and held under the programme had all been transferred to Guantanamo Bay for trial by Military Commissions, and that the programme was continuing:

> The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical -- and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.[15]

It is not disputed that although the US was using extra-judicial procedures to transfer terrorist suspects across borders prior to the 11 September 2001 attacks, the pattern shifted very significantly after the attacks.[16] Some of the key elements of the programme can be summarised as follows:

- The programme is systematic and ongoing;[17]
- The number of victims involved range from hundreds to thousands;[18]

[14] See: www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

[15] *Ibid*.

[16] The former Director of the CIA's Counterterrorist Centre J. Cofer Black stated during testimony before the House of Representatives and US Senate Intelligence Committees on 22 Sept. 2002: "There was a before 9/11 and there was an after 9/11. After 9/11 the gloves came off".

[17] See, interview of Manfred Nowak, 'What to do about Torture?', for Open Democracy, 15 Jan. 2007.

[18] See D. Priest, "CIA holds terror suspects in secret prisons", *Washington Post* 2 Nov. 2005, estimating about 70 renditions; J. Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program", *New Yorker*, 14 and 21 Feb. 2005, estimating 100-150; Egyptian government, saying that 60-70 terror detainees had been sent to Egypt, taken from the S. Waterman report, "Terror Detainees Sent to Egypt", *Washington Times*, 16 May 2005. On the number of CIA flights, Amnesty International has said: "Amnesty International and TransArms have records of nearly 1,000 flights directly linked to the CIA, most of which have used European airspace; these are flights by planes that appear to have been permanently operated by the CIA through front companies." *See* Amnesty International, 'Below the radar: Secret flights to torture and 'disappearance'", 5 April 2006. Other sources include: PACE, Committee on Legal Affairs and Human Rights, 'Alleged secret detentions in Council of Europe member states, Information Memorandum II', Rapporteur Mr Dick Marty, Interim Report, 24 Jan. 2006, at para. 66:'"Rendition" affecting Europe seems to have concerned more than a hundred persons in recent years. Hundreds of CIA-chartered flights have passed through numerous European countries'; Stephen Grey and Luke Harding, 'Twist to terror suspects row as logs show 80 CIA planes visited UK', *The Guardian*, 1 Dec. 2005: "The transatlantic row over the secret transfer of terror suspects by the Bush administration took a new twist yesterday when it emerged that more than 300 flights operated by the CIA had landed at European airports. The Guardian's survey of flight logs taken from 26 CIA planes reveals a far higher level of activity than previously known. The CIA visited Germany 96 times. Britain was second with more than 80 flights by CIA-owned planes, although when charter flights are added the figure rises to more than 200. France was visited just twice and neutral Austria not at all, according to the logs, which also reveal regular trips to eastern Europe, including 15 visits to the Czech capital Prague .Only one visit is recorded to the Szymany airbase in north-east Poland, which has been identified as the alleged site of a secret CIA jail." See also, House of Commons Library, 'Extraordinary Rendition', Adèle Brown, International Affairs & Defence, Standard Note: SN/IA/3816, 23 March 2006: "US officials say there are scores of suspects under their control that have never been officially acknowledged and, therefore, exist in a kind of legal limbo;" General Barry McCaffrey, retired United States Army General, interview with Deborah Norville for MSNBC Tonight, 6 May 2004 www.msnbc.msn.com/id/4924989: "We're probably holding around 3,000 people, you know, Bagram Air Field, Diego Garcia, Guantanamo, 16 camps throughout Iraq';" Reprieve Report, Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas

- Most extra-judicial transfers have not been "renditions to justice" (as defined by the US) but the transfer of individuals to other countries for intelligence gathering through coercive interrogation, or 'warehousing' of individuals considered a threat to US national security;[19]
- Transfers and detentions take place outside of any legal process and routinely involves torture and/or cruel, inhuman or degrading treatment or punishment during the rendition itself and after arrival at the detention site;[20]
- The UN Committee Against Torture which oversees the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) has consistently raised concerns detailing how the programme breaches the US' international law obligations[21]
- The US has woven what has been described as a "spider's web" of secret disappearances and detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become victims of this web, in some cases because they were/are merely suspected of sympathising with a presumed terrorist organisation;[22]
- The US has admitted using 'waterboarding' in these secret detention centres although it denies that this treatment constitutes torture.[23]

This is the context in which the role of the UK needs to be assessed.

4. THE PROHIBITION AGAINST TORTURE AND NON-REFOULEMENT

The UK is bound by its own obligations, and not by what the US says or does. Irrespective of the US view and practice regarding the legality of its programme under US/international law, what does/doesn't constitute torture, what secret detention centres it runs - the UK must ensure that nobody uses its territory to send any person to where there is a real risk of them being tortured. These obligations arise from the absolute prohibition against torture and the principle of *non-refoulement.*

Torture has been universally recognised as one of the most serious crimes, and its absolute prohibition as a fundamental standard of the international community. Moreover, as a *jus cogens* or peremptory norm, the prohibition of torture is placed at the highest level of international law and takes precedent over conflicting rules of treaty law or customary international law.[24] The UNCAT definition of torture in article 1 has been held to constitute

Territories: www.reprieve.org.uk/documents/FinalReprieveSubmissionFASC.pdf: "According to the United States Congress, up to 14,000 people may have been victims of rendition and secret detention since 2001" Congressional Quarterly, Aug. 2006.

[19] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 'Report of the Events Relating to Maher Arar', Factual Background Volume II, p 524.

[20] M.L. Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law," 75 Geo. Wash. L. Rev. 1333 (2007) at 1336.

[21] United Nations Committee against Torture, 'Conclusions and recommendations of the Committee against Torture, United States of America', U.N. Doc. CAT/C/USA/C/2 (2006).

[22] PACE Resolution 1507 (2006), 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states'. para 5.

[23] General M. Hayden, Director of the Central Intelligence Agency (Hearing of the Senate Select Committee on Intelligence, Annual Worldwide Threat Assessment, 5 Feb. 2008. Another report describes 'waterboarding' as follows: "The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt." See, CIA sources,' CIA's Harsh Interrogation Techniques Described', Brian Ross and Richard Esposito, *ABC News*, 18 Nov. 2005.

[24] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

customary international law. Torture is also a crime under UK domestic law, irrespective of where the torture took place.[25]

Article 1 of UNCAT defines "torture" and although CAT does not define CIDTP, Article 16 establishes an obligation to prevent it and specifies that "[i]n particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment." These articles refer to, among other things, interrogations rules; the obligation to undertake an effective investigation; the individual right to complain; and the right to an effective remedy and adequate reparation. Further, there is clear jurisprudence in the ECtHR, for example, as to what can constitute CIDTP.[26]

Article 3 of UNCAT specifically prohibits the expulsion, return or extradition of a person to a state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (or at risk of subsequent transfer to a risk of torture).[27] The provision does not cover other forms of ill treatment, however, the UK is bound under the International Covenant on Civil and Political Rights (ICCPR)[28] and the European Convention on Human Rights (ECHR)[29] not to transfer anyone where there is a risk of either torture *or* CIDTP. The principle of *non-refoulement* contained in article 3 of UNCAT is also a principle under customary international law[30] which applies to legal procedures of extradition, deportation or expulsion of individuals from the jurisdiction of one state to another.[31]

In addition to prohibiting torture and CIDTP, and as stated in the House of Lords' decision of *A (FC) and others v. Secretary of State for the Home Department,* UNCAT establishes an obligation to investigate allegations of torture or CIDTP promptly and impartially.[32] Credible information suggesting that officials of another state are transporting individuals via the UK to detention facilities for interrogation under torture, or are being tortured and ill treated while

[25] Article 4 of UNCAT requires states to ensure that all forms of torture are offences under their criminal laws, including all acts that constitute participation in, complicity in, or an attempt to commit torture. Art. 5 specifies that states should exercise their criminal jurisdiction even when the acts are committed outside their territory. This has been done in terms of section 134 of the Criminal Justice Act, 1988.

[26] See *Selmouni v France* (1999) 29 EHRR 403 where the ECtHR said: "The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possible breaking his physical and moral resistance." *S*ee, also, Lord Bingham of Cornhill in *A (FC) and others v Secretary of State for the Home Department* [2005] UKHL 71, para 29.

[27] According to the UN Committee Against Torture, "The Phrase 'State' in article 3 refers to the State which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited" – General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22:. 21/11/97. A/53/44, annex IX, CAT General Comment No. 01.

[28] The Human Rights Committee has interpreted Article 7 of the ICCPR prohibiting torture and ill treatment as implicitly prohibiting *refoulement - s*ee HRC General Comments No. 20 (1990, at § 9), and No. 31 (2004, §12). For individual communications, see e.g. *Chitat Ng v. Canada*, (1994, §14.1); *Cox v. Canada* (1994); *G.T. v. Australia* (1997)**.**

[29] The ECtHR identified *non-refoulement* as an "inherent obligation" under article 3 of the Convention in cases where there is a "real risk of exposure to inhuman or degrading treatment or punishment." See, *Soering v. UK (*1989) 11 EHRR 439*,* para 88.

[30] See E. Lauterpacht and D. Bethlehem (2001) *An Opinion on the Scope and Content of the Principle of Non-Refoulement*, available on the UNHCR website (Global Consultations page), §§ 196-216. See also art. 16 of the "Draft articles on Responsibility of States for internationally wrongful acts" adopted by the International Law Commission (ILC) in 2001, which provides: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and b) the act would be internationally wrongful if committed by that State".

[31] A breach of this principle gives rise to state responsibility; all transfers, therefore, including those under extra-judicial procedures, need to comply with this principle or otherwise the transferring State would be committing a further international wrongful act. If an official aided or abetted in the perpetration of torture, they may be criminally responsible for the underlying offence. See Article 25 (3) (c) of the International Criminal Court Statute and Article 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia. This provision was interpreted in the *Furundzija* decision of the ICTY, where it was held that "to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place" - ICTY *Furundzija* judgment (1998, § *257).*

[32] Lord Bingham of Cornhill in *A (FC) and Others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 34.

transported, would imply a breach of UNCAT and must be investigated effectively. Further, the UK is obliged to establish effective safeguards to prevent UK participation in 'extraordinary renditions' because of the risk of torture:

> Each State Party shall keep under systematic 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.[33]

Thus the UK must examine whether it has in place sufficient safeguards to prevent its involvement in 'extraordinary rendition.' As Lord Bingham has said, "the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture."[34] Therefore, in addition to the 'negative' duty not to commit torture and CIDTP, the UK is under a positive duty to protect individuals from conduct which violates international law; this positive obligation requires the UK to investigate allegations of torture and CIDTP that may have occurred on its territory, including allegations of complicity or participation in torture, and to establish guarantees of non-repetition.

In summary, therefore, and as a matter of international law binding on the UK, where reasonable grounds exist to believe that torture or other CIDTP may have been committed within the UK's jurisdiction, the competent authorities are obliged to conduct a prompt, impartial, independent, effective and thorough investigation into the allegations.[35] Any failure by the UK to abide by its international legal obligations contributes towards a culture of impunity which the ECtHR has repeatedly said renders the absolute prohibition of torture and CIDTP "ineffective in practice."[36]

5. EVIDENCE OF UK INVOLVEMENT AND THE UK RESPONSE

As noted above there was a significant change in the US extra-judicial transfer programme after 11 September 2001. Reports of the secret movement of detainees began appearing in the public domain, including in the UK media, as early as March 2002:

> The US has been secretly sending prisoners suspected of al-Qaida connections to countries where torture during interrogation is legal…Prisoners moved to such countries as Egypt and Jordan can be subjected to torture and threats to their families to extract information sought by the US…The normal extradition procedures have been bypassed in the transportation of dozens of prisoners suspected of terrorist connections…The suspects have been taken to countries where the CIA has close ties with the local intelligence services and where torture is permitted.[37]

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[33] Article 11.

[34] Ibid, para 34. See also UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, General Assembly A/C.3/60/L.24, 24 Oct. 2005.

[35] This obligation exists regardless of whether the allegations are against the state itself or a foreign state or private individuals, *Calvelli and Ciglio v. Italy,* ECtHR, no. 32967/96 (17 January 2002). This applies even where no formal complaint has been made - *Bati and Others v. Turkey,* ECtHR, no. 33097/96 and 57834/00 (3 June 2004) at para 133

[36] *Assenov v. Bulgaria,* ECtHR No. 24670/94 ECtHR (28 September 1998) at para. 102; *See also, Aksoy v. Turkey* 23 EHRR 413 (1997) at para 98

[37] D. Campbell, *Guardian*, 12 March 2002: "US sends suspects to face torture."

Nevertheless, it was not until late 2004 that a possible link to the UK mainland was first raised and 'rendition' entered the public lexicon. This was when a UK newspaper reported that the CIA was using a Gulfstream executive jet registration number N379P to fly terrorist suspects to countries that routinely use torture in their prisons, and that "over the past two years the unmarked Gulfstream has visited British airports on many occasions, although it is not believed to have been carrying suspects at the time."[38]

In 2005 further media reports appeared in the UK and the last three months of that year saw a flurry of developments at the UK, EU and UN levels.[39] Since then more has been revealed.

a) UK police investigation

In November 2005 the UK organisation Liberty wrote to the Chief Constables asking them to investigate newspaper reports suggesting that the CIA were using airports and military bases in the UK in connection with 'extraordinary rendition.' In June 2007, eighteen months later, it was concluded that there was no basis for a police enquiry. However, as stated by six leading human rights organisations in response to this position:

> [The police] appear mainly to have concentrated upon reviewing the publicly available literature and media reports rather than conducting an in-depth independent investigation, of the type called for by the Council of Europe and the European Parliament. During the time taken for this review the practice of 'extraordinary rendition', by which people are abducted, detained outside the rule of law, and flown to third countries where they have faced torture, has become recognised as fact. President Bush has admitted the existence of secret prisons operated by the CIA around the world and the Council of Europe has identified bilateral agreements by European governments with US authorities which gave the CIA a blank cheque to land, refuel and fly aircraft over their territories without any checks. It is clear that the [police] review will not do, especially if the UK is to live up to its commitments on the complete prohibition on torture and cruel, inhuman or degrading treatment or punishment. Until a full and independent investigation takes place into all aspects of the extraordinary rendition programme, there will always be a suspicion of UK government collusion in this practice. [40]

Since then it appears the UK police are not investigating any aspects concerning 'extraordinary rendition.'

b) Joint Committee on Human Rights (JCHR)

In May 2006 the JCHR dealt with 'extraordinary renditions' in its report relating to the UK's compliance with UNCAT.[41] It "welcome[d] the Government's acceptance that international

[38] S. Grey, *Sunday Times*, 14 Nov. 2004: "US accused of 'torture flights'." "Some former CIA operatives and human rights campaigners claim the agency and the Pentagon use a process called "rendition" to send suspects to countries such as Egypt and Jordan. They are then tortured largely to gain information for the Americans who, it is alleged, encourage these countries to use aggressive interrogation methods banned under US law."

[39] *The Independent* on 10 Feb.2005, and then *the Guardian* on 12 and 13 Sept. 2005, reported on CIA flights involved in the clandestine transportation of terrorist suspects using UK airports; this was followed by further extensive print media and television reports on the practice of "extraordinary rendition" and matters connected to it such as secret detention centres in Eastern Europe; questions were raised in Parliament; an All Party Parliamentary Group on Extraordinary Renditions was formed; the UN Special Rapporteur on Human Rights and Counter-terrorism began enquiries; the Council of Europe opened a formal inquiry into "extraordinary renditions."

[40] *London Times* 14 June 2007, by Amnesty International (UK), Human Rights Watch, Justice, Liberty, REDRESS, Medical Foundation for the Care of Victims of Torture.

[41] The 18 May 2006 report is available at: www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf.

civil aviation law permits thorough investigation of civil flights alleged to be involved in extraordinary rendition"; the JCHR noted, however, that the Government position was that "information that aircraft landing in the UK can be demonstrated to have been previously involved in extraordinary renditions [was not] sufficient in itself to warrant further investigation."[42]

The JCHR considered that there was 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 – a suspicion sufficient to trigger the duty to investigate, and to look behind US assurances:

> [W]e 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.[43]

Although it considered calls for an independent public inquiry premature, the JCHR said the holding of such an inquiry should depend on the publication of more detailed information arising from the above "active steps" concerning past flights. It then went on to make recommendations for the future:

> … [T]he Government should [also] 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 refueling 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.[44]

In response to these clear recommendations to deal with *past* flights, the Government said that the UK Department for Transport and Ministry of Defence had made available the flight information held in their records, along with flight plan data supplied by Eurocontrol[45] about the movements of aircraft allegedly linked to rendition flights transiting through UK military and civilian airports since 2001.[46] This information included "dates, flight numbers and origin and final destination of the flights in question [and there was] no evidence that these flights were being used for unlawful purposes."[47]

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[42] Loc cit, para 164-165.

[43] *Ibid*, para 168.

[44] *Ibid*, para 170.

[45] European Organisation for the Safety of Air Navigation.

[46] Gov't response to Committee's 19th Report: UNCAT, 7 Nov. 2006, at: www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/276/276.pdf.

[47] P. 19.

This reply did not explain which flights were examined – was it only those in the public domain, or lists which had been supplied by NGOs, or had the three authorities mentioned identified and then examined *all* flights of the suspect aircraft since 2001? Furthermore, why did the UK not ask the US for details of who was or had been on the flights, both on their outward and return journeys? There were and remain, therefore, several angles and aspects to be investigated – "active steps" to address the allegations. The flight records should be the starting point of an investigation, not the end result. The Government therefore side-stepped the essence of the allegations while giving the appearance of dealing with them: it has consistently said that there is no evidence for a separate (independent and public) investigation but made minimal genuine effort to seek such evidence – in effect a self-fulfilling prophecy.

As to the JCHR's recommendations to guard against any *future* use of UK territory, the Government simply refused to accept them:

> The Government does not agree that an allegation that an aircraft may have been involved in the practice of extraordinary rendition in the past would justify requiring the plane to land and be searched when re-entering the UK or UK airspace. If individuals are suspected of committing criminal offences, or if there are reasonable grounds to suspect that aircraft **are being** used for unlawful purpose, then action can be taken; but the Government does not accept that the steps proposed by the Committee are required by CAT.[48]

Again, the Government position was that unless there is evidence then it won't look for evidence - a circular argument. In any event there *is* evidence from the past, but this was rejected as insufficient to do anything differently in the future.

The JCHR separately attempted in 2006 to obtain information on 'extraordinary renditions' from the then Director General of the Security Services, Dame Eliza Manningham-Buller. It wrote a letter asking her to give evidence to it or to meet it informally, during its inquiry into Counter-Terrorism.[49] She refused, replying that all of the areas outlined in the letter, which included wishing to ask her views on any information which the security service may have about 'extraordinary renditions' using UK airports, "have been or are the subject of investigation by the Intelligence and Security Committee."[50] The JCHR commented on her reply as follows:

> … [W]e regret that we did not have the opportunity to ask her a number of important questions of concern to us in connection with this inquiry. We have no desire to obtain access to State secrets, but we do consider it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights.[51]

c) Foreign Affairs Committee (FAC)

[48] P. 21; emphasis in the original.

[49] Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Trial detention, 24 July 2006, at: www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf.

[50] *Ibid*, para 160.

[51] *Ibid*, para 161.

The FAC has raised serious concerns about the UK's role in 'extraordinary renditions' in two separate but linked sets of inquiries and reports: one concerns "Foreign Policy Aspects of the War against Terrorism" and the other arises from the scrutiny of the FCO's Annual Human Rights Report. In addition, the FAC has recently specifically examined the issue in its report on the UK's Overseas Territories.

The FAC began looking into 'extraordinary renditions' in 2005,[52] writing to the Government on 25 February 2005 asking it, amongst other things, whether it had allowed any other country to use to use its territory or airspace for 'extraordinary rendition' or any other practice of sending suspects to third countries for interrogation, and whether it regarded the use of such methods as legally and morally acceptable.[53] The Government replied saying that whether 'rendition' is contrary to international law depends on the particular circumstances of each case, that it was not aware of the use of its territory or airspace for the purposes of 'extraordinary renditions,' and that the issue was the subject of a comprehensive published inquiry by the Intelligence and Security Committee, as well as questions and answers in Parliament.[54] The FAC was unimpressed by this response:

> We conclude that the Government has failed to deal with questions about extraordinary rendition with the transparency and accountability required on so serious an issue… We recommend that the Government end its policy of obfuscation and that it give straight answers to the Committee's questions of 25 February.[55]

However, in its formal response in June 2005 the Government simply maintained its position.[56] It also made no mention of 'rendition' in its 2005 Annual Report on Human Rights which covered the period up to the end of June 2005. The FAC, nevertheless, continued to raise its concerns in its review of the afore-mentioned Annual Report, drawing attention to further details of the US' extra-judicial programme (including secret detention centres or "black sites") which had emerged, as well as the Government's response to developments implicating the UK in the programme. In doing so the FAC noted:

> The Foreign Secretary also issued a long statement on extraordinary rendition on 20 January 2006, in which he made reference to a leaked document which appeared to demonstrate the Government's determination to limit debate on rendition; in the statement, Jack Straw said again that the United Kingdom had no knowledge of the transfer of people through British airspace for the purposes of extraordinary rendition… The Government is sticking to this line.[57]

The FAC concluded, however, that "the Government has a duty to enquire into the allegations of extraordinary renditions and black sites under the Convention against Torture."[58] Once more when it came to its formal response to this view the Government said

[52] Foreign Affairs Committee: Foreign Policy Aspects of the War against Terrorism, 22 March 2005, at:

www.publications.parliament.uk/pa/cm200405/cmselect/cmfaff/36/36.pdf.

[53] Para 96.

[54] Para 97.

[55] Para 98.

[56] Response of the Secretary of State for Foreign Affairs, June 2005, p 9, at:

www.fco.gov.uk/resources/en/pdf/pdf12/fco_cm6590facresponse_warterror.

[57] Foreign Affairs Committee: Human Rights Annual Report, 15 Feb. 2006, para 48, at:

www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/574.pdf.

[58] Para 52.

that in the absence of evidence of renditions through UK territory or airspace it did not consider that article 12 of UNCAT required it carry out further investigation.[59] It also said:

> We are also clear that the US would not render a detainee through UK territory or airspace (including Overseas Territories) without our permission. [60]

In the FAC's next report on "Foreign Policy Aspects of the War against Terrorism" released in June 2006,[61] it said "the exchange of letters underlines the unwillingness of the Government to engage with the Committee on this issue in a transparent manner."[62] The Government formally replied to the FAC report in September 2006:

> The Government has made clear that it has found no evidence of detainees being rendered through the UK or Overseas Territories since 11 September 2001. Nor has there been any evidence of detainees being rendered through the UK or Overseas Territories since 1997 where there were substantial grounds to believe there was a real risk of torture. The Government has done everything possible to keep Parliament, including the FAC, properly informed on this issue. [63]

In 2007 the FAC continued to press the Government. The FAC's recommendation when reviewing the 2006 Annual Human Rights Report was that the Government should ask the US administration to confirm whether aircraft used in rendition operations have called at UK airfields in the UK or Overseas Territories en route to or from a rendition, and that the US should make a clear statement of its policy on this practice, it being arguable that refueling an aircraft immediately before or after its use in a rendition amounts to facilitating rendition.[64] In its formal reply to this recommendation in mid-2007 the Government repeated what it has been saying since 2005:

> There is no new evidence…Our position has not changed…We expect the US to seek permission…The Government does not consider that seeking a further clarification from the US administration of its policy is necessary"[65]

However, the Government's dramatic admission to Parliament on 21 February 2008 that the US had rendered two persons through Diego Garcia in 2002 has re-opened the issue, and

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[59] Response of the Secretary of State, May 2006, p 9, at:

http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/Files/kfile/335650_Cm6774%252024-4-6.pdf. The only renditions which the Government said it knew about were two cases in 1998 where the US request to render persons through the UK had been granted. Two other requests had bee refused.

[60] P. 10.

[61] Foreign Affairs Committee: Foreign Policy Aspects of the War against Terrorism, 21 June 2006, at:

www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/573/573.pdf.

[62] Para 62. The then Foreign Secretary Jack Straw had written saying that the FAC's assertion that the Government wasn't taking its questions on "extraordinary rendition" seriously was "completely untrue"; the FAC wrote back saying that the Government had given fuller answers to questions raised by the Opposition than to those raised by the FAC.

[63] Response of the Secretary of State , Sept. 2006, p 7, at:

www.fco.gov.uk/resources/en/pdf/pdf18/fco_4thfacresponse0506.

[64] Foreign Affairs Committee: Human Rights Annual Report, 18 April 2007, para 78 and 80, at:

www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/269/269.pdf.

[65] Response of the Secretary of State, June 2007, pp. 8-9, at:

www.fco.gov.uk/resources/en/pdf/pdf18/fco_facreporthumanrightsresponse.

perhaps broken the stalemate.[66] After reviewing the assurances which the Government had been giving Parliament and its various Committees since 2005, Foreign Secretary Miliband made the following revelations in an oral statement:

> Contrary to earlier explicit assurances that Diego Garcia had not been used for rendition flights, recent US investigations have now revealed two occasions, both in 2002, when that had in fact occurred. An error in the earlier US records search meant that those cases did not come to light. In both cases, a US plane with a single detainee on board refuelled at the US facility in Diego Garcia. The detainees did not leave the plane, and the US Government have assured us that no US detainees have ever been held on Diego Garcia. US investigations show no record of any other rendition through Diego Garcia or any other overseas territory, or through the UK itself, since then. [67]

There have been extensive developments since then. The FAC, which had already initiated an inquiry in July 2007 into the UK's overseas territories, including Diego Garcia, examined the issue of 'extraordinary renditions' in the light of these revelations to Parliament; further, the release of the Government's 2007 Annual Human Rights Report also gave FAC an opportunity to look at the matter afresh. Both of these FAC reports were released in mid-2008, and a further statement by Foreign Minister Miliband on Diego Garcia was made in July 2008. Clearly, the issue is once again wide open as far as the FAC is concerned.

In its report on the Overseas Territories[68] the FAC reviewed the legal position of Diego Garcia (DG), which is one of the islands of the British Overseas Indian Ocean Territory (BIOT) leased to the US as a military base. Under the US-UK agreement the US is required to seek prior approval from the UK for any extraordinary use of the US base or facilities, "such as combat operations or any other politically sensitive activity."[69] The FAC said:

> … [I]t is deplorable that previous US assurances about rendition flights have turned out to be false…We intend to examine further the extent of UK supervision of US activities on Diego Garcia, including all flights and ships serviced from Diego Garcia. [70]

That the issue has now expanded to ships is significant, as the allegations are also that detainees have been or are being held on US ships off-shore which although they may be stationed outside of DG's territorial waters are nevertheless serviced from the base on it. The UK Government has said the US has assured it no detainees were transferred through territorial waters.[71]

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[66] Statement of the Foreign Secretary, David Miliband, Hansard 21 Feb. 2008: Column 547; see: www.parliament.the-stationery-office.co.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0008.htm.

[67] *Ibid*. The statement also said that neither of the men were British nationals or residents, and that one was in Guantanamo Bay and the other had been released; it went on to say UK officials were "to compile a list of all the flights where we have been alerted to concerns regarding rendition through the UK or our overseas territories. Once it is ready we will be sending the list to the US and seeking their specific assurance that none of those flights was used for rendition purposes."

[68] Foreign Affairs Committee, Overseas Territories, 18 June 2008, at: www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/147i.pdf.

[69] *Ibid*, para 52.

[70] *Ibid*, para 70. The FAC had received evidence from the All Party Parliamentary Group on Extraordinary Rendition (APPG) and from the human rights organisation Reprieve that Diego Garcia had been used to land a plane linked to "rendition circuits" and that ships in or near its territorial waters had also been used to hold detainees or otherwise facilitate the United States' renditions programme. The APPG and Reprieve urged further investigation of these allegations and argued that the UK was wrong to rely on US assurances to the contrary. See, para 54.

[71] *Ibid*, para 56.

The FAC released its review of the 2007 Annual Human Rights Report shortly after its Overseas Territories report. In the interim Foreign Secretary Miliband made another statement to Parliament on 3 July 2008 on his subsequent correspondence with US Secretary of State Rice as well as the activities of "our officials [who] have continued to work through the details and implications of the new [i.e. as revealed in February 2008] information."[72] A list of 391 flights about which concerns had been raised had been given to the US on 15 May 2008, he said, and the US had confirmed that apart from the two detainees rendered through DG in 2002 "there have been no other instances in which US intelligence flights landed in the United Kingdom, our overseas territories, or the Crown dependencies, with a detainee on board since 11 September 2001."[73]

Following this latest Government statement, FAC raised the issue of US flights which although they did not have a detainee on board nevertheless passed through or landed on UK territory on the way to or back from a rendition – aircraft using UK airports on what has been called the "rendition circuit."[74] This point had been raised before, with the Government declining to deal with it.[75] The FAC now sought to examine in more detail the UK's legal obligations in regard to these (empty) flights, and heard submissions that the UK does indeed have a clear legal responsibility to challenge the US on this aspect.[76] However, Foreign Secretary Miliband's position, as given to the FAC in the course of its Overseas Territories inquiry, was that the Government did not have to concern itself with these flights as they didn't fall within the 'rendition' "category",[77] but another Minister put a slightly different gloss on the issue when he gave evidence to the FAC for this later report:

> … [T]here is a limit to what we can do effectively to monitor empty planes, whose purpose it is not really reasonable for us to investigate. If an American military flight requests refueling or access and is empty of any passengers, I am not sure that it is possible for us to demand what it might be doing on its return flight. [78]

[72] Hansard 3 July 2008: Column WS21at: www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80703-wms0002.htm.

[73] *Ibid*. "I promised the House [on 21 Feb. 2008] that…my officials would compile a list of flights where we had been alerted to concern about rendition through the UK or our overseas territories. The list which they have compiled, containing 391 flights, reflects concerns put to us by hon. Members, members of the public, multilateral organisations and non-governmental organisations. Inclusion on this list does not represent an official endorsement of any allegations about a particular flight. On the contrary, US Government flights—as with other Government flights—occur regularly for a variety of purposes. Our intention was to collate in one place those concerns that had been put to us directly. The list was passed to the US on 15 May. I undertook in February to publish the list and have today placed a copy in the Library of the House and published it on the FCO website at www.fco.gov.uk. The US Government received the list of flights from the UK Government. The US Government confirmed that, with the exception of two cases related to Diego Garcia in 2002, there have been no other instances in which US intelligence flights landed in the United Kingdom, our overseas territories, or the Crown dependencies, with a detainee on board since 11 September 2001. Our US allies are agreed on the need to seek our permission for any future renditions through UK territory. Secretary Rice has underlined to me the firm US understanding that there will be no rendition through the UK, our overseas territories and Crown dependencies or airspace without first receiving our express permission. We have made clear that we would only grant such permission if we were satisfied that the rendition would accord with UK law and our international obligations. The circumstances of any such request would be carefully examined on a case-by-case basis. Our intelligence and counter-terrorism relationship with the US is vital to the national security of the United Kingdom. There must and will continue to be the strongest possible intelligence and counter-terrorism relationship between our two countries, consistent with UK law and our international obligations."

[74] Foreign Affairs Committee: Human Rights Annual Report, 20 July 2008, para 44, at: www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/533/533.pdf.

[75] See above in the FAC's review of the 2006 Annual Human Rights report, and the Government's response to the review.

[76] Para 44. This submission was made by Amnesty International.

[77] Para 45.

[78] *Ibid*, Lord Malloch-Brown, Minister of state in the FCO. The Government refused to tell the FAC if it had taken any legal advice on its obligations in these cases, on the basis of confidentiality.

The FAC also referred to Mr Miliband's statement of 3 July 2008 and noted that it did not address the issue of flights without detainees on board,[79] and acknowledged the submission[80] which REDRESS had made to FAC's call for evidence:

> …REDRESS argues that the UK is under a "positive duty" to ensure that it has an effective framework in place to prevent extraordinary renditions. It argues that 'an overhaul of the current laws and policies on aviation is urgently required'. It notes that the former Foreign Secretary, Rt Hon Margaret Beckett MP, has already acknowledged the deficiencies in record keeping which she conceded are 'not all that marvelous, frankly', and argues that this may have contributed to failures to detect renditions in the past…REDRESS, Amnesty International, and Human Rights Watch all call in their submissions for the Government to hold a full public inquiry into the use of renditions in UK territory.[81]

REDRESS' submission re-iterated that it is not sufficient for the UK to simply rely on more assurances - as a matter of international law, where reasonable grounds exist to believe that torture or other CIDTP may have been committed within the UK's jurisdiction it is under a positive obligation to conduct a prompt, impartial, independent, effective and thorough investigation into the allegations, even where no formal complaint has been made. Reliance on US assurances falls short of the UK's international legal obligations and contributes towards a culture of impunity, rendering the absolute prohibition of torture and other CIDTP ineffective in practice.

REDRESS emphasised the urgent need for an independent public inquiry to investigate the use of UK territory for rendition as well as a holding site for detainees. Such an inquiry must be public in order to ensure that private individuals, foreign states and non-governmental organisations can submit relevant information to the investigating body and to ensure that the investigation is carried out transparently. The UK is under a positive obligation to review its laws and policies to ensure that renditions cannot take place through or on UK territory, and to ensure that it has an effective legal and practical framework to protect individuals under its jurisdiction from the risk of torture or ill-treatment by state agents or third parties within its jurisdiction. As part of such a public inquiry, an assessment of the adequacy of UK laws, policies and practices to prevent the use of UK territory in renditions is in order.

The FAC concluded:

> … [T]he Government has a moral and legal obligation to ensure that flights that enter UK airspace or land at UK airports are not part of the "rendition circuit", even if they do not have a detainee on board during the time they are in UK territory. We recommend that the Government should immediately raise questions about such flights with the US authorities in order to ascertain the full scale of the rendition problem, and inform the Committee of the replies it receives in its response to this Report. [82]

The Government has yet to respond to this, as well as to the Overseas Territories report.

[79] *Ibid.*

[80] *Ibid*, Evidence 99-102.

[81] *Ibid,* para 46.

[82] *Ibid*, para 47.

d) Intelligence and Security Committee (ISC)

In March 2005 the ISC published a special report on "The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq"[83] which did not refer to 'extraordinary rendition' but does make reference to 'ghost detainees', which it describes as "individuals that the US authorities are holding at undisclosed locations under unknown conditions and to whom the International Committee of the Red Cross does not have access." [84]

In July 2007 the ISC published a special 80-page report entitled "Rendition"[85] in which it examined the knowledge of the Government and role of UK intelligence services in the US programme and the obligations of the UK Government under domestic and international law. Only five pages dealt with the allegations of 'extraordinary rendition' flights through UK territory under the heading "Ghost Flights",[86] the ISC saying that as these were not linked to the intelligence agencies it did not fall within its remit. Nevertheless, it did look at the allegations as part of its background investigations.[87] The ISC concluded:

> … [W]e have seen no evidence that suggest that any of these CIA flights have transferred detainees through UK airspace (other than the two "Rendition to Justice" cases in 1998 which were approved by the UK Government following US requests.) [88]

As for empty flights transiting through the UK from an alleged rendition, the ISC said it had "not seen any evidence that might contradict the police assessment that there is no evidential basis on which a criminal inquiry into these flights could be launched."[89] Unlike the FAC's 2008 report, the ISC's 2007 report showed little concern about aircraft involved in the "rendition circuit."

Unlike the FAC and JCHR, however, the ISC does not make known its findings unless the Prime Minister decides to place its reports before Parliament, and then it can do so in a redacted form. In this case the ISC's "Renditions" report was placed before Parliament in a redacted form, although there were no redactions in the section on "Ghost Flights" which dealt with 'extraordinary renditions.'

The ISC report records that the Director General had given oral evidence to it that the security services had no knowledge of 'extraordinary renditions' through UK territory since 11 September 2001.[90]

e) All Party Parliamentary Group on Extraordinary Rendition (APPGER)

Established by Mr Andrew Tyrie MP in December 2005, the APPGER is a cross-party grouping of MPs and Peers who came together to examine 'extraordinary rendition', to bring

[83] Report of the Intelligence and Security Committee, "The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq", March 2005, Cm 6469.

[84] *Ibid*, para 77.

[85] Report of the Intelligence and Security Committee, "Renditions", July 2007, Cm 7171.

[86] *Ibid*, pages 57-62.

[87] *Ibid*, para 184.

[88] *Ibid*, p 62.

[89] *Ibid.*

[90] Loc cit, para 193.

the issue to wider public attention, to try to ensure that the UK is not involved in the US programme, and to endeavour to persuade the US Administration to desist from the practice. It continues to play a key role in documenting evidence, raising questions inside and outside of Parliament to get more information from the Government, holding public meetings, making proposals for legislative reform and the like. It has managed to keep the matter of 'extraordinary renditions' firmly on the political agenda, although the Government has avoided dealing with some of the key concerns it has raised.

In June 2007 Mr Tyrie secured a debate in the House of Commons.[91] Minister Howell's response on behalf of the Government, when called upon to condemn the US programme, is instructive:

> Mr. Clifton-Brown: May I again press the Minister to make a statement here today that the British Government utterly refuse, refute and condemn anything to do with what is commonly known as extraordinary rendition involving torture?
> Dr. Howells: Absolutely. I give that undertaking totally. We are completely opposed to such activities. They are a violation of every international treaty that we have signed up to and of British law, and I hope that that is clear.
> Mr. Tyrie: Will the Minister clarify whether in saying that he is condemning the policy that the United States has developed during the past seven or eight years for large numbers of extraordinary renditions? Is it British policy publicly to make our Government's dissociation from that policy crystal-clear to the Americans?
> Dr. Howells**:** No, I am not criticising American Government policy. The hon. Gentleman assumes that the Americans are torturing people. I certainly do not have such information, but he is very clear about it. I disagree entirely.
> Mr. Tyrie**:** Is the Minister seriously suggesting that the overwhelming body of evidence that has been produced in Washington to show that the Americans have been engaged in rendition, a policy that involves cruel, inhumane and degrading treatment that amounts to torture, does not exist or has been made up? Is he suggesting that it is just a figment of the imagination of people on the Opposition Benches?
> Dr. Howells**:** No, it certainly is not a figment of the imagination. Such treatment would not take place in Britain, in British prisons or in prisons that Britain is responsible for administering in any other territory.[92]

The debate ended acrimoniously with Minister Howell stating that "it is dangerous to throw mud against this country [i.e. the UK] as has been done this morning. Mud is being thrown."[93] He did, however, agree to consider the APPGER's proposals for legislative reform to tighten up monitoring procedures.[94] In 2006, attempts in the House of Lords by Baroness D'Souza to amend the Civil Aviation Act and the Police and Justice Bill[95] so as to strengthen the role of the police in preventing 'extraordinary renditions' through the UK, had been opposed by the Government on the grounds that sufficiently robust legislation already existed. A full debate on 'extraordinary renditions' in the House of Lords in 2006, where a wide range of peers

[91] Hansard 26 June 2007: Column 25WH.

[92] *Ibid*, Column 45WH-46WH.

[93] Loc cit, Column 47WH.

[94] *Ibid*, Column 44WH. The Minister said: "I am not persuaded that new legislation would add practical value, but, given the work that he and the all-party group have done, I have asked my officials to consider the matter further to confirm that assessment, and I hope that he will welcome that."

[95] Hansard 4 July 2006, Column 210.

expressed their concerns about allegations of UK involvement, also saw the Government maintain its position that there was nothing more it need do:

> In this country we do not engage in practices of the kind that have been described. It may be impossible to prove the negative, but that is no basis for people to assume that there has been the kind of behaviour that gave rise to some of the adjectives used…I say to noble Lords that these allegations are groundless and baseless and should not be repeated without proper evidence.[96]

6. DEVELOPMENTS AT THE EUROPEAN UNION LEVEL

The North Atlantic Treaty Organisation (NATO) arrangement gave blanket overflight rights and access to airports to US military flights across Europe under what is effectively a no-questions-asked policy.

On 12 September 2001, NATO invoked the principle of collective defence under Article 5 of the NATO treaty. An investigation by the Parliamentary Assembly of the Council of Europe (PACE) found that as a result CIA agents had free rein to operate on European soil:

> [A]ll the members and partners of NATO signed up to the same 'permissive' – not to say illegal – terms that allowed CIA operations to permeate throughout the European continent and beyond; all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret.[97]

Measures subsequently taken within this framework facilitated the CIA's covert 'extraordinary renditions' operations. The NATO Secretary General later announced that at the request of the US, NATO had agreed "to expand the options available in the campaign against terrorism", including enhanced intelligence sharing and co-operation, blanket overflight clearances for the US and other allies for military flights related to operations against terrorism, and access to ports and airfields on NATO territory for support of counter-terrorism operations, including for refueling.[98]

There have been consistent calls from various European bodies and officials at the highest level for the problem of 'extraordinary renditions' and secret detention centres to be dealt with on a European-wide basis. Some of these included the following:

- In March 2006 Council of Europe (COE) Secretary-General Terry Davis called for better safeguards against abuse following his February 2006 report.[99]

[96] Hansard 18 July 2006, Column 1225 - Lord Triesman, Under-Secretary of State in the FCO.

[97] Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe: Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, PACE doc. 11302 rev. 11June 2007, Explanatory Memorandum (2007 PACE report), para 39.

[98] NATO press statement 4 Oct. 2001, www.nato.int/docu/speech/2001/s011004b.htm. The actual text of the agreement has been kept secret, and NATO refused to provide it to the Council of Europe, even on a confidential basis. The 2007 PACE report found that rather than constituting an agreement for collective defence, NATO's measures "comprise the very permissions and protections the United States had sought for itself as it embarked on its own military, paramilitary and intelligence-led counter-terrorism operations".

[99] Secretary General's report under Article 52 ECHR on the *Question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies*, 28 February 2006

- In March 2006 legal experts from the COE's Venice Commission said that member states should refuse to allow transit of prisoners where there is a risk of torture. If this is suspected, they should search civil planes or refuse overflight clearance to state planes.[100]
- In June 2006 Dick Marty, Rapporteur of the Parliamentary Assembly of the Council of Europe (PACE) inquiry said there was a global "spider's web" of illegal US detentions and transfers, and alleged collusion in this system by 14 COE member states, seven of whom (including the UK) may have violated the rights of named individuals.[101] Following the report PACE called for the dismantling of the system of secret prisons, oversight of foreign intelligence services operating in Europe and a common strategy for fighting terrorism which does not undermine human rights.[102]
- In June 2006 COE Secretary-General Terry Davis made concrete proposals to European governments for laws to control the activities of foreign intelligence services in Europe, a review of state immunity, and making better use of existing controls on over-flights, including requiring landing and search of civil flights engaged in state functions.[103]
- In February 2007 a European Parliament said EU countries "turned a blind eye" to 'extraordinary renditions' across their territory and airspace.[104]
- In June 2007 Mr Marty submitted a second report to PACE's Legal Affairs Committee, focusing in particular on secret detentions. He found new evidence that US "high-value detainees" were held in secret CIA prisons in Poland and Romania during the period 2002-5 and alleged a series of partly secret decisions among NATO allies in October 2001 which provided the basic framework for illegal CIA activities in Europe.[105]

Despite these recommendations, the UK has not exercised its right to search civilian aircraft when and as necessary, nor adopted any policy on searches whose implementation should be subject to appropriate public scrutiny.

These European proposals have been ignored.

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https://wcd.coe.int/ViewDoc.jsp?Ref=PR110(2006)&Sector=secDC&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE. The report found that existing procedures to monitor who and what is transiting through European airports and airspace do not provide adequate safeguards against abuse; no COE member state appeared to have established any kind of procedure in order to assess whether civil aircraft are used for purposes which would be incompatible with internationally recognised human rights standards; the existing rules on state immunity create considerable obstacles for effective law enforcement in relation to the activities of foreign agents.

[100] Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion no.363/2005 On the International Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, 17 March 2006.

[101] See: http://assembly.coe.int/Main.asp?Link=/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.htm.

[102] See: http://assembly.coe.int/Main.asp?link=/Documents/Records/2006/E/0606271000E.htm#5.

[103] Secretary General Document SG(2006)01.

[104] See: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0032+0+DOC+XML+V0//EN&language=EN.

[105] See: http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=2974.

7. DIEGO GARCIA

About two years before the matter of the UK mainland having been involved in 'extraordinary rendition' flights become a public issue in late 2004,[106] questions were raised on the use the US was making of its military facility on Diego Garcia. In an open letter to then Prime Minister Tony Blair on 28 December 2002 Human Rights Watch wrote:

> We…urge you to take steps to ensure that torture does not take place on British soil, including the islands that are part of British Indian Ocean Territory. According to press reports in the United States, U.S. forces are holding and interrogating suspected al-Qaeda detainees at a U.S. operated facility on the island of Diego Garcia…The allegations…if true, would place the United States in violation of some of the most fundamental prohibitions of international human rights and humanitarian law…The treatment of detainees on Diego Garcia also implicates the legal obligations of the British government. …We also urge you to request a commitment in writing from the U.S. government as a condition of continued use of the island that it will comply with international law governing the treatment of detainees.[107]

In a subsequent series of questions and answers in Parliament in 2003 the UK Government consistently denied that any detainees were on Diego Garcia and said that the US would have to ask for UK permission to bring any detainees to the island, it had not done so, and nobody was being held there.[108]

In November 2003 the UK Bar Human Rights Committee wrote to Foreign Secretary Jack Straw raising concerns about the use of the island as well as US ships off-shore (both within and outside the 3-mile territorial limit), and specifically included a reference to "the transit of any detainees across UK territory, for example, by landing by air on the island of Diego Garcia before being transported [off-shore]."[109] The UK Government, however, continued to deny that this had happened, based, as always, on US assurances. For example, in June 2004 the Foreign Secretary Straw stated:

> The United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government [is] satisfied that their assurances are correct. [110]

But Foreign Secretary Miliband's statements in February and July 2008 that in 2002 two detainees were rendered through the territory, despite previous US assurances that this had never happened, exposed what critics have being saying for the past several years: it is simply not good enough to rely on US assurances. The UK government refused to seriously respond to the significance of the revelations, and effectively signalled to the US that no

[106] See footnote 38, the newspaper report in the Sunday Times, 14 November 2004.

[107] See: www.hrw.org/press/2002/12/uk1230ltr.htm.

[108] See these collected in the Bar Human Rights Committee briefing paper *"Diego Garcia: Footprint of Freedom?"* 17 Nov. 2003, at pp. 16-17, at: www.barhumanrights.org.uk/docs/diegogarciafootprintsoffreedom.pdf.

[109] Letter dated 19 Nov. 2003, p. 2, at: www.barhumanrights.org.uk/docs/Jack_Straw_DG.pdf.

[110] House of Commons Hansard text 21 June 2004 : Column 1222W. In its inquiry into UK involvement in renditions of July 2007, the UK Intelligence and Security Committee exclusively referred to assurances by the US government, simply stating: "… the U.S. has given firm assurances that at no time have there been any detainees on Diego Garcia. Neither have they transited through the territorial seas or airspace surrounding Diego Garcia. These assurances were last given during talks between U.S. and UK officials in October 2006." July 2007; Intelligence and Security Committee – Rendition – para 197.

consequences attach to a violation of UK sovereignty. Thus instead of it properly and transparently investigating all the allegations which have been made, which would surely have included the need for the UK itself to ensure the thorough compilation and close examinination of a comprehensive list of all potential suspect flights, it simply 'invited' civil society organisations, MPs and others to submit details of flights which were of 'concern', and then handed this list to the US. The result, predictably perhaps, was a US assurance that there were no detainees on any of the flights listed.

The UK response also ignores the rights of the two individuals rendered through Diego Garcia, and breaches the UK's positive obligations to conduct an independent and impartial investigation into the use of its territory for rendition, flowing from the UN Convention against Torture. One of the individuals remains detained at Guantánamo Bay and continues to be denied his basic human rights and to face the risk of torture and CIDTP.[111] He also risks being brought before a military commission for prosecution under procedures widely condemned as falling short of fair trial standards. While it has been revealed that the second individual rendered has been released back to his "home" country, no information is available as to whether the person was at risk of torture or ill-treatment on return in contravention of the principle of *non-refoulement,* whether the person has been interrogated or detained since, or indeed any information concerning the individual's present welfare.

Further, no steps appear to have been taken to establish the identities of the two individuals rendered. The Secretary of State appears to have suggested that their lack of British nationality or residency should lessen the UK's concern for them, and that nothing further needs to be done:

> The House will want to know what has become of the two individuals in question. There is a limit to what I can say, but I can tell the House the following. The US Government has told us that neither of the men was a British national or a British resident.[112]

Further revelations concerning Diego Garcia have emerged. In May 2008 a Spanish magazine[113] reported that a "high value" prisoner had been held there - a dual Syrian/Spanish national named Mustafa Setmarian Naser. Then on 31 July 2008, *Time Magazine* published an article citing an anonymous US official speaking of people having been held on the island in 2002 and 2003:[114]

> The official, a frequent participant in White House Situation Room meetings after September 11 who has since left government, says a CIA counterterrorism official twice said that a high-value prisoner or prisoners were

[111] See, "Situation of Detainees at Guantánamo Bay" Commission on Human Rights UN Doc. E/CN.4/2006/120 (27 Feb. 2006).

[112] Statement of the Foreign Secretary, David Miliband, Hansard 21 Feb. 2008: Column 547. While the Government cannot formally espouse the two individuals' cases, the fact that their human rights were violated on UK territory by a foreign state should in and of itself be sufficient for it to take up their cases in a humanitarian capacity. This is particularly so in light of the UK's repeated willingness to make representations to foreign governments on human rights grounds even when the case has no connection to the UK. For example, since 1990, the UK has made regular and repeated representations to the Myanmar Government concerning the prisoner of conscience, Aung San Suu Kyi, and more recently to the Democratic Republic of Congo concerning Marie-Thérèse Nlandu and to the Ethiopian Government concerning Kifle Tigneh Abate. The UK Government has also intervened in cases concerning the prosecution of individuals in circumstances where their trials are unfair by UK or international standards such as the intervention in relation to Libya's imprisonment and trial of Bulgarian nurses for deliberate infection of children with HIV or their potential punishment disproportionate, such as the representations to the Nigerian Government concerning the proposed stoning to death of Amina Lawal for adultery, and to Iran concerning its use of the death penalty.

[113] El Pais, 18 May 2008. He was reportedly apprehended in Pakistan in late summer/early autumn of 2005 and handed to the US for a large bounty. The El Pais article indicated that Judge Garzon had been informed by a US official that Naser had been held on Diego Garcia

[114] See: www.time.com/time/world/article/0,8599,1828469,00.html.

> being held and interrogated on the island. The identity of the captive or captives was not made clear. According to this account, the CIA officer surprised attendees by volunteering the information, apparently to demonstrate that the agency was doing its best to obtain valuable intelligence. According to this single source, who requested anonymity because of the classified nature of the discussions, the US may also have kept prisoners on ships within Diego Garcia's territorial waters, a contention the US has long denied. The White House meetings were also attended by a variety of other senior counterterrorism officials.

Names mentioned in the report include two men, Hambali and Abu Zubaydah, both now detained at Guantanamo Bay.

As a matter of international law, where reasonable grounds exist to believe that torture or other CIDTP may have been committed within a state's jurisdiction,[115] the state is under a positive obligation to conduct a prompt, impartial, independent, effective and thorough investigation into the allegations, even where no formal complaint has been made.[116] Reliance on US assurances falls short of the UK's international legal obligations and contributes towards a culture of impunity which, as the ECtHR has repeatedly emphasised, renders the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment "ineffective in practice."[117] An independent public inquiry is therefore urgently required to investigate the use of UK territory for rendition as well as a holding site for detainees. Such an inquiry must be carried out in a public manner in order to ensure that private individuals, foreign states and non-governmental organisations can submit relevant information to the investigating body and to ensure that the investigation is carried out transparently.[118]

8. THE NEED FOR REFORM

The UK has a positive duty to ensure that it has an effective legal and practical framework to protect individuals under its jurisdiction from the risk of torture and other CIDTP by state agents or third parties within its jurisdiction.[119] An overhaul of the current laws and policies on aviation is urgently required to ensure that a strong preventative framework is in place. Early in 2008 the former Foreign Secretary acknowledged the deficiencies in record keeping which she conceded are "not all that marvellous, frankly"[120] and may have contributed to failures to detect 'extraordinary rendition' flights in the past. Moreover, the laws and procedures by which state aircraft are authorised to enter UK territory appear to be inadequate to determine whether an 'extraordinary rendition' is taking place or is going to take place, as are the laws and practice governing the use of civil aircraft involved in the practice. As part of a public inquiry, an assessment of the adequacy of UK laws, policies and practices to prevent the use of UK territory in renditions is in order.

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[115] This obligation exists regardless of whether the allegations are against the state itself or a foreign state or private individuals, *Calvelli and Ciglio v. Italy,* ECtHR, no. 32967/96 (17 Jan. 2002).

[116] *Bati and Others v. Turkey,* ECtHR, no. 33097/96 and 57834/00 (3 June 2004) at para. 133.

[117] *Assenov v. Bulgaria,* ECtHR No. 24670/94 ECtHR (28 September 1998) at para. 102; *See also, Aksoy v. Turkey* 23 EHRR 413 (1997) at para. 98.

[118] *See, Bati and Others v. Turkey,* ECtHR, no. 33097/96 and 57834/00 (3 June 2004) note 8 at para. 137 (discussing the requirement that investigations be open to "public scrutiny.")

[119] *A. v. United Kingdom,* ECtHR 25599/94 (23 Sept. 1998).

[120] Margaret Becket quoted in "Beckett Attacks Rendition Records," *BBC News* (24 Feb. 2008).

The UK must be capable of detecting these unlawful flights, which in turn requires it to become more stringent when setting and enforcing disclosure requirements for foreign state aircraft wishing to enter UK territory.[121] Once the foreign state aircraft receives authorisation to enter, the aircraft enjoys immunity and cannot be searched or seized.[122] It is therefore vital that the Government acts pre-emptively prior to authorisation. The Secretary-General of the Council of Europe found that most European states fail to require the foreign state to provide details of "the identities and status of all persons on board, the purpose of the flight and its final destination as well as the final destination of each passenger."[123] The Parliamentary Assembly of the Council of Europe also highlighted the particular problem posed by multilateral agreements which provide for blanket overflight clearances which reduce the opportunity to effectively detect renditions, including the NATO arrangements referred to above.[124]

The European Parliament and the Council of Europe have found that the US Government has presented state aircraft as civil aircraft in order to avoid the requirements of prior authorisation but to still benefit from the availability of immunity from search and seizure.[125] For example, the Council of Europe's Parliamentary Assembly found that:

> The US Government's post-9/11 detainee transfer operations would frequently make use of practices that were previously considered "anomalies," such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian operators; and civilian agents and contractors travelling on military travel orders.[126]

Under the *Convention on International and Civil Aviation* of 7 December 1944 (the 'Chicago Convention') to which 189 states including the UK are parties, no prior authorisation is needed for unscheduled civil aircraft.[127] Such aircraft can therefore "make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the state flown over to require landing."[128] Under Article 3 *bis* (b), the territorial state can require the landing of the aircraft if there are "reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention" and under Article 16, "the appropriate authorities of each of the contracting states shall have the right, without reasonable delay, to search the aircraft of the other contracting states on landing or departure, and to inspect the certificates and other documents prescribed by this Convention."

However, the meaning of a "state aircraft" under the Chicago Convention raises the question as to whether 'extraordinary rendition' flights using civil aircraft would fall within the applicable rules relating to state or civil aviation. Any such lack of certainty surrounding the

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[121] Article 3(c) of the Convention on International and Civil Aviation of 7 December 1944 provides that, "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise." *See also,* James Crawford and Kylie Evans, "Opinion: Extraordinary Rendition of Terrorist Suspects through the United Kingdom," submitted to the All Party Parliamentary Group (9 Dec. 2005).

[122] "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe member states: second report," (11 June 2007) [hereinafter "Parliamentary Assembly Report 2"], note 3 at para. 102.

[123] Council of Europe, "Follow-up to the Secretary General's reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies: Proposals made by the Secretary General," SG(2006)01 (30 June 2006) at para. 12(d).

[124] *Ibid,* para. 12(d).

[125] For example, *see* Parliamentary Assembly Report 2 note 3 at paras. 142 – 166.

[126] *Ibid.*. para. 78.

[127] Under Article 6, scheduled flights require prior authorisation.

[128] Article 5.

proper classification of commercial flights used by the US for 'extraordinary rendition' purposes means that the UK authorities might not be exercising their rights of search and seizure where 'rendition' is suspected, even in those cases where the US has not sought prior authorisation to enter UK territory, for fear that the UK would be infringing on the US' immunity – an immunity which doesn't apply to non-state aircraft.[129]

In a paper prepared for REDRESS by international air law expert Professor Dr. Michael Milde[130] the author explained:

> It is of importance that the Chicago Convention's name stresses the words "international **civil** aviation". Since the earliest history of the development of international air law all international instruments referred strictly only to "civil" or "commercial" aircraft and expressly excluded "state" aircraft.
>
> The status of the state/military aircraft is not clearly determined by positive rules of international law and is not particularly transparent or unequivocal The issue is not addressed in international law with any specificity; could not be located in any one single international instrument; and only some fragmentary aspects can be deduced directly or indirectly from different sources of international law (international treaties). The identifiable rules are mostly "negative" in that they state what does not apply to military aircraft or what such aircraft is not permitted to do. The practice of states that could form a basis for the development of customary law is also not transparent or uniform and is often shrouded in secrecy.[131]

Professor Milde found:[132]

- Although some of the aircraft allegedly used for 'extraordinary rendition' flight were by their design, markings, ownership and operating crew typical for *civil* aircraft, they were *used* for police/security services in a clandestine manner and that clearly puts them in the category of s*tate aircraft;*
- Since such flights were performed by state aircraft, their flight over a foreign territory or landing in such territory without a special authorisation and in accordance with the terms thereof was in violation of an international legal obligation (Article 3 (c) of the Chicago Convention);
- The states overflown and the states of landing may protest and invoke international responsibility of the state of registry of the aircraft; the operators of such 'rendition' flights misrepresented the nature of the flight and the nature of the aircraft when filing their "flight plan" as provided in Annexes 2 and 6 to the

[129] See the International Civil Aviation Organisation, "Secretariat Study on Civil/State Aircraft" (Montreal, 4 – 15 July 1994) Attachment 1: LC/29 – WP/2-1 at para. 1.1. (The ICAO Study). While Article 3(b) of the Chicago Convention provides some direction in setting out that, "Aircraft used in military, customs and police services shall be deemed to be state aircraft," uncertainty remains as to whether the list in Article 3(b) is exclusive or merely exemplary of the types of aircraft excluded from the scope of the Convention - see the ICAO Study at para. 5.1.1. (Discussing the significance of the word "deemed" in Article 3(b)). In practice, a functional test is applied to determine whether an aircraft falls within the definition of State aircraft and although the status, ownership or control of the aircraft may be taken into account these are not determinative in classifying the aircraft concerned - see the ICAO Study, and Centre for Human Rights and Global Justice, "Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States: Briefing Paper," NYU Law (February 2006) at 5.

[130] Emeritus Director, Institute of Air & Space Law, McGill University. Professor Milde served for 25 years (1966-1991) in senior legal positions in the International Civil Aviation Organization (ICAO), including as its Principal Legal Officer, and Director of the ICAO.

[131] "Rendition flights" and International Air Law, June 2008, at: www.redress.org/documents/Prof_Dr_Michael_Milde_for_REDRESS_June_2008_2_.pdf.

[132] Loc cit, page 10.

Chicago Convention and could be penalised in accordance with the applicable national legislation;

- Such aircraft were supposed to carry documents prescribed by Article 29 of the Chicago Convention – among them a journey log book and a list of passengers with their names and places of embarkation and destination; this may have been misrepresented by the operators involved and could be penalised.

All these are issues which the UK Government should address with urgency both legally and in practice by making clear to all states that all commercial aircraft will be presumed to fall under the legal regime applicable to civil aircraft *unless* prior authorisation is sought by the state concerned. Moreover, the procedures for detecting the use of civil aircraft, whether clearly marked as such or masquerading as state aircraft for the purposes of 'extraordinary rendition' must be improved.

III. UK VICTIMS OF 'THE WAR ON TERROR'

We hear a lot about individuals who have been detained by counter-terrorism security operatives under questionable circumstances and transferred without any legal process to locations where there is a real likelihood of torture. Some have ended up in Guantanamo Bay, others in recognised or unrecognised places of detention around the world. During this whole process, they have invariably been denied their basic human rights.

We hear a lot about campaigns for the release of these individuals, but much less about what happens to them afterwards. Have they been able to go back to the lives they lived before? What stigmas have they faced? Do they still face any legal restrictions on their freedom, such as control orders, extradition proceedings or criminal investigations? What about the long road to recovery for what has happened to them? Are they receiving any medical and psychological treatment? What are their prospects for receiving compensation for what they endured? What do they feel would best help them move forward with their lives?

1. BACKGROUND

The effort which the UK Government has put into seeking the release of UK nationals and residents incarcerated in Guantanamo Bay constitutes one element of an on-going controversy in which it has from time to time, very reluctantly, been made to confront its major ally. In some instances detainees and their relatives tried to seek relief from UK courts. Further aspects which have come under scrutiny have been the role of the UK security services in interrogating detainees at Guantanamo Bay and elsewhere, and the way in which the security services' cooperation with foreign intelligence agencies has been said to have actually led to unlawful detentions in some cases and to the ill-treatment of detainees in others.

In 2003 Lord Steyn, one of the UK's most senior sitting judges, publicly described Guantanamo Bay as a "legal black hole" and the Military Commissions as "kangaroo courts." In the same speech he commented on the UK's policy as follows:

> The Attorney-General has negotiated a separate agreement with the Pentagon on the treatment of British prisoners. He has apparently received a promise that the British prisoners of war will not face the death penalty. This gives a new dimension to the concept of "most favoured nation" treatment in international law. How could it be morally defensible to discriminate in this way between individual prisoners? It lifts the curtain a little on the arbitrariness of what is happening at Guantanamo Bay and in the corridors of power on both sides of the Atlantic.[133]

[133] "Guantanamo Bay: The Legal Black Hole", 27th FA Mann lecture, 25 November 2003, accessible at http://www.statewatch.org/news/2003/nov/17guantanamo.htm

2. CONSULAR AND DIPLOMATIC PROTECTION

a) UK Nationals

Consular protection refers to the support provided by consulates to a state's nationals abroad. The 1963 Vienna Convention on Consular Relations (VCCR)[134] regulates the rights, duties and privileges of consulates and their officials. Article 5 outlines broad, general consular functions, including those relevant to imprisoned or detained nationals. Article 36 codifies some of the key rights, which developed in customary international law, including the right of consuls to communicate with and assist their detained nationals, and the rights of the detained or imprisoned nationals themselves.[135] Consequently, consular rights do not belong exclusively to governments; they also involve the nationals concerned themselves. In the context of torture and other forms of ill-treatment, the national will be seeking to have consular officials do everything possible to prevent the violations from being inflicted at all, to get the local authorities to cease the violations, as well as to help the national with access to local lawyers and doctors, and to communicate with family or friends.

In 1987 the UK Government issued a lengthy statement in Parliament, setting out its policy on consular protection, which read in part as follows, and which still reflects UK practice:

> …it is internationally accepted practice that officials or representatives of one State cannot intervene in the judicial proceedings of another sovereign State…we in the United Kingdom would not tolerate attempted foreign intervention in our judicial system. The role of consular officials is limited to visiting the detainee as soon as possible after arrest or detention, unless the offence is a minor one, to ensure that the British citizen's rights under local law are fully explained and that they know how to obtain legal representation, if desired. A consular official will try to ensure that a British national is charged and brought to trial without delay, that the trial is conducted within the recognized canons of justice, that their alien status is not detrimental either at a trial or during imprisonment and that they are subject to the same standards as apply to the nationals of the country in which they were arrested. It is our policy that, after an initial visit, further consular visits will be made in the light of local conditions and the detainee's circumstances…They will also…raise any complaints with the proper authorities…There are limitations on what consular officials can do. They cannot get a national out of jail...[136]

Diplomatic protection in international law was traditionally the sole and discretionary right of an injured alien's state of nationality to assert against a foreign state.[137] If the state of

[134] U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963.

[135] A number of cases have been brought before international courts or tribunals for violations of consular rights, when diplomatic or domestic legal remedies have proven ineffectual. From these it has been established that Article 36 confers rights not only on consular officers but also on the detained individuals. See, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due process of Law*, Inter- American Court of Human Rights, Advisory Opinion No. OC-16/99. The International Court of Justice held in *LaGrand,* that article 36 confers specific rights on individual nationals as well as on States: "Based on the text of [article 36], the Court concludes that article 36 paragraph 1, creates individual rights, which, by virtue of article 1 of the Optional Protocol, may be invoked in this court by the State of the detained person." Germany v U.S.A. ICJ (2001), para. 77. See also Mexico v U.S.A., ICJ (2004), para. 40.

[136] *H.C. Hansard,* Vol.116, cols.498-499, 15 May 1987. The extract appears in Warbrick, Colin, *Protection of Nationals Abroad* (current legal developments) (1988) 37 ICLQ 1002-1012, at p. 1005. The statement was made in the context of a British national arrested in Sweden.

[137] "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels…By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules

nationality decided, for example, that to espouse a claim would be contrary to its broader foreign policy needs, it was not obliged to give these or any other reasons to its national. In other words the state of nationality had a discretion as to whether or not to exercise diplomatic protection. With the development of international human rights law, which recognises the rights of individuals to seek and enforce their rights before national and international jurisdictions,[138] questions have arisen as to the extent to which an individual has a right of his or her own to diplomatic protection i.e. to what degree, if any, can the individual in effect compel the state of nationality to exercise diplomatic protection? In broad terms the UK Government practice follows the traditional approach: firstly, it has a right *vis a vis* other states to exercise diplomatic protection, and secondly a discretion as to whether it actually does so in any particular case.[139]

Feroz Ali Abbasi, a UK national held for some eight months at Guantanamo Bay, brought a case in the UK Court of Appeal in 2002 to try to force his Government to protect him.[140] The Appeal Court described Mr Abbasi as one of seven[141] British citizens held at Guantanamo Bay at that time. As soon as she learned what had happened to her son, his mother instructed lawyers to contact the Foreign Office, pressing it to assist in ensuring that the conditions in which her son was detained were humane. She also pressed the Foreign Office to procure from the US authorities clarification of her son's status and of what was to be done with him in the future.

The UK Government told the Court of Appeal that the action it had taken in relation to Mr Abbasi and the other UK detainees in Guantanamo Bay was as follows: there had been close contact between the UK Government and the US Government about the situation of the detainees and their treatment; there had been consistent endeavours by the UK Government to secure their welfare and ensure their proper treatment; the circumstances of the detainees were the subject of regular representations by the UK Embassy in Washington to the US Government; they were also the subject of direct discussions between the Foreign Secretary and the US Secretary of State as well as numerous communications at official level. It also said the detainees had been visited by FCO officials and members of the security services; the former were able to assure themselves that the UK detainees, including Mr Abbasi, were being well treated and appeared in good physical health; the

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of international law…Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant." *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, Judgment of 30 August 1924, p.12. See, also, the Special Rapporteur's Preliminary Report on Diplomatic Protection, UN Doc. A/C N.4/ 84, 4 February 1998. p.6.

[138] See D Shelton, "Remedies in Human Rights Law", Oxford University Press, (1999), 1-37.

[139] See for example ministerial statements in the 1999 British Year Book of International Law. One refers to the policy on making informal representations about convictions and sentencing of British prisoners abroad: "At present we consider making representations if, when all legal remedies have been exhausted, the British national and their lawyer have evidence of a miscarriage or denial of justice. We are extending this to cases where fundamental violations of the British national's human rights had demonstrably altered the course of justice. In such cases, we would consider supporting their request for an appeal to any official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms." The second policy statement is as follows: "We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to a fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the state in question has accepted the right of individual petition under the ICCPR. The UK government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations."

[140] *The Queen on the application of Abassi and Another v The Secretary of State for Foreign and Commonwealth Affairs and Another*, [2002] EWCA Civ 1598. He had been was captured by US forces in Afghanistan and transported to Guantanamo Bay in January 2002. The court proceedings, brought on his behalf by his mother, were founded on the contention that one of his fundamental human rights, the right not to be arbitrarily detained, was being infringed, and sought by judicial review to compel the Foreign Office to make representations on his behalf to the US Government or to take other appropriate action or at least to give an explanation as to why this has not been done.

[141] In fact nine UK nationals altogether were detained at Guantanamo Bay.

security services took advantage of these visits to question Mr Abbasi with a view to obtaining information about possible threats to the safety of the United Kingdom.[142]

In the Court the argument focussed on the allegation that the FCO was not reacting appropriately to the fact that Mr Abbasi was being arbitrarily detained in violation of his fundamental human rights, to which the UK Government said:

> In cases that come to us with a request for assistance, Foreign and Commonwealth Ministers and Her Majesty's diplomatic and consular officers have to make an informed and considered judgement about the most appropriate way in which the interests of the British national may be protected, including the nature, manner and timing of any diplomatic representations to the country concerned. Assessments of when and how to press another State require very fine judgements to be made, based on experience and detailed information gathered in the course of diplomatic business.
>
> In cases where a person is detained in connection with international terrorism, these judgements become particularly complex. As regards the issue of the detainees now at Guantanamo Bay, as well as satisfying the clear need to safeguard the welfare of British nationals, the conduct of United Kingdom international relations has had to take account of a range of factors, including the duty of the Government to gather information relevant to United Kingdom national security and which might be important in averting a possible attack against the United Kingdom or British nationals or our allies; and the objectives of handling the detainees securely and of bringing any terrorist suspects to justice.[143]

The Court of Appeal referred to a number of cases brought by Guantanamo detainees, including Mr Abbasi and other UK nationals, which at the time in 2002 were still pending in the US, but the Court did not find that these precluded it from deciding whether the UK Government could be ordered to take some action. As the Court put it:

> …we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both [UK and US] jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.[144]

In essence the submissions for Mr Abbasi were that because he was subject to a violation by the US of one of his fundamental human rights the UK owed him a duty under English public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance. What was really being sought was for the Court to order the UK Government to put pressure on the US to either charge Mr Abbasi in a proper US criminal court where he would have all the safeguards of due process, or to release him. However, the UK Government submitted that the authorities clearly established, inter alia, that the English court will not adjudicate upon actions taken by the executive in the conduct of foreign relations, based on the foreign affairs prerogative – the common law doctrine (derived from the Royal Prerogative) that there are certain areas, including foreign affairs, which are the sole preserve of the Government.

[142] *Ibid*, paras 4-6.

[143] *Ibid*, para 7.

[144] *Ibid.*

The Court of Appeal found:

> i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.
>
> ii. Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this course.
>
> iii. However the Foreign Office has discretion to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.
>
> iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.
>
> v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.[145]

The Court of Appeal considered the argument that states have a *duty* to exercise diplomatic protection to nationals who have suffered a breach of a *jus cogens* norm,[146] and found that the UK, like many states, does not accept that such a right either exists in international law or can be introduced at this stage on the basis of "progressive development."[147] Further, the Court of Appeal found nothing in the ECHR and the HRA which imposed an obligation on the UK Government to extend diplomatic protection to a national. After examining *Al Adsani*[148] and *Soering,*[149] as well as other ECtHR jurisprudence,[150] it found that neither treaties, legislation nor case law afforded "any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."[151]

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[145] *Ibid*. p. 27, para.106.

[146] *Ibid*. pp. 19-22.

[147] At p. 20.

[148] (2002) 34 EHRR 11.

[149] [1989] ECHR 14308/88.

[150] Including *Bankovic and Others v Belgium and Others* (App. No. 52207/99) [11 BHRC 435] and *Bertrand Russell Peace Foundation v United Kingdom* (Commission decision 2 May 1978).

[151] Page 22 of the judgment, para. 79. The Court of Appeal referred to the doctrine of legitimate expectation as providing "well established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion… [and] the subject is entitled to have it properly taken into account in considering his individual case." The Court rejected the submission that diplomatic protection should naturally follow if the conditions laid down in the Government's rules are met; instead, the legitimate expectation is not that diplomatic protection would be exercised but that the national's request for diplomatic protection will be considered and that all relevant factors relating to the request will be examined.

Accordingly, the present legal position in the UK is that while there is no obligation on the Government to exercise diplomatic protection there remains scope for judicial review of any refusal to do so. The Government will not have breached its duty if it has properly considered whether to offer diplomatic protection, but once it has made such a consideration its reason for any refusal, if based on foreign policy considerations, will not be justiciable. The Court of Appeal recognised that it is vital that the Government examines the nature and extent of the injustice claimed so that a balance can be struck between the interest of the individual and foreign policy considerations:

> Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted.[152]

This ruling made it clear that any efforts to persuade the UK Government to put pressure on the US Government in respect of UK nationals detained at Guantanamo Bay would now be limited to the political arena. Although in the *Abassi* case the UK's position was that he and the other UK nationals were being well-treated, details of what was really happening to them subsequently emerged to show this was far from the case. A UN report published early in 2006, following a study which commenced in mid-2004, proved to be in sharp contrast to such averments by the UK Government.[153] The evidence in *Abassi* also confirmed that UK security services and FCO officials had access to the detainees from 19 January 2002, very soon after their arrival, and from the start concerns were raised that the UK was not making adequate representations to safeguard the individuals' human rights. In May 2002 the Foreign Secretary informed Amnesty International that he had repeatedly raised with the US authorities the circumstances in which UK nationals were being held and that he had had assurances from the US authorities that the detainees were "being treated humanely and consistently with the principles of the Geneva Conventions." He said that he was satisfied that that was the case, and he also stated that the UK nationals had not complained of any ill-treatment.[154]

Following the *Abbasi* decision, the FCO continued to visit the UK detainees and also began to make representations to the US Government that they either face a fair trial or be sent back to the UK.[155] However, these interventions were not based on any recognition of the right of citizens to diplomatic protection. After the *Abassi* case too, and for some two years, the UK Government continued to deny that it had knowledge of allegations of abuse of its nationals at Guantanamo Bay. However, in answer to a Parliamentary question asking "on how many occasions officers carrying out interviews informed the relevant authorities of

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[152] Para 100.

[153] Five UN human rights experts released the report on 16 Feb. 2006, finding, amongst other things, that the interrogation techniques, particularly if used simultaneously, amount to degrading treatment and in some cases torture; and that the "general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees to be treated with humanity and with respect for the inherent dignity of the human person." See, *Situation of detainees at Guantánamo Bay*, Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jehangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt; 62nd Sess. of the UN Commission on Human Rights, Future E/CN.4/2006/120, 15 Feb. 2006.

[154] *United Kingdom: Human Rights, a broken promise*, Feb. 2006, AI Index: EUR 45/004/2006, pp. 58-59.

[155] See, for example, Foreign and Commonwealth Office, 'Statement on the British Nationals Detained in Guantanamo Bay' (10 March 2003); Foreign and Commonwealth Office, 'Statement on British Guantanamo Bay Detainees' (20 May 2003).

complaints made by detainees alleging treatment by US forces contrary to the terms of the Geneva Convention," the then Home Secretary David Blunkett said on 7 June 2004:

> Some of the detainees questioned by UK intelligence personnel have complained about their treatment in detention. All complaints made by detainees interviewed by British Intelligence officers were passed onto the US authorities, who are responsible for the treatment of those detained in Guantanamo Bay.[156]

In March 2004 five of the UK nationals were released and returned to the UK: Rhuhel Ahmed, Asif Iqbal, Shafiq Rasul (known as the "Tipton Three" after the UK town where they came from), Tarek Dergoul, and Jamal Udeen. Subsequently, the four remaining UK nationals were released and returned in January 2005: Moazzam Begg, Martin Mubanga, Feroz Abbasi, and Richard Belamar. All have stated that they were subjected to torture or other ill-treatment, and have given details of the role UK intelligence services played in interrogating them under conditions without respect for their rights under domestic and/or international law. Regarding these UK interrogations, a composite statement by the Tipton Three after their release illustrates something of what happened:

> (It was very clear to all three that MI5 was content to benefit from the effect of the isolation, sleep deprivation and other forms of acutely painful and degrading treatment including 'short shackling'… There was never any suggestion on the part of the British interrogators that this treatment was wrong or that they would modify their interrogation techniques to take this into account or the long-term consequences of isolation, humiliation and despair. All three men express considerable anger at the fact that the MI5 agents were content and in fact quite happy that they were long shackled and attached to a hook through-out their interrogations.)[157]

In November 2004, the UN Committee against Torture recommended to the UK Government as follows:

> [It] should 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 [against Torture] and that any breaches of the Convention that it becomes aware of should be investigated promptly and impartially, and if necessary the State party should file criminal proceedings in an appropriate jurisdiction.[158]

b) UK Residents

In addition to the nine UK nationals, a number of UK residents have been detained in Guantanamo Bay, giving rise to efforts to persuade the UK Government to also intervene on their behalf. The traditional rule in international law is that diplomatic protection is only exercisable on behalf of nationals, which was the position taken in respect of these non-nationals: the UK had no *right* in international law to exercise diplomatic protection on behalf of such persons, it argued. Later, and after the nine nationals had been returned, the UK

[156] Hansard 9 June 2004 Col W27-W.

[157] Statement released by the Centre for Constitutional Rights 26 July 2004, para 43, at: http://ccrjustice.org/files/report_tiptonThree.pdf.

[158] *Conclusions and recommendations of the Committee against Torture on the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories*, Committee against Torture, Thirty-third session, Geneva, 15-26 Nov. 2004, CAT/C/CR/33/3.

Government said it could and was making representations in respect of the non-nationals with refugee or long-term residency status in the UK, but only on what it termed humanitarian grounds.[159]

However, unlike the approach the UK Government had eventually taken in calling for the fair trial or release of its nationals, in respect of these non-nationals its representations were more limited:

> …on 27 April 2005, Baroness Symons [the Foreign Office Minister responsible] met senior officials from the United States Embassy in order to pass on the concerns of the detainee claimants' families and lawyers. Although she made no specific request for their return, she expressed concern about the reasons for their detention, the fact that they had not been charged, and the families' anxiety that they might be returned to countries where they might face torture. She raised the allegations of mistreatment – and torture – which had been put to her at the meetings and asked for assurances as to the conditions in which the detainee claimants were being held. The matter was followed up by British officials in Washington but there has been no formal response to the representations that were made.[160]

Early in 2006 three of the detainees, Messrs El Banna, Deghayes and Al-Rawi and their families, sought a judicial review of the Secretary of State's decision not to formally intervene on their behalf, seeking a declaration that:

> …the Foreign Secretary is under a duty to make a formal and unequivocal request of the United States for the release and return of the detainee claimants to this country;, and/or… a declaration that the Foreign Secretary is under a duty to make the same representations to the United States of America in respect of the detainee claimants as have been made in respect of British citizens detained at the Guantanamo Naval Base in Cuba.[161]

All three detainees alleged that they had been tortured and ill-treated, and the case reached the Court of appeal in July 2006. The Court of Appeal proceeded "on the premise that the detainee claimants have been subjected at least to inhuman and degrading treatment."[162] In addition to arguing that the exercise of diplomatic protection was not possible for non-nationals, the UK Government raised UK nationality security grounds as further reason for non-intervention:

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[159] Six such persons were: Shaker Aamer (a Saudi national and long-term UK resident); Jamil El Banna (a Jordanian national with indefinite leave to remain in the UK and refugee status); Omar Deghayes (a Libyan national with indefinite leave to remain in the UK and refugee status);. Binyam Mohamed (an Ethiopian national with leave to remain in the UK while his application for political asylum was being processed); Bisher Al-Rawi (an Iraqi national who fled Iraq to the UK with his family in 1983; though his family members became UK citizens he retained his Iraqi nationality as the family felt this might help them in recovering property appropriated in Iraq); Abdennour Sameur (an Algerian national with indefinite leave to remain in the UK as a refugee).

[160] *R (on the Application of Al Rawi & Others) v. The Secretary of State for Foreign and Commonwealth Affairs & Anor.* [2006] EWHC 458 at para 22. Initially, the UK Government had declined to make any representations at all. Thus in September 2002 Baroness Symons wrote to the family of Mr Deghayes saying that, '"[h]is detention and welfare are matters for the United States and Libya. I can only advise that you contact the Embassies of the United States and Libya in London and seek information from them."' In January 2003 in relation to Mr. Al Rawi, she wrote that, '"[i]f he was travelling on Iraqi documentation, then clearly it is the role of the Iraqi authorities to provide assistance either directly or through a country which they have indicated they wish to represent their interest."' Ibid, para 19. Under traditional international law, the ability of a state to exercise diplomatic protection was premised on the 'nationality of the claimant state attaching to the individual or corporation' - I. Brownlie, *Principles of Public International Law*, Sixth Edition (Oxford University Press, 2003) at 389.

[161] *Ibid* note 70 at para. 30.

[162] *Ibid* note 70 at para. 3.

> It is assessed that Mr El Banna and Mr Deghayes would pose a significant threat to national security and the public if they were permitted to return to the UK. The assessment in relation to Mr Al Rawi is that he might in some circumstances pose a threat, but the risk of this is at a lower level than for the others.[163]

The UK Government set out the traditional international law view as to why it could not intervene with the US more strenuously – the lack of a recognised right to do so:

> …a sovereign State only possesses standing to seek redress or remedial action from another sovereign State on behalf of an individual where that individual is a national of the first State … There is of course nothing to prevent a State from making representations to another on behalf of a person who is not one of its nationals; indeed, there is nothing to prevent such representations being made on behalf of anyone at all. But the principle of international law asserted by the first respondent, and summarised in the assertion of standing to which we have referred, articulates a legal position which is quite distinct from this ordinary factual reality. The reference is to a right which is recognised and enjoyed by every State to afford diplomatic protection for its own nationals by means of a State to State claim…The process is by its nature wholly different from the making of intercessionary or humanitarian representations on behalf of a non-national, and the response which they might elicit…The US Government is fully alive to the UK Government's lack of any recognised right to intervene on their behalf in the way that the Claimants seek. In our assessment and that of the FCO, the US Government would be very likely to resist any intervention along the lines which the Claimants seek. In our view … lobbying along these lines would not be effective in itself.[164]

By the time the case reached the Court of Appeal in mid-2006 the UK Government had formally requested Mr Al Rawi's release, which request was explained as follows:

> The Foreign Secretary has investigated these matters and has concluded that there is a basis on which it would be possible to approach the US Government on Mr Al Rawi's behalf with some reasonable prospect of success, and without causing the significant counterproductive effects more generally … the matters referred to do not give rise to a legal obligation on him to make any request at all.[165]

The Court of Appeal also considered whether the refusal to make representations' on behalf of the others constituted a violation of the rights of their family members under the ECHR;[166] whether not making the same representations for non-nationals as had been made for nationals constituted unlawful discrimination under the Race Relations Act; whether it constituted a breach of legitimate expectations; whether the position on state to state claims in international law and the primacy of nationality was mistaken; and whether the UK Government's judgment as to the practicality and efficacy of any representations was flawed.

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[163] *Ibid* note 70 at para. 37. As in *Abbasi*, the UK Government also emphasised the weight it accorded to the UK's relationship with the US and the risk of expending its 'diplomatic credit' in cases where it deemed interventions to be counterproductive and ineffective.

[164] *Ibid* at paras. 28,29,34.

[165] *Ibid* at para. 38. He was finally released on 30 March 2007.

[166] Articles 3 and 8.

The claimants argued, inter alia, that Article 8 of the Draft Articles on Diplomatic Protection recognised that the state in which a non-national was habitually and lawfully resident could exercise diplomatic protection; however, the Court found that the Article did not constitute customary international law and therefore the UK did not have standing to make formal representations on behalf of the non-nationals.[167] The Court was especially concerned with the efficacy and practicality of the interventions, perhaps even more than any legal basis. Thus in regard to the Draft Articles on Diplomatic Protection as well arguments under Article 16 of the Refugee Convention, the Court said:

> [They] do not in truth engage the core of the case: the [UK Government's] judgment that any formal representations to the US authorities on behalf of the detainee claimants would be ineffective and counterproductive.[168]

The case was appealed to the House of Lords, but shortly before it was due to be heard the UK Government decided to request the release and return of the two remaining appellants as well as the other UK residents still held, and thus the appeal was withdrawn.[169] Subsequently, Jamil El Banna, Omar Deghayes and Abdennour Sameur were released and returned to the UK in December 2007. Shortly before the three men arrived the Foreign Secretary explained:

> My Right Honourable Friend the Home Secretary and I decided to seek the release of the five in light of work by the US government to reduce the number of those detained at Guantanamo and our wish to offer practical and concrete support to those efforts. In reaching this decision we gave full consideration to the need to maintain national security and the Government's overriding responsibilities in this regard.[170]

It is clear, therefore, that the UK was still not prepared to raise the same issues as it had eventually done on behalf of the UK nationals, such as trial by military commission, and instead characterised its intervention on a different basis altogether. Two UK residents remain at Guantanamo: Binyam Mohamed and Shaker Amaar. The position of Binyam Mohamed is dealt with below.

3. ROLE OF SECURITY SERVICES

a) The case of Martin Mubanga

Mr Mubanga is a dual UK/Zambian national who left the UK for Pakistan in October 2000 to study Islam and Arabic.[171] He later entered Afghanistan and attended madrasahs (Islamic

[167] *Id.* at paras. 118 – 119. The Court also rejected the family, discrimination and legitimate expectation arguments, as it had already adopted a traditional international law position on standing, finding that diplomatic protection was only exercisable in relation to nationals. This interpretation is inconsistent with the international law on diplomatic protection which has always recognised exceptions to the general rule of nationality, precisely in circumstances in which an individual would be otherwise unprotected.

[168] *Id.* at para. 122; *see also,* para. 120. The Court appears to have suggested that if the claimants could have show that an intervention would be effective and productive in securing the fair trial or release and return of the individuals, the Court would be prepared to consider whether the Secretary of State's decision not to intervene was sound.

[169] Foreign and Commonwealth Office, 'Guantanamo Bay: Former UK Residents' (7 Aug. 2007).

[170] Foreign and Commonwealth Office, 'David Miliband: Written Ministerial Statement on Guantanamo Bay: Return of UK Residents' (13 Dec. 2007).

[171] D. Rose, *Observer*, 6 Feb. 2005: "How I entered the hellish world of Guantanamo Bay" at www.guardian.co.uk/uk/2005/feb/06/world.guantanamo.

schools) in Kabul and Kandahar, and was booked to fly back to the UK on 26 September, 2001, from Karachi, where he was going to travel by bus from Afghanistan. After the terrorist attacks of 11 September 2001 the bus stopped running, and he went into hiding in Kandahar when the American bombing campaign began. He discovered his UK passport was missing (it might have been stolen or lost) so he had his Zambian passport sent to him from the UK and then travelled to relatives in Zambia, where he was subsequently arrested by Zambian security officers.

During questioning by the Zambian authorities he was asked if he considered himself a Zambian or British citizen. He immediately answered British, expecting the British authorities would intervene in the case. However, an American female defence official and a British MI6 agent (also called Martin) came to question him, later producing his missing UK passport and other documents which they claimed had been found in a cave in Afghanistan, and accused him of being an Al-Qaeda operative. It soon became apparent that they wanted to recruit him as a plant within Muslim communities in South Africa or Leeds, if he preferred to stay in the UK:

> They wanted me to go where no one would know me, I suppose so I could be undercover.[172]

The routine of interrogation lasted a period of three to four weeks, until one day when the American officer said he was being taken to Guantanamo Bay "in 10 to 15 minutes."[173] He was indeed taken there and held for some 33 months, where he suffered serious ill-treatment before his release and return to the UK in January 2005.[174] His UK lawyer accused the UK of collusion with the US:

> We are hoping to issue proceedings for the misfeasance of [UK] officials who colluded with the Americans in effectively kidnapping him and taking him to Guantanamo.[175]

When the Intelligence and Security Committee considered whether the Security Services were in any way responsible for what happened to Mr Mubanga, it completely exonerated the government and concluded after no more than a very brief summary of some of the facts that:

> We are satisfied that the UK intelligence and security agencies had no involvement in the capture or subsequent "Rendition to Detention" of Martin Mubanga and that they acted properly.[176]

b) The cases of Jamil El Banna and Bisher Al Rawi

Mr El Banna is a Jordanian refugee who had indefinite leave to remain in the UK. Mr Al Rawi is an Iraqi citizen, resident in the UK since 1983. Mr Al Rawi was recruited by the UK Security Services in 2001 and effectively came to act as an intermediary between M15 and

[172] *Ibid.*

[173] *Ibid.*

[174] *Ibid.* The ill-treatment including being subjected to extremes of heat and cold, assaults and a variety of other forms of abuse

[175] Solicitor Christian Khan quoted in an article by Harvey Mcgavin, *Independent on Sunday*, 6 Feb. 2005: "I was assaulted three times by Guantanamo riot squad," available at:

www.independent.co.uk/news/uk/crime/i-was-assaulted-three-times-by-guantanamo-riot-squad-485670.html.

[176] Report of the Intelligence and Security Committee, "Renditions", July 2007, Cm 7171, p. 32.

the Muslim cleric Abu Qatada, with the full knowledge of both parties. Mr Al Rawi was assured by M15 that he would not be compromised in any way. Mr El Banna, a friend of Mr Al Rawi, was also approached by M15 and had a more limited involvement:

> … Abu Qatada was actively engaged in a dialogue with British officials that involved Mr al-Rawi and Mr el-Banna. Mr al-Rawi asked Mr el-Banna to drive Abu Qatada's wife and son to meet Abu Qatada in London. Mr el-Banna followed Mr al-Rawi, who led the way on his motorcycle. When Abu Qatada was arrested, Mr el-Banna taxied his wife and child home at the request of the British officials on the scene. Mr el-Banna never was arrested: the police thanked him for his assistance. He was never even questioned because everyone was aware of his limited involvement.[177]

The two men and others travelled from London to the Gambia on business in November 2002. Initially they were arrested prior to departure at Heathrow on suspicion of being in possession of terrorist materials which proved to be harmless. They were permitted to continue, the UK Security Services having found no reason to prevent them. However, it subsequently transpired that the UK Security Services informed the US and Gambian authorities that they were on their way, and as a result they were arrested on their arrival at Banjul Airport on 8 November 2002. Shortly afterwards they were informed that the UK had told the Gambians to make the arrests:

> A British citizen, Abdullah El Janoudi, who accompanied Mr al-Rawi and Mr el-Banna to Gambia, confirms that a large American by the name of Lee told him British officials had the group arrested.[178]

Mr Al Rawi told his lawyer that "from the very beginning in the Gambia the CIA said, 'The British told us that one of you was helping MI5.' By the second day in the Gambia, they [the CIA] were asking me to work for the US in Britain. I said I would not."[179]

Both men were rendered to Afghanistan, to the notorious "dark prison" in Kabul, imprisoned underground in isolation and darkness and tortured: held in leg shackles 24 hours a day; starved, beaten, dragged along floors while shackled, and kicked; round-the-clock screams from fellow prisoners made sleep impossible. Subsequently, they were transferred to the US Air Force base at Bagram, Afghanistan, where they were imprisoned and suffered further torture: beatings, starvation and sleep deprivation.[180] Early in 2003 both men were transported to Guantanamo Bay,[181] where they continued to be ill-treated in a variety of ways which have became well known as taking place there, including exposure to extremes of temperature. Mr Al Rawi was visited by MI5 frequently:

> He first met an MI5 agent in the early autumn of 2003, fully shackled. After some perfunctory questions and answers that confirmed his work with MI5, the agent offered him an oblique, belated apology: "Sorry about all this."[182]

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[177] George B. Mikum, the two men's US lawyer, in the *Independent*, 16 March 2003: "MI5, Camp Delta, and the story that shames Britain".

[178] *Ibid.*

[179] *Ibid.*

[180] *Ibid*.

[181] The trip itself was harrowing: "Forced to wear darkened goggles, face-masks and earphones, chained at the ankles, handcuffed behind their backs with thin plastic that caused incredible pain, and, in some cases, lasting damage, starving and sick prisoners who had been deprived of sleep were forced to maintain a sitting position, legs forward and chained without moving for nearly 24 hours"; *Ibid*.

[182] *Ibid.*

During another visit in January 2004, this time with some of the very same MI5 agents that he had worked with in London, they proposed that if he returned he should continue to work for them, and he agreed to do so. The next day they said it would take one to six months to get him home.[183] In fact he was only released and got back to the UK more than three years later, on 30 March 2007. For years, therefore, the US continued to accuse him of having worked with Aba Qatada knowing full well he had being doing so under the auspices of MI5.

During his Combatant Status Review Tribunal (CSRT) hearing Mr Al Rawi testified under oath about his relationship with MI5 and his role as a liaison between MI5 and Abu Qatada. He informed the Tribunal that MI5 had expressly approved of this:

> During a meeting with British Intelligence, I had asked if it was OK for me to continue to have a relationship with Abu Qatada. They assured me it was.[184]

He requested that certain named MI5 agents appear before the Tribunal to confirm this, and the Tribunal president instructed the military prosecutor to make inquiries whether the UK Government would make the witnesses available. The UK Government refused, and it also refused to confirm the accuracy of Mr Al Rawi's account, thereby ensuring the indefinite imprisonment. The following is taken from Mr Al Rawi's CSRT hearing:

> President: Detainee has requested three witnesses who would testify that he supported the British Intelligence Agency. We have contacted the British Government and at this time, they are not willing to provide the tribunal with that information. The witnesses are no longer considered reasonably available, so I am going to deny the request for those three witnesses.
>
> Later in the proceeding, the president issued the following clarification: "The British Government didn't say they didn't have a relationship with you, they just would not confirm or deny it. That means I only have your word."[185]

It was not until March and December 2007 respectively that Mr Al Rawi and Mr El Banna were released and returned to the UK. Though MI5 never denied its involvement, the UK refused to intervene on Mr Al Rawi's behalf until the case was brought to court in the UK but, and in Mr El Banna's case only after the Court of Appeal had ruled that the UK Government was not obliged to intervene, and shortly before the case was to be heard in the House of Lords.

In July 2007 the ISC's report on rendition[186] devoted some 10 pages to Messrs Al Banna and El Rawi, particularly the latter, including the communications which the UK Security Services had made to the Gambian and US authorities when the men left Heathrow for Banjul, as well as the relationship with MI5. Some of these communications had a caveat prohibiting "overt, covert or executive action," and the ISC found:

> …the Security Service explicitly required that no action (such as arrests) should be taken on the basis of the intelligence contained in the telegrams. We have been told that the Security Service would fully expect such a caveat to be honoured by the U.S. agencies – this is fundamental to their intelligence-

[183] *Ibid.*

[184] *Ibid.*

[185] *Ibid.* As far as Mr Al Banna's CSRT hearing was concerned the only evidence considered was that he drove Abu Qatada's wife and son to visit him - during the time the time that the UK authorities were engaged in discussions with him.

[186] Report of the Intelligence and Security Committee, "Renditions", July 2007, Cm 7171.

> sharing relationship. We accept that the Security Service did *not intend the men to be arrested.*[187]

The ISC noted that the Foreign Affairs Committee had said that the policy of "not accepting consular responsibility for non-British nationals is correct."[188] However, it emerged that the UK had protested to the US earlier about the intention of the US to render them to Afghanistan, along with two UK nationals who had been arrested with them. The two nationals were soon released in the Gambia and returned to the UK; a few days later, after the UK had informed the US it would not make representations for the remaining two, the non-nationals El Rawi and Al Banna, were both rendered. The ISC considered whether the UK bore any responsibility:

> We have considered whether the Security Service should have been more aware of the risk that the men would be rendered…We have been told that this was the first time after 9/11 that the Service became aware of a rendition of individuals unrelated to the Afghanistan battlefield (or surrounding area of operations), and it was not therefore expected.
>
> This is the first case in which the U.S. agencies conducted a "Rendition to Detention" of individuals entirely unrelated to the conflict in Afghanistan. Given that there had been a gradual expansion of the rendition programme during 2002, it could reasonably have been expected that the net would widen still further and that greater care could have been taken. We do, however, note that Agency priorities at the time were – rightly – focused on disrupting attacks rather than scrutinising American policy. We also accept that the Agencies could not have foreseen that the U.S. authorities would disregard the caveats placed on the intelligence, given that they had honoured the caveat system for the past 20 years.
>
> This case shows a lack of regard, on the part of the U.S., for UK concerns. Despite the Security Service prohibiting any action being taken as a result of its intelligence, the U.S. nonetheless planned to render the men to Guantánamo Bay. They then ignored the subsequent protests of both the Security Service and the Government. This has serious implications for the working of the relationship between the U.S. and UK intelligence and security agencies.

The ISC only voiced concern over the US' behaviour. As far as Mr Al Rawi's relationship with MI5 was concerned, by the time the ISC report was published in July 2007 he had been released and returned to the UK. The ISC commented on how the UK Government had finally begun in 2006 to make representations on his behalf on a "fact specific" basis which differentiated him from the other non-nationals; negotiations with the US took about a year before he was released and returned. The ISC comments are redacted in part, and the section ends as follows:

> We recognise the contribution of the Foreign and Commonwealth Office in securing Bisher al-Rawi's release. However, having seen the full facts of the case – and leaving aside the exact nature of al-Rawi's relationship with the Security Service – we consider that the Security Service should have informed

[187] *Ibid*, p. 40.

[188] *Ibid*, p. 42.

> Ministers about the case at the time, and are concerned that it took *** years, and a court case, to bring it to their attention.[189]

The ISC noted that an amount of time had elapsed (and how long that actually was is redacted) before the Security Services informed the Ministers concerned "about the case." It is not clear what the ISC means by "bring it to their attention" but it appears to be saying that it was only after (finally) receiving this information from the Security Services, as well as through the court case, that the Government changed its position of non-representation (apart from raising humanitarian issues) for non-nationals and began making "fact specific" representations for Mr Al Rawi's release. This ignores the fact that within five months of his arrest and rendition in November 2002, Mr Al Rawi's lawyer had gone public in March 2003 that Mr Al Rawi had been working for MI5, as set out above. Why it took the UK Government about three years thereafter to *begin* seeking Mr Al Rawi's release is simply glossed over. It cannot seriously be argued that the UK Government wasn't aware of the March 2003 allegations, so it either turned a blind eye to them and didn't bother to ask the Security Services whether there was any truth in them, or it did and the Security Services misled the Government for a considerable time until it was no longer possible for it to do so because of the court case. It is indeed significant that the length of time - we know it was years and not months - has been redacted. What is surprising, or at least disappointing, is the ISC's complete failure to pursue this aspect.

c) The case of Binyam Mohamed Al-Habashi

Binyam Mohamed is an Ethiopian national who sought political asylum in the UK in March 1994 and was given indefinite leave to remain whilst his asylum application was considered.[190] In June 2001 he travelled to Pakistan, planning to return in April 2002. On 10 April 2002 Pakistani authorities arrested him at Karachi airport for allegedly travelling on a false passport. It was also alleged that he fled Afghanistan where he been fighting with the Taliban.

Since his arrest and from a variety of reports[191] the following is a summary of key events:

- He was held by the Pakistani authorities unlawfully and incommunicado for a period of three months, during which time he was denied access to a lawyer and his detention was not reviewed by a court or tribunal; he says he was tortured and subject to CIDTP; at one point he was interrogated by UK officials and he says that "one of them did tell me I was going to get tortured by the [Arabs]";[192]
- In July 2002 he was extraordinarily rendered from Pakistan to Morocco, where he was held for 18 months; he says he was tortured by the Moroccans and subjected to CIDTP; the torture included his penis being cut with a razor blade; the Moroccans told him that they were working with the UK Security Services; he was questioned on details about his life that could only have come from UK sources;

[189] *Ibid*, p. 46.

[190] His application was refused in May 2000.

[191] See for example Cage Prisoners (undated) "Fabricating Terrorism: British Complicity in Renditions and Torture," at: www.cageprisoners.com/downloads/FabricatingTerrorism_Report.pdf pp. 21-22; Also, Amnesty International, "State of Denial: Europe's Role in Rendition and Secret Detention," p. 11; Intelligence and Security Committee (ISC), "Renditions", July 2007, Cm 7171, pp. 33- 35.

[192] Statement to his lawyer in Guantánamo Bay, taken from Reprieve's written submission to the ISC, 4 Dec. 2006, fn 78 in ISC "Renditions" loc cit.

- In January 2004 he was rendered to the US "dark prison" near Kabul, Afghanistan, where he says he suffered further torture and CIDTP; in May 2004 he was moved to the US Air Force base at Bagram in Afghanistan;
- He was rendered to Guantánamo Bay in September 2004 where he remains held;
- The UK Government began to ask the US to release and return him in August 2007 after the Court of Appeal ruling that the UK was not obliged to intervene, but the US refused as it intended to prosecute him before a Military Commission;
- Litigation commenced in the UK in May 2008 seeking possibly exculpatory documents in the UK's possession; the case was brought on the basis of the UK having been "mixed up" in the wrongdoing of the US, relying on Mr Mohamed's evidence about the UK officer who visited him in detention in Pakistan;
- The US sought to have him tried before a Military Commission on terrorism charges based on confessions, but these charges were dropped in October 2008, although the US authorities are considering whether to re-commence the prosecution; Mr Mohamed says the confessions were made while he was held in Morocco and as a result of the torture he suffered there.

The ISC was told that an experienced officer of the Security Service did interview Mr Mohamed once, for approximately three hours whilst he was detained in Pakistan; the interview was conducted in line with the Service's guidance to staff on contact with detainees. The Security Service denied that the officer told Mr Mohamed that he would be tortured, and also told the ISC that the officer did not observe any abuse and that no instances of abuse were mentioned by Mr Mohamed. The Security Service was aware of the US plan to transfer him:

> … at the beginning it was thought [he] was [a British national], we were told by [the US] that they were going to move him to Afghanistan and we know that he was moved to Guantánamo. He has claimed that on the route there he was held in Morocco and that while in Morocco he was tortured… We do not know whether that happened…[193]

The Director General of the Security Service told the ISC that it regretted not having sought "proper full assurances at the time";[194] in conclusion, after several redacted sections, the ISC said:

> There is a reasonable probability that intelligence passed to the Americans was used [in Mr Mohamed's] subsequent interrogation. We cannot confirm any part of [his] account of his detention or mistreatment after his transfer from Pakistan. We agree with the Director General of the Security Service that, with hindsight, it is regrettable that assurances regarding proper treatment of detainees were not sought from the Americans in this case.[195]

The UK litigation has since revealed a great deal more than emerged from the ISC report. In the first open judgment[196] the Court held that the Foreign Secretary should provide exculpatory information in the UK's possession relating to the Mr Mohamed's treatment after his arrest for the purposes of military commission proceedings, subject to any claim by the UK Government for public interest immunity. This was on the basis that the claimant had

[193] Oral evidence – Security Service, 23 Nov. 2006, fn 80 in ISC "Renditions" loc ci.

[194] *Ibid*, p 34.

[195] *Ibid.*

[196] [2008] EWHC 2048 (Admin); [2008] WLR (D) 295.

established an arguable case of wrongdoing involving his being subjected to torture while held in unlawful incommunicado detention in Pakistan, Morocco and Afghanistan, before making the confessions on which the case against him was based; that the United Kingdom had become mixed up in any such wrongdoing by facilitating his interrogation; and that documents (42 in number) in the UK Government's possession were essential to his defence. A claim for public interest immunity was subsequently made.

In the third open judgement handed down on 22 October 2008, it was made clear that the Court hoped that means would be found under the US' own judicial procedures of securing disclosure of the potentially exculpatory documents, and that Mr Mohamed's lawyers would obtain the documents without the UK court having to order the UK Government to release them. Thomas LJ, delivering the judgment of the court, reviewed the facts set out in the first and second judgments in the light of subsequent developments, including the revelation of habeas corpus proceedings in the US on behalf of Mr Mohamed and others detained at Guantanamo Bay, previously subject to a protective order of the US court. It emerged that the US government had refused to allow seven of the documents provided in the context of the habeas corpus proceedings to be used in the Military Commission proceedings or to reveal to the UK court which seven of the 42 documents seen by it had been provided to the US court. Further, the withdrawal without prejudice of the existing charges against Mr Mohamed and the receipt of information that the new prosecutors intended to bring new charges in 30 days were noted. The Court said that the submissions made by Mr Mohamed's counsel (including that the US Government could not be relied upon to disclose the documents in a timely manner and would do all it could to avoid disclosure) could not be dismissed as fanciful since there was a clear evidential basis for them and they called for a detailed explanation. Where such serious allegations were made against a person not party to proceedings, fairness would dictate that notice and an opportunity to comment should be given to that party.

The court noted that there was no precedent for applying this approach in the case of a foreign friendly state and close ally. It was the opinion of the court that challenges made to the conduct of the US Government and the legality of its actions should, save in the most exceptional circumstances, be determined by the US judiciary. The stance taken by the US Government was that it would reconsider the intelligence relationship between the US and the UK if the court were to order disclosure. Accordingly, the Court concluded that the appropriate course was to stay proceedings until after the outcome of the forthcoming hearing in the US Federal District Court in which the US judge would have the opportunity to consider the issues relating to the provision of the 42 documents, all of which were relevant and potentially exculpatory, and which fairness and justice demanded should be made available as being the only independent support in some material particulars for Mr Mohamed's case that his confessions were induced by torture and cruel, inhuman or degrading treatment at the hands of the detaining authorities.

At the time of publication of this Report, the US Federal District Court proceedings were ongoing.

Home Secretary Jacqui Smith has subsequently asked the Attorney General to investigate possible "criminal wrongdoing" by MI5 and the CIA over its treatment of Mr Mohamed.[197]

[197] *Guardian*, 30 0ct. 2008, "Smith orders inquiry into MI5 and CIA torture claims", at: www.guardian.co.uk/uk/2008/oct/30/uksecurity-terrorism.

4. CONCLUSION

An examination of the ill-treatment which UK nationals and non-national UK residents have suffered illustrates the lack-lustre approach of the UK Government in protecting these detainees from multiple violations of their rights. Linked to this, and in addition, there are serious questions to be answered as to the direct and indirect role of members of the UK Security Services in either the process whereby the men were 'rendered' to begin with and/or Security Service behaviour when interrogating them in US or other state's custody.

Some information has been revealed as a result of various court cases brought in the UK as well as through parliamentary inquiries. There is prima facie evidence that the UK has not fulfilled its obligations under UNCAT in numerous respects including failure to prevent torture or ill-treatment but also a subsequent failure to properly investigate the allegations. In particular, in the case of Binyam Mohamed, it is undisputed that he was questioned by UK officials more than six years ago in early 2002, and it has taken until October 2008 for the UK Government to consider whether UK criminal law has been breached by initiating the Attorney-General to investigate.

What is urgently required is a full, independent and impartial public inquiry into all aspects of the treatment of these UK nationals and non-national residents, including the role of the UK authorities at all relevant times, and where the UK is found to have been at fault reparations must be made and those responsible must be held accountable.[198]

[198] According to the March 2005 report of the Intelligence and Security Committee, UK intelligence personnel conducted or witnessed over 2,000 interviews in Afghanistan, Guantánamo Bay and Iraq. Its investigations indicated there were fewer than 15 occasions when UK intelligence personnel reported actual or potential breaches of UK policy or international human rights law. It found no evidence that UK intelligence personnel abused detainees. Report of the Intelligence and Security Committee, "The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq", March 2005, Cm 6469.

IV. THE UK, DEPORTATIONS & DIPLOMATIC ASSURANCES

1. BACKGROUND

Article 3(1) of the UNCAT sets out that "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." In *Soering v. United Kingdom* it was held that the principle of non-refoulement is an inherent and indivisible part of the prohibition of torture as without it any other approach would be "contrary to the spirit and intention of [Article 3 of the European Convention on Human Rights which prohibits torture]".[199] Thus the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment imposes a negative duty on states to refrain from torturing and also a range of positive obligations including the obligation to "prevent such acts by not bringing persons under the control of other states if there are substantial grounds for believing that they would be in danger of being subjected to torture."[200]

The absolute principle of *non-refoulement* as set out in Article 3(1) of the UNCAT contains both a procedural and a substantive dimension. As such, where an individual is removed in violation of Article 3(1), a substantive breach will be found. In relation to the procedural dimension, the United Nations Human Rights Committee found in *Alzery v. Sweden* that, "[t]he absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7 [prohibition against torture], read in conjunction with article 2 [right to a remedy] of the Covenant".[201]

As an inherent and indivisible part of the absolute prohibition of torture, the requirement in Article 2(1) of the UNCAT to take "effective legislative, administrative, judicial or other measures to prevent acts of torture" must equally encompass the absolute principle of *non-refoulement.*[202] To find otherwise, would mean that the absolute principle of *non-refoulement* may not be "practical" and "effective."[203]

Diplomatic assurances or 'Memoranda Of Understanding' (MOUs) are government instruments which record an arrangement or understanding between states, and have long been used to facilitate the transfer of persons, in certain circumstances, from one jurisdiction to another. A largely accepted use of diplomatic assurances, particularly by European states, is where they record when requests for extradition are being processed that the death

[199] Application No. 14038/88 (Eur. Ct. H.R. 1989) at para. 88.

[200] See General Assembly, "Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 55th Session, Item 116(a) of the provisional agenda, Human Rights Questions: Implementation of Human Rights Instruments" U.N. Doc. A/55/290. (2000) at 27. The Committee against Torture has previously found that the principle of *non-refoulement* not only reflects a treaty obligation of states parties to the CAT but also constitutes a *jus cogens* norm: "non-refoulement must be recognized as a peremptory norm under international law, and not merely as a principle enshrined in Article 3 CAT" - Committee Against Torture, "Summary Record of the 624th Meeting", U.N. Doc. CAT/C/SR.624, (2004) at paras. 51 - 52.

[201] Human Rights Committee, *Alzery v. Sweden,* U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006) at para. 11.8.

[202] *See,* Committee against Torture, "General Comment No. 2: Implementation of Article 2 by States Parties" U.N. Doc. CAT/C/GC/2/CRG.1/Rev.4 (23 November 2007) at para. 19. *See also,* Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008) at 50 (characterising Article 2(1) as an "umbrella clause" encompassing Article 3).

[203] As required by the Committee against Torture, *see for example,* "Initial Report of Peru" U.N. Doc. CAT/C/SR.193 at para. 44 (9 Nov. 1994); "Initial Report of Morocco" U.N. Doc. CAT/C/SR. 203 (16 November 1994) at para. 51.

penalty will not be sought by the prosecutor or imposed in the requesting state. Extradition treaties often allow a request to be refused if such an assurance cannot be given.[204] The UK Foreign and Commonwealth Office guidance note on the subject states that "an MOU records international "commitments", but in a form and with wording which expresses an intention that is not to be legally binding."[205]

However, the use of diplomatic assurances has become contentious since states, including the UK, began trying to use them to mitigate risks of torture and other ill- treatment that would otherwise prevent the transfer of people, especially terrorist suspects. An early and leading case was that of *Chahal*[206] where the UK attempted to deport Mr Chahal to India in 1990, because of his alleged involvement in terrorism. Mr Chahal argued that he had a well founded belief that he would suffer persecution within the terms of the United Nations 1951 Convention on the Status of Refugees. He sited previous torture he suffered in detention in the Punjab, his political activism for a Sikh state, links with others who had been tortured and had died in police custody, and evidence from human rights organisations on the torture and murder of those thought to be Sikh militants. The Home Secretary obtained an assurance from the Indian Government stating simply that:

> If Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.[207]

At the ECtHR the UK argued that the risk of torture or other CIDTP to Mr Chahal if returned to India should be balanced against the risk he posed to national security. Since the provision not to return a person to a country where there are substantial grounds for believing they would face a real risk of torture or other CIDTP was implied into article 3 by the court's case law this provision was not absolute, the UK said, in that it could be balanced against the threat to security posed by the person. The ECtHR disagreed:

> The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, 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 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.[208]

The UK also sought to rely on the Indian Government's assurance to mitigate against the risk facing Mr Chahal, but the ECtHR held:

> Although the Court does not doubt the good faith of the Indian Government in providing the assurances …, it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab

[204] For example see, article 7 of the UK – US Extradition Treaty.

[205] Treaties and MOUs: Guidance on Practice and Procedure, FCO, 2004, p. 1, at: www.fco.gov.uk/resources/en/pdf/pdf8/fco_pdf_treatymous.

[206] Chahal v. the United Kingdom, No. 22414/93 ECHR, 1996.

[207] *Ibid*., para. 37/.

[208] *Ibid*., para. 80.

> and elsewhere in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.[209]

2. THE DOWNING STREET VIEW ON DIPLOMATIC ASSURANCES

Even prior to the 11 September 2001 attacks, the UK Government was exploring the use of diplomatic assurances to deport failed asylum seekers suspected of being linked to terrorism. This was illustrated in 1999 by the case of *Hany Youssef*, which became one of intense interest for Prime Minister Tony Blair during attempts to deport Mr Youssef to Egypt, a country where it was known and accepted that there was strong evidence that "detainees were routinely tortured by Egyptian Security Services."[210]

Mr Youssef's application for asylum in the UK had failed because the Home Secretary decided that he had, in pursuing terrorism, acted contrary to the purpose and principles of the United Nations, and thus fell within an exception to the obligation to provide asylum.[211] From January 1999 there were conversations between and within the Home Office and the FCO over whether and what assurances should be sought to enable his deportation to Egypt. Internal Home Office legal advice said that there were a number of factors suggesting that assurances would do "little or nothing to diminish the article 3 risk":[212] the ECtHR had rejected the assurances in *Chahal* and the risk in Egypt in this case would be higher as the asylum application showed "plausible claims of harassment and torture."[213]

Nevertheless, on 21 March 1999 a detailed request for assurances was made to the Egyptian Government, including a provision that if the returnee was arrested arrangements would be agreed for at least monthly access by UK Government and independent medical personnel, telephone access to a UK lawyer if the UK Government failed to meet the visiting obligation, commutation of any death sentence, and other provisions.[214] However, Egypt immediately rejected all these terms on the grounds that they would constitute interference with their judicial system and an infringement of national sovereignty.[215] Prime Minister Blair then became directly involved in trying to make the FCO obtain assurances, even if that meant lesser protection. He commented on an FCO letter by writing on it "this is a bit much. Why do we need to do these things?" next to the proposed list of assurances and "Get them back," across the top.[216]

This was followed the next month by the Prime Minister's Private Secretary writing to the Home Office pushing for the deportation of Mr Youssef and three others in a similar position, stating that Mr Blair thought the FCO's demands for assurances were too excessive, and questioning why UK officials would need to have access to Egyptian nationals held in Egypt. The letter went on to request that the list of assurances be narrowed down and reminded the

[209] *Ibid*., para 105.

[210] Hany El Sayed Sadaei Youssef, v The Home Office, [2004] EWHC 1884 (QB), Paras 6 – 7.

[211] Convention relating to the Status of Refugees, 1950, Article 1F.

[212] Youssef v Home Office, para 8.

[213] *Ibid.*

[214] The rejection was made the next day, 22 March 1999; *Ibid*, para 13.

[215] *Ibid*, para 14.

[216] *Ibid*, para 15.

Home Office that "the Prime Minister's priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve that."[217] At this point the FCO learned that an Egyptian Military Court had sentenced Mr Youssef *in absentia* to life imprisonment with hard labour.

On 5 May 1999 the Home Secretary wrote to the Prime Minister explaining that article 3 precluded the deportations, pointing out that the ECtHR had confirmed in *Chahal* that there are no exceptions to article 3. The letter also said that it would be unreasonable to expect to be able satisfy the Special Immigration Appeals Tribunal of the safety of the four men without the "strongest possible assurances," and that if the Egyptians were unwilling to accept the requested assurances then there was "very little scope for pursuing the deportations further."[218]

Shortly afterwards the FCO wrote to the Prime Ministers Private Secretary in similar terms, saying too that there was no scope to offer the Egyptian Government flexibility on the issue of access in the assurances. Monitoring by the International Committee of the Red Cross (ICRC) had been explored but it refused: the ICRC had been denied access to prisoners in Egypt previously and said that it "would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved with any process which could in any way be perceived to contribute to, facilitate or result in the deportation of individuals to Egypt."[219]

Mr Blair's response, through his Private Secretary, was again to question whether some other "minimum assurances"[220] could be sought; however, internal Home Office advice stated that the assurances that had been sought were those which a UK court would expect if a deportation was to be reasonably argued; this advice also pointed out that a judge hearing Mr Youssef's habeas corpus petition on 7 May 1999 had stated the issue over assurances should conclude within weeks not months.[221] In reply to the latest letter from Downing Street the FCO stated that nothing could be done as the Egyptians were unlikely to agree to give the assurances, and that the UK ambassador in Cairo should seek a final response to the request. In reply the Prime Minister wrote across the top of the letter "This isn't good enough. I don't think we should (sic) be doing this. Speak to me."[222] As a result Mr Blair's Private Secretary then responded, explaining that the Prime Minister was still very keen for the deportations to take place and that he understood the danger of the courts overturning a Government decision if the necessary assurances had not been obtained.

On 27 May 1999 the UK ambassador met with an adviser to the Egyptian President in an effort to have the issue of UK access reconsidered; however, the Egyptian response was unchanged. After further letters and more legal advice the Home Secretary asked the Prime Minister for an urgent final decision at to whether he would personally ask the Egyptian President to give the assurances; if not, then the four men could not be deported and would need to be released and given "Exceptional Leave to Enter the UK."

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[217] On 19 April 1999*; Ibid*, para 18.

[218] *Ibid*, para 23.

[219] *Ibid*, para 26. The FCO couldn't identify any other acceptable impartial third party to undertake regular visits and believed that human rights NGOs would take the same line as the ICRC. The letter also felt that a general assurance of access by a "mutually acceptable, impartial third party of international repute [would,] compared with a specific assurance of access by British officials…provide a much weaker argument." Here it is worth noting that as the policy of seeking diplomatic assurances later developed with respect to other countries, this point came to be disregarded: assurances from Algeria and Jordan involving inexperienced local NGOs were deemed acceptable to the UK Government.

[220] *Ibid*, para 27.

[221] *Ibid.*

[222] *Ibid.*

By 14 June 1999 the Prime Minister had decided that "whatever assurances the Egyptians were willing to offer"[223] should be put to the test in the courts and that it would be better for the courts to be responsible for releasing the men rather than the Government. He instructed that just one assurance be sought - that the four individuals, if returned to Egypt, would not face torture.[224] It was not until 24 June 1999, after the UK ambassador's assessment that the Egyptians wanted to keep discussion of how the four would be treated out of a "humiliating public discussion," that the FCO finally decided not to seek the simplified assurance which Mr Blair wanted.[225] On the 8 July 1997 the Home Secretary wrote to the Prime Minister notifying him that he disagreed will the view that a simple assurance on torture would be sufficient, and that he would be releasing the four men, which he did the next day.[226]

It was only five years later in 2004, when judgement was given in this case where Mr Youssef had sought damages for having been allegedly unlawfully detained from 14 January to 9 July 1999, that all of these details emerged.[227]

3. THE SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC)

The Special Immigration Appeals Commission Act 1997 was one of the first statutes arising from the New Labour Government, the Bill having been presented in May 1997 and the Act promulgated by 17 December 1997.

The Act governs appeals in cases where the Home Secretary exercises statutory powers to deport or exclude someone from the UK on national security grounds. It allows SIAC to rely on closed material that has not been disclosed to the appellant or his representative for reasons of national security, the international relations of the UK or another public interest reason. In such cases the Act allows for the appointment of a Special Advocate to represent the interests of the appellant.[228] SIAC can use closed sessions while applying the "real risk of torture" test. Therefore, after an applicant expresses a fear that he or she may be tortured on return, SIAC can reject the arguments without letting the applicant personally challenge certain evidence.

In fulfilling this role SIAC has reviewed many of the cases involving the Government's policy of seeking to use diplomatic assurances to deport terrorist suspects. Three countries in particular have given assurances and had them tested in SIAC: Algeria, Jordan and Libya.

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[223] *Ibid*, para 38.

[224] Communications with the Home Office on 16 June 1999 again showed that the Egyptians viewed any formal assurances as unacceptable; raising further doubt that any adequate assurances would be agreed, a Memorandum from the UK embassy in Cairo on 16 June indicated that the *in absentia* sentence on Mr Youssef would not be open to judicial appeal, only an appeal to the President not to ratify the sentence; Ibid paras 41-42. Despite the indications that adequate assurances were unlikely to be agreed, the Home Office wrote to Mr Youssef's solicitors on 17 June 1999 saying "that we do see a realistic possibility that the Egyptian authorities will provide reliable assurances within a reasonable time," arguing that Mr Youssef should remain in immigration custody because the assurances allowing for his deportation would be provided. *Ibid* para 43.

[225] *Ibid*, para 46-47.

[226] *Ibid*, para 51.

[227] His argument was that from the time when deportation to a county other than Egypt was ruled out there was no reasonable prospect of deportation without breaching article 3. However, the judge ruled that the original assurance sought on 21 March 1999 had a reasonable prospect of being approved by a UK court; he concluded, nevertheless, that it should have become apparent to the Home Secretary by 18 June 1999 that the single assurance on torture was not going to satisfy a UK court and that he should have concluded by 25 June 1999 that there was no real prospect of removing Mr Youssef. He therefore found that Mr Youssef had been unlawfully detained for 14 days.

[228] Section 6.

The cases highlight the dynamic nature of the Government's anti-terrorism policy, particularly after the House of Lords outlawed indefinite detention of non-national terrorist suspects in late 2004 ruling that such indefinite detention was incompatible with the ECHR.[229] The result was that if such suspects could not be deported then they would have to be released, albeit subject to control orders. The issue also became more pressing after the London bombings on 7 and 21 July 2005.

4. ALGERIA

In December 2002 the Home Office asked the FCO to reconsider previous advice that diplomatic assurances should not be sought from Algeria. The FCO resisted these calls until May 2003 when it agreed that specific and credible assurances might be acceptable.[230] Algeria was accordingly approached in 2004, but progress was slow.

The SIAC cases of Y, BB, and U, and G highlight a shift in the way the policy was used by 2006. In *Youssef* it was relatively clear that the applicant would have been able to show that there were substantial grounds that the ″real risk″ existed, and that the diplomatic assurance was accordingly being sought to mitigate that risk. In contrast, in the majority of these later cases, assurances were used (along with other points) to argue that these deportees would not face a substantial risk if returned to Algeria. A major factor was that human rights in Algeria were seen to have improved since 2004 as the country moved away from civil war,[231] and the assurances were used to highlight the view that the political climate had changed in Algeria, thereby allowing for the protection of the human rights of the returnees. Nevertheless, in all such cases if there was no substantial risk then why bother with a diplomatic assurance at all?

On 11 July 2006 Mr Blair signed an Exchange of Letters with Algerian President Bouteflika, a "commitment…to human rights and fundamental freedoms such as the freedom of movement and the right of abode, the right to take legal action, the right to be informed of the reasons for one's arrest or detention, the right to the presumption of innocence, the assistance of legal council and the right to a fair hearing and public hearing by a competent and impartial court."[232] The commitment allows for ″special assurances″ to be requested in individual cases.

a) Case of Y

In the case of Y specific assurances were agreed, and given the fact that the applicant had been convicted in absentia and would be detained on arrival he would have the following rights:

1. To appear before a court for the purpose of obtaining a decision as to the legality of his arrest or detention, be informed of the charges laid against him, and to be informed of his right to be assisted by counsel of his choice and to make immediate contact with such counsel.
2. Legal aid.
3. That he may not be detained otherwise than by competent judicial authority.

[229] Non-nationals had been held under Part 4 of the Anti-terrorism, Crime and Security Act 2001 in December 2004.

[230] *MT* (*Algeria*) and others v. Secretary of State for the Home Department [2007] EWCA Civ 808, para 33.

[231] Y (Algeria) v Secretary of State for the Home Department, SIAC, 24 Aug. 2006, para 181.

[232] Letter to President Bouteflika from Tony Blair, 11 July 2006, House of Commons Deposited Paper 06/1586, pp 1-2.

4. He has the benefit of the presumption of innocence until his guilt has been established lawfully.
5. To inform one of his family or friends of his arrest or detention.
6. To be visited by a doctor.
7. To respect in any circumstances for his human dignity.
8. That if he is retried and found guilty and the death penalty is imposed, the 1993 moratorium on executions would apply.
9. That if he has not been previously involved in collective massacre, rape or explosive attacks in public places he will be eligible to benefit from the provisions of the Charter for Peace and National Reconciliation and the subsequent legislation implementing it.[233]

Particularly stark was the lack of any provisions for monitoring; the UK had wanted to include an independent monitoring arrangement but the Algerian Government would not agree to it.[234]

> It was the British Government's view that if Y were to allege a breach of the assurances, the British Government would seek an immediate report of the circumstances from the Algerian authorities, would request access to the detainee and consider what further action to take with the Government of Algeria.[235]

As Algeria refused to have a monitoring system it is unclear whether British officials would be given access even if a complaint was made. What is also evident is that there is no explicit assurance relating to ill-treatment, only the vague term ″respect for dignity″. Given these problems, the Home Office altered its position during the case and began to rely more on Algerian domestic legal provisions.[236] The consequence of these provisions was that Y would probably only be held in detention for a short period by the judicial authorities, and not by the security services, to determine whether he is eligible for an immunity; it was thus argued that monitoring would not be as important. These provisions, along with the improvement in the security situation in Algeria, led SIAC to hold there was not a real risk that Y would face Article 3 ill-treatment if returned.[237] However, as more information came to light about the legal provisions in Algeria and their interest in Y it became apparent that this was not going to be the reality.

b) Case of BB

In the case of BB[238] the domestic provisions were not relevant and thus SIAC reviewed the worth of the individual assurances in relation to him, stating that four conditions needed to be met by an assurance:

i. The terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;
ii. The assurances must be given in good faith;
iii. There must be a sound objective basis for believing that the assurances will be fulfilled;

[233] Y (Algeria), 24 Aug. 2006, para 241.

[234] Y (Algeria), 24 August 2006, paras 227, 237.

[235] Y (Algeria), 24 August 2006, para 259.

[236] Y (Algeria), 24 August 2006, para 333.

[237] Y (Algeria), 24 August 2006, para 381.

[238] BB (Algeria) v Secretary of State for the Home Department, SIAC, 5th Dec. 2006.

iv. Fulfilment of the assurances must be capable of being verified.[239]

SIAC showed its willingness to accept assurances despite their non-binding nature provided it was satisfied that it is in the long term interest of the receiving state to comply with the assurance, because then it is likely that it would be complied with.[240] The growing diplomatic relations between the UK and Algeria, as evidenced by a number of treaties on judicial cooperation and extradition, was seen as important. This position, however, does not take adequate account of the impact future changes in government or other events could have on diplomatic relations.

Further, SIAC stated that monitoring was not the only way of verifying an assurance, and it was willing to accept the significantly lesser provision that UK officials would be able to maintain contact with deportees not in detention and with the next of kin of those detained. It also took the view that the work of NGO's - who oppose the use of assurances and would therefore be looking to find out if they were breached - would provide verification.[241] Thus it accepted a similar assurance to that used in the case of Y, for the purpose of determining whether or not there are substantial grounds for believing that BB would face a real risk of being subjected to treatment contrary to article 3 if deported to Algeria. SIAC, taking in to account the assurance, held that there was no real risk.

c) Case of G

SIAC also considered the case of *G*, a mentally ill detainee who appealed against the decision to deport him to Algeria. This case is important because the Home Secretary accepted, due to G's condition, for the first time in SIAC that without the assurance, given in similar terms as in the case of Y above, that there would be a real risk that he would be subjected to torture or other ill-treatment.[242] This SIAC panel agreed with the decision in *BB* regarding the conditions for assessing assurances through placing greater emphasis on the importance of verification, going as far as to state that "lack of verification may preclude treating an assurance as sufficiently reliable."[243] Another important aspect of this case was whether the security services would comply with the assurance, but this was considered in the closed judgement.[244]

While accepting that the mental health condition of G lowered the threshold for treatment prohibited by article 3,[245] the SIAC panel thought that as the Algerian Government would want to avoid accusations of ill-treatment, his mental state would be taken into account.[246] However, it accepted that it was unclear how this would be achieved. Given other evidence that detainees returned to Algeria under the deportations with assurances programme have faced intimidation in the form of being able to hear the screams of other detainees being tortured,[247] this important issue was not clarified. The panel did consider the treatment of others recently voluntarily deported (that is, they had not pursued appeals against deportation) to Algeria with assurances. However, there was no evidence that these men

[239] BB, para 5.

[240] BB, para 18.

[241] BB, para. 21.

[242] G (Algeria) v Secretary of State for the Home Department, SIAC, 8 Feb. 2007, para 26 (d).

[243] G, para 28.

[244] G, para 34.

[245] G, para 22.

[246] G, para 44.

[247] U (Algeria) v Secretary of State for the Home Department, SIAC, 14 May 2007, para 17.

(known as *V* and *I*) had been ill-treated, although both had been held incommunicado for just under a week.[248]

The SIAC panel accepted that "G's detention on arrival will provide an opportunity for ill-treatment…that ill-treatment and tortured may be carried out by methods that leave no observable physical symptoms…[and] that there can be no absolute assurance that a DRS or other officer will not wish to inflict ill-treatment or torture."[249] However, ultimately it decided that the assurance and the political situation would lead the Algerian Government to ensure that those dealing with G would not ill-treat him and would impose disciplinary measures if they did.[250] The appeal was dismissed.

d) Case of U

The case of U, heard in April 2007 highlights the fact that since the previous cases had been decided four more Algerians had withdrawn their appeals and were deported in January 2007. These deportees were known as Q, K, H and P. All but Q were the subject of a specific assurance, and their treatment on return was thus examined by SIAC in U's case to test the "reliability and the limits of the assurances."[251]

Q was detained by the security service within a week of being returned, and although his Algerian lawyer said that as of 4 March 2007 he was in decent health, she expressed concern that while in detention "he heard the screams of people being tortured around him."[252] H had also claimed to have been subjected to similar treatment.[253] It was argued in *U* that this was used as a scare tactic to make those who had been returned more susceptible to questioning; to rebuke these claims, despite a risk of reprisals against the detainees, the UK Government notified the Algerian Ministry of Justice about the allegations, asking for a response. The Algerian reply suggested that the security officers responsible for Q's detention had not been questioned, and simply stated:

> On their (i.e. Q's and H's) release from custody, the above named persons stated that they had been treated with respect and that they had not received any inhumane or degrading treatment. The statements by these persons were included in the case file and are corroborated by medical certificates issued by the doctor who examined them in accordance with article 51(a) if the Code of Criminal Procedure.[254]

Regarding H's claim, the UK Government relied on apparent second hand knowledge from his brother of a visit by their parents which had not resulted in any reported problems with H's conditions in custody.[255] They also relied on a phone call with H's lawyer who reported no problems regarding treatment. However, it is unclear whether the specific claim that H heard people being tortured was asked of his lawyer and /or brother.

[248] G, para 35.

[249] G, para 39.

[250] G, para 43.

[251] U, para. 14.

[252] U, para 17.

[253] U, para 23, 25.

[254] U, para 19.

[255] U, para 26.

In regard to Q's claim, the UK embassy wrote to his family (which he had not nominated as a point of contact) and in response his sister telephoned the embassy and said that he was well.[256] Consideration does not seem to have been given to that fact that Q might not have nominated his family as a point of contact precisely because he would not want to discuss his treatment or mistreatment with them.

e) Y, BB and U in the Court of Appeal

The cases of Y, BB and U went to the Court of Appeal in *MT (Algeria) and others*.[257] The main issue was SIAC's reliance on closed material in considering the question of safety on return in all three cases. The applicants argued that the procedural component of Article 3 meant that the proceedings to determine whether somebody would face a risk of torture if deported had to be fair. This, they argued, would not be the case if closed evidence was allowed, but this was rejected, the Court of Appeal finding that there was no convincing European case law to displace the UK Act which allowed the procedure.[258]

Arguments to mitigate the reliance on diplomatically sensitive evidence, which did not involve the security services or state secrets, were also rejected. Two proposals were put forward. The first would have allowed applicants to be present during *in camera* hearings to restrict diplomatically sensitive material, but the Court of Appeal sided with the Government's position that the applicants were "the last people who ought to be admitted to that state's confidential diplomatic dealings."[259] The other proposal was to allow the applicant's open counsel to be privy to the diplomatically sensitive material on terms that they could not discuss it with their clients, the theory being that they would be in a better position to argue for their clients than the special advocates. This too was rejected because it was thought that it would place the counsel in a difficult position and "seriously undermine the careful division between counsel appearing in the open proceedings and the special advocates."[260] The court also took note of the Government's argument that SIAC takes rigorous care to ensure that the Secretary of State does not extend the closed process in an unreasonable way.

Only matters of law and not matters of fact can be appealed from SIAC.[261] The "question of what treatment the applicant risks receiving when returned to Algeria… is a pure issue of fact"[262] and in this case the Court of Appeal was therefore unable to consider many of the issues regarding the treatment the other deportees had received, including re-examining the claims of ill-treatment. The issue of whether the assurances can be properly policed was also a matter of fact.

The question whether prison conditions could amount to an Article 3 breach was, however, a matter of law. It had been reported that the prison authorities had shaved off H's beard and that Q had been held in a very small dirty cell which he had to share with two others, including shared toilet facilities. There was also evidence that Q was held a dormitory cell with 25 others and forced to take sleeping medication. The conditions had been described as "hell" by one of the men, who was only allowed 10 minutes exercise per day.[263] The Court of

[256] U, para 18.

[257] MT (Algeria) v SSHD [2007] EWCA Civ 808.

[258] MT, para 13.

[259] MT, para 20.

[260] MT, para 21.

[261] Section 7 SIAC Act 1997 and Section 30 (5) of Anti Terrorism, Crime and Security Act 2001.

[262] MT, para 97.

[263] MT (Algeria), para 170.

Appeal dismissed the appeals of U and BB on this ground, agreeing with SIAC's view of the lack of evidence to support the claims of Q and H and also that it could not be assumed that U or BB would be detained in the same conditions.[264] However, the court accepted U's argument that SIAC should not have looked at the risks of torture and bad prison conditions separately: the cumulative risk should have been considered, but this would not have changed the outcome according, the Court of Appeal.[265] Regarding BB, the case was remitted back to SIAC on the basis of closed evidence, and U's case too was remitted back on the basis of closed evidence and because SIAC had not adequately explained why the closed judgement did not undermine the conclusion it had reached in its open judgement.

Y's appeal succeeded because it was inappropriate for SIAC to rely on domestic provisions in Algerian law as providing any protection for him, SIAC having thought that he would be subject to an immunity provision and thus only detained for a short period, even though it became apparent that this was not the case and that SIAC had misinterpreted that provision. The Court of Appeal decided that SIAC should have sought evidence that the immunity would have applied to Y, and therefore his case too was remitted back.

f) SIAC reconsiders the cases of Y, BB and U

SIAC reconsidered the cases of Y, BB and U on the issue of safety on return, passing a joint judgment on 2 November 2007; the main issue was now the political situation in Algeria, SIAC having heard expert evidence that the political situation had not greatly improved - there had been seven bombings, including speculation that one was an assassination attempt on the President, since 11 April 2007.[266] SIAC found that Algeria had not responded in an authoritarian or lawless manner to these incidents and that reports of ill-treatment had not increased.[267]

Additional evidence was also heard that prison conditions in Algeria were poor, including statements that H had been held in crowded pre-trial detention conditions and had to sleep on the bare floor. These were dismissed on the grounds that even if true they would not amount to a "gross and systematic violation of rights under Article 3."[268] SIAC relied instead on evidence from a visit to the prison where H was held by the International Centre for Prison Studies, even though they did not inspect the part of the prison where he was kept. Their report was largely positive, apart from the view that prison discipline was excessive.[269] Further evidence of H's claims was put forward, including statements from his lawyers that he was subjected to screams of people being tortured,[270] but it was dismissed again as a "mere possibility."[271] SIAC then considered the return of two others to Algeria with assurances, X and A, no allegations of ill-treatment having been made in respect of these men.

Once more, SIAC dismissed all three appeals. After determining that Y would be arrested on arrival in Algeria and held by the security services for up to 12 days, SIAC determined that he would not be at risk of ill-treatment because he was unlikely to have any information of

[264] MT (Algeria), para 173.

[265] MT (Algeria), para 174.

[266] Y, BB, U remitted appeals, SIAC, 2 November 2007, para 9.

[267] Y, BB, U, 2 November 2007, para 22.

[268] Y, BB, U, 2 November 2007, para 17.

[269] Y, BB, U, 2 November 2007, para 18.

[270] Y, BB, U, 2 November 2007, para 19.

[271] Y, BB, U, 2 November 2007, para 20.

current operational value.[272] BB's appeal was dismissed because SIAC thought it unlikely that he would be prosecuted and thus there was little chance he would be held or interrogated by Algerian authorities.[273] U's appeal was dismissed, again on the basis of the closed evidence, though presumably SIAC explained itself properly in the closed judgement this time.

In these cases, SIAC showed its willingness to effectively defer to the Government on almost every issue: the use of closed sessions to protect only the state's interests rather that the individuals'; to take at face value the somewhat cursory investigations of previous ill-treatment under the programme; to adopt 'high' standards for showing previous abuse of deportees under the policy and 'low' standards for showing political stability and interests. The burden is clearly on applicants to disprove each of the Governments arguments and when it comes to political relations the Government holds all the evidence. By 29 April 2008 eight people altogether had been deported to Algeria after withdrawing their appeals against deportation.[274] The cases of BB and U have been joined with the Othman case, discussed below, and were heard before the House of Lords in October 2008 where many of the legal issues were re-examined. Judgement is pending.

5. JORDAN

On 10 August 2005 the Jordanian Government gave assurances to the UK Government which reversed the FCO view given in October 2001 that Article 3 would prevent the deportation of terrorist suspects to Jordan. The Home Office had attempted since March 2003 to have the advice that assurances should not be sought from Jordan reversed, but it was not until May that year, after the Foreign Secretary agreed in general terms that MOUs could be sought to facilitate deportations, that negotiations with the country began.[275]

In July 2004 Jordan submitted a draft MOU, and following the House of Lords ruling out-lawing indefinite detention in *A and Others*[276] later that year the discussions were raised to a higher level between the Prime Minister and the King of Jordan, and in principle an MOU was agreed. Unlike the Algerian agreement it did not apply to named individuals but to any person accepted in writing by Jordan following a UK written request under the MOU. It states that both parties will comply with their international human rights obligations regarding individuals returned under the agreement. Provisions are made for detained persons to be treated humanely including adequate accommodation, nourishment, and medical treatment to international standards; to be brought promptly before a judge or judicial officer to review the legality of any detention; to be informed of the reasons for detention promptly; for at least fortnightly visits from a independent monitoring body if detained within 3 years of the return; and certain fair trial provisions.

a) Case of Othman

The Othman case was the first test of the Jordanian MOU. Omar Othman is an alias for Abu Qatada, a Muslim cleric subject to an international travel ban by the UN Security Council for involvement with Al-Qaeda. On 11 August 2005 the Home Secretary issued a notice of

[272] Y, BB, U, 2 November 2007, para 28.

[273] Y, BB, U, 2 November 2007, para 30.

[274] House of Commons, Hansard, Written Answers for 29 April 2008, Col 335W.

[275] Othman, SIAC, 26 February 2007, para 171.

[276] A and others v. SSHD; X and another v. SSHD [2004] UKHL 56.

intention to deport him to his native Jordan in the interest of national security. He had previously been held under Part 4 of the Anti-terrorism, Crime and Security Act and was subject to control orders under the Prevention of Terrorism Act, before he was taken into immigration custody. He appealed to SIAC. SIAC heard the case in May 2006 and passed judgement on 26 February 2007.

Othman, born in 1960 in Bethlehem, then part of Jordan, arrived in the UK in 1993 and claimed asylum on the basis that he had been tortured by Jordanian intelligence services and would be again if he was returned.[277] In SIAC the Government did not adopt the position argued in the Algerian cases - that the human rights situation in Jordan had recently changed and that the MOU merely reinforced this, or that without the MOU there would be a real risk of mistreatment as would be the position in the Libyan cases[278] - but it did rely heavily on the MOU. This led to a full examination of the MOU and to some extent the policy of diplomatic assurances generally. Importantly, Jordan does allow human rights groups to operate and they often visit detention centres; the ICRC is also allowed access to all prison facilities, including those run by the intelligence service and military intelligence. There have, however, been allegations of incommunicado detention.[279]

The Adaleh Centre (AC) is the nominated monitoring organisation, although it was not the first organisation approached. The National Centre for Human Rights, a Jordanian statutory body, was asked but refused to carry out the role, apparently because of "domestic political sensitivity."'[280] In contrast to other agreements involving monitoring, terms of reference were drawn up stating the obligations and quite strict conditions which the monitoring body would have to meet. Despite this the AC's independence and capacity to fulfil the terms of reference was questioned: it's a small organisation with five full time staff, seven part-time and a number of volunteers. It was expecting to grow and would need help in providing:

> Training: for judges and others who would deal with cases involving those deported, for doctors and lawyers who would be involved in interviewing and detecting signs of whether a detainee had been mistreated and for the own staff who would have to deal with all the bodies involved in these cases.[281]

The training would come from the UK Government, and by the time SIAC heard the case the FCO had given £67,000 to the AC. However, cross-examination of the UK Government's expert witness revealed that the AC "had no record, history or experience of investigating and monitoring the treatment of individual detainees or of investigating complaints about their treatment."[282]

SIAC then looked at how the MOU would operate in practice, particularly how promptly the applicant would be brought before a judge; the lack of reference in the MOU and under domestic law to access to a lawyer during interrogation at the GID; the effectiveness of the

[277] Othman v Secretary of State for the Home Department, SIAC, 26 February 2007, para 5.

[278] A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56.

[279] Othman, SIAC, 26 February 2007, para 134.

[280] The constitutionality of the MOU had become a political issue between the Jordanian Government and Parliament, the latter arguing it had to agree to the MOU. The National Centre for Human Rights did not want to get involved in this controversy - Othman, SIAC, 26 February 2007, para 179.

[281] Othman, SIAC, 26 February 2007, para 190.

[282] Othman, SIAC, 26 February 2007, para 196. At least one of the applicant's own expert witnesses had not heard of the AC before the case and both concluded that it was not a leading Jordanian human rights organisation and neither was it an NGO in the usual sense as it operated as a for-profit law centre. There were also unsubstantiated claims of personal links to the Government, including a family link between its executive director and Jordon's General Intelligence Directorate (GID) – para 204-205.

monitoring body; lack of provisions for the monitoring body to choose a doctor for any medical examinations or have it done outside of the prison.[283]

In this case SIAC accepted that the political climate and the diplomatic relationship between the UK and Jordan, and the existence of any sanction for breach of the MOU, would be the key factors for the likelihood that it would be complied with. While agreeing that the MOU was not legally enforceable by the applicant or even the UK Government[284] and that there were no provisions for sanctions, the Government's expert argued that the MOU was politically binding in that military, economic, cultural and other forms of cooperation might suffer as a result of a breach.[285] It remained true, however, that the applicant would only have the UK Government's word that any action would be taken for his benefit. Importantly, SIAC concluded that there had not been a general improvement in the human rights situation in Jordon,[286] thus increasing the Home Secretary's reliance on the MOU.

Evidence from the UN Special Rapporteur on Torture, who had just completed an official visit to Jordan, reached SIAC after the hearing. He raised a number of important issues in a press release that was given to SIAC: contrary to his agreed terms of reference, he had not been allowed to speak privately to those in GID detention (where the applicant would be held); he was obstructed during his visit by the Criminal Investigation Department who tried to hide evidence; he concluded that "torture is systematically practiced by both the GID and the CID."[287] The Home Secretary sought to discount this evidence on the ground that the MOU would still protect the applicant, that the press release was not a balanced view of the visit and was wrong on a number of issues such as how torture is criminalised in Jordan. It was also put forward that media interest in the case would help protect Othman from torture.[288]

SIAC considered a report by the Independent Expert on the Protection of Human Rights whilst Countering Terrorism expressing concerns that assurances should not be used to circumvent the absolute obligation not to expose someone to a risk of torture. The Independent Expert went further however, criticising rudimentary assurances, stating that if assurances were to be used they should conform to minimum requirements including: prompt access to a lawyer; recorded interviews with those present being identified; independent and timely medical examinations; prohibition on incommunicado detention or detention in undisclosed places; independent and appropriately qualified monitors conducting prompt regular visits which include private interviews.[289]

SIAC discussed some international cases of deportation involving assurances and one involving beatings by Jordanian officials, though not subject to an assurance. The UK

[283] The Home Secretary argued that SIAC should place particular reliance on its expert witness, going so far as to submit that SIAC was "poorly equipped to review the assessments and decisions in the field of diplomatic relations." SIAC found this "wholly unpersuasive," ruling that it would decide how much weight to give to witnesses - Othman, SIAC, 26 February 2007, para 339.

[284] Othman, SIAC, 26 February 2007, para 279.

[285] Othman, SIAC, 26 February 2007, para 284.

[286] Othman, SIAC, 26 February 2007, para 334.

[287] Othman, SIAC, 26 February 2007, para 264 -266.

[288] Othman, SIAC, 26 February 2007, para 267 and 268. A previous report in 2005 by the Special Rapporteur which mentioned the use of diplomatic assurances generally was also discussed, the main points being that parties to diplomatic assurances are usually bound by international obligations not to torture people, and seeking specific assurance for exceptional treatment for a few leads to double standards; the influence of the receiving state's government over members of its security forces; even the best monitoring provides no guarantees against torture; both states would have an interest in denying that returnees had been tortured which might lead to pressure being put on the monitoring organisation - para 293. As the UK Government's expert Mr Oakden's main point against this was that the Special Rapporteur did not understand how MOUs work in practice; he stated that "states look not only to the legal status of international documents when deciding their behaviour but to the whole political context." He went on to criticise UN international human rights treaties because their enforcement mechanisms were weak, stating that the MOU provided more specific protection towards identified individuals - at para 296.

[289] Othman, SIAC, 26 February 2007, para 297.

Government sought to discount these cases either because the assurances were not as strong as the present one or because the Jordanian officials' abuses would not happen given the present political relationship with the UK and with the MOU. SIAC also considered the likelihood that Othman would be transferred to or interrogated by a third country. It was particularly concerned with the possibility he might be rendered to the US, but concluded that since Jordanian law did not permit the deportation of its own nationals it was not a real risk.[290]

The detention conditions that the applicant would face if convicted in Jordan were deemed not to breach the high standard of article 3; this despite SIAC accepting that such an inmate would experience "uncomfortable and unpleasant conditions at times, sometimes with inadequate food, water and sanitation,"[291] and it not doubting he could face "some harshness even beatings, from the guards."[292] In considering the risk to the applicant immediately on return and during questioning by the GID, SIAC discussed the risk that he would be tortured or otherwise ill-treated in order to obtain a confession, or for intelligence purposes. It accepted that there was a real risk for ordinary Islamist extremists in GID detention before charge,[293] and that this would be sanctioned or overlooked at a senior level in the GID.[294] However, applying Othman's circumstances, SIAC decided that a number of factors would prevent him from being abused: the publicity the applicant attracts, particularly the support he receives in Jordan on account of anti-western views;[295] monitoring by the Adaleh Centre would provide additional protection;[296] other NGOs would "keep a vigilant eye on the way in which the Adaleh Centre dealt with issues of access and allegations of ill-treatment."[297]

SIAC did not see the MOU nor the monitoring as the "crucial component which would make what would otherwise be a real risk of a breach of Article 3 into something else."[298] While the MOU did influence the panel as to the fair trial conditions it merely reinforced its view that there was no Article 3 risk. It also said that it was not for the panel to take a view of the wider implications of using assurances, namely, that they may undermine long terms attempts for compliance with human rights obligations more generally.

One issue which had been raised was the incentive, or lack of it, for both parties to admit to any breach of the MOU. SIAC failed to address this. It acknowledged that the UK programme of deportations with assurances would suffer from any breach, but pointed to the mere possibility that abuse or a complaint would be made public as sufficient incentive for a thorough investigation.[299]

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[290] It also drew a distinction between the only case of rendition to the US from Jordan given in evidence because it involved a dual US-Jordanian citizen - Othman, SIAC, 26 February 2007, para 480. The risk that the applicant would end up in an alleged CIA detention facility in Jordan was also rejected because of the MOU and political considerations.

[291] Othman, SIAC, 26 February 2007, para 485.

[292] Ibid.

[293] Othman, SIAC, 26 February 2007, para 350.

[294] Othman, SIAC, 26 February 2007, para 352.

[295] Othman, SIAC, 26 February 2007, paras 355 and 356. SIAC went as far as stating that Othman's profile is such that if he were abused it could de-stabilise the country. Due to this, even without the MOU, the Government would work to prevent any abuse.

[296] Othman, SIAC, 26 February 2007, para 360. The UK's arguments that the organisation would be an effective monitor were accepted despite claims of its inexperience - SIAC thought it would "be keen to show its mettle."

[297] *Ibid*.

[298] Othman, SIAC, 26 February 2007, para 490.

[299] Othman, SIAC, 26 February 2007, paras 504- 507. It didn't deal with the possibility that the parties have an incentive to actively cover up any allegations or abuses. It did, however, consider whether the appellant would be prepared to make allegations of ill-treatment to the AC, given the risks of reprisals. Here SIAC decided that monitoring would reduce the fear of future reprisals because perpetrators would, it said, discover over time that ill-treatment would be punished and not over looked because of the MOU. It glossed over the fact that the Special Rapporteur was refused entry to the GID facility despite having

Issues of disclosure were brought up by the Special Advocates and discussed in the open judgment. In such a case the Home Secretary is under a duty to disclose any material which is in the possession of the Government, including by the FCO and Secret Intelligence Service, which might undermine the case. They argued that the Home Secretary had not provided adequate information in a timely fashion which could advance the case of the applicant.[300] This complaint of late disclosure of information was rejected because an adjournment could be sought.

The Special Advocates also argued that SIAC had not been provided with documents and comments relating to the draft MOU; SIAC agreed but rejected this point because they had chosen not to question Mr Oakden, the UK Government's expert, about the issue. This raises questions as to whether the Special Advocate's system is working behind closed doors.[301] In the judgment Mr Justice Ouseley acknowledged that because the Home Secretary's disclosure was so broad and so many documents were provided:

> Material which could be relevant to another case has come to light in the course of another SIAC case. Sometimes the file has not been examined, perhaps because of the way in which the files are structured. It may be that the possible relevance had not been appreciated, and it may be that on examination it still had no relevance.[302]

However, this was thought to be normal in any large scale document search in litigation. SIAC ultimately dismissed the appeal.

b) Case of VV

The case of VV also involved deportation to Jordan and was decided on 2 November 2007. It is notable for two reasons. Firstly, SIAC considered recent evidence from Human Rights Watch (HRW) of the torture of detainees in Jordan. This led the Home Secretary to accept that without the MOU VV would face a risk of treatment in breach of article 3 and could therefore not be deported. The reliance on the MOU now became similar to that of the Libyan cases where it had to actually reduce the risk below the real risk threshold. Secondly, the Jordanian Government's written acceptance that the agreement applied to VV, as the MOU required, was not met.

HRW inspected a Jordanian prison in August 2007, and was able to show SIAC that they had heard complaints of "persistent ill-treatment by prison guards, including hanging prisoners by iron handcuffs in a large cage-like cell, and beatings with cables."[303] The Jordanian authorities also refused to give a written acceptance that VV will be treated in accordance with the MOU, despite the explicit need for such in the MOU. Instead, the case was put forward on the basis of an oral remark from the Jordanian legal adviser in the Ministry of Foreign Affairs.[304] Mr Layden, the expert witness for the Home Secretary in this

had prior permission, even after accepting that this showed the GID could refuse access to the AC monitors "just when a visit was most needed" – para 512.

[300] Othman, SIAC, 26 February 2007, para 528.

[301] Othman, SIAC, 26 February 2007, para 536.

[302] Othman, SIAC, 26 February 2007, para 534.

[303] VV v SSHD, SIAC, 2 Nov. 2007, para 15. After the visit they also heard of reprisals against those they had spoken to. A second visit was carried out and they found extensive evidence of mass beating by the guards including signs of injury and receiving statements. It was concluded that nearly all of the inmates had been beaten, probably as the result of a new director of the prison wanting to impose his rule. The director was later removed from the prison. This evidence was not challenged by the Home Secretary.

[304] VV v SSHD, SIAC, 2 November 2007, para 20.

case, acknowledged that Jordan's Ministry of the Interior initially wanted VV returned without the protection of the MOU; however, he claimed, on the basis of closed evidence that this was not for sinister reasons. SIAC accepted this and stated that there was no significance in the procedural breach.

Despite these two issues SIAC accepted that the MOU would protect VV and that in accordance with it he would be treated in a humane and proper manner.[305] In the Othman case much was made of the fact that the GID had been involved in negotiating the MOU, but here an unofficial promise was accepted without the explicit assurance at all levels justifying the MOU. Despite this clear difference, the same reasoning was adopted from the Othman case for believing that the GID would apply the MOU. It is difficult to understand any decision partly made in closed sessions, but it is hard to think of any reason which might justify allowing the two parties to go against their own promises. It is also interesting that the possible diplomatic sanctions for breaching the MOU were in this case, unlike in Othman, discussed only in the closed session.[306] The appeal was dismissed.

c) Othman in the Court of Appeal

After judgment in VV, the *Othman* case went to the Court of Appeal which gave judgment on 4 April 2008. It considered whether SIAC placed too much reliance on the Jordanian MOU given that there was a prima facie case that ill-treatment would occur without it, although the UK Government did not explicitly accept this as it had done regarding Libya. The Court rejected the submission that a distinction should be made between *Othman* and *MT and Others* based on an argument that in the latter case SIAC was satisfied that gross violations of human rights no longer took place in Algeria whereas it did not with regard to Jordan. The Court of Appeal, the same bench as sat in *MT and Others*, rejected the distinction as one of fact only for SIAC to decide.[307]

The appeal was upheld, however, on the ground that SIAC erred in not giving enough weight to the fact that the Jordanian State Security Court might allow evidence obtained through torture of third parties to be use in any trial of the appellant. SIAC had approached this as one of many fair trial issues and then based its decision on the fair trial question as a whole. The Court of Appeal ruled that evidence obtained though torture should be tested separately from the general fair trial standards in article 6, because evidence obtained through torture was primarily an issue under article 3. As Lord Bingham made clear in *A & Others* torture evidence should be disallowed.[308] The Home Secretary has appealed the Court of Appeal decision to the House of Lords in a joint appeal with the RB and U cases regarding Libya.

6. LIBYA

On 18 October 2005 the Governments of the UK and Libya concluded an MOU which included fair trial standards, provisions for deportees to be treated in a humane manner and an independent body ("the monitoring body") to be nominated by both sides to monitor the implementation of the assurances given under the MOU, including any specific assurances, by the receiving state:

[305] VV, SIAC, 2 November 2007, para 21.

[306] VV, SIAC, 2 November 2007, para 30.

[307] Othman v SSHD, 9 April 2008 EWCA Civ 290, para 7.

[308] A & Ors v. Secretary of State for the Home Department [2005] UKHL 71 (8 December 2005) para 17.

> The deported person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned, he will be entitled to contact promptly a representative of the monitoring body and to meet a representative of the monitoring body within one week of his arrest, detention or imprisonment. Thereafter he will be entitled to regular visits from a representative of the monitoring body in co-ordination with the competent legal authorities. Such visits will include the opportunity for private interviews with the person and, during any period before trial, will be permitted at least once every three weeks. If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so.[309]

The UK had thus been able to get a receiving state to agree to substantial monitoring provisions, but what was not clear at this stage was who was going to carry it out.

a) Cases of DD and AS

In late 2005 the Home Secretary began proceedings to deport DD and AS to Libya on national security grounds. The Government did not contest the general thrust of NGO and other reports on human rights in Libya, as it had done in the Algerian cases, and it further accepted that without an assurance it "could risk breaching its ECHR obligations if it were to deport them."[310] Witnesses for the Home Secretary accepted that:

> but for the Memorandum of Understanding, the UK Government would have serious concerns about the real risks faced by the Applicants as extreme Islamist opponents of the Qadhafi regime and their alleged membership of the LIFG: torture or other ill-treatment, incommunicado detention without trial, an unfair trial, imprisonment and torture as political prisoners, a risk of the imposition of the death penalty and perhaps of it being carried out.[311]

Further, the Home Office Operational Guidance Note issued to immigration decision makers in October 2006 stated:

> The following human rights problems were reported in 2005: … torture; poor prison conditions; impunity; arbitrary arrest and incommunicado detention; lengthy political detention; denial of fair public trial; …. It concludes:
>
> The Libyan government continues to be repressive of any dissent and opposition political activists and opposition Islamic activities are generally not allowed to operate on any substantial scale within the country. If it is accepted that the claimant has in the past been involved in opposition political activity or is a radical Islamic activist for one of the opposition political or Islamic groups mentioned above then there is a real risk they will encounter state-sponsored ill-treatment amounting to persecution within the terms of the 1951

[309] Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Co-operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland concerning the provision of assurances in respect of persons subject to deportation, 18 October 2005.

[310] DD and AS v Secretary of State for the Home Department, SIAC, 27 April 2007, para 132.

[311] DD and AS, 27 April 2007, para 133.

> Convention. The grant of asylum in such cases is therefore likely to be appropriate.[312]

Both the Home Secretary and the applicants agreed that torture is common in Libya:

> Torture is extensively used against political opponents among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi. It is practised for the purposes of obtaining confessions for use in trials against the confessor or other defendants; it is used in intelligence gathering although there may be some realisation growing that that is not as generally useful as humane treatment. There is evidence that it is used for punishment. The holding of political prisoners, who could include Islamist extremists, in conditions which breach Article 3 ECHR, incommunicado and in several instances without trial for many years, is a disfiguring feature of Libyan justice and punishment. The position of ordinary prisoners has shown some improvement in the last few years.[313]

Thus in this case reliance was being placed more on the MOU than with the assurances from Algeria and even from Jordan where the human rights situation was not always explicitly accepted as necessitating the MOU. An important factor in judging whether the assurances would be enforced was Libya's system of government, particularly the role of its *de facto* leader Colonel Qadhafi. SIAC also drew attention to a report submitted in evidence by Professor El-Kikhia, stating "Libya is governed by edict and the rule of law is absent in any meaningful sense."[314] Another important factor in weighing the MOU was the nature of civil society in Libya.

On 8 May 2006 the British and Libyan Governments jointly appointed the Qadhafi Development Foundation (QDF) as the monitoring body. Its president is Colonel Qadhafi's son. The Home Secretary sought to counter arguments against the independence and effectiveness of the QDF by down-playing its importance, claiming that 90 percent of the confidence that the assurance would be adhered to "came from [an] assessment of how Colonel Qadhafi thought and acted."[315] SIAC took this to mean that the MOU would only protect against a rogue guard or merely act persuasively as far as Colonel Qadhafi was concerned.[316] The Home Secretary argued that if the MOU was breached it would affect areas important to Libya including "intelligence, counter-terror and defence;"[317] economic arguments were also used to emphasise a 'they need us more than we need them' attitude.

> The Home Secretary had accepted that without the assurance the applicants would face a real risk of treatment contrary to article 3, and SIAC accepted that if the assurances were adhered to and if the monitoring worked as intended then the applicants would be protected.

[312] DD and AS, 27 April 2007, para 137.

[313] DD and AS, 27 April 2007, para 301.

[314] DD and AS, 27 April 2007, para 183.

[315] DD and AS, 27 April 2007, para 284.

[316] DD and AS, 27 April 2007, para 331- 332.

[317] DD and AS, 27 April 2007, para 288. How far the UK would go to support a Libyan national in Libya was also questioned, with the Home Secretary conceding that the UK has never broken off diplomatic relations because of the treatment by a foreign country of one of that country's own nationals – para 289.

SIAC concluded that the regime's self-interest would be insufficient to ensure the MOU would not be breached.[318] It found that there was too much scope for something to go wrong and little to deter ill-treatment.[319] Significantly, it went against evidence from an important witness for the Home Secretary, the UK Ambassador to Libya, who was involved in much of the negotiations around the MOU. SIAC allowed the appeal.

b) DD and AS Court of Appeal

The Home Secretary appealed to the Court of Appeal in 2008, but the appeal failed and the SIAC ruling was upheld. Appeals from SIAC can only be on points of law, and the appeal was solely concerned with the issue of safety on return to Libya. The UK Government had four grounds:

> *i) SIAC failed to give sufficient weight to the evidence of the FCO witness Mr Layden and/or wrongly substituted its own assessment for his and/or failed to give sufficient reasons for rejecting his evidence.*
>
> *ii) SIAC failed to direct itself as to the correct test to measure the degree of risk that the respondents would suffer ill-treatment contrary to article 3 on return.*
>
> *iii) SIAC erred in lowering the test for risk on return to take account of the unpredictability of future events in Libya.*
>
> *iv) SIAC's findings of fact do not warrant, and are not capable of supporting, a conclusion that substantial grounds have been shown for believing that the respondents face a real risk of suffering treatment contrary to article 3 on return.*[320]

If successful, the first ground of appeal would have made it difficult for any appeals to SIAC to succeed - the Government would always be able to produce expert witnesses with far more experience on diplomatic relations between the UK and whichever country was involved than the other side could call. The Home Secretary was basically arguing that SIAC should have taken Mr Layden's opinions as fact, and if accepted it would have created a serious imbalance of power in favour of deportation. The Court of Appeal ruled that the considerable weight that SIAC had given to Mr Layden was appropriate and that it was still for SIAC, not the Government's witnesses, to decide on the facts.[321]

On the issue of the correct test the Home Secretary argued that SIAC had applied the wrong test because it repeatedly phrased the question as "whether there was a real risk of the respondents suffering torture contrary to Article 3 on return to Libya," rather than the more standard "whether there were substantial grounds for believing that the respondents would face" a real risk.[322] The Court of Appeal rejected this argument, and using language from the ECtHR it showed that the phrase "substantial grounds for believing" imposes no higher standard than that there "must be a proper evidentiary basis for concluding that there was such a real risk,"[323] which SIAC had done in considering a substantial amount of evidence.

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[318] DD and AS, 27 April 2007, para 356-363.

[319] DD and AS, 27 April 2007, para 371.

[320] AS and DD v Secretary of State for the Home Department, EWCA 9 April 2008, para 5.

[321] AS and DD, 9 April 2008, para 33.

[322] AS and DD, 9 April 2008, para 23.

[323] AS and DD, 9 April 2008, para 24.

The Home Secretary then argued that SIAC should have adopted a higher threshold because of the national security risk the returnees posed. However, the ECtHR's ruling in *Saadi v Italy*,[324] made as the Court of Appeal was hearing *AS and DD*, expressly rejected this approach. *Saadi* rejected arguments that the threshold for deciding on real risk should be the higher standard of "more probable than not" rather than "substantial grounds for believing."[325] The Home Secretary attempted to argue that in cases where an applicant argued a historical breach of article 3 the breach should have to be proved beyond reasonable doubt.[326] This very high standard would have made it almost impossible for SIAC to accept that previous returnees had been abused unless there was very strong evidence; however, the Court of Appeal rejected this argument, as well as an interpretation that *Saadi* put the test as one of a real and immediate risk.[327]

The position which the Court of Appeal accepted was that the meaning of "substantial risk" meant that the threshold was high, "a stringent test which is not easy to satisfy,"[328] though not as high as the UK Government wanted. The court then had to decide whether accepting the unpredictability of future events lowered the threshold. After examining all SIAC's reasons regarding future risk - whether the regime would stick to the MOU in all circumstances, the control over security personnel, the independence of the QDF, and the role of international pressure on Libyan human rights practices - the Court of Appeal concluded that these did not lower the standard of the test:

> SIAC fully understood and sought to apply the correct test. Its responsibility was to consider the many pieces of evidence in a complex picture and to decide whether there were substantial grounds for believing that there was a real risk that the respondents would be tortured some time after their return to Libya, notwithstanding the terms of the MOU. We are not persuaded that SIAC erred in principle by either misstating or misapplying the test.[329]

The appeal was dismissed.

7. HOUSE OF LORDS APPEALS

The Algerian cases of *BB* and *U* were joined with the Jordanian case of *Othman* for a joint appeal to the House of Lords, and hearings began on 23 October 2008.

8. UK & DIPLOMATIC ASSURANCES AT THE INTERNATIONAL LEVEL

Apart from these attempts to use diplomatic assurances in UK court the Government has also taken a lead in trying to persuade other states, particularly in Europe, to adopt the same policy. It has twice intervened in the ECtHR in attempts to overturn *Chahal* so that domestic courts can balance the risk of torture if a terrorist suspect is returned with "national security

[324] Saadi v. Italy, 37201/06, 28 February 2008.

[325] AS and DD, 9 April 2008, paras 53 – 55, referring to Saadi paras 137-139 and 140.

[326] AS and DD, 9 April 2008, para 61.

[327] AS and DD, 9 April 2008, para 64.

[328] AS and DD, 9 April 2008, para 65.

[329] AS and DD, 9 April 2008, para 81.

considerations."[330] It has also advocated the assurances policy in the G6 Group of EU Interior Ministers.

In the *Saadi*[331] case Italy sought to deport a suspected terrorist to Tunisia despite compelling evidence that he would face ill-treatment in breach of article 3. The order to deport was appealed to the ECtHR and as the case was being prepared Italy requested a number of assurances from the Tunisian authorities, the main requests sent on 29 May 2007 stating:

> Please give assurances that the fears expressed by Mr Saadi of being subjected to torture and inhumane and degrading treatment on his return to Tunisia are unfounded; please give assurances that if he were to be committed to prison he would be able to receive visits from his lawyers and members of his family.[332]

The Tunisian Minister of Foreign Affairs responded:

> Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.[333]

The UK intervened to attempt to persuade the ECtHR to "alter and clarif[y]"[334] its previous judgment in *Chahal* to allow the risk of article 3 treatment to be balanced against the threat to national security. It argued that as article 3 included the "general concept of 'degrading treatment'" it was not unreasonable to allow the threat that the person posed to be considered. It also argued that this would allow the article 2 right to life - of everyone - to be considered. Further, if a government could show a threat to national security then the standard of proof needed to prove a potential detainee would be at risk of ill-treatment should be higher.

In the ECtHR's ruling the question of diplomatic assurances became largely a side issue as the court accepted that a diplomatic assurance had not actually been made. It asserted that the "existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment."[335] The ECtHR, however, did not rule out the use of diplomatic assurances, but said that it would in future cases continue to consider "whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the convention."[336] The *Ramzy* case has not yet been heard.

[330] Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom Intervening in Application 2542/05 Ramzy v The Netherlands, para 3.3.

[331] Saadi v. Italy, 37201/06, 28 February 2008.

[332] Ibid, para 52.

[333] Ibid, para 55.

[334] Ibid, para 122.

[335] Ibid, para 147.

[336] Ibid, para 148.

9. THE UK IN THE COUNCIL OF EUROPE (COE)

At the G6 Group meeting of EU Interior Ministers on 18 October 2007, the UK, France, Germany, Italy, Poland and Spain (the six largest EU states) all agreed that a "mechanism of seeking assurances, on a government-to-government basis…could provide an effective way forward in some cases,"[337] and that they would keep the option of using diplomatic assurances open. It is unclear which country raised the matter as the conduct of G6 meetings are kept relatively confidential, but it is highly likely that the UK would have been a strong proponent of developing guidelines for the use of such assurances. The proposal came despite the COE Venice Commission legal opinion in March 2006 that strongly disagreed with the use of diplomatic assurances to protect against article 3 violations:

> The assessment of the reality of the risk must be carried out very rigorously. The risk assessment will depend upon the circumstances, meaning both the rights which risk being violated and the situation in the receiving State. The diplomatic assurances which are usually provided by the requesting State in order to exclude human rights breaches in its territory after the extradition or deportation is carried out may be appropriate as concerns risks of application of the death penalty86 or for fair trial violations, because such risks can in most instances be monitored satisfactorily. On the other hand, as regards the risk of torture, monitoring is impracticable in the vast majority of conceivable cases, especially bearing in mind the fact that, even after conviction in a criminal case, a State may torture a prisoner for the purpose of obtaining information. At the same time, it is impracticable to have a "life-long" responsibility for people who are removed out of the country.[338]

10. CONCLUSION

The UK Government's policy of deportations with assurances developed as a counter-terrorism measure following the 2004 House of Lords ruling that indefinite detention of foreign nationals without charge breached the Human Rights Act. The Government has relentlessly pursued this policy; however in so doing, rather than seeking to rely on the MOUs themselves, it prefers to put weight on and to exploit secretive diplomatic relations between it and the country involved, along with raising vague adverse economic consequences as a 'deterrent' against the other state breaching human rights.

It has attempted to stack the system against deportees at every stage, often successfully. Closed sessions are used to test the likelihood of risk of ill-treatment where there are national security considerations and/or where it might be detrimental to diplomatic relations or for any other public interest reason. In such circumstances, one of the most worrying aspects of the system relates to the disclosure of evidence and how the closed sessions work.

Also of concern is how the Government has attempted to argue in SIAC hearings that SIAC should accept the evidence of Government expert witnesses without demur. Further, it has looked to SIAC to use a "beyond reasonable doubt" test when considering historical breaches of article 3 protection, an approach which might well help improve the appearance

[337] Joint Declaration by the Ministers of Interior of G6 States, Sopot, 18 October 2007, pg 3.

[338] European Commission for Democracy through Law (Venice Commission) *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners*, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), para 140.

of some states' human rights record but which would prevent SIAC from considering most previous cases of abuse, as allegations are rarely fully investigated in these counties.

Some aspects of SIAC's approach, such as its willingness to allow great latitude to the Government, are also worrying. Further, and as shown, the explicit breach of a procedural protection in one MOU was made worthless as SIAC accepted such a violation of an MOU's terms as a mere procedural breach.

Finally, and not content with seeking to extend its policy domestically the UK has been a staunch advocate of it abroad, particularly in Europe, encouraging others to adopt this dangerous approach to the principle of non-refoulment.

V. FINAL CONCLUSIONS AND RECOMMENDATIONS

At the beginning of this Report, we referred to the present UK Government's anti-torture initiative launched ten years ago with the unequivocal undertaking that the UK would be a country that "speaks clearly and acts effectively against torture, and behalf of its victims, wherever they are in the world."[339] The programme was intended to be a comprehensive one in with the UK would play a leading role in its relations with other states to combat all manifestations of torture at a practical, diplomatic, research and funding level. Yet as this Report has shown, there are torture issues directly relating to the UK itself which the Government has refused to face up to. In the circumstances it is legitimate to point out that this not only undermines any sincere attempts to positively influence anti-torture developments abroad but it invites the charge of hypocrisy when the UK criticises those responsible for torture committed elsewhere.

The Report has shown that the there are significant and now long-standing concerns linking 'extraordinary renditions' flights through the UK mainland as well as territory for which the UK is responsible, such as Diego Garcia. At every point where this has been raised, be it in either the House of Lords or the House of Commons, parliamentary committees or in wider public fora and the media, the Government has steadfastly refused to budge from its position that it relies on US assurances that 'extraordinary renditions' are not made through the UK. This policy has continued despite the admission in early 2008 that these assurances in respect of Diego Garcia were false.

In addition, the Report has focused on a number of UK nationals and residents who became direct victims of the US' anti-terrorism programme of 'extraordinary rendition' either directly to Guantanamo Bay or to that "legal black hole" via other centres, and in the process suffered years of torture or ill-treatment. Although almost all of these men have subsequently been released, the UK Government for a long time declined to effectively intervene on their behalf and instead asserted at every level through the UK courts that it had no obligation to do so. Thereafter, and belatedly, it began to call for the men's release, but in the interim serious questions have been raised about the role of the UK's own intelligence services both in how some of them came to be rendered as well as the extent to which there was any UK involvement in the ill-treatment itself. Very recently the Attorney General has been directed to investigate whether there is any criminal responsibility arising, but this applies to only one case and there is good reason to seek a far wider investigation as well as to assist the victims in rebuilding their lives and to compensate them when appropriate.

Finally, the Report has examined the intense litigation in UK courts, still on-going, arising from the policy of trying to deport terrorist suspects to places where they face the real risk of torture. Despite the clear principle of non-refoulement as an integral part of the absolute prohibition against torture, the UK Government has and still is trying to re-write the rules using diplomatic assurances and memoranda of understanding with regimes notorious for torture. In addition to the risk of torture the individuals themselves face, by its avowed policy of arguing that the principle of non-refoulement can and should be modified or the obligations arising therefrom avoided the UK is doing considerable harm to the wider struggle to make effective the absolute prohibition against torture throughout the world.

[339] Speech by the Foreign Secretary, Mr Robin Cook, to the Amnesty International Human Rights Festival 16th October 1998.

It is therefore indeed regrettable that the positive role which the UK has played in other areas relating to the struggle against torture has been seriously compromised by its record in dealing with torture issues arising from its own anti-terrorism policies as well as those of its closest ally.

What is needed is a new commitment to fighting torture at each and every level, including and especially within the context of fighting terrorism, and REDRESS calls upon the UK Government to do so on the basis of the recommendations below.

RECOMMENDATIONS

1) Regarding the US' 'extraordinary renditions' programme the UK Government should abandon its policy of relying on US assurances that UK territory is not being used for any purposes involving terrorist suspects, and should instead:

- Undertake a comprehensive review of all domestic laws, administrative procedures and Government policies to insure that no UK territory, either the mainland or any overseas territory, is being used or is able to be used by the US in its programme;
- In consultation and co-operation with other EU and Council of Europe states and institutions take a lead in reforming regional and international mechanisms and practices to make Europe, and any part of the world under the care or control of any European state, a rendition free and secret detention free area;
- Within the NATO alliance take a lead in reversing policies and decisions which have effectively facilitated the US programme in any NATO member state or any part of the world under the control of any NATO member state;
- Seek to work with the US and all other states in the fight against terrorism in ways which do not breach fundamental human rights norms and safeguards, in particular the total prohibition against torture.

2) The UK Government should insure that there is an independent public investigation and inquiry into the extent of any UK involvement in the US 'extraordinary renditions' programme; such a process should include:

- An examination of all documentation relating to all suspect flights and aircraft which have landed in or passed through UK territory, including overseas territories, and including flight plans and any other papers relating to the purposes of the flights and who was or had been on them;
- Collating all such documentation and evidence relating to such suspect flights and aircraft with other information concerning known individuals who have been rendered and tortured and who have also been in any way linked to the flights and aircraft involved;
- An analysis of information which the UK shared with the US concerning any individuals rendered, and any co-operation between the UK and US intelligence services in rendering any persons;
- Obtaining and making public any and all agreements between the UK and US and any other states, including those made under the auspices of NATO, regarding the use of UK territory for any purposes involving terrorist suspects;
- An examination of any legal advice sought about possibly complicity in the programme;

- Identifying the two men known to have been rendered through Diego Garcia and the place of their present whereabouts and welfare;
- The making of recommendations in respect of any compensation which should be made to the two men and to any other persons whose rendition was in any way linked to the UK.

3) Regarding the UK nationals and residents who were victims of the US 'extraordinary renditions' programme, such an independent public investigation and inquiry should also:

- Examine the role of UK interrogators in questioning such nationals and residents rendered or held in secret detention;
- Scrutinise the role of UK intelligence personnel in supplying questions or information to foreign interrogators of such nationals and residents;
- Consider whether any UK agents acted unlawfully in any of these roles or in other way concerning nationals and residents;
- Ascertain whether evidence obtained from any of the men as a result of torture or ill-treatment has been used against any other party in any other jurisdiction, including but not limited to the US;
- Make recommendations for any necessary reforms to UK laws, policies and practices to prevent such occurrences in future, including improvements to parliamentary and ministerial oversight of the intelligence services;
- Determine whether any nationals and residents should be compensated for harm suffered as a result of UK involvement.

4) Regarding the policy of seeking to make use of diplomatic assurances or memoranda of understanding (MOUs) to deport terrorist suspects to states where they face the real risk of torture, the UK Government should:

- Prohibit the return or transfer of people to places where they are at risk of torture or other ill-treatment;
- Abandon the policy and stop seeking deportations in each and every case where the receiving state or any third state to which the putative deportee might be sent practices torture;
- Confirm its recognition of and commitment to the principle of non-refoulement as an indivisible part of the absolute prohibition against torture;
- Accept and acknowledge that any attempt to undermine the aforesaid principle, whether along the lines of seeking to balance national security considerations against the risk of torture or any variation of such an argument, is contrary to fundamental international law norms;
- Stop attempting to persuade the European Court of Human Rights to reconsider its jurisprudence establishing that the total prohibition encompasses an absolute prohibition of refoulement;
- Not proceed with the implementation of MOUs with those countries which have concluded such with the UK, and should not seek additional MOUs with other governments;
- In countries with which MOUs have been concluded or considered the UK should seek for the implementation of systematic reforms to eliminate the practice of torture and other fundamental breaches of basic human rights, including ratification and implementation of the UN Convention Against Torture and the Optional protocol thereto.

5) Regarding other related matters, the UK Government should:

- Seek compensation from the US for the harm suffered by UK nationals and residents who have been victims of the US' unlawful anti-terrorist programme;

- Carefully examine the Convention on International and Civil Aviation of 7 December 1944 (the 'Chicago Convention') with the clear view to making it a more effective tool against the unlawful transfer of persons through or across other states' territories, and make proposals for amendments to it where necessary for the protection of human rights;
- Review its 10-year old anti-torture initiative and expand it to incorporate all necessary safeguards for the prevention of torture within the context of anti-terrorism .