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 COMMITTEE AGAINST TORTURE ON ITS LIST OF ISSUES FOR CONSIDERATION OF THE UK'S 5th STATE PARTY REPORT

19 April 2013

Introduction

1. REDRESS is an international human rights organisation whose mandate is to seek justice and reparation for torture survivors. REDRESS' work has included written submissions to the Committee Against Torture (CAT) in respect of State Parties' Reports, and compliance with their obligations, as well as in other matters.

2. Following a brief Overview, we have set out our comments on some of the ***Issues*** that CAT has published, in order to assist the Committee in its examination of the UK's report and its dialogue with the UK delegation. We focus on selected ***Issues***, and have maintained the numbering used by CAT: in each case we reproduce the ***Issue*** *(in italics)* and then set out our comments, in numbered paragraphs.

Overview

3. The UK's 5th State Party report along with its Response to the List of Issues gives rise to a substantial number of concerns in respect of the UK's compliance with its obligations under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Many of these concerns are direct consequences of the UK's counter-terrorism policies, particularly the role of the security services, along with the conduct of the armed forces in Iraq and in Afghanistan. The negative impact of a range of different types of abuses, some of which have been proven and others which remain as allegations, has damaged the UK's credibility as a State committed to the eradication of torture, and risk undermining the positive steps it has taken to advance the anti-torture agenda worldwide.

4. The UK's approach to implementing and promoting the prohibition of torture has been characterised by marked inconsistency that has limited the effectiveness of steps taken. While key aspects of UNCAT have been incorporated into domestic law, such as the criminalisation of torture, this has not been matched by a coherent policy to prosecute alleged perpetrators within the UK's jurisdiction. In a closely related development, the UK has extended criminal jurisdiction over genocide, crimes against humanity and war crimes (previously, only such crimes committed since

2001 could be prosecuted, but now those committed since 1991 can be) and yet made it more difficult to proceed against suspects using the centuries old private arrest warrant procedure.

5. To combat torture abroad, the UK has developed a commendable foreign policy *Strategy* for the period 2011-2015, and yet its approach to protecting and assisting its own nationals and residents who are tortured abroad is seriously flawed, with shortcomings in the provision of consular assistance and a reticence to using diplomatic protection.

6. A major step in the protection of human rights was the promulgation of the Human Rights Act 1998 which came into force in 2000, incorporating as it did the European Convention on Human Rights (ECHR) into the UK's domestic law. However, this Act is now the subject of regular, often ill-informed, and increasingly strident criticism, including by leading Government ministers, particularly in the context of decisions by the European Court of Human Rights (ECtHR) upholding the UK's *non-refoulement* obligations. This development, which is partly based on prioritising UK security interests over individual rights, is of great concern both in respect of *non-refoulement* as well as the general scrutiny of other measures that have a bearing on torture, such as the ability to raise allegations of complicity in UK courts.

7. Both the previous and present Government have failed to develop and pursue clear policies to ensure that security services do not engage in torture or complicity therein, and are held to account by means of an effective investigations and prosecution, as appropriate. But for the tenacious efforts of UK human rights lawyers acting on behalf of individuals subjected to extraordinary rendition and other terrorism suspects, many of the allegations (some of which have been proven) would never have been exposed. The need for a proper independent public inquiry into complicity allegations remains crucial, but the process towards this has stalled. The Detainee Inquiry into UK involvement with detainees in overseas counter-terrorism operations was wound-up some 15 months ago and its report, sent to the Prime Minister in June 2012, has never been released. There are no clear steps being taken to prepare for a proper judge-led inquiry.

8. A further serious concern is the imminent legislation in the form of the Justice and Security Bill [HL] 2012-3, which will allow closed hearings in civil claims for torture when the security services are allegedly involved, defying open justice and fair trial rights. A civil claim for damages is one crucial way of establishing state responsibility and accountability and for combating impunity. The Bill, if enacted, will therefore adversely impact on the right to effectively bring civil claims for damages under article 14 of the Convention and undermine the value of such proceedings as a means of contributing to the prevention of torture.

9. The UK has taken some steps to address some of the serious violations committed in Iraq by UK soldiers against civilians. However, truth, accountability and adequate reparation for victims of torture and ill-treatment still remain glaringly absent. In Afghanistan there is little indication of how the UK intends to uphold its obligation to UK-held detainees upon its withdrawal, given the propensity of the Afghan authorities to condone torture that has been recognised in a number of judgments on the UK's obligation of *non-refoulement* in this context.

10. From victims' perspectives, the UK's practice must be described as piecemeal, despite government expressions of concern and commitments to oppose torture always and everywhere. Failures to reach the highest standards of protection of human rights have also impacted beyond its shores, making it easier for other States to accuse the UK of hypocrisy when criticising those States' own shortcomings. No senior politicians, senior civil servants or senior officers have been held accountable for their involvement in acts of torture, including by means of failure to act where they were obliged to do so. REDRESS submits that UK authorities must undertake effective investigations to meet their obligations and restore credibility of its anti-torture policy.

REDRESS comments on CAT issues

Issue 1. Are there any plans to formally incorporate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (the Convention) into domestic law as was done for the European Convention on Human Rights (ECHR) through the Human Rights Act 1998 (HRA)? If not, how does the State party ensure that the Convention is fully applicable in the domestic legal system, and that its provisions are fully incorporated into national legislation?

11. While the UK has made torture a criminal offence under section 134 of the Criminal Justice Act 1988, REDRESS has long had concerns with this legislation as set out under ***Issue 6*** below**,** and as raised in its response to the UK's 4th Periodic Report in 2004.[1]

12. The Committee has raised ***Issue 1*** in relation to articles 1 and 4 only; however, UNCAT must be fully incorporated into UK domestic law. Such a step would enhance awareness of UNCAT and it would mean *all* its articles could be looked at by UK courts when considering torture-related cases, including the UK's obligations under article 14. While the ECHR and HRA provide protection in cases dealing with torture and there is considerable overlap, incorporation of the UNCAT provisions would be an important complementary step in the implementation of the UK's obligation under article 2(1) UNCAT, particularly as the HRA and ECHR should be interpreted in line with the UK's international obligations.

Issue 2. Given the national debate about the drafting of a Bill of Rights and the possible repeal of the Human Rights Act 1998, please confirm that the Bill of Rights will not, if enacted, repeal the incorporation of the ECHR into domestic law, weaken the mechanisms for its enforcement nor undermine the prevention of torture, cruel, inhuman or degrading treatment or punishment.

13. Since 2010 there have been two parallel but connected processes concerning this issue: first, measures to reform the European Court of Human Rights (ECtHR) involving the 47 Member States of the Council of Europe;[2] second, the UK Government's appointment of a Commission on a [UK] Bill of Rights (the Commission) after the May 2010 general election.[3] In December 2012, the Commission submitted its final report on a Bill of Rights.[4]

14. Regarding the first process, the UK was one of the leading proponents for ECtHR reform. In response to UK calls, the Council of Europe adopted the Brighton Declaration at the High Level Conference on the Future of the ECtHR in Brighton in April 2012. The Declaration called for, *inter alia*: the Court to be able to concentrate on the most serious violations of human rights by amending the Convention to include the principle of subsidiarity and margin of appreciation to avoid case backlog; an amendment to the Convention to tighten admissibility criteria to the most serious violations; the continued refinement of the process for judge selection; a reduction of the time limit for applications from six months to four; and a roadmap for further reform.[5] REDRESS and several

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[1] REDRESS, *Comments to the United Kingdom's 4th Periodic Report to the Committee Against Torture,* 15 October 2004, p.14, available at: http://www.redress.org/downloads/publications/CATRepOct2004.pdf.

[2] Council of Europe, *High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration,* 19 February 2010, available at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

[3] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, December 2012, available at: http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf. The Commission's final report was submitted on 18 December 2012. In September 2011 the Commission published interim advice to the Government on reform of the ECtHR, which highlighted challenges caused by the ECtHR's caseload and suggested certain areas reform - *Ibid.,* pp.172-3.

[4] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, above n. 3.

[5] *Ibid*., pp. 173-4. On 20 April 2012, Secretary of State for Justice Kenneth Clarke announced that the UK's pledge to reform the ECtHR would mean fewer cases would be considered by the court- *see* Ministry of Justice, *UK Ministry of Justice, UK*

other human rights NGOs are deeply concerned that the proposals on admissibility and codification of subsidiarity and margin of appreciation could "seriously undermine the effectiveness of the European Court of Human Rights in protecting the Convention rights", and should be abandoned.[6]

15. In a very recent development on 15 April 2013 REDRESS and several other NGOs urged the State parties to improve the current text contained in article 1 of draft Protocol 15 as follows (amendment in bold):[7]

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so **may** enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

16. Regarding the second process, the Commission on a [UK] Bill of Rights said in its final report to the Government:[8]

> The conclusion of a majority of the Commission's members is accordingly that the case has been made out in principle for a UK Bill of Rights protecting everyone within the jurisdiction of the UK. In accordance with the Commission's terms of reference this conclusion is put forward on the basis that such a Bill *would incorporate and build on all of the UK's obligations under the European Convention on Human Rights.* However, the wider constitutional and political dimension is also of crucial significance in considering the way forward towards the introduction of a Bill of Rights, *and it is essential that it provides no less protection than is contained in the Human Rights Act...* [Emphases added]

17. It is unlikely that the present Government will proceed with the complex constitutional processes necessary to introduce a Bill of Rights, as there appears to be no clear consensus between the coalition parties on such major changes. However, there are regular pronouncements by senior Conservative ministers that if the Conservative party wins the 2015 general election it will repeal the Human Rights Act (HRA)[9] and/or withdraw from the European Convention on Human Rights (ECHR).[10] Such pronouncements raise concerns as to whether the Commission's finding of the fundamental importance of the HRA and the ECHR will be reflected in the policies and practice of the UK Government as the foundation on which human rights are built and protected.

18. REDRESS welcomes CAT raising the issue of the importance of the HRA and the ECHR as crucial means in the UK's anti-torture arsenal. There are numerous examples of how critical the ECtHR (and the HRA and ECHR) have been in enforcing the prohibition of torture and the rights of victims, and just two such cases are those of *Al-Skeini* [11] and *Al-Jedda* [12] which CAT has referred to in ***Issue 4***

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delivers European court reform, 20 April 2012, available at: http://www.justice.gov.uk/news/press-releases/moj/uk-delivers-european-court-reform.

[6] REDRESS, *Joint NGO input to the on-going negotiations on the draft of the Brighton Declaration on the Future of the European Court of Human Rights,* 20 March 2012, available at: http://www.redress.org/downloads/publications/Brighton%20Declaration%2020%20March%202012.pdf.

[7] *Draft Protocol 15 to the European Convention on Human Rights: a reference to the doctrine of the margin of appreciation in the Preamble to the Convention: Open letter to all member states of the Council of Europe,* 15 April 2013, available at: http://www.redress.org/downloads/publications/Draft%20Protocol.pdf

[8] *A UK Bill of Rights? The Choice Before Us*, above n. 3, p.30.

[9] For example, The Guardian, *Tory ministers plot Human Rights Act repeal,* 3 March 2013, available at: http://www.guardian.co.uk/politics/2013/mar/03/tory-ministers-human-rights-act.

[10] For example, BBC News, *Theresa May: Tories to consider leaving European Convention on Human Rights*, 9 March 2013, available at: http://www.bbc.co.uk/news/uk-politics-21726612.

[11] *Al-Skeini and Others v. the United Kingdom,* App. No. 55721/07, ECtHR (2011), available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606.

below. The increasing number of attacks on the HRA, on the ECHR and on the ECtHR by senior ministers is of concern. Such attacks undermine respect for human rights, are hardly compatible with the obligations of states under article 2(1) of the Convention and susceptible to damaging the credibility of the UK's anti-torture policy.

19. REDRESS therefore calls on CAT to emphasise that any public statements or legislative changes in the UK should not undermine the prevention of torture, cruel, inhuman or degrading treatment or punishment.

Issue 4. The European Court of Human Rights has ruled in two judgments (Al-Skeini and others v. the UK, and Al-Jedda v. the UK, Grand Chamber Judgment, 7 July 2011) that the United Kingdom had jurisdiction in relation to acts committed abroad[13] under Article 1 of the European Convention on Human Rights. Please provide information on steps taken to abide by these judgments, including any public acknowledgement made and amendments of rules and regulations. Please also indicate whether the interpretation of the State party[14] on the extraterritorial applicability of the UN Convention against Torture has been revised accordingly and in light of the General Comment No. 2 (para.7.)[15]

20. In March 2010, the Ministry of Defence announced the establishment of the Iraq Historic Allegations Team (IHAT) to investigate the five *Al-Skeini* cases, as well as other claims of violations of Article 2 and 3 of the ECHR (approximately 170 cases in total).[16] The IHAT is led by a civilian who reports to the Provost Marshal, the head of the Royal Navy Police, and contains investigation and case review teams. However, UK lawyers for some of the victims have challenged the IHAT process on the ground that it lacks independence and have called for a public inquiry; judgment is pending.[17]

21. In relation to the judgment's application more widely, the UK Government has taken the view that "the Al-Skeini judgment relates to the particular circumstances of the past operations in Iraq and it has no implications for its current operations elsewhere, including in Afghanistan, where the legal basis for UK operations is materially different from that which pertained in Iraq."[18]

22. The UK Government has also stated in its response to the Committee on this issue that its position on the scope of application of UNCAT has not been specifically revised as a result of the *Al-Skeini* and *Al-Jedda* judgments.[19] It should be noted that the applicability of the ECHR[20] to the abuse

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[12] *Al-Jedda v. the United Kingdom,* App. No. 27021/08, ECtHR (2011), available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612.

[13] CAT/C/GRB/5. para. 210. The UK's 5th State Party Report is available at: http://www.univie.ac.at/bimtor/dateien/uk_cat_2012_report.pdf.

[14] *Ibid.,* para. 29.

[15] CAT/C/GC/2. General Comment 2 is available at: http://www.unhcr.org/refworld/docid/47ac78ce2.html.

[16] Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12,* September 2012, p. 29, available at: http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf.

[17] In 2011, the Court of Appeal ruled that IHAT was not sufficiently independent; the Government's subsequent changes to IHAT's composition have been challenged and the case was argued in January 2013. REDRESS intervened in the earlier successful appeal case of *Ali Zaka Mousa v Secretary of Defence,* [2011] EWCA Civ 1334: see http://www.redress.org/case-docket/single-iraq-inquiry.

[18] Above, n.16.

[19] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* 27 March 2013, para. 4.5, available at: http://www2.ohchr.org/english/bodies/cat/cats50.htm.

[20] It is to noteworthy that based upon the rulings in *Al-Skeini* and *Al-Jedda*, lawyers for the families of troops killed in Iraq have argued that a soldier in a war zone has the same right to protection as civilians caught in combat – see Terri Judd, The Independent, *Troops' right to life same as civilians, court told*, 18 February 2013, available at: http://www.independent.co.uk/news/uk/home-news/troops-right-to-life-same-as-civilians-court-told-8500307.html. In February 2013 the case was argued before the UK Supreme Court; the Ministry of Defence opposed the families' case and counter appealed a decision by the Court of Appeal that those killed in a Snatch (a type of land rover vehicle subsequently

of Iraqi civilians by UK forces can be compared to the way the Committee has interpreted UNCAT, as set out in General Comment 2 (paras. 7 and 17). REDRESS welcomes CAT raising the issue of both the ECHR and UNCAT in this context. In the light of General Comment No. 2 (para.7), the failure of the UK to change its attitude on the reach of UNCAT raises questions as to its recognition of the significance of article 2(1) of the Convention, which sets out the overarching obligation of States parties to take measures to prevent acts of torture in any territory "under its jurisdiction". It also calls into question the credibility of the FCO's professed anti-torture policy regarding the actions of its own public officials (such as soldiers serving abroad), compared to the actions of other States.

23. REDRESS calls on CAT to affirm that the UK's position on the extraterritorial application of UNCAT is not in line with its obligations.

Issue 5. Please indicate how the State party means to reconcile its obligations under the Convention[21] with the guidance given by the State party to business enterprises that "the UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas".[22] Are transnational corporations registered in the State party held accountable for violations of the Convention outside of the United Kingdom? Are remedies provided to the victims? Please indicate whether private military companies acting overseas and contracted by the United Kingdom receive a human rights training similar to that of British military forces before deployment and whether they abide by the same set of Standard Operating Procedures.

24. Before 2011, the UK Government was reportedly "unwilling" to address ways it might be able to assert jurisdiction over parent companies which are registered in the UK to ensure compliance with human rights obligations abroad.[23] This approach was challenged by the UN Committee on the Elimination of Racial Discrimination (CERD). In 2011, that Committee called on the UK "to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the convention."[24]

25. On 16 June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights,[25] and the UK has shown considerable support for the development of those principles. The Guiding Principles contain language such as "Business enterprises *should* respect human rights" [emphasis added], but do not establish enforcement mechanisms or liability for international businesses.[26] Principle 2 says that states should set out the "expectation" that companies domiciled in their territory comply with human rights. However, it is noteworthy that CAT has highlighted in General Comment 2 (para.17) the "due diligence" obligations under UNCAT to "prevent, investigate, prosecute or punish…non-State officials or private actors".[27]

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withdrawn from combat zones due to issues of vulnerability) and others caught in 'friendly fire' could pursue damages on negligence grounds. Judgement is pending. While this case does not refer to torture, the Ministry of Defence's opposition to the claim illustrates the UK's continued reluctance to acknowledge the applicability of the ECHR. This is contrary to the ECtHR's rulings in human rights cases involving abuse of Iraqi civilians and reflects a failure to take steps to positively build on these decisions.

[21] See in particular CAT/C/GC/2, para. 15 and 16.

[22] The Foreign and Commonwealth Office, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies,* October 2009, p. 4, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35451/business-toolkit.pdf.

[23] Foreign Affairs Committee, *Written evidence from Amnesty International*, 15 May 2012, available at: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/116/116we02.htm.

[24] Human Rights Watch, *UN Human Rights Council: Weak Stance on Business Standards*, 16 June 2011, available at: http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

[25] See United Nations*, Guiding Principles on Business and Human Rights,* 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[26] United Nations, *Guiding Principles on Business & Human Rights*, *ibid.,* p. 13; Human Rights Watch*, UN Human Rights Council: Weak Stance on Business Standards,* above n.24*,* p. 13.

[27] Above, n.15.

26. In December 2012, the FCO issued a report concerning the implementation of the Guiding Principles.[28] The report states that the objective is to increase State and corporate understanding and implementation of the UN Guiding Principles on Business and Human Rights. The report also notes that the target areas will be: the State's duty to protect, corporate respect for human rights, and access to an effective remedy.[29] It further states that the UK Government has made it clear that the commitment to supporting UK business internationally is consistent with placing human rights at the core of foreign policy.[30]

27. However, there are concerns that recent changes in the laws governing legal aid for civil litigation have undermined access to an effective remedy for human rights abuses committed by business enterprises.[31] For example, regarding legislation such as the Legal Aid, Sentencing and Punishment of Offenders Act 2012[32] (LAPSO), the FCO noted that "changes to the law governing legal aid for civil litigation for cases external to the UK, like the recent Trafigura case, means it will be far more onerous to bring such claims in the future if proposed changes are adopted." [33]

28. An important recent case illustrating the importance of access to an effective remedy is the successful claim involving allegations of torture in *Guerrero v. Monterrico Metals Plc* (2009-2011):[34]

> In June 2009, proceedings were commenced against Monterrico Metals Plc in the English High Court on behalf of 33 indigenous Peruvians who have allegedly been tortured and mistreated at Monterrico's Rio Blanco mine in August 2005 following an environmental protest. The claimants alleged, in essence, that Monterrico was complicit in the torture and mistreatment [of the claimants] …. Monterrico denied all these allegations. In July 2011 the proceedings were settled, on confidential terms, by a payment of compensation and legal costs, without admission of liability.

29. A 2012 report, "Dangerous Partnership", published by the Global Policy Forum and the Rosa Luxemburg Foundation, argues that Private Military and Security Companies (PMSCs), largely utilised by the UK, have committed serious human rights abuses including injuring or even killing civilians and engaging in financial malfeasance.[35] The report argues that the PMSC industry has close relations with the governments of the States where they are based, including the UK, which is the headquarters and prime contractor for a large number of firms.[36] Moreover, the PMSCs operate in secrecy typically afforded to national security operations, and where cases of human rights violations surface, PMSCs avoid liability from ill-equipped local legal systems and host States which are unwilling to prosecute.[37] While some PMSCs have signed codes of conduct, the UK has not committed to hiring solely signatory companies.[38]

30. The FCO announced that it is working with the PMSC industry to develop, implement and enforce national and international standards governing the activity of UK-registered PMSCs. The UK

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[28] UK Foreign & Commonwealth Office, Conference report, *Business and human rights: implementing the Guiding Principles one year on*, 29 June 2012, available at: https://www.wiltonpark.org.uk/wp-content/uploads/wp1172-report.pdf.
[29] *Ibid.*
[30] *Ibid.,* p. 8.
[31] *Ibid.,* p. 7.
[32] The Legal Aid, Sentencing and Punishment of Offenders Act, 2012, available at: http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted.
[33] UK Foreign & Commonwealth Office, Conference report, n. 28 above, pp. 6-7.
[34] See further Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, reprinted from City University of Hong Kong Law Review, Volume 3:1, Fall 2011, pp. 1–41, at p.40.
[35] Global Policy Forum & Rosa Luxemburg Foundation*, Dangerous Partnership: Private & Security Companies and the UN,* June 2012, p. 7, available at: http://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf.
[36] *Ibid.,* p. 14.
[37] *Ibid*., p. 16.
[38] *Ibid.*

Government stated that it will use its influence as a key purchaser of PMSC services to ensure compliance.[39] REDRESS submits that it is imperative that the UK put in place these standards due to the impunity with which PMSCs may otherwise act, and in line with its obligations under UNCAT.

31. Irrespective of the possible liability of a home State for the conduct of a business enterprise registered in its territory, the State has the responsibility to provide access to remedies for victims, such as providing courts with jurisdiction to hear civil claims arising from company acts outside of the State.[40] The State's duty also extends to investigating and prosecuting individuals related to the company who commit, participate in or are otherwise complicit in torture or ill-treatment, regardless of its commercial context or where it was committed.[41]

32. There have been recent cases of alleged complicity in torture involving private corporations based in the UK. For example, the British-Danish security company G4S has allegedly been supplying perimeter defences, CCTV systems, and command control centres for Ofer Prison in Palestine, as well as information systems for the al-Jalame interrogation centre in Israel which have allegedly been housing detainees, including Palestinian children, in solitary confinement for the purposes of interrogation and torture.[42] There does not appear to be any official statement or measures taken by the UK Government on the matter.

33. Also, in February 2013, the European Centre for Constitutional and Human Rights, the Bahrain Centre for Human Rights, Bahrain Watch and Reporters Without Borders filed formal complaints with the Organisation for Economic Cooperation and Development (OECD) in the UK and Germany against two surveillance companies, Gamma International and Trovicor, which allegedly created surveillance products and services which were instrumental in multiple human rights abuses in Bahrain, including torture.[43] Though not filed in court, if the companies are found to be in violation of the OECD Guidelines for Multinational Enterprises, the UK National Contact Point is required to investigate to determine the extent of the breach (if any), provide recommendations, and follow up to ensure compliance, but is not apparently empowered to award reparations to the victims of the torture in which Gamma and Trovicor were allegedly complicit.[44]

34. REDRESS therefore welcomes CAT raising this issue and submits that the above survey highlights current problems which the UK Government needs to address urgently in relation to UK companies.

Issue 6. Please explain what steps has the State party undertaken to review its statute and common law, including Sections 134(4) and 134(5) of the Criminal Justice Act (CJA) 1988,[45] to ensure full consistency with the obligations imposed by the Convention, as recommended by the Committee in the last concluding observations (CAT/C/CR/33, para. 4(a)(ii)).

35. CAT raised this aspect in 2004 as follows:

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[39] See Foreign & Commonwealth Office, *Promoting high standards in the UK PMSC industry*, 21 June 2011, available at: https://www.gov.uk/government/news/promoting-high-standards-in-the-uk-pmsc-industry

[40] CAT/C/GC/2, paras 15, 16 and 18; CAT/C/GC/3, para. 22.

[41] UNCAT, Art. 5(1)(b); CAT/C/GC/2, para. 18.

[42] See Islamic Human Rights Commission, *Action Alert: UK/Palestine/Israel-Protest against G4S complicity in the torture of Palestinian Children*, 6 March 2013, available at: http://www.ihrc.org.uk/activities/alerts/10447-action-alert-uk-palestine-israel-protest-against-g4s-complicity-in-the-torture-of-palestinian-children; War on Want, *G4S accused over links to Palestinian 'torture' death jail,* 25 February 2013, available at: http://www.waronwant.org/news/press-releases/17819-g4s-accused-over-links-to-palestinian-torture-death-jail.

[43] See European Centre for Constitutional and Human Rights, Press Release, 7 February 2013, available at: http://www.ecchr.de/index.php/surveillance-technology/articles/human-rights-organisations-file-oecd-complaints-against-surveillance-firms-gamma-international-and-trovicor.html?utm_source=smartmail&utm_medium=email&utm_campaign=March+UJ+News&file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/OECD%20complaint%2C%20press%20release%2013-02-07.pdf.

[44] *Ibid.*

[45] CAT/C/GBR/5, para. 28.

(ii) article 2 of the Convention provides that no exceptional circumstances whatsoever may be invoked as a justification for torture; the text of Section 134(4) of the Criminal Justice Act however provides for a defence of "lawful authority, justification or excuse" to a charge of official intentional infliction of severe pain or suffering…; moreover, the text of section 134(5) of the Criminal Justice Act provides for a defence for conduct that is permitted under foreign law, even if unlawful under the State party's law.[46] [Emphasis in original]

36. REDRESS reiterates the submission made in 2004 in relation to the State Party's 4th Periodic Report, namely, that the UK should reform Section 134 of the CJA 1988 rather than leave it for the courts to second guess parliament's intention behind the existing statutory provisions.[47] As previously submitted, the definition of torture in section 134 requires strengthening by expressly providing for article 2(3) of the Convention: "An order from a superior officer or a public authority may not be invoked as a justification of torture". At present, the UK statutory provision refers to "lawful authority" as a potential defence that may be given a wide interpretation. By including an additional provision to the UK's current definition, no room is left for an interpretation contrary to UNCAT.[48]

37. REDRESS notes that the UK has retained its position that sections 134 (4) and (5) are consistent with the obligations imposed by UNCAT,[49] and submits that the Committee should continue to put to the UK that it has not dealt with the shortcomings identified.

Issue 7. The Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (Guidance) retains the possibility for Ministerial approval in some cases where torture may be required to extract information "crucial to saving lives".[50] In light of the fact that "no exceptional circumstances […] may be invoked as a justification of torture" (art. 2(2)), please explain whether the State party intends to review the Guidance. Has Ministerial approval been sought since the last concluding observations?

38. In addition to the specific concern raised by the Committee under this issue in relation to the Guidance, REDRESS has criticised, *inter alia*, the requirement that UK security services must not proceed to interview detainees overseas where they "know or believe" that torture will occur as being too narrow and inconsistent with the UK's obligations under UNCAT.[51] The Guidance should explicitly prohibit an officer from proceeding where there is a serious or real risk of torture. 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).[52] REDRESS is concerned that this could lead to complicity in torture contrary to article 4 of UNCAT.[53] The Guidance also allows officers to rely on

[46] UN Committee against Torture, *Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland"*, CAT/C/CR/33/3, 10 December 2004 available at: http://www.unhchr.ch/tbs/doc.nsf/0/3bb35be99d933e27c1256f780039b9cb?Opendocument.
[47] REDRESS, *Comments to the United Kingdom's 4th Periodic Report to the Committee Against Torture,* 15 October 2004, p.14, available at: http://www.redress.org/downloads/publications/CATRepOct2004.pdf.
[48] *Ibid.*
[49] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* 27 March 2013, p. 6, available at: http://www2.ohchr.org/english/bodies/cat/cats50.htm.
[50] CAT/C/GBR/5, para. 281.
[51] 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.
[52] *Ibid*.
[53] See in this regard Sarah Fulton, *Cooperating with the enemy of mankind: can states simply turn a blind eye to torture?* International Journal of Human Rights, Vol. 16, June 2012, 773-795. The author raises concerns about the practice of States

assurances that detainees will not be tortured (paragraph 17 of the Guidance), but such assurances may not be reliable and cannot provide protection from regimes which are known to authorise torture.[54]

39. Other NGOs have also raised concerns about the Guidance as being inadequate for the protection of human rights, including: the list of treatments which could constitute human rights violations is inadequate, especially in terms of forms of torture which are particularly suffered by women;[55] the Guidance's apparent creation of ministerial discretion to authorise UK cooperation where there is a risk torture may occur; its indication that "private assurances between intelligence services can ameliorate the risk of torture, despite the unreliability of such assurances".[56]

40. REDRESS therefore welcomes CAT raising its concerns, and submits that the Guidance needs to be urgently reviewed and amended to conform with the UK's obligations under UNCAT.

Issues 12. In view of the risk of torture that detainees face in Afghanistan, please explain whether the State party considers extending on a long term basis the current moratorium on the transfer of prisoners detained by UK military forces in Afghanistan to Afghan authorities.

41. There have been recent cases concerning the detainee handover by the UK to Afghan officials. On 6 November 2012 the High Court of England and Wales ordered that the UK government maintain a temporary moratorium on the transfer of detainees to Afghan authorities due to the risk of torture and ill-treatment.[57] The ruling was based upon a case brought by Serdar Mohammed, an Afghan national detained by the UK in Afghanistan in 2010, who was transferred to Afghan Intelligence, where it was alleged he was tortured and subjected to an unfair trial.[58] Previously, the case of *Maya Evans* [59] revealed serious concerns about the detainee transfer policy which applied to Afghans captured by British soldiers, following claims that the detainees were subject to torture after being handed to Afghan authorities.

42. There are alleged to be 70 prisoners still held in British military bases in Afghanistan as of the beginning of 2013, in spite of UK Government hopes to reduce the number in line with troop withdrawals due to be completed by 31 December 2014.[60] However, on 29 November 2012, Defence Secretary Philip Hammond revealed to the High Court that "secret new information had persuaded him to abandon the transfers despite claims by British officials that the situation in Afghan jails had

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closing their eyes to the source of the intelligence it receives, and in particular the passive receipt of information known or suspected to have been obtained from torture – she submits this may amount to an international wrongful act.

[54] The UK has yet to hold a proper inquiry into the allegations of complicity in torture by the security services. This is dealt with under ***Issue 24*** below.

[55] See Foreign Affairs Committee, *Written evidence from Amnesty International*, 15 May 2012, available at: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/116/116we02.htm Amnesty International also noted that the Guidance says little about how Ministerial authority and discretion will be used, and does not indicate what personnel should do if they believe their actions will result in human rights abuses but ministers instruct them to proceed.

[56] See Human Rights Watch, *Written evidence from Human Rights Watch*, 28 April 2011, para. 18, available at: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/human/hr12.htm.

[57] See BBC News, *High Court blocks UK detainee transfers in Afghanistan*, 2 November 2012, available at: http://www.bbc.co.uk/news/uk-20185001.

[58] *Ibid.*

[59] *The Queen (on the application of Maya Evans) v. Secretary of State for Defence,* [2010] EWHC 1445 (Admin), available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-evans-v-ssd-judgment.pdf. The case was brought by a UK peace activist, alleging that the transfers were in breach of the UK's *non-refoulment* obligations.

[60] Open Society, *Fears for prisoners left behind after Afghan withdrawal*, 3 January 2013, available at: http://www.thebureauinvestigates.com/2013/01/03/fears-for-prisoners-left-behind-after-afghan-withdrawal/.

improved."[61] He therefore implemented a third moratorium on detainee transfer,[62] which is currently still in force.

43. REDRESS welcomes CAT having raised this issue. In the *Maya Evans* case, REDRESS submitted a witness statement in support of the claimant, and in an earlier submission to the Foreign Affairs Committee, REDRESS recommended,[63] *inter alia,* that the UK should accept full responsibility under international humanitarian law and international human rights law for all persons it detains in Afghanistan; it should stop transferring detainees on the basis of a memorandum of understanding (MOU) between the two States or any other similar basis; instead it should retain custody until Afghanistan has properly and effectively implemented mechanisms and safeguards in its detention and prison systems for the prohibition and prevention of torture and ill-treatment. In addition, REDRESS recommended that the UK should properly investigate what has happened to all persons already transferred; where allegations of torture or ill-treatment arise these should be investigated promptly, impartially and effectively; and the UK should make full reparation to any person abused post-transfer. The UK should take full, comprehensive and effective steps to assist the Afghan authorities in building the rule of law, internationally acceptable prison and detention systems and a torture-free society; and it should take a lead in working with and within UN, EU, NATO and ISAF institutions to ensure the strengthening of and compliance with its *non-refoulement* principles and obligations.

44. REDRESS submits that CAT should approach the issue of transfers in the above context, as there is credible evidence that the UK has not fulfilled its UNCAT obligations in Afghanistan.

Issue 13. Please provide updated information on the total number of cases of extradition or removal subject to the receipt of diplomatic assurances or guarantees that have occurred since 11 September 2001, disaggregated by receiving State. Please explain if the monitoring of persons removed under Memoranda of Understanding or diplomatic assurances to Algeria, Ethiopia, Jordan, Lebanon, Libya or Morocco includes the possibility of unannounced and unrestricted visits and private meetings with the person deprived of his liberty and if independent medical expertise is granted. Please describe how the State party assures itself of the independence, effectiveness, and impartiality of monitoring conducted by third parties?

Issue 14. Please indicate whether similar Memoranda have been or are being elaborated with other States since the submission of the State party's periodic report and explain how these are compatible with the State party's obligations under article 3 of the Convention.

45. REDRESS submits in respect of both of these issues that there remain fundamental problems with the use of diplomatic assurances in the context of the UK's *non-refoulement* obligations, and REDRESS continues to oppose their use as a method of deporting persons to States known to practice torture. The UK Government's policy of relying on diplomatic 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.[64] The previous and present Government has vigorously pursued this policy.[65]

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[61] The Guardian, Philip Hammond cites torture risk as he halts transfer of prisoners to Afghan jail, 29 November 2012, available at: http://www.guardian.co.uk/world/2012/nov/29/prisoner-transfer-to-afghan-jails-halted.
[62] *Ibid.*
[63] REDRESS, *Foreign Affairs Committee: New Inquiry: Afghanistan: Submissions of the Redress Trust (REDRESS),* 23 January 2009, p. 8, available at: http://www.redress.org/downloads/publications/Submission_to_FAC_23_January_2009.pdf.
[64] *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
[65] The use of the policy is recently re-iterated in Foreign and Commonwealth Office*, FCO Strategy for the Prevention of Torture 2011-2015*, October 2011, p. 10, available at:

46. Closed sessions are used in the Special Immigration Appeal Commission (SIAC) hearings to test the likelihood of risk of torture or 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. Such proceedings raise a series of concerns, particularly in relation to the disclosure of evidence, the testing of evidence and the use of special advocates.[66] These concerns are in addition to the problem of post-deportation monitoring itself which CAT has raised.

47. According to the information provided by the UK in its Response to the Committee on the List of Issues,[67] it has deported individuals to Algeria and Jordan on the basis of agreements with the respective states. In the case of Algeria, this practice was based on an exchange of letters between the UK and Algeria that did not envisage any monitoring mechanism.[68] However, this agreement was accepted by UK courts as substantially reducing the risk of torture or ill-treatment upon return.[69] This was notwithstanding persistent concerns relating to the prevalence of torture and ill-treatment in Algeria.[70]

48. In respect of Jordan, the European Court of Human Rights held in the case of *Othman (Abu Qatada) in* 2012 that deporting Mr Othman to Jordan would not violate article 3 of the European Convention of Human Rights (ECHR), notwithstanding the fact that he had suffered torture in Jordan before and concerns over safeguards and the effectiveness of monitoring mechanisms.[71] However, the Court did find a violation of article 6 ECHR, holding that deporting an individual to stand trial for serious offences in which a conviction may be based on evidence extracted under torture would constitute a flagrant denial of justice.[72] The case has since been the subject of further litigation before UK courts.[73]

49. SIAC has rejected the reliability of diplomatic assurances in relation to only one state – Libya. [74] It did, however, in the case of *Y v. Secretary of State for the Home Department*, recognise that "there is an argument that such bilateral arrangements may undermine longer term attempts to achieve adherence more generally to international human rights norms, although we do not see that there is any necessary conflict. But that issue is not open for us to resolve nor is it relevant to our decision."[75] This reasoning points to broader systemic concerns; the focus on individual cases to meet security objectives is detrimental to the objective set out in the Preamble of the Convention, i.e. "to make

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-tortureprevention.pdf.

[66] For a detailed criticism of diplomatic assurance see REDRESS*, The United Kingdom, Torture and Terrorism: Where The Problems Lie*, December 2008, pp. 50- 73, available at: http://www.redress.org/downloads/publications/Where%20the%20ProblemsLie%2010%20Dec%2008A4.pdf. See also REDRESS letter to the Foreign Affairs Committee, 20 June 2011, p. 3, available at: http://www.redress.org/downloads/publications/Letter%20to%20FAC%2020%20June%202011.pdf.

[67] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* n.19 above, p. 14.

[68] *Y v. Secretary of State for the Home Department*, Special Immigration Appeals Commission, Appeal No: SC/36/2005 (26 August 2005), paras.226-228, available at: http://www.siac.tribunals.gov.uk/Documents/Y%20%20%20OPEN%2016%20Aug.pdf

[69] See in particular *RB (Algeria), U (Algeria), Othman v. Secretary of State for the Home Department* [2009] UKHL 10, available at: http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090218/rbalge-1.htm

[70] See Concluding Observations of the Committee against Torture: Algeria, UN Doc. CAT/C/DZA/CO/3, 26 May 2008.

[71] *Othman (Abu Qatada) v. United Kingdom*, Appl.no. 8139/09, ECtHR (2012), particularly paras. 160-207, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{"itemid":["001-108629"]}.

72 *Ibid.,* paras. 236-287.

[73] *Omar Othman Aka Abu Qatada v. Secretary of State for the Home Department*, [2013] EWCA Civ. 277, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2013/277.html

[74] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* above n.19, p. 15.

[75] *Y v. Secretary of State for the Home Department*, Special Immigration Appeals Commission, Appeal No: SC/36/2005 (26 August 2005), para. 389.

more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."

50. REDRESS submits that CAT should, in light of these considerations, call on the UK to abandon the practice of relying on diplomatic assurances when transferring an individual to a country where he or she may be at risk of torture or ill-treatment.

Issue 19. Since the last concluding observations, how many prosecutions were carried on for torture and ill-treatment whether under the HRA, the Criminal Justice Act 1988 or the Service Law? How many of these are of current and former government officials or members of the armed forces?

51. UK law has criminalised torture since 1988 and the legal framework to fill "impunity gaps" for torture and other international crimes has since been significantly reinforced.[76] At the same time legislation has been passed making it more difficult for private arrest warrants to be issued where a suspect is coming to the UK or is present.[77] There have been no criminal prosecutions for torture or complicity in torture involving government officials, members of the security services or military personnel, although there have been a number of court martials of soldiers for abuses committed in Iraq against civilians.[78] Only two foreign suspects of international crimes, one of which concerned torture, have been successfully prosecuted in the UK to date.[79] This is despite figures indicating that there are a considerable number of alleged perpetrators present or residing in the UK. For example, in 2009 the Joint Committee on Human Rights said that it had information that the UK Borders Agency (UKBA) had investigated 1,863 individuals in the UK for genocide, war crimes or crimes against humanity."[80] There is currently a criminal trial pending involving an accused Nepalese citizen, Colonel Kumar Lama, arrested in the UK in January 2013.[81]

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[76] The ICC Act 2001 was amended by section 70 of the Coroners and Justice Act 2009. The effect of this amendment, which came into force on 6 April 2010, is to give UK court's jurisdiction over genocide (and war crimes and crimes against humanity) committed abroad after 1 January 1991 where the suspect is resident in the UK.

[77] Police Reform and Social Responsibility Act, 2009. REDRESS opposed this legislation, which now requires the consent of the Director of Public Prosecutions before a private arrest warrant can be issued. See REDRESS, *Submission to Police Reform and Social Responsibility Public Bill Committee,* 17 January 2011, available at: http://www.redress.org/downloads/publications/Submission%20to%20parl%20comm%20FINAL%2017%20JAN%202011.pdf.

[78] Such as the court martial arising from the killing of Baha Mousa and the ill-treatment of other Iraqi civilians arrested as a result of Operation Salerno in Basra in September 2003; one British soldier, Corporal Donald Payne, received a one-year prison sentence for inhuman treatment; he pleaded guilty to a war crime under section 51 (1) of the International Criminal Court Act 2001. For full details of what happened see Sir William Gage, Chairman, *The Baha Mousa Public Inquiry Report*, 2011, available at: http://www.bahamousainquiry.org/report/index.htm.

[79] Afghan Faryadi Zardad was convicted of torture and hostage taking in 2005 and sentenced to 20 years imprisonment. There is an unreported High Court judgment of 19 July 2005 in *R v. Zardad* which relates to certain legal aspects of the case. An appeal was denied 17 February 2007. On 1 April 1999, Anthony (Andrzej) Sawoniuk was sentenced under the War Crimes Act 1991 to life imprisonment for the murder of two civilians. The Court of Appeal upheld his conviction on 10 February 2000 - *R. v. Sawoniuk*, Court of Appeal (Criminal Division), [2000] Crim. L. R. 506. The House of Lords denied leave to appeal on 20 June 2000 - War Criminal Refused New Hearing, Financial Times, 20 June 2000.

[80] Joint Parliamentary Committee on Human Rights, *Closing the Impunity Gap,* 11 August 2009, para. 34, available at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153.pdf. More fully, the JCHR said here: "We [...] asked for information on the number of suspected perpetrators of genocide, war crimes and crimes against humanity present in the UK who cannot be prosecuted [because of the existing legislation's lack of retrospective jurisdiction]. In its memorandum, the Government said it could not estimate the number of suspects living in the UK but said that in the four years between 2004 and 2008, there were 138 adverse immigration decisions (such as refusal of entry, indefinite leave to remain and naturalisation, and exclusions from refugee protection), and that "these individuals may no longer be in the UK." In the same four years, 22 cases were referred to the Metropolitan Police. In its memoranda, Aegis quoted figures provided to Parliament: the UK Borders Agency (UKBA) has investigated 1,863 individuals in the UK for genocide, war crimes or crimes against humanity."

[81] REDRESS Press Release, *REDRESS welcomes UK prosecution of Nepali torture suspect,* 7 January 2013, *available at:* http://www.redress.org/downloads/Nepalpressrelease_070113_final.pdf.

52. According to a reply from the UK Border Agency to a 2012 Freedom of Information request from the press, there were "more than 200 suspected war criminals [...] recently [...] identified by UK immigration officials with most continuing to live freely in the country [...]".[82] The press report went on to state: "it was previously revealed that a further 495 suspected war criminals had been identified by the Home Office in the five years to June 2010."[83]

53. REDRESS' concern is that there is no coherent UK policy to investigate and, where evidence is found, to prosecute alleged perpetrators of torture found within the UK's jurisdiction. Thus the FCO Annual Human Rights and Democracy Report, addressing "Human rights offenders and entry to the UK,"[84] states that "[w]here there is independent, reliable and credible evidence that an individual has committed human rights abuses, the individual will not normally be permitted to enter the United Kingdom."[85] However, there is no reference to the law, practice or policy concerning suspected perpetrators of torture who are already known to be present (some of whom cannot be deported or extradited due to *non-refoulment* concerns), and the UK's approach to not making the UK a "safe haven" seems to be largely concerned with keeping suspects out.

54. The UK's *Strategy for the Prevention of Torture 2011-2015*[86] refers to the obligations under UNCAT to ensure that there are no safe havens for individuals accused of torture.[87] The UK needs to make this aspect of the strategy operational with a view to ensuring that a policy to prevent the UK being a safe haven results in torture suspects being held accountable. Establishing such a clear policy requires coordinated engagement between several different departments and agencies, including the FCO, the Crown Prosecution Service (Counter Terrorism Division); Metropolitan Police Service (War Crimes Unit); Home Office (Extradition) and UK Border Agency (War Crimes Team) to identify, investigate and either extradite or prosecute suspects.[88] Further, and crucially, the UK also needs to ensure that these authorities, in particular the relevant units within the Crown Prosecution Service and the Metropolitan Police, have the necessary resources and skills to investigate, and, where sufficient evidence exists, to prosecute suspected perpetrators of torture in the UK, including on the basis of universal jurisdiction.

55. It is imperative that the FCO and other Government ministries/agencies work together to tackle the UK being a *de facto* safe haven. Building on the *Strategy for the Prevention of Torture*, a Government-wide approach to address accountability and redress for torture is necessary. Such an approach must also include scrutinising the appointment of foreign diplomats to High Commissions and Embassies in the UK, to ensure that foreign diplomats suspected of having perpetrated international crimes will not be accredited to work in the UK, and further that swift action is taken to

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[82] Yorkshire Post, *UK 'safe haven' for war crimes suspects as 200 remain at large*, 8 May 2012, available at: http://www.yorkshirepost.co.uk/news/at-a-glance/general-news/uk-safe-haven-for-war-crimes-suspects-as-200-remain-at-large-1-4524193

[83] *Ibid*. Further, the report also said: "Michael McCann MP, chairman of the All-Party Group for the Prevention of Genocide and Crimes Against Humanity, has criticised the UKBA for not acting quickly enough when suspicions came to light. He also expressed frustration at his inability to obtain answers from the UKBA about the full scale of the problem. 'We need a frank exchange between the UKBA and police and we need Ministers to provide straight answers to straight questions.'"

[84] United Kingdom Foreign and Commonwealth Office, *Human Rights and Democracy: The 2011 Foreign and Commonwealth Office Report,* 30 April 2012, p. 16, available at: http://fcohrdreport.readandcomment.com/wp-content/uploads/2011/02/Cm-8339.pdf.

[85] *Ibid.,* p. 53.

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

[87] *Ibid*., p. 6.

[88] REDRESS, *Submission to the Foreign Affairs Committee's Annual Inquiry into the FCO's Human Rights Work in 2011*, 25 May 2012, p.3, available at: http://www.redress.org/downloads/publications/121017FACsubmission.pdf.

declare *persona non grata* any foreign diplomat for which there are credible allegations relating to their involvement in such crimes.[89]

56. Further, criminal prosecutions should not be seen in isolation from other aspects of reparation to which victims are entitled, including, for example compensation. State immunity currently prevents survivors suing foreign states[90] in UK courts for damages; this problem is examined under ***Issue 29.***

57. The above concerns relate to torture and other international crimes committed by non-UK public officials abroad and who have come within the UK's jurisdiction. However, REDRESS also welcomes CAT raising the issue of such crimes allegedly committed by UK public officials, as there have been serious allegations made of complicity in torture involving the UK security services personnel, as well as cases concerning UK soldiers in Iraq and Afghanistan, which are dealt with under ***Issues 12, 25*** and **27**.

Issue 21. With reference to the previous request by the Committee's Rapporteur on follow-up to concluding observations, please provide comprehensive information on all investigations undertaken by the State party into allegations of torture and ill-treatment by its forces in Iraq and Afghanistan; the results of these investigations; the number of resulting prosecutions before courts; and the outcomes of any such prosecutions. Please also clarify the legal means available to challenge final decisions of investigatory bodies and describe how the State party has ensured the independence of such investigations. Please indicate whether the State party has considered revising or repealing the Inquiries Act of 2005 in order to transfer control over inquiries from the government to the judiciary.

58. REDRESS submits that as in the case of the allegations of complicity involving the security services in their counter-terrorism activities, the last decade has seen serious allegations of torture, including by means of complicity, as a result of the UK's military interventions in Iraq and Afghanistan. In respect of the security services the call for a public inquiry continues (see ***Issue 24*** below). While there have been some inquiries into the allegations involving the UK army such as the Baha Mousa Public Inquiry (see ***Issue 25***) and the on-going Al Sweady Inquiry, it is clear that there are still hundreds of cases[91] of alleged torture remaining unaddressed in respect of Iraq. In relation to Afghanistan, there are also serious issues which have not been resolved. Matters relating to the IHAT process in Iraq are dealt with under ***Issue 27*** and in respect of *non-refoulement* concerns in Afghanistan under ***Issue 12.***

59. REDRESS is deeply concerned that, given all of the above, there have been no criminal prosecutions for torture, and only a handful of court-martial convictions for lesser offences. Further, the prospect of the truth being reached and justice achieved for victims and their families has proved and is proving to be a very long process. It appears likely that more allegations will arise from a variety of sources as time goes by - indeed, as recently as April 2013, reports were made of the

[89] See, for example, The Guardian, *Sri Lankan diplomat may avoid questioning on war crimes claims*, 5 April 2012, available at http://www.guardian.co.uk/politics/2012/apr/05/sri-lankan-diplomat-war-crimes-allegations. The UK should also refuse consent to anyone coming to the UK on special missions where there are credible allegations relating to their involvement in international crimes.

[90] In respect of claims against individuals, there is a case pending in the ECtHR which raises this issue: *Jones v. United Kingdom* (Application Number 34356/06) *and Mitchell and Others v. United Kingdom* (Application Number 40528/06) - see below n. 132. Adequate reparation includes restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition as set out in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

[91] The Guardian, *Iraq abuse inquiry was a 'cover-up', whistleblower tells court*, 11 December 2012: "Lawyers say they have now received complaints of abuse from more than 1,100 Iraqis…"; available at: http://www.guardian.co.uk/uk/2012/dec/11/iraq-abuse-inquiry-whistleblower-court.

direct involvement of UK soldiers working with their USA counterparts in the early days of the invasion of Iraq in the torture of detainees:[92]

> British soldiers and airmen who helped to operate a secretive US detention facility in Baghdad that was at the centre of some of the most serious human rights abuses to occur in Iraq after the invasion have, for the first time, spoken about abuses they witnessed there.

60. What is significant is that this latest report is based on allegations by UK servicemen themselves. REDRESS submits that the Committee should impress on the UK the urgent need for allegations such as these and for all outstanding matters where human rights violations have been alleged to be urgently dealt with, and once and for all, by an appropriate mechanism that fulfils the UNCAT requirements.

Issue 24. The Prime Minister announced in July 2010 that an independent inquiry (the Detainee Inquiry) would examine whether and to what extent State security and intelligence agencies were involved or otherwise complicit in the improper treatment or rendition of detainees held by other States in counter-terrorism operations in the aftermath of the attacks of 11 September 2001. On 3 August 2011 lawyers acting for former detainees and ten non-governmental organisations indicated that they would not participate in the Detainee Inquiry (which was concluded in January 2012) due to its lack of transparency and the lack of participation of former and current detainees and other third parties.[93] Please explain how the State party intends to remedy the structural shortcomings of the inquiry.

61. REDRESS was one of ten human rights non-governmental organisations[94] refusing to participate in the Detainee Inquiry. Shortly before the Government ended the Inquiry because of police investigations into the allegations of the two Libyan men Sami al-Saadi and Abdul Hakim Belhaj (see ***Issue 28*** below), REDRESS joined others in, once again, highlighting their concerns with the Inquiry.

62. These concerns with the Inquiry were: a) the lack of its own power to decide which documents or evidence to publish, because the final say rests with the Cabinet Secretary, answerable to the Government - while some documents may need to be kept secret for legitimate national security reasons, there should be a presumption in favour of openness with the final decision on disclosure resting not with the government but with an independent body; b) the form of the Inquiry prevents the meaningful participation of victims, their representatives and other interested parties; c) with the exception of the heads of agencies, all members of the security services will give evidence behind closed doors, and there will be no opportunity to effectively cross examine or otherwise challenge that evidence; d) those who were subject to torture, rendition or illegal detention and the groups who documented these abuses should have the opportunity to challenge the official version of events and those responsible for policy and its implementation; e) without this the Inquiry is most unlikely to establish the full picture and to identify all the policy failures.[95]

63. Following the Government's announcement[96] of the termination of the Inquiry, the Government stated[97] that the Prime Minister had received the Inquiry's report on 27 June 2012 "on its

[92] The Guardian, *Camp Nama: British personnel reveal horrors of secret US base in Baghdad*, 1 April 2013, available at: http://www.guardian.co.uk/world/2013/apr/01/camp-nama-iraq-human-rights-abuses.
[93] CAT/C/GBR/, para. 21.
[94] REDRESS, Amnesty International, Human Rights Watch, Liberty, Justice, Cage Prisoners, British Irish Rights Watch, Reprieve, Freedom from Torture, Aire Centre.
[95] *Open letter to the Prime Minister concerning the Detainee Inquiry*, 6 January 2012, available at: http://www.redress.org/downloads/publications/Open%20letter%20to%20the%20Prime%20Minister%20concerning%20the%20Detainee%20Inquiry%2006%2001%2012.pdf
[96] On 18 January 2012.
[97] On 17 July 2012.

preparatory work to date, highlighting particular themes or issues which might be the subject of further examination."[98] However, to date there have been no further developments which have been made public. REDRESS calls for the Inquiry's findings to be released urgently. It is important that in the process of a (new) inquiry being established the Inquiry's findings are taken into account in a way which will enable NGOs and other interested parties to critique and challenge if necessary the terms of reference and protocols of the new inquiry. Recently the UN special rapporteur on protecting human rights within efforts to combat terrorism called upon the UK to release the report.[99]

64. Further, and in regard to a (new) proper inquiry being established, and pending the outcome of the police investigations, it is noted that the Government has not used the *interregnum* to develop any mechanisms for a new inquiry, and/or to deal with the structural shortcomings to which CAT has referred. REDRESS submits that CAT should stress the urgent need for substantial progress – it is almost three years since the Detainee Inquiry was announced and more than a year since it was aborted. Victims of alleged UK complicity in torture are entitled to have their claims properly investigated, and not for these serious allegations to be left unaddressed. This is also considered further under ***Issues 30*** *and* ***31*** in regard to the Justice and Security Bill.

Issue 25. With regard to the Inquiry into the death of Baha Mousa, please provide updated information on the implementation of the recommendations addressed to the Ministry of Defence contained in part XVII of the report published in September 2011.

65. The Baha Mousa Public Inquiry (the Inquiry) chaired by Sir William Gage found that Mr Mousa, an Iraqi citizen, died with 93 injuries while in British military custody in Basra, Iraq in September 2003 as a result of serious gratuitous violence by UK soldiers, and corporate failure at the Ministry of Defence for the use of banned interrogation methods. [100] The Inquiry made 73 recommendations[101] to the Ministry of Defence, 72 of which the Government accepted. The recommendation not accepted[102] was recommendation 23, which states that the "harsh approach" in tactical questioning (involving screaming during interrogation) should be prohibited.[103]

66. In rejecting recommendation 23, the then Secretary of Defence Liam Fox stated in parliament:[104]

> [T]he so-called harsh approach involves a short burst of shouting—defined as a short, sharp shock—to bring a captured person back to the realisation of their situation. It is not a violent technique, but it has produced information that has led to both civilian and military lives being saved. To deprive our armed forces of techniques that can make them safer and protect the population both here and abroad would be wrong.

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[98] The Detainee Inquiry, available at http://www.detaineeinquiry.org.uk/. The Ministerial statement of 17 July 2012 is at http://www.parliament.uk/documents/commons-vote-office/July_2012/17-07-12/21-Justice-Detainee-Inquiry.pdf.

[99] The Guardian, *Britain and US asked to release secret torture reports,* 5 March 2013, available at: http://www.guardian.co.uk/law/2013/mar/05/britain-us-secret-torture-reports; see also The Guardian, *Rendition report still unpublished nine months after completion,* 5 April 2013, available at: http://www.guardian.co.uk/world/2013/apr/04/rendition-report-unpublished.

[100] Sir William Gage, Chairman, *The Baha Mousa Public Inquiry Report*, 2011, available at: http://www.bahamousainquiry.org/report/index.htm.

[101] *Ibid.,* p.1267, available directly at: http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVII/Part%20XVII.pdf.

[102] Hansard*, House of Commons Debates*, 8 September 2011, column 572, available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110908/debtext/110908-0002.htm#11090852000005.

[103] Recommendation 23 reads: "The harsh approach should no longer have a place in tactical questioning. The MoD should forbid tactical questioners from using what is currently known as the harsh approach and this should be made clear in the tactical questioning policy and in all relevant training materials" – see *The Baha Mousa Public Inquiry Report*, 2011, above n. 100, p.1273, available at: http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVII/Part%20XVII.pdf.

[104] Hansard*, House of Commons Debates,* above n. 102, column 573.

67. The lawfulness of the use of the "harsh approach" to CPERS (Captured Persons) was raised in the High Court in the *Ali Hussein* case by Iraqi citizens allegedly ill-treated physically and by being shouted at for substantial periods during questioning.[105] The claimants argued, *inter alia*, that shouting during questioning was essentially common assault and a violation of the Geneva Convention's prohibition on intimidation. The court rejected this and the claimants' arguments concerning the right to silence:[106]

> While it may be that there is a right of silence to be attributed to POWs, there is no such right applicable generally to CPERS. The questioning is not for the purpose of self incrimination but to obtain valuable information which may protect lives. The right not to incriminate oneself and the so-called right of silence are by no means necessarily coterminous.

68. The *Ali Hussein* case had been brought before the Inquiry's recommendations were published; following the publication, the "harsh approach" (also sometimes referred to as the "harsh technique") was modified before the case was fully argued.[107] As long ago as 1977, the "five techniques" - requirement to maintain physical postures which are extremely uncomfortable, painful or exhausting, hooding, exposure to excessive noise, sleep deprivation and deprivation of food or water – had been found to constitute a violation of article 3 by the ECtHR in *Ireland v UK.*[108] The current policy for questioning, the "challenging approach", was said to be designed to avoid the deficiencies of the "harsh approach/technique" policy by prohibiting intimidating behaviour or threats of violence by the interrogator but allowing a range of attitudes such as sarcasm and scepticism that would focus the detainee's mind on the reality of the situation and the futility of not cooperating with the questioner.[109]

69. The court referred to the rights of POWS not to have to answer questions, but indicated a different approach applied to CPERS:[110]

> It will be noted that it has been decided that the Challenging approach should not be applied when questioning Prisoners of War (POWs). They are protected by GCIII, which by Article 17 requires a POW to 'give only his surname, first names and rank, dates of birth, and army, regimental, personal or serial number, or, failing this, equivalent information.' There is no prohibition on questioning a POW, but he is not required to give any further information…
>
> [T]he decision to provide greater protection to POWs cannot in my judgment properly be used to establish that there is some defect in the approach when used against other CPERS.

70. REDRESS is concerned that this creates a two-tier system: while all persons in military custody are entitled to humane treatment, some (i.e. CPERS) effectively seem to enjoy lesser protection. We

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[105] *Ali Hussein v. Secretary of State for Defence*, [2013] EWHC 95 (Admin), 1 February 2013, para. 25, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/95.html.
[106] *Ibid*.
[107] *Ibid.,* para. 7: "The harsh technique included the following elements which could be deployed as the questioner considered necessary. The shouting could be as loud as possible. There could be what was described as uncontrolled fury, shouting with cold menace and then developing, the questioner's voice and actions showing psychotic tendencies, and there could be personal abuse. Other techniques were described as cynical derision and malicious humiliation, involving personal attacks on the detainee's physical and mental attitudes and capabilities. He could be taunted and goaded as an attack on his pride and ego and to make him feel insecure. Finally, he could be confused by high speed questioning, interrupting his answers, perhaps misquoting his replies."
[108] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, available at: http://www.unhcr.org/refworld/docid/3ae6b7004.html.
[109] UK Human Rights Blog*, Shouting is a lawful interrogation technique, says High Court,* 11 February 2013, available at: http://ukhumanrightsblog.com/2013/02/11/shouting-is-a-lawful-interrogation-technique-says-high-court/.
[110] *Ali Hussein v. Secretary of State for Defence*, above n.105, paras. 24-25.

submit CAT should seek to elicit from the State Party whether it believes that such an approach is correct.

Issue 27. Following the European Court of Human Rights judgments in Al Skeini v UK (2011) founding that the State party had failed to carry out an effective investigation into the deaths and mistreatment of Iraqi civilians, the State party established a unit within the Iraq Historic Allegations Team (IHAT) to investigate those cases. Please provide updated information on the investigation process and provide information on the actions taken in response to the finding of the Court of Appeal in Mousa v. Secretary of State for Defence, that the IHAT was not sufficiently independent to satisfy article 3 of the European Convention.

71. As the UK points out in its Response to the list of issues,[111] the IHAT procedure has been the subject of further litigation, and judgement is awaited in a further judicial review challenge. REDRESS intervened in the first *Ali Zaka Mousa* case.[112] Following this ruling, the UK introduced changes including removing the Royal Military Police from IHAT and replacing them with the Royal Navy Police. However, the independence requirement under article 3 of the ECHR has been raised as the Royal Navy itself was involved in interrogations in Iraq, and it has been argued that IHAT's structure remains characterised by close institutional links with the Ministry of Defence.[113]

72. REDRESS submits that there is evidence that abuse in Iraq was systemic, which is now the basis for the claimants seeking a public inquiry into all outstanding allegations. This evidence has received added weight by recent revelations of yet other instances of abuse, such as those referred to under ***Issue 21*** above based on very recent revelations by UK servicemen themselves. REDRESS therefore urges the Committee to stress to the UK the need to put adequate mechanisms in place that respect the rights of victims of torture, ill-treatment and related violations and are capable of establishing the truth of what happened in Iraq.

Issue 28. Please provide updated information on the on-going criminal investigations in relation to the possible cooperation of the British Secret Intelligence Service with the Libyan External Security Organisation in the rendition of the Libyan dissidents Sami al-Saadi and Abdul Hakim Belhaj who claim they were tortured upon their arrival in Libya.

73. In 2004, Sami al Saadi, an opponent of Moammer Gadhafi, says he was put on a plane in Hong Kong along with his wife and four young children as part of a joint operation by the USA, UK and Libyan intelligence services. They were subsequently flown to Libya and imprisoned, and Sami al-Saadi was held for six years and tortured by means of physical beatings and electric shocks. Mr al Saadi and his family sued the UK for its involvement and in December 2012 the al-Saadi family accepted a 2.2 million pound settlement, paid without the UK Government admitting liability.[114]

74. Abdul Hakin Belhaj says that, in March 2004, he and his pregnant wife were kidnapped in Bangkok, tortured in a secret CIA site, and flown on a CIA jet to Libya, where he was tortured at Abu Saleem prison and jailed until 2010.[115] He believes[116] that his flight refuelled on the British island of

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[111] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* 27 March 2013, pp. 27-28, available at: http://www2.ohchr.org/english/bodies/cat/cats50.htm

[112] In 2011, the Court of Appeal ruled that IHAT was not sufficiently independent; the Government's subsequent changes to IHAT's composition have been challenged and the case was argued in January 2013. REDRESS intervened in the earlier successful appeal- see *Ali Zaka Mousa v Secretary of Defence,* [2011] EWCA Civ 1334; see http://www.redress.org/case-docket/single-iraq-inquiry.

[113] *Ibid.*

[114] Laura Smith-Spark, CNN, *UK pays large sum to Libyan family over rendition case*, 13 December 2012, available at: http://edition.cnn.com/2012/12/13/world/europe/uk-libya-rendition-payout.

[115] BBC News, *Abdul Hakim Belhaj 'will settle' over Libyan rendition*, 4 March 2013, available at: http://www.bbc.co.uk/news/uk-21651979.

Diego Garcia, that the UK government approved his rendition, and that British intelligence was responsible for the tip-off that led to his detention. Mr Belhaj sued former Secretary Jack Straw and former MI6 director Sir Mark Allen, and announced in March 2013 that he would settle his rendition case for a nominal payment of £1 from each defendant and an apology.[117]

75. The police investigation into the issues raised by the two men was launched in January 2012 and is still underway, and the UK Government has refused to comment on the on-going civil case of Mr Belhaj.[118] Due to the police investigation the Detainee (Gibson) Inquiry was abandoned (see ***Issue 24*** above), and no further inquiry into all the other cases of alleged complicity in torture by the UK security services has yet been instituted.

76. REDRESS submits that a proper police investigation is imperative, and needs to be completed as soon as possible without prejudicing the thoroughness of such an investigation. Irrespective of the outcome of the police investigation, these two cases also need to be part of the new inquiry into all allegations of UK security services' complicity in torture.

77. REDRESS notes that Mr al Saadi's case was settled without admission of liability. In settling earlier civil claims for rendition and torture by Binyam Mohamed and some dozen other men these too were done on the basis of no admissions, and on a confidential basis.[119] As a result the issues in these types of cases involving the UK's alleged complicity in torture have not been fully aired in court, and the only prospect of the truth of the nature and extent of the practice being revealed is in criminal prosecutions (where this is sufficient evidence for such) and a proper public inquiry. It is imperative that progress is made, and REDRESS submits the Committee should stress the urgency of the issues.

Issue 29. Please include the number of instances during the reporting period in which the State party ensured that a victim of torture or ill-treatment obtained compensation, the amount received in each case and the means for a full rehabilitation. Are migrant workers and persons subjected to trafficking in persons included in programmes of compensation and provided with appropriate rehabilitation assistance?

78. In regard to claims arising out of renditions and related matters involving terrorism suspects, it is noted that the UK has not been forthcoming with the details of the civil claims,[120] some of which have been referred to immediately above, or in respect of cases such as that of Baha Mousa and other civilians abused by UK forces in Iraq.[121] Beyond this, REDRESS' concern relates to the difficulties facing UK nationals and residents tortured abroad in obtaining compensation and other forms of reparation on their return to the UK, where there has been no allegation of UK complicity and the torture survivor wishes to proceed against the State alleged to be responsible. REDRESS has

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[116] *Ibid.*

[117] *Ibid.* The text of the letter Mr Belhaj sent proposing the settlement is available at: http://www.independent.co.uk/news/uk/home-news/full-text-of-letter-libyan-from-rendition-victim-abdul-hakim-belhaj-8519438.html.

[118] Jerome Taylor, The independent, *Libyan 'rendition victim' Abdul Hakim Belhaj offers to settle UK lawsuit for £3 and apology*, 4 March 2013, available at: http://www.independent.co.uk/news/uk/home-news/libyan-rendition-victim-abdul-hakim-belhaj-offers-to-settle-uk-lawsuit-for-3-and-apology-8519408.html.

[119] BBC News*, Government to compensate ex-Guantanamo Bay detainees,* 16 November 2010, available at: http://www.bbc.co.uk/news/uk-11762636. The report states: "Binyam Mohamed's solicitor, Sapna Malik, said: 'I can't confirm any details about the settlement package. All I can say is that the claims have been settled and the terms are confidential. Our client was horrendously treated over a period of almost seven years, with a significant degree of collusion from the security services in the UK.'

[120] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* 27 March 2013, p. 28, available at: http://www2.ohchr.org/english/bodies/cat/cats50.htm.

[121] The Guardian, MoD pays out millions to Iraqi torture victims, 20 December 2012, available at: http://www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims.

recently published a comprehensive report on the UK law, practice and policy on consular assistance and diplomatic protection, analysing current shortcomings in respect of torture survivors falling within the above category.[122]

79. Every year British nationals and residents are arrested, detained and imprisoned abroad.[123] Some are ill-treated in detention; others are ill-treated by state officials outside of formal places of detention. Ill-treatment can involve torture as defined and prohibited under UNCAT or it can constitute other forms of cruel, inhuman or degrading treatment also prohibited under UNCAT. Diplomatic protection involves interstate diplomatic interventions when a national suffers injury as a result of an internationally wrongful act committed (either directly or indirectly) by another State whereas consular assistance concerns the assistance provided to nationals abroad by consular officers.[124] The need for consular assistance in cases of ill-treatment (or fears of ill-treatment) arises when the individual concerned is still abroad, usually but not always still in custody; diplomatic protection is more likely to become an issue when the individual has returned to the UK, though this is not always the case.

80. The UK's policy of consular assistance has become clearer and better publicised in recent years, and yet still appears to be based entirely on the UK's exercise of discretion.[125] In REDRESS' experience, there is a need for consular assistance to become more responsive to the needs of the vulnerable individuals who are most reliant upon it and who often feel that consular assistance was not sufficiently responsive to their needs.[126] Britons should be entitled to expect a particular level of service that is reliable, predictable and dependable, and not one that is contingent on foreign policy considerations. [127]

81. At the same time, the UK has not followed a policy that make it clear to other states that it will, to the fullest extent possible, take action to help its nationals and long term residents who alleged to have suffered torture or ill-treatment to obtain justice and reparation. This is where diplomatic protection must become more than a theoretical possibility, as it is at present,[128] both to secure the rights of individual victims and to make a meaningful contribution to the eradication of torture on which the Convention is based. This would require putting into practice the principles highlighted in the FCO's Strategy on the Prevention of Torture, namely that the response to torture and other ill-treatment of British nationals should be integral to the Government's anti-torture strategy.[129]

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[122] REDRESS, *Tortured Abroad: The UK's obligations to British Nationals and Residents*, September 2012, available at:http://www.redress.org/downloads/publications/121001tortured_abroad.pdf.

[123] The Foreign and Commonwealth Office (FCO) has said: "As of 30 September [2011], we were aware of 2,572 British nationals detained in 87 countries overseas" - United Kingdom Foreign & Commonwealth Office *Human Rights and Democracy: The 2011 Foreign & Commonwealth Office Report,* April 2012, p. 120, available at: http://centralcontent.fco.gov.uk/pdf/pdf1/hrd-report-2011. During 2011 -2012, 6,015 arrests were handled in 181 countries – see Guardian 28 June 2012 *'Britons arrested abroad mapped'*, available at http://www.guardian.co.uk/news/datablog/interactive/2012/jun/28/britons-arrested-abroad-2012.

[124] John Dugard, *Diplomatic Protection*, Max Planck Encyclopaedia of International Law, 2010, para. 71. The UK Government emphasises the distinction between consular assistance and diplomatic protection as follows: "[D]iplomatic protection [...] is formally a state-to-state process by which a state may bring a claim against another state in the name of a national who has suffered an internationally wrongful act at the hands of that other state. Conversely, consular assistance is the provision of support and assistance by a state to its nationals... who are in distress overseas" – FCO, *UK response to the [European] Commission's Green Paper on Diplomatic and consular protection of Union citizens in third countries,* March 2007, para. 1.5, available at: http://www.careproject.eu/database/upload/UKresponseGP/UKresponseGPText.pdf. However, the distinction between diplomatic protection and consular assistance can be blurred in practice.

[125] REDRESS, *Tortured Abroad: The UK's obligations to British Nationals and Residents*, above n. 122, pp.14-23.

[126] *Ibid*.

[127] *Ibid.*

[128] *Ibid.,* pp. 24-40.

[129] FCO, *FCO Strategy for the Prevention of Torture 2011-2015,* Human Rights and Democracy Department, *loc. cit*. at p. 4: "Torture prevention sits firmly within wider rule of law work being done to build fair legal systems, security and stability overseas. It also reinforces our Consular work to address the mistreatment of British detainees overseas." At p.9 the

82. According to UK Government figures there are on average about 50 known cases of alleged torture or ill-treatment per year (i.e. cases where concerns of ill-treatment were raised by UK nationals and recorded by the FCO) for the period 2005-2010, in 67 different states altogether.[130] This is an average of about four a month, some 300 cases altogether. However, as REDRESS has said:[131]

> Diplomatic protection appears to be a form of justice-seeking available to torture survivors in theory only. There has been no formal espousal during the years under examination, and there is no indication that any claims were espoused previously either.

83. Where a survivor has exhausted domestic remedies or there are none, the failure of the UK to espouse a claim means that in practice a survivor has no remedy. This is because in 2006 the UK's highest court ruled in *Jones*[132] that state immunity remains a bar to an action in the UK against a foreign state and individual state officials for torture committed in that State. *Jones* was decided on an interpretation of the UK's State Immunity Act 1978. Subsequently, an attempt was made by way of a Private Members Bill to amend the said Act so that in a claim based on torture state immunity could no longer be raised when no adequate and effective remedy for damages is available in the State where the torture is alleged to have been committed. The Torture (Damages) Bill was passed in the House of Lords in 2008 but failed to proceed through the House of Commons.[133]

84. In sum, survivors cannot obtain relief through diplomatic means *nor* can they sue a foreign State in UK courts. REDRESS asks CAT to pursue this issue, particularly bearing in mind CAT's General Comment 3:[134]

> Under article 14, a State party shall ensure that victims of any act of torture or ill-treatment under its jurisdiction obtain redress. States parties have an obligation to take all necessary and effective measures to ensure that all victims of such acts obtain redress.

85. It is submitted that if the UK Government continues to refuse to give its nationals and residents the right to sue torturing States in the UK, then it should be obliged to give them a right to diplomatic protection, that is, a *right* to espousal when no adequate and effective remedy for damages is available in the State where the torture is alleged to have been committed. Without one of these – court jurisdiction or diplomatic protection - REDRESS submits the UK is failing in its obligation "to take all necessary and effective measures to ensure that all victims of such acts obtain redress".[135] The practice of the UK, namely, that it "does not operate any programme of

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Strategy states: "HMG opposes torture in all contexts but we will focus our effort on countries [including those] where... we have other interests such as security, prosperity and British nationals in prison abroad."

[130] REDRESS, *Tortured Abroad: The UK's obligations to British Nationals and Residents*, above n.122, pp. 47-48, Annex C.

[131] *Ibid., p*. 39.

[132] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia),* 14 June 2006, [2006] UKHL 26, available at: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm. REDRESS intervened in the case. The case has subsequently been pending in the ECtHR since December 2006 in *Jones v. United Kingdom* (Application Number 34356/06) *and Mitchell and Others v. United Kingdom* (Application Number 40528/06) in which REDRESS has also intervened: see the intervention at http://www.redress.org/case-docket/jones-v-uk-and-mitchell-and-others-v-uk.

[133] Full details of the attempts to amend the State Immunity Act, in which REDRESS was very closely involved, can be accessed at http://www.redress.org/the-torture-bill/the-torture-bill-in-parliament. The Bill was not supported by the Government, and in practice a Private Members Bill will not be passed without such support.

[134] CAT, General Comment 3: *Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2013, para. 27, available at:
http://www2.ohchr.org/english/bodies/cat/comments.htm.

[135] *Ibid*.

compensation for individuals who have been tortured or ill-treated by other sovereign nations", [136] fails to reflect the UK's obligations under UNCAT.

Issue 30. Please indicate whether the decision of the House of Lords in the case of A v Secretary of State for the Home Department (No.2) (2006) which makes clear that evidence obtained by torture is inadmissible in any legal proceedings was reflected in formal fashion, such as through legislative incorporation or by undertaking to Parliament. Please also provide examples of any case in which evidence was deemed inadmissible on the grounds that it was obtained through torture.

Issue 31. Please indicate if the State party modified the Special Advocate System to guarantee fully effective legal representation following the determination by the European Court of Human Rights in A et Al. v. UK (application no. 3455/05) that the system was insufficient to safeguard detainees' rights. Given the above, please explain the rationale for the State party's proposal to extend the use of closed proceedings to civil cases involving sensitive material and indicate whether, given the forceful criticism against this proposal from Special Advocates and civil society organizations, the State party is considering its withdrawal.

86. REDRESS will comment on both of these connected ***Issues.*** Far from modifying the Special Advocates System, the UK Government is determined to extend Closed Material Proceedings (CMPs) by way of the Justice and Security Bill [137] to civil claims for torture where the security services are alleged to be involved, notwithstanding trenchant criticism from many leading lawyers (including those who have acted as Special Advocates in other types of hearings), NGOs (including REDRESS)[138], some back-bench Conservative Party MPs,[139] and many others. One of the leading critics of the Bill summed matters up very recently:

> [The bill] is wrong in principle, and will not deliver justice. It will be used to shield governmental wrongdoing from public and judicial scrutiny under conditions that are fair and just. The bill threatens greater corrosion of the rights of the individual in the UK, in the name of "national security".[140]

87. A civil claim for damages is one crucial way of establishing state responsibility and accountability and for combating impunity. Being able to effectively bring civil claims for damages is therefore both a right under article 14 of the Convention and a means of contributing to the prevention of torture. In the *Al Rawi* case, ruling that the common law precluded the importation of closed procedures in a civil damages claim, the UK Supreme Court emphasised that the case before it concerned allegations of torture and said:[141]

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[136] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* above n. 19, p. 28.

[137] Both Houses agreed on the text of the Bill which now waits for the final stage of Royal Assent when the Bill will become an Act of Parliament. Royal Assent is yet to be scheduled – see http://services.parliament.uk/bills/2012-13/justiceandsecurity.html.

[138] REDRESS, *Justice and Security Green Paper: Consultation: Submission from the Redress Trust*, 6 January 2012, available at: http://www.redress.org/downloads/publications/Justice%20and%20Security%20Green%20Paper%20Consultation%20REDRESS%20submission%20-%20Copy.pdf.

[139] Such as Andrew Tyrie MP and David Davis MP.

[140] Professor Philippe Sands QC, The Guardian, *I'm leaving the Liberal Democrats too,* 11 March 2013, available at: http://www.guardian.co.uk/commentisfree/2013/mar/11/justice-security-i-quit-the-lib-dems.

[141] *Al Rawi v Security Service* [2011] UKSC 34, para 83, available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0107_Judgment.pdf.

> A closed procedure in the present context would mean that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad would be heard in proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time.

88. In recent years, bodies such as the Joint Parliamentary Committee on Human Rights (JCHR) have also examined the role of Special Advocates and said that they "have no means of gainsaying the government's assessment that disclosure would cause harm to the public interest",[142] and that the current system of dealing with closed material "is not capable of ensuring the substantial measure of procedural justice that is required".[143] These concerns in relating to control orders apply *a fortiori* to civil claims for damages where the essence of the dispute is not on the use of intelligence information but allegations of the UK's involvement in torture.

89. In a recent analysis, Professor Adam Tomkins points out that "a frequent problem in the law of national security [is that] because something touches on the work of MI5 or MI6, all too often it is immediately assumed that it must therefore raise some deeply sensitive matter of national security. The 'top secret' stamp is straight away reached for, without a second thought as to whether the matter really is secret at all."[144]

90. Although they mainly concern freedom of expression, the Johannesburg Principles[145] underline the importance of not regarding "national security" as some all-encompassing concept used to restrict and undermine basic human rights, but rather that "[a]ny restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest."[146]

91. Further concerns arise from the case of *Ahmed*[147] in which, although evidence obtained by torture wasn't was not used in the criminal proceedings, the court was asked to stay the prosecution of a terrorism suspect because the UK authorities had been complicit in his torture by Pakistani security service agents; it was argued that to allow the prosecution to continue in such circumstances would be an abuse of court process. Mr. Ahmed argued that the UK had effectively 'outsourced' his torture to another State. However, the UK court held that knowingly receiving and relying on information obtained by torture did not constitute complicity under international customary or treaty law.[148]

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[142] 38 JCHR, 9th Report of 2009–10, HL 64, HC 395, para 62, available at: http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf.
[143] *Ibid*. para 90.
[144] Adam Tomkins, *National Security and the Due Process of Law* , Oxford Journal of Law and Religion, April 15 2011, pp. 26-27, available at: http://clp.oxfordjournals.org/content/early/2011/04/15/clp.cur001.full.
[145] *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles)* adopted on 1 October 1995, available at: http://www.unhcr.org/refworld/category,LEGAL,ART19,,,4653fa1f2,0.html. These Principles have been endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996.
[146] Principle 1.2.
[147] *Rangzieb Ahmed and Habib Ahmed v R,* [2011] EWCA Crim 184, available at : http://www.bailii.org/ew/cases/EWCA/Crim/2011/184.html
[148] *Ibid.*

92. To the contrary, turning a blind eye to torture, including the passive receipt of information known or suspected to have been obtained by torture, may amount to an international wrongful act.[149] REDRESS submits that CAT ought to raise these concerns with the UK.

Issue 42. Both the Joint Committee on Human Rights (JCHR) of the UK Parliament and the Equality and Human Rights Commission believe that "the UK's slow progress in accepting individual petition […] undermines its credibility in the promotion and protection of human rights internationally". Please, comment on the above and explain whether it intends to reconsider its position with regard to making a declaration under Article 22 of the Convention?

93. The procedure under article 22 provides victims with an opportunity to raise allegations of specific or systemic violations under UNCAT, whose provisions on the prohibition against torture are more specific than those under the ECHR contained in the HRA. Individual petitions constitute an important additional avenue and remedy that both gives individuals a direct role in proceedings and would enable the Committee to monitor the UK's compliance with its UNCAT obligations beyond periodic reporting.

94. In its jurisprudence, the Committee gives authoritative interpretations of UNCAT, identifies violations and urges states to take measures to comply with their obligations, including provision of adequate remedies. The lack of explicit binding force of Committee decisions put forward by the UK as a reason for not recognising the Committee's competence to hear individual complaints is not material if the UK is willing to give effect to them in good faith as authoritative interpretations of the obligations it has undertaken under UNCAT.

95. The value of individual complaint mechanisms to the UN, including under article 22, is evident in relation to a number of States. The reference to insufficient empirical evidence[150] under the Optional Protocol to CEDAW and CRDP is unconvincing. These protocols address different rights and have only been available for a relatively short period of time. As the procedures develop and individuals become more aware of the procedure, there may well be an increase in petitions. Individuals should be given the opportunity to show that complaints mechanisms have practical value. It is not apparent what the negative consequences would be of making available an individual complaints mechanism that is not used.

96. Irrespective of the practical value to people in the UK, the UK's acceptance of the individual petitions procedure would send an important message in the international campaign against torture. The UK should therefore be an example to other States and help to strengthen the body - the Committee - created to develop international standards, whose decisions in turn can positively impact on domestic jurisprudence.

[149] See Sarah Fulton, *Cooperating with the enemy of mankind: can states simply turn a blind eye to torture?* International Journal of Human Rights, Vol. 16, June 2012, 773-795.

[150] Ministry of Justice, *UNCAT: Response to the list of issues adopted by the Committee during its 49th session by the United Kingdom of Great Britain and Northern Ireland,* above n. 19, p. 47.