REDRESS

Ending Torture. Seeking Justice for Survivors

87 Vauxhall Walk, London SE11 5HJ, United Kingdom
Tel: + 44 (0) 20 7793 1777 Fax: + 44 (0) 20 7793 1719
Email: info@redress.org Web: www.redress.org

SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: RESPONSE TO THE UNITED KINGDOM'S 7TH PERIODIC REPORT (DECEMBER 2012)

5 JUNE 2015

INTRODUCTION

1. REDRESS is an international non-governmental human rights organisation with a mandate to assist torture survivors to obtain justice and reparation for their suffering. Since its establishment in December 1992, REDRESS has accumulated wide expertise on the rights of victims of torture both within the United Kingdom ("UK") and internationally.

2. This submission focuses on the UK's obligations under Article 7 of the International Covenant on Civil and Political Rights ("the Covenant") and in particular, paragraphs 555 - 566 of the UK's 7th Periodic Report which deals with: allegations of transit of rendition flights through UK territory; use of torture evidence and Memoranda of Understanding on Deportations with Assurances and allegations of use of torture and degrading treatment by UK armed forces. In addition, the submission addresses paragraphs 16 and 17 of the Committee's List of Issues (November 2014), and paragraphs 138 -144 of the UK's Replies to the List of Issues (March 2015), which also deal with allegations of complicity in torture; and the defence of "lawful authority, justification or excuse" to a charge of torture in the Criminal and Justice Act 1988. In the submission REDRESS also sets out the need for the UK Government to adopt a comprehensive policy concerning the prohibition of torture and other ill-treatment.

A. ALLEGATIONS OF TRANSIT OF RENDITION FLIGHTS THROUGH UK TERRITORY (paragraph 555 – 557 of the State Party report))

3. As early as 2005 calls were first made publically for police investigations to be initiated into allegations of USA rendition flights using UK facilities.[1] Over the subsequent decade other

[1] See for example Liberty, *Chief Constable begins police inquiries into extraordinary rendition flights,* 19 December 2005, available at: https://www.liberty-human-rights.org.uk/news/press-releases/chief-constable-begins-police-inquiries-extraordinary-rendition-flights. In 2008 two Parliamentary Committees raised concerns: see Foreign Affairs Committee, *Human Rights Annual Report 2008,* Section 3, available at: http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/557/55708.htm; Joint Committee on Human Rights, *Allegations of UK Complicity in Torture,* 21 July 2009, available at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf.

information has emerged pointing to UK involvement in renditions in/from Iraq and to Libya. The response(s) of the UK Government to these allegations have been slow, ineffectual and lacking in transparency.

4. After Prime Minister Cameron announced the setting-up of a judge-led Detainee Inquiry in July 2010[2] a number of human rights organisations (including REDRESS) cautiously welcomed the development and endeavoured to engage constructively with the Inquiry[3] but eventually withdrew because of fundamental concerns about how the Inquiry was to operate.[4] The original Detainee Inquiry which included renditions in its mandate made only limited progress, and after about 18 months issued a 'report' in which it was disclaimed that the report only "summarises the preparatory work of the Inquiry, and highlights those particular themes and issues which the Inquiry believes might be the subject of further examination. The Report does not, and cannot, make findings as to what happened."[5] The Detainee Inquiry was prematurely terminated in January 2012, and reported to the UK Government in June 2012; its report was only released publicly in December 2013.

5. Instead of setting up an investigation in line with recognised international standards, including by an impartial body, the UK Government announced in December 2013 that the Intelligence and Security Committee (ISC) would take over any pending issues raised by the Detainee Inquiry.[6] This decision was made notwithstanding concerns over the ISC's past failure to adequately address allegations of UK complicity in torture.[7] With the publication of the USA Senate Select Committee on Intelligence report on CIA torture in December 2014,[8] human rights organisations reiterated their concerns about the lack of adequate investigations and the inadequacy of the ISC to address the allegations, in an open letter to the Prime Minister.[9]

6. Allegations of the UK armed forces' involvement in transfers in Iraq during 2003-2009 have also arisen, some aspects of which the UK has admitted. These allegations concern the role of the UK in the rendition of captured Iraqi detainees and others to "black sites" within Iraq and to places outside Iraq where they were subject to torture and other ill-treatment, and/or handing them over to US forces inside Iraq, where they faced a real risk of torture or other mistreatment. The UK Government admitted in Parliament in 2009 that in February 2004 "two individuals were captured by UK forces in and around Baghdad. They were transferred to US detention, in accordance with normal practice, and subsequently moved to a US detention facility in Afghanistan."[10]

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[2] Hansard, HC 6 July 2010, cols 175-176, available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100706/debtext/100706-0001.htm.

[3] REDRESS and others, *Letter to Sir Peter Gibson,* 8 September 2010, available at: http://www.redress.org/downloads/publications/NGO_Inquiry_Letter_FINAL.pdf.

[4] REDRESS and others, *Letter to Detainee Inquiry*, 3 August 2011, available at: http://www.redress.org/downloads/publications/Joint_NGO_letter_3-8-11.pdf.

[5] *The Report of the Detainee Inquiry*, December 2013, available at: http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf; para. 1.2.

[6] Minister without Portfolio (Mr Kenneth Clarke), Hansard, 19 December 2013, col. 913 et seq., available at: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131219/debtext/131219-0002.htm.

[7] The Joint Committee on Human Rights (JCHR) said in 2009: "The missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services" – see JCHR, *Allegations of UK Complicity in Torture,* August 2009, para. 65, available at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf.

[8] *Unclassified Select Committee on Intelligence -Committee Study on the Central Intelligence Agency's Detention and Interrogation Program*, 9 December 2014 available at: http://www.intelligence.senate.gov/study2014/sscistudy1.pdf.

[9] REDRESS and others, *NGO letter to the Prime Minister urging him to establish a judge-led inquiry into UK involvement in rendition and torture,* 16 December 2014, available at: http://www.redress.org/downloads/publications/NGO%20letter%20to%20Prime%20Minister%20161214.pdf.

[10] Secretary of State John Hutton – see Hansard, 29 February 2009, col. 394 at 395-6, available at: http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090226/debtext/90226-0008.htm. Press reports have also referred

7. The All Party Parliamentary Group on Extraordinary Rendition has periodically raised its concerns, and its chair Andre Tyrie MP said in 2011:[11]

> More than three years after I first requested information on rendition from the Ministry of Defence it has finally been required to disclose much of it. It reveals a catalogue of MOD mishaps and failures, including a failure to track detainees handed over to the US, a weakening of protections for those handed over and a failure to keep proper records.

8. The Rome Statute of the International Criminal Court (ICC) makes it clear that an enforced disappearance when carried out as part of a widespread or systematic set of conduct may be a crime against humanity and that "an unlawful deportation, transfer or confinement" may be a war crime.[12] Torture may in equal circumstances amount to a crime against humanity and a war crime.[13] For an individual to be liable for these offences, there is no need for evidence that he or she physically committed the offence.[14] Such offences can also be committed when an individual affords assistance to any person (including to individuals of foreign nations). The UK Government, under article 7 in conjunction with article 2(3) of the Covenant as interpreted by the HRC,[15] is obliged to ensure that these allegations be investigated to their source, including up the chain of command, if this is where the evidence points. Only if this is done can it be determined who authorised, supported and/or acquiesced in such operations.

9. We recommend that the Committee ask the UK Government why it has retreated from its previous assurance of an independent judge-led inquiry; how it expects the ISC examination to be compliant with its obligations under the Covenant; what is being done about the several fresh allegations which have arisen concerning the UK's knowledge of the USA's use of Diego Garcia during the USA's torture programme, as well as UK renditions in and from Iraq.

B. USE OF TORTURE EVIDENCE AND MEMORANDA OF UNDERSTANDING ON DEPORTATIONS WITH ASSURANCES (paragraphs 558-561 of the State Party report)

10. The judgment of 8 December 2005 referred to in the Periodic Report is the *Case of A*[16] which saw the UK's highest court recognise a blanket exclusionary rule that applies to all proceedings, including evidence that a foreign State has procured through torture in a judicial proceeding against a suspected terrorist. The court stated as follows:[17]

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to further allegations. In March 2006, Ben Griffin, a former special forces soldier, alleged to the media that Iraqis (and Afghans) had been captured by British and American special forces and rendered to prisons where they faced torture. The UK Government said at the time that it did not comment on the activities of special forces, and subsequently obtained a court injunction preventing Griffin from disclosing anything further on the matter - see *Britain aided Iraq terror renditions, government admits,* Guardian, 29 February 2009*, available at* http://www.theguardian.com/world/2009/feb/26/britain-admits-terror-renditions. In 2013, another press report drew attention to alleged secret detention centres ("black sites") in Iraq in 2003, including an alleged "detention and interrogation facility at a remote location known as H1, in Iraq's western desert",[10] run by a UK-US joint force where prisoners were allegedly mistreated - see *Camp Nama: British personnel reveal horrors of secret US base in Baghdad,* Guardian, 1 April 2013, available at http://www.theguardian.com/world/2013/apr/01/camp-nama-iraq-human-rights-abuses

[11] Press release, 22 June 2011, available at http://www.extraordinaryrendition.org/document-library/finish/23-2011/243-foia-press-release-22-06-11.html.

[12] Articles 7 and 8 (i) and (vii) of the ICC Rome Statute.

[13] Articles 7(1)(f) and 8(2)(ii) ibid.

[14] See articles 25 and 28 ibid. on criminal liability.

[15] HRC, General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15, 18.

[16] *A and others v Secretary of State for the Home Department*, [2005] UKHL 71, available at: http://www.bailii.org/uk/cases/UKHL/2005/71.html. REDRESS was one of the interveners in this case.

[17] *Ibid.,* Lord Bingham, paras.51.

> [T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is shared by over 140 countries which have acceded to the Torture Convention….

The Law Lords were divided by four to three on the question of the burden of proof in establishing whether or not a statement (emanating from abroad) was obtained by torture. The majority concluded that where there was no more than a possibility that the statement was obtained by torture it would be admissible, while the minority said that where there was a real risk that the evidence was obtained by torture it should not be admitted. They strongly rejected the test preferred by the majority as it would place a burden on persons that they can seldom discharge:[18]

> [I]t is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.

11. It has subsequently been argued by a former Special Rapporteur on Torture that a full shift in the burden of proof as set out by the minority would be better suited to ensure that information extracted by torture is not used in any proceedings:[19]

> For criminal proceedings this conclusion also corresponds to the principle *"in dubio pro reo",* but it is equally valid for extradition, expulsion and habeas corpus proceedings or any other proceedings determining the lawfulness of detention.

Deportation with assurances

12. The UK Government uses deportation with assurances (DWA), also known as diplomatic assurances, to justify the deportation of foreign nationals and stateless persons suspected of terrorism related offences to countries in which a widespread practice of torture is alleged. The FCO's latest Human Rights and Democracy Report (HRDR) claims that this "has enabled the UK to reduce the threat from terrorism by allowing foreign nationals who pose a risk to our national security, to be deported, while still meeting our domestic and international human rights obligations."[20] In 2014 there were functioning DWA arrangements in 2014 with Algeria, Jordan, Lebanon, Ethiopia and Morocco.[21]

13. The UK Government's policy[22] of relying on DWA developed as a counter-terrorism measure following the 2004 House of Lords ruling that indefinite detention of foreign nationals without charge breached the UK's Human Rights Act.[23] The UK Government deals with the issue on a case by case basis. In 2013 the Home Office mandated the Independent Reviewer of

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[18] *Ibid.,* para. 59.

[19] Manfred Nowak, *Dignity and physical integrity,* Legal controversies relating to torture, 2007, pp.255-6, available at: http://www.corteidh.or.cr/tablas/r29062.pdf. The Committee Against Torture (CAT) in its 2013 Concluding Observations echoed the concern that the burden of proof on the admissibility of torture material continues to lie with the defendant/applicant, and hence said: "The Committee calls on the State party to ensure that, where an allegation that a statement was made under torture is raised, the burden of proof is on the State. In addition, the State party should never rely on intelligence material obtained from third countries through the use of torture or cruel, inhuman, or degrading treatment" - see Committee Against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013)"* 24 June 2103, CAT/G/GBR/CO/5, para.7, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en.

[20] FCO, *Human Rights and Democracy: The 2014 Foreign and Commonwealth Office Report*, March 2015, p. 67, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415910/AHRR_2014_Final_to_TSO.pdf.

[21] *Ibid*.

[22] The use of the policy is re-iterated in Foreign and Commonwealth Office, *FCO Strategy for the Prevention of Torture 2011-2015*, October 2011, p. 10, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategytortureprevention.pdf.

[23] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent),* [2004] UKHL 56, available at: http://www.bailii.org/uk/cases/UKHL/2004/56.html.

Terrorism Legislation (IRTL)[24] to "review the framework of the UK's [DWA] policy to make recommendations on how the policy might be strengthened or improved, with particular emphasis on its legal aspects".[25] The ITLR's review report has not yet been released.

14. There is no mention of this review in the FCO's March 2015 HRDR, which does however make reference to another post, namely, the UK Special Representative for DWA.[26] The FCO post of UK Special Representative of DWA appears to have been established in 2006 with the appointment of Sir Anthony Layden,[27] who according to a media report resigned early in 2015:[28]

> [A] Sunday Telegraph investigation has discovered that the senior official in charge of the DWA scheme has resigned because he claims it is not working. Two deportation cases collapsed last summer after Anthony Layden, the official who had been overseeing DWA, expressed serious misgivings about its operation. It is not clear what those misgivings were but they are thought to be concerned with Britain's failure to put in place proper monitoring to ensure deported terror suspects were not mistreated — or even tortured — on their return. An official review of the scheme…is unlikely to be published until after the election…

There is a lack of transparency about the role of the UK Special Representative for DWA who has not been mentioned in the FCO's Annual Human Rights reports before March 2015.

15. REDRESS and other NGOs oppose the use of DWAs as being incompatible with the UK's obligations under the prohibition of torture.[29] This is both before and after the judgment in *Othman v United Kingdom*[30] in which the ECtHR ruled that the UK would not breach its obligations in that particular case in deporting a terrorist suspect to Jordan on the basis of assurances. It is noteworthy that the Committee Against Torture (CAT) in its concluding observations on the UK's Fifth State Party Report said in 2013, after *Othman*, that it "considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the [Torture] Convention."[31]

16. REDRESS submits that the principled way to deal with foreign nationals or stateless persons who are terrorist suspects within the UK's jurisdiction is not to try to bend the non-

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[24] See Independent Reviewer of Terrorism Legislation, available at: https://terrorismlegislationreviewer.independent.gov.uk/. By coincidence the first incumbent, Lord Carlisle, accepted the post a few hours before the terrorist attacks of 11 September 2001. The present IRTL is David Anderson QC, appointed in February 2011.

[25] *Ibid*., and see the IRTL's Terms of Reference at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260320/TOR_for_the_Independent_Review_of_Deportation_with_Assurances.pdf.

[26] FCO, *Human Rights and Democracy: The 2014 Foreign and Commonwealth Office Report,* March 2015, p.67, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415910/AHRR_2014_Final_to_TSO.pdf.

[27] See Debrett's, *Anthony Michael LAYDEN,* available at: http://www.debretts.com/people-of-today/profile/19034/Anthony-Michael-LAYDEN.

[28] Daily Telegraph, *Anti-terrorism chief quits over failure to expel suspects,* 21 February 2015, available at: http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11427428/Anti-terrorism-chief-quits-over-failure-to-expel-suspects.html.

[29] See REDRESS, *Joint NGO Letter regarding Denmark and diplomatic assurances against grave violations of Human Rights,* 18 June 2008, available at: http://www.redress.org/downloads/publications/Joint%20NGO%20open%20letter%20re%20DAs_without%20signatures.pdf.; REDRESS, *The United Kingdom, Torture and Anti-Terrorism: Where the problems lie,* December 2008, available at: http://www.redress.org/downloads/publications/Where%20the%20ProblemsLie%2010%20Dec%2008A4.pdf.; REDRESS, *Submission to the Committee Against Torture on its List of Issues for Consideration of the UK'S 5th State Party Report,* April 2013, available at: http://www.redress.org/downloads/publications/REDRESS%20SUBMISSION%20TO%20CAT%20ON%20UK%20%20%2019%2004.pdf.

[30] *Case of Othman (Abu Qatada) v. The United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012.

[31] Committee Against Torture, *Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013),* para 18, available at: http://www.justice.gov.uk/downloads/human-rights/cat-concluding-observations-may-2013.pdf.

refoulement rule to near breaking-point, but to prosecute them in the UK.[32] Further, a willingness to engage with States with questionable human rights records may adversely impact on the UK's ability to raise concerns with them over their use of torture, both generally and in specific instances.

17. We submit, therefore, that the UK should be asked to revisit the use of DWA in the formation of an over-arching anti-torture policy, as submitted in paragraph 30-31 below.

C. ALLEGATIONS OF USE OF TORTURE AND DEGRADING TREATMENT BY UK ARMED FORCES (paragraphs 562-566 of the State Party report)

18. The UK Government states that its Iraq Historic Allegations Team (IHAT) mechanism established in 2010 is now investigating the allegations of serious human rights violations such as torture committed by UK armed forces in Iraq. While most of these allegations relate to the armed forces, there are also other allegations such as renditions which may have involved the security agencies too.

19. The current investigatory process is complicated, drawn-out and lacking in transparency and effective coordination, even without considering any interaction between the military and security branches of the State. There are now three distinct but related arenas in which matters are unfolding: the Iraq Historical Allegation Team (IHAT) established in 2010; domestic (and ECtHR) litigation relating to IHAT but also other cases from Iraq; the ICC, since January 2014.

20. Two groups of cases have considered these issues: Ali Zaki Mousa,[33] and Al Saadoon.[34] In a series of cases *Ali Zaki Mousa* and approximately 128 other Iraqi nationals sought a single public inquiry into the allegations that they were mistreated by the UK armed forces in detention facilities in Iraq between April 2003 and December 2008. They argued that the obligation under article 3 ECHR to conduct an independent and effective investigation into the allegations, including arguable systemic mistreatment, can only be met by a public inquiry. The High Court held that IHAT was sufficiently independent but this was reversed by the Court of Appeal because of the involvement of members of the Royal Military Police in the investigation of matters in which the Royal Military Police had been involved. Subsequently the UK Government re-constituted the IHAT personnel to promote more independence. In the next case the High Court found that IHAT was now sufficiently independent. It determined that it was not therefore appropriate to order a full public inquiry but that there should be more streamlined inquiries

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[32] Serious consideration be given to allowing intercept evidence to be used in UK courts, for example - see REDRESS, *Letter from Sir Emyr Parry Jones, REDRESS Chair, to the Foreign Affairs Committee, submitting evidence to its Annual Inquiry into the FCO's Human Rights work,* 20 June 2011, p. 3, available at: http://www.redress.org/downloads/publications/Letter%20to%20F%20A%20C%2020%20June%202011.pdf.

[33] *R (on the application of Mousa) v Secretary of State for Defence* [2010] EWHC 1823 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2010/1823.html.; *R (on the application of Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2010/3304.html.; *R (on the application of Mousa) v Secretary of State for Defence and another (*Court of Appeal) [2011] EWCA Civ 1334, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2011/1334.html.; *R (on the application of Mousa and others) v Secretary of State for Defence (No 2),* [2013] EWHC 1412 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/1412.html.; *R (on the application of Mousa and others) v Secretary of State for Defence (No 2)* [2013] EWHC 2941 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/2941.html.

[34] See: R (on the application of Al Saadoon and Others) v Secretary of State for Defence, Divisional Court (August 2008) [2008] EWHC 2391 (Admin); R (on the application of Al Saadoon and another) v Secretary of State for Defence, Divisional Court (December 2008) [2008] EWHC 3098 (Admin); R (on the application of Al Saadoon and Others) v Secretary of State for Defence, Court of Appeal (December 2008) [2008] EWCA Civ 1528; R (on the application of Al Saadoon and Mufdhi) v Secretary of State for Defence, Court of Appeal (January 2009) [2009] EWCA Civ 7; Al Saadoon v UK(Admissibility) (2009) 49 E.H.R.R. SE11; Al Saadoon and Mufdhi v UK(Merits) (2010) 51 E.H.R.R. 9; March 10, 2010; R (on the application of Al Saadoon and Others) v Secretary of State for Defence, (Mar 2015) [2015] EWHC 715 (QB).

undertaken using an inquisitorial approach on the model of coroners' inquests to investigate cases where a duty of investigation arises.

21. The Al Sadoon cases initially related to Mr Al-Saadoon and Mr Mufdhi who faced the death penalty by hanging as a result of their transfer to the Iraqi authorities by British Forces. A series of cases were brought before the UK courts and then to the ECtHR which established that in the circumstances of the case, awaiting the death penalty constituted torture. More recently, the High Court decided various preliminary issues in test cases arising out of the operations of the UK army in Iraq during the invasion, occupation and post-occupation periods, and made several key findings on various points of law. The litigation in *Al Saadoon* is ongoing with arguments that IHAT has apparently failed to implement the procedures set out in *Ali Zaka Mousa*, namely, an inquisitorial, coroners' approach to investigations. On 27 April 2015 parties met before a judge to deal with matters such as delays in communication of IHAT decisions to counsel, that negative decisions taken against a complainant should be challengeable, and the lack of a clear route for appealing an IHAT decision; further, concerns about IHAT not having done enough to remove pro-administration bias were argued, and that IHAT has not sufficiently reviewed cases of aggressive interrogation and cases of improper detention in violation of article 5 ECHR. The High Court will hear these arguments later in 2015.

22. Other cases have clarified the UK's obligations under the ECHR, including the *Al Jedda* cases.[35] Mr Hilal Abdul-Razzaq Ali Al-Jedda has been represented in at least 9 actions before the courts, from the Divisional Court in the UK to the Grand Chamber of the ECtHR. Mr. Al-Jedda was an Iraqi who had been detained for three years without charge by British Forces, a breach of Mr Al-Jedda's right to liberty. Public Interest Lawyers successfully argued before the Grand Chamber that the European Convention applied to the Applicant's detention by British Forces in Iraq and that if Resolutions of the UN Security Council are to override Convention rights then they must do so expressly.

23. While IHAT has continued to operate, modified as a result of court challenges which have not yet been finalised, the ICC has now been sent a Communication on the basis that the many hundreds of alleged cases of ill-treatment were widespread and systematic and constitute war crimes.[36] The ICC Prosecutor has subsequently confirmed the opening of a preliminary examination.[37]

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[35] See: R (on the application of Al Jedda) v Secretary of State for Defence, Divisional Court (August 2005) [2005] EWHC 1809 (Admin); R (on the application of Al Jedda) v Secretary of State for Defence, Court of Appeal (March 2006) [2006] EWCA Civ 327; R (on the application of Al Jedda) v Secretary of State for Defence, House of Lords (December 2007) [2007] UKHL 58; R (on the application of Al Jedda) v Secretary of State for Defence(March 2009) [2009] EWHC 397 (QB); Al Jedda v Secretary of State for Home Department SIAC (April 2009) [2009] UKSIAC 66/2008; Al Jedda v Secretary of State for Defence, Court of Appeal (July 2010) [2010] EWCA Civ 758; Al Jedda v Secretary of State for Home Department (SIAC) [2010] UKSIAC 66/2008 [November 2010]; Al Jedda v UK, Grand Chamber (2011) 53 E.H.R.R. 23; Al Jedda v Secretary of State for Home Department Court of Appeal (March 2012) [2012] EWCA Civ 358.

[36] European Centre for Constitutional and Human Rights and Public Interest Lawyers, *Communication to the Office of the Prosecutor of the International Criminal Court*: *The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008,* submitted on 10 January 2014, p. 6, available at: http://www.ecchr.de/united-kingdom.html.

[37] On 2 December 2014 the Office of the Prosecutor published its *Report on Preliminary Examination Activities 2014,* and covered the Iraq "Situation" in paragraphs 42-57. It concluded at para.57:"The Office is in the process of conducting a thorough factual and legal assessment of the information received in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. In accordance with its policy on preliminary examination, the Office will also continue to gather information on relevant national proceedings at this stage of analysis." The *Report* is available at http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf.

24. Despite all these processes, there have been no criminal prosecutions of UK armed forces personnel for the crime of torture, and only a handful of court martial convictions for lesser offences. The prospect of the truth being reached and justice achieved for victims and their families has proved and is proving to be a long and uncertain process, six years after the last UK troops withdrew in 2009.

25. Regarding both the security agencies and the armed forces, therefore, we submit that where there is evidence of torture having been committed by any UK official the suspect should be prosecuted for torture and not for a lesser offence, and certainly the dearth of any charges at all in many cases is striking; the UK Government needs to show very clearly the seriousness with which it takes this aspect of its anti-torture obligations.

26. We believe the UK Government should explain to the Committee its charging policy for service personnel, and in particular why the crime of torture has never been used in relation to allegations which would amount to torture under Article 7 of the Covenant.

27. The Committee has also raised the Libyan cases of Sami al-Saadi and Abdul Hakim Belhaj who alleged UK complicity in their rendition, which cases the UK has said are under police investigation. The State Party report does not refer to the civil case which Mr Belhaj has brought, now pending in the Supreme Court, nor the similar civil case settled without admission of liability concerning Sami al-Saadi.[38]

D. THE DEFENCE OF "LAWFUL AUTHORITY, JUSTIFICATION OR EXCUSE" TO A CHARGE OF TORTURE IN THE CRIMINAL AND JUSTICE ACT 1988 (CJA) (Issue 17 of the HRC; paragraph 144 of the UK's Replies to the issues)

28. While the definition of torture under section 134 of the CJA is not identical with that of article 1 UNCAT, and is actually wider in scope, the legislation giving the UK universal jurisdiction over torture provides:

> (4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct"
>
> (5) For the purpose of this section "lawful authority, justification or excuse" means - …(b) in relation to pain and suffering inflicted outside the United Kingdom . . . (iii) in any other case, lawful authority, justification, or excuse under the law of the place where it was inflicted.

These defences are incompatible with the UK's obligations under UNCAT and the ICCPR. Article 1(1) UNCAT simply states that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions", which means that they must be lawful under international law, not just under national law; article 2(3) UNCAT specifies that "an order from a superior officer or a public authority may not be invoked as a justification for torture." An interpretation of sections 134 (4) and (5) of the CJA has not been given by UK courts.

29. The wording of these statutory provisions is clear and unambiguous. Parliament may pass a law that mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the incorporation may be misleading. It is not the treaty but the statute, which forms part of English law. In addition, English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even

[38] BBC, *UK pays £2.2m to settle Libyan rendition claim*, 13 December 2012, available at: http://www.bbc.co.uk/news/uk-20715507.

though the United Kingdom is bound by international law to do so, or to an authoritative interpretation by a treaty body. In light of the above, it would be open to a Court to interpret these provisions without having to assess its compliance with the Torture Convention, because of the lack of interface between the statute and the Convention and the unambiguous wording.[39] We therefore believe the defence should be repealed.

E. A COMPREHENSIVE POLICY IS NEEDED

30. In our view it is the UK's lack of an over-all anti-torture policy relating in particular to counter-terrorism and the conduct of its security agencies and armed forces abroad which lies at the root of the concerns examined above. This contrasts with the pro-active role the UK has assumed on various aspects of the prohibition of torture. The UK has a written foreign policy relating to its work to prevent torture around the world and continues to play a leading role in the promotion of the Optional Protocol to UNCAT.[40] It has incorporated aspects of UNCAT into its domestic law,[41] and has some limited guidelines for its security agencies and service personnel relating to the treatment of detainees abroad.[42] Notwithstanding this, and the UK's regular pronouncements condemning torture committed by officials of other countries,[43] REDRESS believes that it is time for the UK to adopt and implement a comprehensive policy to prevent, prohibit and respond to allegations of torture which also concern UK agents and officials.

31. The standard approach to allegations of torture (whether by the security agencies or by the armed forces) is to eventually set up inquiry mechanisms. This approach has been reactive and piecemeal, and has not resulted in accountability and broader reforms to ensure non-repetition. Responses to date suggest that the UK will not meet its obligations without a comprehensive, 'joined-up', consistent and transparent policy grounded in applicable international standards.

F. RECOMMENDATIONS

REDRESS respectfully suggests that the Committee should ask the UK Government:

- why it has retreated from its previous assurance of an independent judge-led inquiry into complicity in torture allegations;

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[39] See REDRESS (and others), *Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law*, July 2008,pp 12-13, available at: http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf.

[40] Foreign and Commonwealth Office, *Strategy for the Prevention of Torture 2011 – 2015*, Human Rights and Democracy Department, October 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-tortureprevention.pdf.

[41] Such as criminalising torture irrespective of where it takes place: see Criminal Justice Act 1988, section 134, available at: http://www.legislation.gov.uk/ukpga/1988/33/section/134.

[42] Her Majesty's Government, Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing a and Receipt of Intelligence Relating to Detainees, July 2010, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf. REDRESS' view is that the guidelines do not go far enough. Under the guidance where an officer knows or believes that torture will take place, he or she must report it, but may, with authorisation, continue to co-operate with the foreign agencies responsible (under the apparent discretionary power given to Ministers). REDRESS believes this could lead to complicity in torture - See REDRESS, *Universal Periodic Review, United Kingdom*, 13th Session May-June 2012, 21 November 2011, pp. 3-4, available at: http://www.redress.org/downloads/publications/UPR-UK%20Final%2021%20November%202011.pdf.

[43] See Foreign and Commonwealth Office, *"Human Rights and Democracy*: *The 2013 Foreign and Commonwealth Office Report"*, 10 April 2014, p. 52: "We do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose, and international action against torture remains a human rights priority for the UK Government"; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302421/18049_TSO_Cover__amp__Print_Text_with_trims_1_.pdf.

- how it can ensure that the ISC examination will be compliant with its obligations under the Covenant;

- what is being done about the fresh allegations which have arisen concerning the UK's knowledge of the USA's use of Diego Garcia during the USA's torture programme, as well as UK renditions in and from Iraq;

- to revisit the use of DWA in the formation of an over-arching anti-torture policy;

- to explain its charging policy for service personnel, and in particular why the crime of torture has never been used in relation to allegations which would amount to torture under Article 7 of the Covenant;

- to repeal the defence of "lawful authority, justification or excuse" to torture as set out in the Criminal Justice Act 1988;

- to adopt a comprehensive, 'joined-up', consistent and transparent anti-torture policy grounded in applicable international standards.