



**COMMENTS TO THE UNITED KINGDOM'S  
4<sup>TH</sup> PERIODIC REPORT TO THE  
COMMITTEE AGAINST TORTURE**

**Submitted 15 October 2004**

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## INTRODUCTION

The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to assist torture survivors to seek justice and reparation. It fulfils this mandate through a variety of means, including casework, law reform, research and advocacy. It has a wide expertise on the rights of victims of torture both within the United Kingdom and internationally, and has intervened before national and international tribunals including the Court of Appeal and House of Lords in England and Wales.<sup>1</sup> REDRESS has also assisted torture survivors to pursue civil reparation claims and to bring alleged perpetrators of torture to justice in the UK and has analysed the effect existing UK law and policy has on survivors' right to reparation.<sup>2</sup>

This report does not address every matter raised in the UK's 4<sup>th</sup> periodic state party report (UK report) to the UN Committee against Torture (the Committee)<sup>3</sup> but focuses on issues in which REDRESS has special expertise.

This report is divided into three parts; Part one contains comments on some of the points raised in the UK report that are not included in the "List of Issues" that the Committee has transmitted to the UK Government in advance of the thirty-third session on;<sup>4</sup> Part 2 sets out further subjects of concern that are neither in the "List of Issues" nor in the UK report and Part 3 gives information and comment on some of the matters raised in the "List of Issues".

The UK Government has initiated a number of positive developments for victims of torture both at home and abroad. REDRESS welcomes the UK Government's progressive policy towards human rights and in particular, placing "[i]nternational action against torture" as a priority in its foreign policy as well as giving its commitment "to promoting more intensive and concerted action to achieve the global eradication of torture".<sup>5</sup> REDRESS is also encouraged by the Foreign and Commonwealth Office's acknowledgment that: "A concern for the victims of human rights abuses lies at the heart of the Government's foreign policy."<sup>6</sup>

As evidence of this, the Foreign and Commonwealth Office launched the third phase of its anti-torture initiative in June 2002. This project is part of the Government's bid for the global eradication of torture which aims "to combat one of the most abhorrent violations of human rights and human dignity"<sup>7</sup> and has resulted in the production of a number of handbooks such as the "Torture Reporting handbook" and "Combating Torture – A manual for Judges and Prosecutors"

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<sup>1</sup> REDRESS intervened in the following UK cases: *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (3) 1999 2 WLR 827; Judicial review of medical evidence re Pinochet, unreported judgment of the High Court; *Ron Jones v Kingdom of Saudi Arabia*; *Al-Skeini and others v Secretary of State for Defence* CO/2242104.

<sup>2</sup> In addition to intervening in the above cases, REDRESS has published a report on Scotland as one of its country studies in *Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries*, May 2003, [available at [www.redress.org/studies/Scotland.pdf](http://www.redress.org/studies/Scotland.pdf)], and has critiqued UK law, policy and practice as background information for its European seminar on *Legal Remedies for Victims of International Crimes* [available at: [www.redress.org/publications/LegalRemediesFinal.pdf](http://www.redress.org/publications/LegalRemediesFinal.pdf)]. It has also published a *Torture Survivors Handbook* together with the Medical Foundation for the Care of Torture Survivors, on services for torture survivors in the United Kingdom. REDRESS continues to assist survivors to liaise with UK authorities to ensure that they are aware of the presence of alleged torturers in the United Kingdom.

<sup>3</sup> CAT/C/67/Add.2.

<sup>4</sup> CAT/C/33/L/GBR.

<sup>5</sup> Page 170 of the United Kingdom's Foreign and Commonwealth Office's Annual Report 2003 of Human Rights found at <http://www.fco.gov.uk/Files/kfile/FullReport.pdf>.

<sup>6</sup> *ibid*, p.3. Opening statement of the Rt Hon Jack Straw MP in his forward to the report.

<sup>7</sup> Speech "Phase 3 of the Anti-torture Initiative" given by the Rt Hon Peter Hain MP at the Foreign and Commonwealth Office, London Wednesday 26<sup>th</sup> June 2002 at the launch of this phase of the initiative. <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391647&a=KArticle&aid=1025099205060>.

which are available in all of its embassies around the world.<sup>8</sup> This project includes giving “support for the African Commission on Human Rights Special *Rapporteur* on Prisons and the establishment of a visiting programme to the UK for senior clinicians who work in countries where the practice of torture is widespread”.<sup>9</sup> In addition to this, the UK continues to give its strong support to the Optional Protocol to the UN Convention against Torture, by being one of the first countries to ratify this protocol,<sup>10</sup> and by making it a policy aim to encourage other countries to do the same.<sup>11</sup>

REDRESS also welcomes the UK Government’s continued commitment towards human rights in its domestic law and policy. The incorporation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) through the Human Rights Act 1998 (HRA) has heralded a new era for enforcing rights in Britain. Not only does this Act give individuals a vehicle in which to raise their rights before the UK courts, it also places obligations on all Government institutions to act in a way that is compatible with the Convention.

## **PART 1: COMMENTS ON SOME OF THE POINTS RAISED IN THE UK REPORT THAT ARE NOT INCLUDED IN THE “LIST OF ISSUES”**

### **(A) ARTICLE 5: JURISDICTION AND ITS IMPACT ON ARTICLE 14**

REDRESS is concerned by the Government’s statement in its report to the Committee that:

“The United Kingdom Government’s consistent position has been that the UN Convention Against Torture has no bearing on the issue of civil jurisdiction in relation to acts committed abroad but only relates to criminal jurisdiction.”

REDRESS notes that the Government has not placed any reservation to this effect. Furthermore, it is REDRESS’ understanding that this appears to be a somewhat ‘new’ position, in that the Government has not raised this point in any of its previous reports to the Committee. In fact the UK accepted in its initial report to the Committee that:

“Under the Powers of Criminal Courts Act 1973, as amended and extended by the Criminal Justice Act 1988, Courts in England and Wales have the power to order a convicted offender to pay to the victim compensation either by itself or in addition to other measures. Courts are required to give consideration to the question of compensation in every appropriate case and to give reasons where no order results. Subject to the means of the offender, a compensation order may be made in respect of: pain and suffering, permanent disability or disfigurement, loss of earnings or earning capacity, out of pocket expenses and loss of or damage to property.”<sup>12</sup>

According to this report, similar powers to award compensation also exist in Scotland.<sup>13</sup> The UK further states in this earlier report, in respect of Article 14 of the Convention, that:

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid. The UK ratified the Optional Protocol on 10<sup>th</sup> December 2003.

<sup>11</sup> Ibid.

<sup>12</sup> Para 107 of United Kingdom’s initial report to the Committee against Torture, CAT/C/9/Add.6, 10<sup>th</sup> May 1991.

<sup>13</sup> Ibid, para. 108.

“In both England and Wales, and in Northern Ireland, acts or omissions which constitute torture as defined in article 1 of the Convention constitute civil wrongs for which civil remedies are available in civil proceedings”.<sup>14</sup>

The UK did not place any express territorial limitation in respect of its statements made under Article 14 in this earlier report to the Committee. Nor did it make any distinction between civil and criminal proceedings in relation to reparation for victims. In relation to article 5, its submission in this earlier report makes no delimitation between the jurisdiction given under article 5 and the types of remedies to be afforded to torture victims in the UK under article 14.

The Government appears to have applied its ‘new’ approach to article 5 in its joint submission to the Supreme Court of the United States of America in the *Sosa v. Alvarez-Machain* case.<sup>15</sup> Here, the Government appears to suggest that the scope of article 14 is limited by the distinction between universal criminal and universal civil jurisdiction in relation to article 5, claiming that international law only recognises the former jurisdictional base.<sup>16</sup>

Furthermore, the Government’s justification for the non-existence of universal *civil* jurisdiction appears to counter the provision for reparations under Article 14 of the Convention. The Government argues that:

“the solutions to such state-orientated wrongdoing may be multilateral co-operation or bilateral diplomatic action, rather than a national judicial process. In contrast, where individual malefactors are involved the international community generally treats egregious human rights violations as *crimes* to be punished by domestic or international tribunals ... rather than *torts* to be remedied primarily by damage awards in civil proceedings.”<sup>17</sup>

and

“It is not even necessary that all remedies for tort-like wrongs be judicial in nature. A responsible sovereign may prefer to have a political resolution that looks to the future rather than a backward-looking resolution based on litigation damages.”<sup>18</sup>

Here, the Government appears to ignore the position in international law that remedies for serious violations of human rights, such as torture must be judicial in nature.<sup>19</sup>

Finally, the Government appears to fail to separate the act of torture as a peremptory norm subject to universal jurisdiction from ordinary torts, the law on which may vary from State to State:

“Substantial differences exist in the precise rules for defining torts in different common law and civil law systems. Some conduct may be legal in France, while it would not be illegal in Australia ... The point is not that one system is right and another is wrong; rather it is that tort rules and allowable recoveries are important

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<sup>14</sup> Ibid para 111. The Scottish law position is set out at para 112.

<sup>15</sup> *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in support of the petitioner*. No.03-339, dated 11<sup>th</sup> July 2003.

<sup>16</sup> Ibid, page 6.

<sup>17</sup> Ibid, page 13.

<sup>18</sup> Ibid, page 23.

<sup>19</sup> See Human Rights Committee Decision of admissibility of 13 October 2000, Communication No 778/1997, Case Coronel et al(Colombia), United Nations document CCPR/C/70/D/778/1997, para 6(4). See also REDRESS *Reparation: A Source book for victims of torture and other violations of human rights and international humanitarian law*, March 2003. Found at REDRESS website [www.redress.org](http://www.redress.org).

legislative and judicial decisions that each sovereign should be allowed to make for its nationals and others within its jurisdiction.”<sup>20</sup>

Given the status of torture as a crime recognised universally, and the internationally recognised right of the victim to reparation, the arguments based on the different laws of each State for a particular substantive act appear moot. Moreover, all the countries referred to in this submission are all state parties to the Convention against Torture, and as a result have the same procedural obligations to provide an effective remedy to torture victims.

REDRESS is concerned by the UK’s interpretation of its obligations under Article 14 of the Convention as revealed by *Ron Jones v. Kingdom of Saudi Arabia and others* where the claimant is bringing a civil claim for torture against the State of Saudi Arabia and named Saudi officials. A further claim for torture against Saudi officials has been launched by three other British nationals (the case of *Sandy Mitchell, William Sampson, Leslie Walker v Ibrahim Al-Dali, Khalid Al-Saleh, Colonel Mohamed Al Said and Prince Naif*) and has been linked to the Jones case, currently pending before the Court of Appeal. In particular, the Government makes the distinction between civil and criminal proceedings in order to restrict the jurisdictional basis of article 14:

“There is an important distinction to be drawn between criminal and civil proceedings against individuals acting on behalf of a State. This is reflected in the UN Convention against Torture which imposes obligations on Contracting States either to prosecute or to extradite alleged torturers and thereby comes close to achieving a universal criminal jurisdiction, but which does not impose any corresponding obligation or power in relation to the exercise of civil jurisdiction. In particular the obligation under Article 14 has no application where the act of torture alleged occurs outside the jurisdiction of the Contracting State.”<sup>21</sup>

In relation to the immunity of the State in civil proceedings for acts of torture, REDRESS understands the law to be in a state of development as recognised by the European Court of Human Rights in *Al-Adsani v. UK*:

“The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”<sup>22</sup>

Moreover, the Government argues that: “immunity *rationae materiae* protects all governmental acts and in its view, a limited exception to this principle has been created by the UN Convention against Torture for criminal proceedings against individuals.”<sup>23</sup> This interpretation of the Convention appears to focus on the type of proceeding to which immunity applies, rather than examining the underlying act of torture or the importance of the procedural rights to underpin the prohibition of torture.

## **(B) ARTICLE 9: MUTUAL LEGAL ASSISTANCE**

Contrary to the Government’s statement, REDRESS is aware of one request for legal assistance from the Australian Federal Police in relation to the investigation of an individual who allegedly

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<sup>20</sup> Ibid, page 23.

<sup>21</sup> Para 13 of “Further submissions on behalf of the Secretary of State for Constitutional Affairs” in case of *Ron Jones v Ministry of Interior Al-Mamlaka Al-Arabiya As Saudya and Lieutenant Colonel Abdul Aziz and Secretary of State for Constitutional Affairs, The REDRESS Trust*.

<sup>22</sup> Para 66, application no 35763/97, 21<sup>st</sup> November 2001.

<sup>23</sup> Para 12 of the Government’s further submission in the *Ron Jones* case, supra.

perpetrated acts of torture in Bahrain and who was located for a short period in Australia.<sup>24</sup> At the same time the UK requested legal assistance from the Australian authorities in relation to the same perpetrator. Unfortunately, neither request was responded to in time even though the UK indicated to Australia that there was an ongoing investigation and that the UK authorities had amassed a considerable amount of evidence. REDRESS was surprised to learn that there was some discussion about which country had “primary jurisdiction” over the case in the absence of any extradition request. This may have hindered the UK’s response for mutual legal assistance. In REDRESS’ view, the UK should have provided the evidence expeditiously to the Australian authorities, in the absence of any request from the UK for the individual’s extradition, rather than make its own request for assistance.

As a result, the alleged perpetrator left Australia before any arrest could be made presumably because of the lack the evidence, which remained under the control of the UK authorities.

## **PART II: FURTHER SUBJECTS OF CONCERN TO REDRESS THAT ARE NEITHER IN THE “LIST OF ISSUES” NOR IN THE UK REPORT**

### **(A) ARTICLE 5: ABILITY TO WITHDRAW ACQUIRED BRITISH NATIONALITY IN CASES WHERE CRIMINAL PROCEEDINGS ARE “IMPRACTICABLE”**

Although REDRESS welcomes the Government’s commitment to ending safe havens for war criminals and those committing crimes against humanity, both crimes of which may include torture, it is concerned that the Home Secretary’s new powers under section 4 of Part 1 to the Nationality and Immigration and Asylum Act 2002 to deprive citizens of their acquired British nationality should not be used at the expense of prosecuting these nationals in the UK.<sup>25</sup> In its White Paper “Secure Borders, Safe Haven: Integration with Diversity in Modern Britain”, the Government expresses the need for this power because:

“The UK should not provide a safe haven for war criminals or those who commit crimes against humanity. Action should be taken to bring such individuals to justice wherever possible within the rule of law and depending on the sufficiency of evidence available. However, our experience, and that of a number of other countries which have been very active in this field, is that an effective response cannot be founded solely on criminal prosecution. Frequently evidence will be insufficient to meet the high standard of proof required to convict a particular individual”<sup>26</sup>

and is proposing to use these powers “[I]n cases where criminal proceedings, either in the UK or abroad, are not practicable”.<sup>27</sup>

REDRESS is concerned that the Government should not use this power to strip a person of their acquired citizenship and require them to leave the country (provided a safe third country can be

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<sup>24</sup> See “Alleged torturer questioned in Bahrain on “Fraud and other Abuses” dated 27<sup>th</sup> November 2003. [http://www.redress.org/news/bahrain\\_27\\_11\\_2002.html](http://www.redress.org/news/bahrain_27_11_2002.html) following the individual’s return to Bahrain.

<sup>25</sup> Under section 4 of part 1 of the Nationality, Immigration and Asylum Act 2002 (amending section 40 of the British Nationality Act 1981), the Home Secretary now has the power to deprive an individual of his or her acquired British citizenship if he is “satisfied that the person has done anything seriously prejudicial to the vital interests of (a) the UK or (b) a British overseas territory” (paragraph 4(2)) or has obtained citizenship through “ a) fraud, b) false representation, or c) concealment of a material fact” (paragraph 4(3)). <http://www.hmso.gov.uk/acts/acts2002/20020041.htm> See also explanatory notes to the legislation found at <http://www.hmso.gov.uk/acts/en2002/2002en41.htm>.

<sup>26</sup> Para 7.20 of Government White Paper “Secure Borders, Safe Haven: Integration with Diversity in Modern Britain”, February 2002, <http://www.official-documents.co.uk/document/cm53/5387/cm5387.pdf>.

<sup>27</sup> Ibid, para 7.17.

found) without the UK authorities fulfilling their obligations under the Convention to carry out an effective investigation with a view to prosecution in the absence of any *bone fide* extradition request.

## **(B) ARTICLE 6: DETENTION OF INDIVIDUALS SUSPECTED OF TORTURE**

Although REDRESS has been aware of allegations of torture committed abroad against individuals who have been physically present in the UK and reported the same to the relevant authorities, REDRESS is concerned by the lack of arrests.<sup>28</sup> According to information recently given by the Home Office Minister, Baroness Scotland of Asthal, to the House of Lords, around 8 cases of torture have been investigated since section 134 of the Criminal Justice Act came into force in 1988.<sup>29</sup> REDRESS knows of only 3 cases where a person has been detained in the UK pursuant to this law.<sup>30</sup> This number is disappointingly low.

When assisting torture survivors in their bid to bring the perpetrators to justice, and in particular acting as intermediary between the victim and the appropriate UK authorities, REDRESS has found that the current institutional set up does not lend itself to the swift detention of perpetrators. Usually, the Metropolitan Police are charged with the investigation of these allegations of torture. In Baroness Scotland's recent statement, she indicated to the House of Lords that "there is one detective superintendent in charge of a team of on average five people who are currently engaged in the investigation of offences under section 134 of the Criminal Justice Act 1988", however the Metropolitan Police does not appear to have publicised to which unit this "team" belongs. In REDRESS' experience, cases have been allocated to either SO 7(1) Kidnap and Specialist Investigations Unit of the Serious crime group or SO13 Anti-terrorist branch, neither of which appears to have the remit to investigate torture and other similar international crimes. As a result, when a torture victim or their representative wishes to inform the police of a potential perpetrator's presence in the UK, it is unclear which team should be the first point of contact. Added to this, REDRESS has found that the high turnover of investigating officers working on individual cases has further frustrated contact with the Metropolitan Police. This lack of institutional framework has resulted in delays to cases where time is very much of the essence. Furthermore, in REDRESS' view, the nature of the crime of torture requires particular expertise and knowledge that is not necessary found within either the anti-terrorism branch or the kidnap and specialist investigations unit. For example, in one case in particular, the investigating officers erred in their understanding of the obligation to try or extradite, and as a result handed over the evidence to another State to carry out the investigation where no request for extradition had been made.

Although REDRESS recognises the difficulties in pursuing extraterritorial crime (e.g., the short time frame to make an arrest, the need to verify evidence which may be outside the UK's jurisdiction and resultant human and material resources), REDRESS believes that by setting up a designated unit to investigate torture and other similar international crimes, the Metropolitan Police would be able to increase the number of investigations as well as develop the expertise of

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<sup>28</sup> For a list of cases that are in the public domain see "country studies" at page 77 of REDRESS & FIDH report *Legal Remedies for Victims of "International Crimes" Fostering an EU Approach to Extraterritorial Jurisdiction* found at <http://www.redress.org/publications/LegalRemediesFinal.pdf>.

<sup>29</sup> Parliamentary answer to Lord Avebury on 1<sup>st</sup> July 2004 published by Hansard, [http://www.publications.parliament.uk/cgi-bin/ukparl\\_hl?DB=ukparl&STEMMER=en&WORDS=section+134+criminal+justic+act+J0scotland+&COLOUR=Red&STYLE=s&URL=/pa/ld199697/ldhansrd/pdvn/lds04/text/40701w02.htm#40701w02\\_wqn2](http://www.publications.parliament.uk/cgi-bin/ukparl_hl?DB=ukparl&STEMMER=en&WORDS=section+134+criminal+justic+act+J0scotland+&COLOUR=Red&STYLE=s&URL=/pa/ld199697/ldhansrd/pdvn/lds04/text/40701w02.htm#40701w02_wqn2).

<sup>30</sup> The most recent case is that of the Afghan war lord, Mr Sarwar Zardad who was arrested and charged with torture under section 134 of the CJA and hostage-taking in July 2003 and whose trial opened in the Old Bailey on Friday 8<sup>th</sup> October 2004. See REDRESS news release, *UK must not be a safe haven for torture*, dated 8<sup>th</sup> October 2004 found at <http://www.redress.org/news/PRESS%20STATEMENT%2008%20OCT%202004.pdf>. The extradition case of Pinochet turned on section 134 of CJA, where Pinochet remained under house arrest pending the outcome of the judicial review between 1999 and 2000. Dr Magoub, a Sudanese doctor, was charged under section 134 of the CJA for torture in September 1997, however, the case was withdrawn during the preparation of the trial. See pages 44-47 of REDRESS' publication *Universal Jurisdiction in Europe Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide* 30<sup>th</sup> June 1999 at <http://www.redress.org/publications/UJEurope.pdf>.

its officers responsible for existing investigations. Officers working within this unit should be provided with specialist training and the unit should be clearly marked in all public documents to ensure that the general public is aware of its remit to investigate such crimes. In REDRESS' view, this would improve torture victims' participation in the investigation of such crimes, as well as act as a deterrence to alleged perpetrators wishing to visit the UK.

### **(C) ARTICLE 7: PROSECUTION OF INDIVIDUALS SUSPECTED OF TORTURE**

Since the incorporation of section 134 of the CJA in 1988, there have been no prosecutions of individuals charged with torture, however, the trial of Mr Faryadi Sarwar Zardad, a mujahadeen military commander who has been charged with conspiracy to torture for acts perpetrated in Afghanistan, opened on 8<sup>th</sup> October 2004.<sup>31</sup> This is the first case to proceed to full trial using section 134 of the CJA.

Before any prosecution can proceed, the Attorney General's consent is required pursuant to section 135 of the Act, and REDRESS believes that this requirement may be hindering prosecutions.<sup>32</sup> Currently, there are no published guidelines, however, the Attorney General has confirmed to Parliament that the applicable criteria he uses "are the same as for any other criminal offence. First, there must be sufficient admissible and reliable evidence to afford a realistic prospect of conviction; secondly, the circumstances must be such that it would be in the public interest for there to be a prosecution".<sup>33</sup> The test requires that the evidence be admissible in a UK court of law, reliable and "more likely than not" to lead to a conviction.

Section 135 of the Criminal Justice Act 1988 does not stipulate when such consent should be sought, however, in practice, the Crown Prosecution Service (CPS), following the contact from the police will usually seek the Attorney General's consent before the alleged perpetrator is arrested and presumably once the CPS considers that a person can be prosecuted, ie: the case fulfils its guidelines on decisions to prosecute.<sup>34</sup> Consent is not needed to arrest an individual without an arrest warrant or to issue an arrest.<sup>35</sup> However, consent is needed if the summons procedure is used to detain a person.<sup>36</sup>

In REDRESS' experience, time is very much of the essence especially where an alleged torturer is not resident but just visiting the UK. The procedure to seek the Attorney General's advice is lengthy and may result in delay to the laying of charges against an alleged torturer which in turn may lead to the individual leaving the country and thus escaping prosecution. Moreover, REDRESS questions the need for such a requirement, given that the Attorney General bases his

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<sup>31</sup> Ibid.

<sup>32</sup> Section 135 of the CJA 1988 states that "Proceedings for an offence under section 134 above shall not be begun—in England and Wales, except by or with the consent of, the Attorney General; or in Northern Ireland, except by or with the consent of the Attorney General for Northern Ireland."

<sup>33</sup> Written answer by the Attorney General to Mr Boateng Parliamentary question 19/07/93 published in Hansard.

<sup>34</sup> There is no requirement for the police to contact the CPS before they have concluded their investigation and/or decided to lay charges. However, in cases such as torture, they usually liaise closely with the CPS.

<sup>35</sup> Section 25(2)(a). Section 25 of the Prosecution of Offences Act 1985 provides (1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except – (a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or (b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director; and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person). (2) An enactment to which this section applies –(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; and (b) ... (3) In this section "enactment" includes any provision having effect under or by virtue of any Act; and this section applies to enactments whenever passed or made. As quoted in District Judge, Nicholas Evans decision of 24<sup>th</sup> April 2002 to refuse an application to issue an warrant of arrest for Kissinger under the 1957 Geneva Conventions.

<sup>36</sup> R v Bull (1994) 99 Cr App R 193. Confirmed in the application for the arrest of Mr Narendra Modi, Chief Minister of the State of Gujarat for torture under section 134 of the CJA before District Judge Workman at Bow Street Magistrates' Court on 20<sup>th</sup> August 2003.

decision on exactly the same guidelines as those taken by the CPS when deciding to pursue a regular prosecution. At the least, Government issued guidelines setting out how and when the Attorney General is to give his consent may enhance transparency. Guidelines could also set out clearly the ability to have this decision reviewed by an independent judicial body and that such consent should be taken once the matter proceeds to trial.

#### **(D) ARTICLE 8: EXTRADITION AND UK'S NEW EXTRADITION ACT 2003**

In its third periodic report, the UK referred to its statutory provisions under the Extradition (Torture) Order 1997 which were made pursuant to section 22 of the 1989 Extradition Act in order to outline the legal basis on which extradition requests can be made in the absence of a formal extradition arrangement with other signatories to CAT.<sup>37</sup> Since the UK's last periodic report, an additional order, the Extradition (Torture) Amendment Order 2003 under section 22 of the 1989 Extradition Act, has been adopted, which included new signatories to the Convention.<sup>38</sup> However, the new Extradition Act 2003 that came into force on 1<sup>st</sup> January 2004 has repealed the whole of the 1989 Extradition Act including section 22 and all orders made under it.<sup>39</sup> Although article 193 of the 2003 Act similarly allows for extradition provided for under an international convention in the absence of a formal arrangement, the countries concerned must be set out in an order made by the Secretary of State.<sup>40</sup> It appears that no order has yet been made.

REDRESS believes that this gap should be filled as soon as possible in order to maintain UK compliance under article 8 of the Convention.

#### **(E) ARTICLE 14: REPARATION FOR UK NATIONALS WHO ARE TORTURED ABROAD**

The cases of the 7 British nationals who were detained and severely tortured in the Kingdom of Saudi Arabia<sup>41</sup> have highlighted a number of gaps in the Government's stated policy to protect the rights of its nationals. This applies to those who have been tortured, both while they are in detention, often still at risk of torture and on their return to the UK.

In keeping with the UK's international right to protect its own nationals in detention abroad,<sup>42</sup> REDRESS welcomes the Government's assurances that:

"The welfare of British nationals in foreign prisons is one of the key concerns of consular staff. Our staff seek to ensure that prisoners' rights are respected in accordance with international standards. This includes ensuring that they have access to legal representation and that their welfare needs are met during their detention".<sup>43</sup>

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<sup>37</sup> Section 22 of the 1989 Extradition Act provided that international conventions such as the Convention Against Torture had the effect of an extradition treaty in respect of any country with which the UK did not have a treaty provided that the country in question was a party to the relevant convention and there was an Order in Council applying the 1989 act to that country.

<sup>38</sup> Order 2003/1251.

<sup>39</sup> Schedule 4 of the 2003 Act.

<sup>40</sup> Section 193 states: "(1) A territory may be designated by order made by the Secretary of State if (a) it is not a category 1 territory or a category 2 territory, and (b) it is a party to an international Convention to which the United Kingdom is a party"

<sup>41</sup> See REDRESS news releases "REDRESS calls for justice for the British nationals tortured in Saudi Arabia" 6<sup>th</sup> September 2003, and Parliament to Debate Plight of British Nationals Imprisoned in Saudi Arabia" 3<sup>rd</sup> June 2003.

<sup>42</sup> Articles 5 and 36 of Vienna Convention on Consular Relations 1963 and article 5 of International Law Commission's draft articles on diplomatic protection.

<sup>43</sup> Written Ministerial Statement on *Consular assistance for British nationals detained overseas* by the Foreign Secretary, the Rt Hon Jack Straw MP to the House of Commons on 14<sup>th</sup> July 2003 reported in Hansard.

However, REDRESS is concerned by the lack of a specific policy detailing the steps the Government will take when a detained British national has been tortured or is at risk of torture. In its experience, REDRESS has found that the current general policy statements have caused confusion and frustration to victims and to their relatives, especially where the victim is subjected to on-going risk of torture.

At present, the Foreign and Commonwealth Office has outlined its general policy in its travel leaflet "*If it all goes wrong*" in which it states that: "The Consul... will take up (at your request) any justified complaint about ill treatment or discrimination with the police or prison authorities."<sup>44</sup> Although this position reflects the requirement of consent from the detained national required by article 36(1)(c) of the Vienna Convention on Consular Relations (Vienna Convention),<sup>45</sup> this position does not address the case where the detainee has been threatened with further torture, if he/she raises their ill-treatment during their meeting with the Consul. In some incidences, the meeting between the detainee and the Consul was monitored, either through the presence of the torturer, or in a room that had listening devices, making confidentiality virtually impossible. Although there is no explicit requirement in the Vienna Convention, this in REDRESS' view is implied in the provision that the Consul and British national should be afforded "free" access and communication.<sup>46</sup> Where the Consul has reasons to believe that the British national has been tortured and/or is at risk of torture, representations should be made to ensure that the national is being provided all the well established safeguards protecting them from torture, regardless of whether consent has been given.

The travel leaflet also states: "Insist that the British Consul be notified. IT IS YOUR RIGHT" and: "The Consul. Will visit you as soon as possible – if that is what you want".<sup>47</sup> REDRESS has found with a number of its clients, that they did not receive a consular visit for a number of days and in some cases, weeks after their initial detention. In all cases, the detainees were not informed of their right to communicate with their Consul on their arrest and in some cases where the national demanded to see their Consul, this request appears not to have been transmitted to the British Embassy. It was during this initial period of detention, that victims were kept incommunicado in an irregular detention centre and suffered the most severe torture during interrogations. The denial of the information about the right of access to a Consul and to transmit a request to see a Consul is in clear contravention of article 36 of the Vienna Convention.<sup>48</sup> REDRESS believes that the British Government could better safeguard their nationals from torture if it makes strong representations at the highest level whenever a state or its agent fails to inform a British national of their right of access to the British consul.

British Government's policy towards providing information to the relatives of these torture victims is far from clear. In its travel advice leaflet, the Government provides: "The Consul.... will pass a message to your family if you want. To save money, your family can find out what is happening to you by contacting Consular Division at the FCO in London..."<sup>49</sup> REDRESS has found that relatives of British nationals in detention abroad have at times been very frustrated by their

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<sup>44</sup> Travel leaflet "If it all goes wrong".

<sup>45</sup> "(c) ... consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".

<sup>46</sup> The requirement for confidential meetings is not included in article 36 of the Vienna Convention. However, arguably, one can be implied through the wording that "Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State" otherwise the requirement of "free" communication and access cannot be ensured.

<sup>47</sup> Supra.

<sup>48</sup> 36(b) states "if he [national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph".

<sup>49</sup> Supra.

contact with the Foreign and Commonwealth Office. Usually this stems from the lack of information about their loved ones, and at times the manner in which this information has been conveyed to them.<sup>50</sup> This frustration and distress is also displayed through the relatives' efforts to enlist the assistance of MPs to obtain information from the Government.<sup>51</sup> REDRESS believes that the UK Government should give better consideration to the way in which it handles its communications with relatives so as to avoid causing them considerable distress. Moreover, given the insidious nature of torture and the number of Britons detained abroad,<sup>52</sup> a specific policy needs to be formulated. The UK Government has already recognised this need in relation to death penalty<sup>53</sup> and cases where the detainee has been denied a right to a fair trial.<sup>54</sup>

British nationals tortured abroad usually wish to pursue their right to a remedy on their return to the UK and the British Government may at its own discretion assist the victim in their bid for justice. Baroness Scotland has confirmed to Parliament that provided the victim has exhausted all local remedies:

"The UK Government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations."<sup>55</sup>

REDRESS is aware of a number of cases where the British Government is pursuing reparations on behalf of the victim. However, this practice appears to be applied in an *ad hoc* way rather than on any consistent basis in the absence of any stated policy. Given the recognition of torture survivors' right to reparation under international law and the universal abhorrence of torture itself, REDRESS believes that the Government should formulate clear policy as it has done for the denial of a fair trial.

On their return to the UK, British nationals who have been tortured abroad have complained of the lack of support that they have received from various government departments, including the Foreign and Commonwealth Office and social services. Often suffering from post traumatic stress syndrome and being unable to work, they have had difficulty in accessing financial and other support, such as housing and specialist medical care. Although their numbers are relatively small, the unique needs of UK torture survivors on their return home, requires

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<sup>50</sup> In an adjournment debate, Mr Lyons MP, quoted from one of the men's relatives, Margaret Dunn: "I last saw Sandy in January of this year. I was in Saudi Arabia for 1 week. While I was there the Saudis afforded me the opportunity to see my brother, for which I am eternally grateful. They were hospitable and courteous which I appreciated. I am told my brother is coping. I was told before Christmas my brother was coping. I don't believe that Sandy or any of the men being detained are coping—I saw that for myself in January." And in her view "situation needs to be brought to an end. Sandy is now well into his 3rd year and he is ill. The situation has taken a toll on ALL the family." 18th June 2003, House of Commons Adjournment Debate reported in Hansard at columns 132 WH 133 WH

<sup>51</sup> "By the end of the debate, if we achieve nothing else, we need to make sure that the Minister will tell my right hon. Friend the Secretary of State for Foreign and Commonwealth Affairs that those of us involved in the debate, and in representing our constituents' interests, want him to put as much pressure as possible on the Saudis. He must tell them that the British Government fully support the appeal for clemency. As I have said, it is time to intensify the campaign. There must be personal intervention, if that is what is needed. It is certainly what the families demand. They want more activity; they want it 24 hours a day, seven days a week. It is all very well for people to criticize them and say that they are putting too much pressure on the Government, but any family would naturally want to do that if a relative were involved." 18<sup>th</sup> June 2003, House of Commons Adjournment Debate reported in Hansard at columns 134 WH.

<sup>52</sup> *Supra*. According to the Foreign and Commonwealth Office's Human Rights Annual Report 2003 at page 79, 2,266 British nationals were detained abroad at the end of June 2003. P.79.

<sup>53</sup> *Ibid*, reference is made to this policy on p.80 of this Annual Report.

<sup>54</sup> Parliamentary Answer on 16<sup>th</sup> December 1999 by Baroness Scotland. Having referred to the revised policy, she said: "We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to a fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the State in question has accepted the right of individual petition under the ICCPR. The UK Government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations. "

<sup>55</sup> *Ibid*.

specialist attention. REDRESS suggests that one way to rectify this gap in practice is for the Government to issue policy to the relevant departments.

### **PART III: POINTS RAISED IN RELATION TO THE COMMITTEE'S "LIST OF ISSUES" TRANSMITTED TO THE UK GOVERNMENT IN ADVANCE OF THE 33<sup>RD</sup> SESSION**

#### **(A) ISSUE 5: CONCLUSION THAT SECTIONS 134(4) AND (5)(3)(B) OF THE CRIMINAL JUSTICE ACT 1988 DO NOT CONFLICT WITH ARTICLE 2 OF THE CONVENTION – THE DEFENCE TO TORTURE**

REDRESS is not aware of the Government publicising its “further consideration” referred to at para 18 of the UK report following the conclusion of its public consultation exercise to review the Offences against the Person Act. Nevertheless, REDRESS is concerned by the Government’s overall conclusion that the defence set out in section 134(4) and (5)(3)(b) falls within the limits of article 2 of the Convention set out at paras 17 to 22 of the UK report.

Sections 134(4) and 5(b)(iii) provide that:

(4) “It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct”

(5) For the purpose of this section “lawful authority, justification or excuse” means - ... (b) in relation to pain and suffering inflicted outside the United Kingdom (iii) in any other case, lawful authority, justification, or excuse under the law of the place where it was inflicted”

In REDRESS' view, the wording of these statutory provisions appears to be clear and unambiguous and therefore, it is likely that a UK court will follow the approach in *R v Lyons* when interpreting this provision: “a convention duty, even if found to exist, cannot override an express and applicable provision of domestic statutory law...”<sup>56</sup>

Parliament may pass a law that mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the incorporation may be misleading. It is not the treaty but the statute, which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.

In light of this, it would be open to a Court to interpret these provisions without having to assess its compliance with the Torture Convention because of the lack of interface between the statute and the Convention and the unambiguous wording. As a result, the UK courts “are not free” to interpret statutory provisions in accordance with international law, even if this results in a breach of the UK’s international obligations. Moreover, contrary to the UK Government’s assertion about the ECHR, the HRA does not provide a safeguard against this. Section 3 of the HRA only requires that:

**“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the conventions rights...”**

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<sup>56</sup> Quoted in A & others, *infra* at para 119.

The HRA does not give the Courts the power to overturn clear statutory provisions in favour of individual rights. The general rule still applies. However, where a Court is unable to interpret statutory provisions in line with the ECHR, it may make a declaration of incompatibility.<sup>57</sup> The result of such a declaration is to highlight the breach rather than provide a remedy as the finding of a declaration “does not affect the validity, continuing operation or enforcement of the provision... and is not binding on the parties to the proceedings.”<sup>58</sup>

Furthermore, REDRESS is concerned by the Government’s submission that the definition of torture under section 134 of CJA is wider than the definition set out in the Torture Convention. It may be wider in scope, however it is temporally narrower, leaving some torture victims without redress in the UK. According to the House of Lords in the *Pinochet* case, section 134 of the CJA is not retrospective.<sup>59</sup> Moreover, the majority of Law Lords found that torture was not a common law crime before the CJA came into force on 29 September 1988.<sup>60</sup> Instead they found that acts of torture and conspiracy to commit torture which were perpetrated prior to 29 September 1988 can **only** be used as evidence in a case to show that incidents of torture committed on or after 29 September 1988 was/were part of a systematic State policy.<sup>61</sup> This leaves the unwieldy situation where an individual can be prosecuted for torture under the Geneva Convention Act and the Genocide Act for torture committed prior to September 1988 but where these acts are neither a war crime nor an act of genocide, the torturer will escape prosecution, unless he/she committed further acts of torture after September 1988. As a result, torturers can (and have) evaded justice under section 134 CJA and justice and reparation are consequently denied to their victims.

REDRESS suggests that the best way to rectify the problem would be for the UK Government to 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.

REDRESS also considers that 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 statutory interpretation.

## **(B) ISSUE 9: UK’S DEROGATION TO ARTICLE 5 OF THE ECHR: INDEFINITE DETENTION WITHOUT CHARGE OF NON-UK NATIONALS SUSPECTED OF TERRORIST ACTIVITIES UNDER THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 (ATCSA)**

In relation to this derogation, REDRESS wishes to draw to the Committee’s attention the strong recommendations that have been raised in the review process so far. The Newton report (in which the Privy Counsellor Review Committee set out their review of the ATCSA),<sup>62</sup> “strongly

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<sup>57</sup> Section 4 of the Human Rights Act 1988.

<sup>58</sup> Section 6 of the Human Rights Act 1988.

<sup>59</sup> *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* Ungarte (3) 1999 2 WLR 827.

<sup>60</sup> *Ibid.* Lord Millet was the only Law Lord to find that systematic practice of torture prior to September 1988 was a common law crime however, he found that a single act of torture was not: “*In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973*” (p.103 of the judgment).

<sup>61</sup> *Ibid.* Lord Hope and Lord Browne-Wilkinson reached this conclusion. Out of the other three, Lord Millet found that torture part of a systematic practice was a crime in the UK under the common law, though a single act of torture was not. Lord Hutton, Lord Saville of Newdigate and Lord Phillips of Worth Matravers all agreed with Lord Hope’s analysis but made no specific comment about this.

<sup>62</sup> The Newton report published on 18th December 2003. HC 100, 2003-4.

recommended" that: "the powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency. New legislation should:

a) deal with all terrorism, whatever its origin or the nationality of its suspect perpetrators; and

b) not require a derogation from the European Convention on Human Rights"<sup>63</sup>

In response to the Newton Report, the Home Secretary issued a discussion paper "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society" in February 2004 in which the Home Secretary made clear his view that the continuation of Part IV of the ATCSA and the derogation to article 5 of the ECHR was vital in the UK's fight against terrorism. The Joint Committee on Human Rights, in response to the Government's discussion paper, carried out their own enquiry. They concluded that they "strongly agree" with the Newton Report's recommendation regarding Part IV of ATCSA. In their view:

"Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency. In our view, this makes it absolutely imperative that an alternative way be found to deal with the threat that exists without derogating indefinitely from the most basic human rights obligations".<sup>64</sup>

REDRESS welcomes the Government's consultation on this matter, however, it is concerned that the Government appears to have made its mind up to maintain the UK's derogation despite the very strong opposition from independent review bodies within Parliament and from civil society.<sup>65</sup> The public consultation closed on 31<sup>st</sup> August 2004 and as far as REDRESS is aware, the Government has not yet indicated when the results of this consultation will be made public. Like many other NGOs, REDRESS believes that Part IV powers are contrary to fundamental human rights, in particular the safeguards protecting the right to security and liberty of the person. REDRESS is particularly concerned for the 11 individuals that remain in detention indefinitely, a number of whom are torture victims who have sought refuge in the UK. Some of the detainees have indicated to members of the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) that "the belief that they had no means to contest the broad accusations made against them also was a source of considerable distress, as was the indefinite nature of detention."<sup>66</sup> The British Psychological Society has expressed its concern that "serious harm is being done to the mental well-being of ATCSA detainees, mainly because of the psychological impact of indefinite detention without charge or trial and without being informed of the evidence against them, or even being subjected to interrogation or questioning" and in particular this impact on those detainees that are torture victims, young and those with mental health problems or physical or learning disabilities.<sup>67</sup>

Concerns for the mental health and well-being of those detained without charge continue to be raised. A team of 11 eminent consultant psychiatrists and one leading psychologist have

<sup>63</sup> Para 4 of the Principle Conclusions on p. 8 of the report "Anti-Terrorism Crime and Security Act 2001 Review: Report (known as the Newton Report) 18<sup>th</sup> December 2003.

<sup>64</sup> Joint Committee On Human Rights "Review of Counter-Terrorism Powers" 18<sup>th</sup> report of session 2003-2004, 4<sup>th</sup> August 2004 at para 4.

<sup>65</sup> In its concluding paragraph of the discussion paper, the Government reiterates this view: "Finally we stress that any withdrawal of the powers granted by Parliament in Autumn, 2001 would be detrimental to the safety and security of the nation which is why we are not proposing to relinquish Part 4 of the Act and why we are seeking renewal separately for this purpose". Ibid, para 81.

<sup>66</sup> Para 25 of "Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by European Committee for the Prevention of Torture and Inhumane or Degrading Treatment (CPT) from 17 to 21 February 2002", Strasbourg dated 12 February 2003 <http://www.cpt.coe.int/documents/gbr/2003-18-inf-eng.htm>.

<sup>67</sup> Supra, Joint Committee on Human Rights' Report at para 34. The Joint Committee on Human Rights also points to two detainees whose state of mental health has raised serious concern.

recently issued a report concluding that: "There is evidence from repeated clinical interviews carried out by expert clinicians that indefinite detention is having a damaging impact on detainees mental health". The report identifies all eight ATCSA detainees as suffering from "major depressive anxiety disorder and some are experience post-traumatic stress disorder".<sup>68</sup>

### (C) ISSUE 10: SAFEGUARDS FOR SUSPECTS DETAINED UNDER ATCSA AND THE ROLE OF THE SPECIAL ADVOCATE

As the Newton Report has identified: "The suspects face no specific charge and are not presented with, and given the opportunity to refute, all the evidence against them." This is a significant limitation in what is an essentially adversarial legal process and increases the risk of a miscarriage of justice. This risk is compounded by the following features of the process:

*The standard of proof involved in the Special Immigration Appeals Commission procedure is low. It is "unreasonable belief and suspicion", and not even "a balance of probabilities", much less proof "beyond all reasonable doubt";*

The current Special Immigration Appeals Commission rules do not oblige the Home Secretary to reveal all material which could help the suspect (even in summary form);

In some cases the vast majority of the case is closed and so the open case might be an unreliable indication of the basis of the closed case.<sup>69</sup>

Moreover, REDRESS does not view the role of the "Special Advocates" who are appointed to represent the individual interests in their appeal as an effective safeguard. Even though the Special Advocate is privy to all closed information and represents the detainee at the closed sessions of the appeal,<sup>70</sup> once the "Special Advocate" has seen the closed material, he cannot communicate further with the individual whose interests he represents without the direction of the court.<sup>71</sup>

Added to this, the Secretary of State bases his decision to detain a non-UK national under Part IV of the Act *on reasonable grounds for suspecting* that the individual is a terrorist as well as on a *reasonable belief* that they are a threat to national security.<sup>72</sup> This suspicion that the

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<sup>68</sup> Tortured terror suspects have mental illnesses, say doctors, by Robert Verkaik, Legal Affairs correspondent for the Independent, 14<sup>th</sup> October 2004. This medical report was released on 13<sup>th</sup> October 2004.

<sup>69</sup> Supra at para 187.

<sup>70</sup> Section 5 provides wide powers to the Lord Chancellor to make such provisions and Section 6(1) of the Special Immigration Appeals Commission Act 1997 sets out the role of the Special Advocates ; 6. – "The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission **from which the appellant and any legal representative of his are excluded.**" (Emphasis added). Under section 25 of ATCSA, a detained individual may challenge this decision before the Special Immigration Appeals Commission (SIAC) who will assess "whether or not reasonable grounds exist for the Secretary of State's belief or suspicion." (para 16 of M quoted in A & others case, supra.. at para 46).

<sup>71</sup> Rule 36 of the SIAC Procedural rules 2003 states : "(1) The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant. (2) After the Secretary of State serves material on the special advocate as mentioned in paragraph (1), the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or a direction of the Commission pursuant to a request under paragraph (4). (3) The special advocate may, without directions from the Commission, communicate about the proceedings with - (a) the Commission; (b) the Secretary of State, or any person acting for him; (c) the relevant law officer, or any person acting for him; (d) any other person, except for the appellant or his representative, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings. (4) The special advocate may request directions from the Commission authorising him to communicate with the appellant or his representative or with any other person". See Newton Report for further information on the procedure.

<sup>72</sup> Section 21 of Part 4 of the ATCSA 2001 allows the Secretary of State to issue a certificate ordering the detention of an individual who is not a UK national and who cannot be deported to a safe country provided the Secretary of State "a) believes that the person's presence in the United Kingdom is a risk to national security, and b) suspects that the person is a terrorist." Section 23(1) of the Act makes it clear that the detained individual is free to leave the country. A & others v SSHD Case no C2/2003/2796, C2/2004/0064, C2/2004/0067, Court of Appeal unreported judgment 11 August 2004.

individual may be a terrorist can be based on information "which has not been proved in the ordinary sense of that word. Suspicion may reasonably arise from unproved facts."<sup>73</sup>

In REDRESS' view, this system lacks the safeguards to ensure that the evidence which the Home Secretary may receive from other States has not been obtained through torture. Furthermore, it appears that the Home Secretary is not paying sufficient attention to this risk, even though the UK authorities are liaising closely with foreign intelligence and police agencies.<sup>74</sup> In the case of *A & others*, the Government asked the Court when looking at the issue "to bear in mind the importance of international co-operation in the fight against terrorism. The sharing of information between law enforcement agencies in different states is vital. A requirement to ascertain how information had been obtained by another state would damage international relationships and impair the free flow of information".<sup>75</sup> More worryingly is the apparent attitude of the Home Secretary revealed after the Court of Appeal found in his favour:

"we unreservedly condemn the use of torture and have worked hard with our international partners to eradicate the practice. **However, it would be irresponsible not to take appropriate account of any information which could help protect national security and public safety.**"<sup>76</sup> (emphasis added)

It also appears that Lord Carlisle, the independent reviewer of the terrorism legislation has not ruled out the possibility that such evidence may be used:

"I would be the first to say that I feel very uncomfortable about evidence being used if it has been obtained by torture, but is it reasonable to say that information which has been obtained which leads to evidence should never be used?... The general principle must be that you never act on evidence obtained from torture, the general principal, but there may be circumstances in which one would say, "Well, just a moment".<sup>77</sup>

Moreover, even though he believed that information used to detain an individual had not been obtained by torture, he "could not say for certain that no evidence obtained as a result of torture had been used".<sup>78</sup>

In REDRESS' view, even if the Home Secretary may not intentionally use information/evidence that has been obtained through torture, the lack of enquiry into his sources, the rules of disclosure of evidence and the use of closed sessions and the stringent rules governing the Special Advocate's contact with the detainee makes the risk that the Home Secretary may unwittingly use such information a real possibility and thereby breaching the UK's obligations under article 15 of the Torture Convention. In light of this, REDRESS suggests this is another reason why it is essential for the Government to immediately amend the ATCSA and its secondary legislation.

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<sup>73</sup> Ibid, para 30.

<sup>74</sup> The Joint Committee on Human Rights drew attention to in their eighteenth report supra at para 27.

<sup>75</sup> Supra at para 85 of *A & another*.

<sup>76</sup> Statement from the Home Secretary, Court of Appeal Judgment, dated 11 August 2004. In response to Lord Judd's Parliamentary question, Baroness Scotland confirmed that : "SIAC has adopted the common law approach to evidence which may have obtained elsewhere through the use of torture - save for the evidence that is obtained from a party (usually the defendant in a criminal trial), all evidence is admissible, however unlawfully obtained. However, where that evidence may have been obtained by torture, this will bear on the proper weight to be given to the information" 26<sup>th</sup> June 2004 reported in Hansard.

<sup>77</sup> Supra at para 28 of the Joint Human Rights Committee Eighteenth report - evidence given to the Committee by Lord Carlisle.

<sup>78</sup> Ibid.

## **(D) ISSUE 21: RESULT OF UK'S REVIEW OF THE RIGHT TO INDIVIDUAL PETITION UNDER ARTICLE 22**

Since the Government compiled the UK report to the Committee against Torture, the Government has completed its review of the individual right of petition in the Torture Convention and other human rights instruments referred to at para 7 of the UK report.<sup>79</sup>

REDRESS is concerned that the Government has decided not to afford torture victims in the UK the individual right of petition set out in the Torture Convention for the time being.<sup>80</sup> The Government has based this decision on the following factors:

“The UN monitoring committees which would receive individual petitions from citizens are not courts and cannot award damages, or produce a legal ruling on the meaning of the law..... The practical value to the individual citizen is unclear and there is also to be considered the cost to public funds of preparing submissions of the government's opinion on the subject matter of the petition. This could be significant if individual petition were used extensively as a means of seeking to explore the legal meaning of a treaty's provision, a process which could not ... come to juridical conclusion in any case”<sup>81</sup>

The Government has, in REDRESS' view premised this decision on erroneous assumptions:

- i) Even though the UK is correct in pointing out that the Committee is not strictly a judicial body and cannot award damages, the UK appears to have overlooked the Committee's key role in giving definitive interpretation to Convention's provisions, in assisting State parties to comply with these provisions and in making recommendations that States parties afford reparation to victims. Without the individual right of petition, this important task is left to the UK's periodic reporting to the Committee which occurs infrequently and where victims have no voice.
- ii) The UK Government has disregarded the importance of the Committee's role in relation to a victim's right to reparation which does not just encompass compensation, but also, restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>82</sup> In this respect, the UK does not appear to take into account how the Committee's recommendations in themselves, can go some way to fulfilling a victim's right to reparation, given that the Committee can not only make a finding that the UK is in breach of its obligations under the Convention but also highlight the offending domestic legislation and/or practice.<sup>83</sup>
- iii) The cost to the public purse in preparing submissions will not entail the same costs as in judicial proceedings as the petition is not subject to any oral hearing. Moreover, contrary to the Government's assertions, the UK is unlikely to be faced with a flood of applications given that all petitions have to overcome the admissibility hurdle requiring the exhaustion of domestic remedies. The HRA, which gives individuals a separate right of action before UK Courts, would act as an additional filter.

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<sup>79</sup> Appendix 4 of the report “International Human Rights Instruments: The UK's position Report on the outcome of an Inter-Departmental Review conducted by the Department of Constitutional Affairs” found at [www.dca.gov.uk/hract/ngo/reviews/appendix5.pdf](http://www.dca.gov.uk/hract/ngo/reviews/appendix5.pdf).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> These 5 elements, being the scope of reparation under customary international law, are given equal importance in the UN Draft 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. (Rev.24 October 2003) E/CN.4/2004/57, 10<sup>th</sup> November 2003.

<sup>83</sup> ie: just satisfaction and guarantees of non-repetition.

Also, the right of individual petition is an important and necessary safeguard because the Convention itself has not been directly incorporated into UK domestic law. Currently, individuals find it difficult to request any UK court to directly assess the implementation of the UK's obligations under the Convention. Generally, the Courts will only look to the Convention where the interpretation of the statutory provision is ambiguous, or in the absence of statutory provision, the Courts may use it to develop the common law.<sup>84</sup> The Court will not use the Convention to overturn an express statutory provision even if it results in the UK being in breach of its international obligations.<sup>85</sup> Even though the HRA provides an individual with some protection by allowing the Courts to directly consider the Government's compliance with individuals' rights under the ECHR, these rights do not always correlate to all the provisions of the Convention against Torture. As a result, there is still a protection gap in the UK – that is the UK may implement legislation that may violate an individual's rights protected under the Convention, leaving the victim without any meaningful redress. A recent example of this, is the case of *A and others v Secretary of State for the Home Department* where the Court of Appeal was unable to directly assess the compliance of a procedural rule relating to the admissibility of evidence with article 15 of the Convention because of the clear and unambiguous wording of that procedural rule.<sup>86</sup> The Court also found that this rule did not breach the victim's rights under article 6 of the ECHR.

### (E) ISSUE 22: CASE OF A & OTHERS

In the case of A & others, the Court of Appeal was asked to give its generic determination on whether rule 44(3) of the SIAC procedural rules allows the admission of evidence that has been obtained through torture of another individual in a foreign jurisdiction. Rule 44(3) states that SIAC “may receive evidence that **would not be admissible in a court of law**”.<sup>87</sup> (emphasis added). In its judgment, SIAC found that such evidence was admissible: “We are, of course, not bound by any rules of evidence, but must act fairly in considering the appeal of each Appellant. But the means by which information is obtained goes to its reliability and weight and not to its admissibility”.<sup>88</sup>

REDRESS is deeply concerned that by allowing the Secretary of State to take into account such evidence and by relying on him to afford the appropriate weight to this evidence and by failing to ensure SIAC's role as a judicial body to safeguard the rights of the detainee under article 15 of the Torture Convention, the Court of Appeal has reached a conclusion that is in clear contravention of the Convention. In addition to this, REDRESS believes that the Court of Appeal would have reached a different conclusion if the UK Government had incorporated the Torture Convention into UK domestic law.

In essence, the majority finding of the Court of Appeal reached their decision on the following basis:

- there is no rule under the common law to exclude the admissibility of such evidence;
- the admissibility of such evidence did not give rise to any violation under article 6 of the ECHR; and

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<sup>84</sup> R v Lyons & Ors supra. The Court may also use the Convention to assist in the assessment of an executive discretion.

<sup>85</sup> Ibid.

<sup>86</sup> Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 made pursuant to Special Immigration Appeals Commission Act 1997.

<sup>87</sup> Ibid.

<sup>88</sup> Para 78 of *A & other*

- Article 15 of the Torture Convention has no bearing on the lawfulness of the derogation under article 5 of the ECHR<sup>89</sup>

REDRESS is concerned by the Court's approach to this case. Firstly, their findings in relation to domestic law seems to have been coloured by their view that it is unrealistic and impractical to expect the Secretary of State to investigate his sources as "it would involve investigation into the conduct of friendly governments with whom the Government is under an obligation to co-operate".<sup>90</sup> In REDRESS' view, the Home Secretary is used to examining the conduct of other governments in relation to the risk of torture perpetrated by non-UK agents abroad in its assessment of asylum claims. Here both objective and subjective evidence is taken into account.

Moreover REDRESS believes that the Court has overlooked the full scope of article 15 of the Torture Convention which place the unambiguous obligation on the State to investigate all allegations of unreliable evidence as a result of torture in order "to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture".<sup>91</sup> Furthermore, the obligation set out in UN Security Council resolutions for international co-operation in the fight against terrorism does not envisage inter-state co-operation and the exchange of information operating at the expense of human rights. The Security Council has issued a clear declaration reminding states to "ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law".<sup>92</sup>

REDRESS is also concerned by the Court's finding that there is "no sound juridical base for the imposition of such requirement" in UK domestic law. If this is correct, it shows that the UK Government has failed to adequately implement its obligations under article 15 of the Convention. It is clear from the Committee's decision in *PE v France*, that where a detainee raises an allegation that evidence was obtained by the torture of another individual outside the jurisdiction, the obligation on the State "to ascertain the veracity of such allegation" is triggered. In this case, French **judicial and administrative authorities** had examined the complaint and decided that the allegations "had not been sufficiently substantiated". From the Committee's decision, it is clear that article 15 applies to all types of cases not just criminal or extradition cases, and the determining factor is whether the state has competence over the proceedings.<sup>93</sup>

Also of concern is that the Court, when assessing the case in relation to article 6 of the ECHR appears to have distinguished administrative detention from criminal cases even though the sanction of indefinite detention without charge is equal to that of the penalty for any serious crimes.<sup>94</sup> In REDRESS' view, the Court should have looked at the nature of such evidence and the impact rule 44(3) has on the overall fairness of the hearing. It is well recognised that evidence procured by torture is by its very nature, unreliable, and as a result taints the fairness of any judicial hearing.<sup>95</sup>

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<sup>89</sup> Interestingly, the Court of Appeal did not decide on the argument that article 15 of the Convention is part of customary international law and therefore part of a common law obligation to prevent the admissibility of such evidence because this argument was raised too late in the day. If they had, they may have reached a different conclusion. See paras 80 & 81.

<sup>90</sup> Para 129 of Pil LJ. See also para 254 of Laws LJ.

<sup>91</sup> para 6.3 of *PE v France* Communication no 193/2001, 21<sup>st</sup> November 2002.

<sup>92</sup> UN Security Council Resolution 1456 (2003) on 20<sup>th</sup> January 2003. See REDRESS' publication "Terrorism, Counter-Terrorism and Torture International Law in the fight against Terrorism" July 2004.

<sup>93</sup> *Supra PE case*, at para 6.3.

<sup>94</sup> A point made by the dissenting judge, Neuberger LJ at para 405.

<sup>95</sup> *Ibid*, para 464.

REDRESS also finds it objectionable that the Court treats evidence obtained through torture perpetrated by UK agents differently from evidence obtained through the torture by non-UK agents in other jurisdictions, even though the UK has recognised that the prohibition of torture has attained *jus cogens* status. The Court appears to have overlooked the link between this prohibition and article 15, that "the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture".<sup>96</sup> Moreover, treating evidence obtained by torture perpetrated abroad more leniently in itself condones the use of torture. Not only does this contravene the purpose of the Torture Convention to make the fight against torture more effective, it also goes against the UK Government's policy to eradicate torture globally.

In order to comply with the Convention, it would be appropriate for Rule 44(3) to be reviewed immediately. Furthermore, separate procedural rules need to be devised setting out in particular;

- the obligation of the Secretary of State to investigate any such allegation;
- rules to facilitate the individual to substantiate such allegation; and
- a fair standard of proof for both parties.

REDRESS believes that the Parliamentary Joint Committee on Human Rights is well placed to assist the Secretary of State in this task.

#### **(F) ISSUE 26 : CASES OF ALLEGED TORTURE, ABUSE OR ILL TREATMENT BY UK ARMED FORCES IN IRAQ AND THE RIGHT TO REPARATION FOR VICTIMS**

REDRESS welcomes the Prime Minister's strong stance in relation to torture inflicted on Iraqi detainees when questioned about allegations against US military personnel:

"The abuse of prisoners, the torture of prisoners, degrading treatment of people in the custody of coalition forces, those things are completely and totally unacceptable, they are inexcusable and there can be no possible justification for them. And we must do everything that we can do, and need to do, in order to root out such practices and bring to justice those people who are responsible for them"<sup>97</sup>

REDRESS hopes that the Prime Minister will ensure that the above applies where such abhorrent practice is found amongst British armed forces and that the victims of these violations are guaranteed their right to reparation. REDRESS is aware of a number of incidents where it believes that the treatment of detainees may have amounted to torture or ill-treatment.

The practice of hooding of Iraqi nationals by UK armed forces has been raised in the UK Parliament. Although the Government has agreed that hooding during interrogation is "unacceptable",<sup>98</sup> "[it] believes that hooding during arrest and transit is acceptable when there is a strong military reason, for example to offer security to our own forces and locations and to provide protection to the detainee (through the prevention of identification by other detainees). Military commanders became aware that the practice of hooding could be harmful to prisoners, especially if it was applied inappropriately. They judged that these concerns outweighed the

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<sup>96</sup> Supra *PE case*, at para 6.3.

<sup>97</sup> Britain and Poland: "A Strong Relationship" (06/05/04) edited transcript of press conference given by the Prime Minister, Tony Blair and the President of Poland, Aleksander Kwasniewski, in London, on Thursday 6<sup>th</sup> May 2004.

<sup>98</sup> Parliamentary answer "It is made clear to all armed forces personnel undergoing training in interrogation that the five techniques, hooding, wall standing, sleep deprivation, food deprivation, and white noise, are in all circumstances unacceptable as methods of interrogation." 28 June 2004 col 143W recorded by Hansard. The Prime Minister himself has accepted that certain interrogation techniques were "not consistent with the principles laid down in the Geneva Conventions". See REDRESS' publication "Terrorism, Counter-Terrorism and Torture International Law in the fight against Terrorism" July 2004.

military justification for the continued use of hooding as a means of blindfolding, and that the most prudent, immediate response was to introduce a ban.<sup>99</sup>

Both hooding during arrest, detention and interrogation have been raised in the International Committee of the Red Cross report on Umm Qasr detention facility and its successor Camp Bucca (which for most part has been under British control). In relation to arrest and transfer of individuals detained, the ICRC found that:

“they [Coalition Forces] arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles”<sup>100</sup>

When questioned about this in the House of Lords, Lord Bach, the Parliamentary Under-Secretary for the Ministry of Defence answered:

“The Secretary of State for Transport was correct in saying that direction had been given in September 2003 that United Kingdom forces should cease hooding prisoners, despite this being legitimate in certain specific operational circumstances. The International Committee of the Red Cross report of February 2004 did not allege that UK interrogators had hooded prisoners during interrogations. My statement on 12 May was and remains correct. We are not aware of any incidents in which UK interrogators are alleged to have used hooding as an interrogation technique.”<sup>101</sup>

Lord Bach also stated:

“No legal or disciplinary measures have been taken against any members of the United Kingdom Armed Forces in Iraq for breaches of international human rights law or international humanitarian law. UK Armed Forces personnel are subject to English criminal law wherever in the world they are deployed. Service personnel suspected of breaking the law are subject to Military Police investigation and due judicial process. We are not aware of any incidents in which UK MoD personnel or persons employed by firms contracted to the UK Government have allegedly committed a breach of human rights.”<sup>102</sup>

REDRESS is concerned by the fact that the Ministry of Defence appears to believe that the hooding is not at odds with the prohibition of torture or cruel, inhumane and degrading treatment. Even though the practice has now ceased, the Ministry of Defence has not ruled out future use of such practice.

In the former cases where the Government has found hooding as unacceptable practice, REDRESS is not aware of any steps that the UK Government has taken to provide redress to the victims. In REDRESS' view, not only should the UK Government carry out an independent impartial investigation into all cases of hoodings, compensation, rehabilitation and other forms of reparation (in particular, guarantees of non-repetition) should be afforded to all victims.

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<sup>99</sup>Response by Mr Ingram to the House of Commons 21 Jul 2004 : *Column 266W Hansard*.

<sup>100</sup> Report of the International Committee of the Red Cross (ICRC) on treatment by the Coalition forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation. February 2004. The report was initially confidential and handed to the Coalition Forces, however, after parts were leaked to the press, the report was subsequently made public with the ICRC's consent. See REDRESS' publication "Terrorism, Counter-Terrorism and Torture International Law in the fight against Terrorism" July 2004.

<sup>101</sup> 5 Jul 2004 : *Column WA66*.

<sup>102</sup> *Ibid*.

In addition to the practice of hooding, individual allegations of ill treatment against British servicemen have been raised by a number of family members of victims, human rights organisations and the ICRC.<sup>103</sup> The case of Baha Mousa, an Iraqi civilian who was detained, allegedly beaten by British soldiers and died whilst in their custody which is now the subject of a judicial review, (the case of *Al-Skeini and others* before the High Court in England and Wales). According to eyewitness reports, Mousa's injuries included "a broken nose, several broken ribs and skin lesions on the face consistent with beatings."<sup>104</sup> The ICRC report highlights the case of 8 other Iraqi civilians who were detained at the same time as Baha Mousa and apparently suffered similar treatment:

"One allegation collected by the ICRC concerned the arrest of nine men by CF in a hotel in Basrah on 13 September 2003. Following their arrest, the nine men were made to kneel, face and hands against the ground, as if in a prayer position. The soldiers stamped on the back of the neck of those raising their head. They confiscated their money without issuing a receipt. The suspects were taken to Al-Hakimiya, a former office previously used by the mukhabarat in Basrah and then beaten severely by CF personnel. One of the arrestees died following the ill-treatment (##### aged 28 married, father of two children). Prior to his death, his co-arrestees heard him screaming and asking for assistance."<sup>105</sup>

2 of the 8 other men detained and ill-treated during this incident were hospitalised with severe injuries.<sup>106</sup>

The Royal Military Police in Iraq are apparently investigating the circumstances surrounding the death of Mousa and one soldier has reportedly been arrested in connection with the case. It also appears that the British Forces may have provided Mousa's family with financial assistance as a result of Mousa's death, though this does not appear to have been triggered by any acknowledgement of responsibility. While REDRESS welcomes the seriousness which the UK authorities are treating this case, the soldier under arrest has apparently not yet been charged with torture under section 134 of the Criminal Justice Act.<sup>107</sup> Furthermore, once liability for the torture has been established, the UK Government should provide the victim's family with full reparation; including adequate compensation, and a public admission of liability and an apology, which has already been requested by the victim's family.

In the Baha Mousa case, REDRESS is concerned by the slow pace of the investigation. REDRESS is also concerned by the Ministry of Defence's assertion that the actions of its troops are not subject to the ECHR or the HRA. According to the Government, neither the rights or procedural safeguards under the ECHR, nor those set out in the HRA apply to the armed forces because the violations did not take place within the territorial jurisdiction of the UK as defined by article 1 of the ECHR. While REDRESS takes a contrary view, if the Government's assertion is correct, it is unclear how the UK may practically ensure compliance with all of its obligations under the Torture Convention in particular to ensure an effective investigation and guarantee the right of torture victims to reparation.

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<sup>103</sup> ICRC report, supra Amnesty International's reports "Iraq: Amnesty International reveals a pattern of torture and ill-treatment" May 2004, and "Iraq One year on the human rights situation remains dire" March 2004. CINAT's "Statement on revelations of torture by Coalition Forces in Iraq," 13 May 2004.

<sup>104</sup> ICRC report at para 16.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid. These two men were examined by ICRC medical doctors who found "large haematomas with dried scabs on the abdomen, buttocks, sides, thigh, wrists, nose and forehead consistent with their accounts of beating received."

<sup>107</sup> The Metropolitan Police press office has confirmed to REDRESS that they have been charged with the investigation of one British Soldier who has been serving in Iraq and who has been charged with murder. The Metropolitan Police have not yet been asked to investigate any other others in relation to British servicemen in Iraq.