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 URL: www.redress.org

JUSTICE AND SECURITY GREEN PAPER: CONSULTATION: SUBMISSION FROM THE REDRESS TRUST: 6 JANUARY 2012

1. The Redress Trust (REDRESS) is an international human rights non-governmental organisation based in London, with a mandate to assist torture survivors to seek justice and reparation. Our programmes include casework, law reform, research and advocacy. We have wide expertise and experience on the right to reparation for victims of torture under international law and take cases on behalf of torture survivors before national, regional and international human rights mechanisms, courts and tribunals.

2. REDRESS' involvement and interest in torture-related issues in the United Kingdom (UK) is ongoing. In recent years this aspect of our work has included intervening in cases concerning torture, making submissions (written and/or oral) to parliamentary committees and to the Government, making written submissions to the Baha Mousa Public Inquiry, advocating for the Torture (Damages) Bill, advocating for an effective public inquiry into allegations of complicity in torture, and advocating for the investigation and prosecution of international criminal law suspects within the UK's jurisdiction.

3. We wish to respond to some of the questions in the *Justice and Security Green Paper* (GP). Our key concern relates to the impact of closed material procedures (CMP) in civil claims cases on the right to a remedy and reparation for survivors of torture. In this context we will cover matters relating in particular to the following questions as framed in the GP:

- *How can we best ensure that closed material procedures support and enhance fairness for all parties?*
- *What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?*
- *In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?*

4. In broad terms, we do not agree with the way some of the questions have been framed, nor the way in which the GP as a whole approaches 'Justice and Security'. For example, the GP states that "... [W]e must *strike a balance* between the transparency

that accountability normally entails, and the secrecy that security demands."[1] [emphasis added]. We believe that the GP itself is not a balanced exposition of the matters involved: it gives too much weight to *Security* and not enough to *Justice,*[2] and at the same time it has an overly-broad approach to the former. While the scope of withholding material on national security grounds in court proceedings has typically included matters such as the identities of informants or covert agents, details of surveillance operations or sensitive methods of interception, the GP uses the term "national security" in an un-defined way as if it is self-explanatory and a concept that is in contrast to justice. Further, the first question above pre-supposes that using and extending CMP is necessary, but the fundamental issue at the heart of both national security and justice is the public interest. Although it was in a criminal case, the words of Lord Bingham are a salutary reminder of the appropriate approach:[3]

> "The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations."

5. The overall premise of the GP, therefore, suggests that because of terrorism there is a new conflict between national security and justice, and that the latter must give way to the former. However, terrorism is not new, and it is a serious crime. There is no need, merely because of recent litigation, for CMP to be extended to civil claims involving torture allegations. Indeed, we believe that recent events have shown that without the substantive common law protection which the Supreme Court confirmed in *Al Rawi*[4] state responsibility for torture allegations will not be forthcoming.

6. We are also concerned that the existence of *allegations of torture or complicity therein* is not properly acknowledged by the GP. When it comes to torture the 'Justice and Security' debate must be firmly based on the absolute prohibition against torture. It is effective access to the courts and the right to a remedy and reparation which are the foundation upon which justice for torture survivors depends, and which should inform any examination of civil claims for damages based on torture allegations.

7. The prohibition against torture and other forms of ill-treatment is universally recognised and enshrined in all of the major international and regional human rights instruments.[5] The prohibition is recognised as absolute and non-derogable.[6] In *Chahal v*

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[1] 1.6, p 3.

[2] Discounting when the terms "justice and security" or "security and justice" are used together, the GP contains over 200 substantive references to "security" and less than 70 to "justice."

[3] *R v H (2003)* [2004] UKHL 3 at para 18, available at http://www.bailii.org/uk/cases/UKHL/2004/3.html. See also the judgment of the European Court of Human Rights in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, at para 61: "In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused."

[4] *Al Rawi and Others v The Security Service* [2011] UKSC 34.

[5] Universal Declaration of Human Rights (Article 5); International Covenant on Civil and Political Rights, "ICCPR" (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples' Rights (Article 5), Arab Charter on Human Rights (Article 13), European Convention on Human Rights, "ECHR" (Article 3); United Nations Convention Against Torture ("UNCAT") and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to The Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

[6] The prohibition of torture and other cruel, inhuman and degrading treatment and punishment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the UNCAT; Article 27(2) of the

United Kingdom (1996) 23 EHRR 413, paragraph 49, the European Court of Human Rights (ECtHR) explained that Article 3 of the European Convention on Human Rights (ECHR):

> "enshrines one of the most fundamental values of democratic society … The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation."[7]

8. As well as enshrining substantive responsibilities on states to protect individuals from torture and other cruel, inhuman or degrading treatment or punishment, Article 3 also enshrines positive obligations embracing, *inter alia*, a requirement to investigate arguable breaches of Article 3 in a manner capable of leading to the identification and appropriate punishment of wrongdoers.[8] The jurisprudence and principles concerning investigations into allegations of torture are highly pertinent to torture victims' right to effective remedies and access to justice and reparations in the courts. Investigations should lead to the identification of state officials responsible and be capable of holding them to account, which in itself is a recognised form of reparation for a torture survivor. Another form of reparation is compensation and one process for attaining this is by civil litigation. Further, identification of state officials and/or establishing that torture occurred will often clearly assist a civil litigant. The right to all forms of reparation flows from the absolute prohibition.

9. The obligation to investigate arguable claims of torture and other prohibited forms of ill-treatment is part of the positive obligations of Article 3 of the ECHR. It is likewise well established that sufficient public scrutiny and meaningful participation on the part of the survivors is required for the investigation to be considered truly effective. This approach has been supported by the European Committee for the Prevention of Torture and

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American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Article 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[7] See also *Tomasi v France* (27 August 1992, Series A no. 241-A, p. 42, para 115) where the ECtHR held that the "requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."

[8] See *Krastanov v Bulgaria* (2005) 41 EHRR 1137, para 57: "...where an individual raises an arguable claim that he has been seriously ill-treated ... in breach of art 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible." See also *Aksoy v Turkey* (1997) 23 EHRR 553, paras 98-99. This principle was further explained in *Dedovskiy v Russia* (App. No. 7178/03, 15 May 2008) at para 87: "An obligation to investigate 'is not an obligation of result, but of means': not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. Thus, the investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard."

Inhuman or Degrading Treatment or Punishment (CPT) in their general report.[9] It also features in the EU Council Framework on the Standing of Victims in Criminal Proceedings.[10]

10. This element of effective investigation has been affirmed by the UN General Assembly[11] 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 ("the Basic Principles and Guidelines").[12] More particularly, the Basic Principles and Guidelines affirm unequivocally that "victims and their representatives should be entitled *to seek and obtain information* on the causes leading to their victimization".[13] [emphasis added] Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[14] Satisfaction includes a broad range of measures including verification of the facts and seeking the truth.[15]

11. The ECtHR has not yet pronounced itself explicitly on the right to truth but certain of its pronouncements are fully compatible with the notion of the right to truth. These include pronouncements on the obligations to carry out effective investigations and to make the results of these investigations transparent by providing interested parties with effective access to the investigative process and by publicly disclosing information on the results of the investigation.[16] In *Anguelova v Bulgaria*, the court emphasised that "[t]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[17] The importance of respecting and ensuring the right to the truth was recently affirmed by the UN Human Rights Council.[18]

12. The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism (Mr. Martin Scheinin) has raised significant concerns about states' use of doctrines such as state secrets privilege. In a 2009 report[19] he indicated that the invocation of the state secrets doctrine renders the right to a remedy illusory and may amount to a violation of the ICCPR.[20] Similarly, the Parliamentary Assembly of the

[9] CPT General Report No. 14. CPT/Inf (2004) 28, para 36.
[10] 2001/220/JHA, Article 4, para 2.
[11] Resolution 60/147 of 16 December 2005.
[12] The Council of Europe Commissioner for Human Rights has emphasised recently that the Basic Principles and Guidelines contain established principles of international law (CommDH(2011)11, para. 187).
[13] Basic Principles and Guidelines, para 24.
[14] Paragraphs 18-23 of the Basic Principles.
[15] The right to know the full and complete truth has been held by the Inter-American Court of Human Rights to extend to "all persons and society….The right of a society to have full knowledge of its past is not only a mode of reparation and clarification of what has happened, but is also aimed at preventing future violations." *Oscar Arnulfo Romero y Galdamez v El Salvador,* Case 11.481, report no. 37/00, (1999) at [148].
[16] *Kelly and others v United Kingdom,* Appl. No. 30054/96, Judgment of 4 May 2001, para118; *Bazorkina v Russia,* Appl. No. 69481/01, Judgment of 27 July 2006, para 150; *Kurt v Turkey,* Appl. No. 24276/94, Judgment of 25 May 1998, para140.
[17] *Anguelova v Bulgaria,* Appl. No. 38361/97, Judgment of 13 June 2002, para.140.
[18] UN Human Rights Council Resolution 12/12 of 12 October 2009 entitled "Right to the truth", para. 1. See also Study on the Right to the Truth, Commission on Human Rights E/CN.4/2006/9 18 February 2006.
[19] Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, U.N. Doc. A/HRC/10/3 (2009).
[20] "The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence ...*effective investigation* and renders the right to a remedy illusory. This is *incompatible with article 2 of the International Covenant on Civil and Political Rights"* (emphasis added) para 60.

Council of Europe has stated that proposed Council of Europe guidelines on human rights and the fight against impunity should stress that:

> "state secrecy... do[es] not prevent effective, independent and impartial investigations into serious human rights violations – including in relation to the secret detentions and unlawful interstate transfer of individuals that have taken place in and throughout Europe – and that those responsible should be held to account".[21]

13. In the UK itself these principles were recently applied when the Court of Appeal overruled the objection of the Foreign Secretary who referred to intelligence-sharing arrangements between the UK and their allies, and ordered publication of several redacted paragraphs from the lower court's decision. The Appeal Court reasoned:

> "*The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law... [T]he principle of open justice represents an element of democratic accountability"*.[22]

14. If national security concerns are allowed to prevail over the survivors' right of access to information the non-derogable and absolute character of Article 3 will be undermined. In the specific circumstance of torture, whose effectiveness depends on secrecy, Governments should not be allowed to utilise national security arguments in order to bar processes which seek to redress that secrecy.

15. Article 3 of the ECHR imposes specific obligations on the state to remedy allegations of torture in a particular way. Those are obligations of means, not of result. Article 13 goes further - requiring that victims of torture are *in fact* provided with an effective remedy, including reparation.[23] The investigation required by Article 3 forms part of, and is essential to, other aspects of the remedy required by Article 13. Article 13 reflects the general principle in international law that victims of human rights violations are entitled to redress for the damage caused to them.[24] That redress includes both procedural and substantive aspects: a victim must have access to justice to claim rights to substantive reparations.[25] The procedural and substantive aspects of the right to a remedy are inextricably linked: a right is meaningless if it cannot be claimed and enforced, and a

[21] Parliamentary Assembly Recommendation 1876 (2009) "State of Human Rights in Europe: The Need to Eradicate Impunity", para 2.2.
[22] *R. (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ. 65, paras 38-39.
[23] In relation to the analogous provision of the International Covenant on Civil and Political Rights, Article 2(3), see Human Rights Committee, General Comment 31, Nature of the Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004, para. 16: "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged".
[24] See, for example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14), the Rome Statute for an International Criminal Court (art. 75) and the Convention for the Protection of All Persons from Enforced Disappearance (art. 24); the Inter-American Convention on Human Rights (arts 25, 63(1)68 and 68 63(1)); the African Charter on Human and Peoples' Rights (art. 21(2)).
[25] See, for example, the Basic Principles, principle 11: The right to remedy and reparation includes"(a) Equal and effective access to justice; (b)Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms".

harm suffered cannot be repaired if the violation is not understood and acknowledged.[26] In cases of alleged torture the state is in the position of power and will almost always have access to the evidence.

16. Verification of the facts and public disclosure of the truth are also of themselves vital as part of the substantive reparations owed to victims. The basic principle of international law is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[27] In the case of torture, disclosure of the truth is crucial in achieving that aim. This is the proper context in which "justice and security" must be approached, including civil claims for damages. Open justice, transparency and accountability are referred to in the GP, but it is important for the Government to acknowledge that *in cases of alleged torture* there are specific considerations arising, as set out above in the survey of the different aspects of the right to reparation, which need to be considered.

17. Torture is a matter of state responsibility. States are responsible for wrongful acts, including torture, under international law.[28] Article 1 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001, provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[29] While holding individual officials criminally responsible for torture is an essential component of the prohibition against torture, it is not enough. Not only direct actors but those who are complicit in torture must be held to account. Article 4 of UNCAT reads:

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes *complicity or participation* in torture [emphasis added]

18. Furthermore, actions against individual suspects, whether directly involved in torture or complicit in it, rarely expose the broader patterns of abuse underlying the acts of the individual:

> "In the same way that the principle of command responsibility recognises that individuals occupying a relationship of superiority are as responsible as the

[26] See *Bámaca Velásquez v Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000), at para 32 (Separate Opinion of Judge Cançado-Trindade); *Abdulsamet Yama v Turkey* (Applic. No 32446/96) [2004] ECHR 572 (2 November 2004) at para. 53 "the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure." On the positive obligations States have towards victims, see also the Basic Principles, paragraph 12(c): "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. ….To that end, States should … (c) Provide proper assistance to victims seeking access to justice".

[27] *The Factory At Chorzow (Claim for Indemnity) (Germany v Poland)* (The Merits), Permanent Court of International Justice, 13 September 1928, p 47.

[28] Ibid.

[29] Article 1, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The Articles are recognised as an authoritative statement of the principles of state responsibility in international law: see, for example, the reference to them by the House of Lords in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 at paragraph 36.

perpetrators that pulled the trigger or physically committed the acts,[30] the state possesses the ultimate position of authority which must be addressed in order to fully combat impunity."[31]

19. A civil claim for damages is one crucial way of establishing state responsibility and accountability and for combating impunity. In ruling that the common law precluded the importation of closed procedures in a civil damages claim, the Supreme Court in *Al Rawi,* unlike in the GP, did not lose sight of or gloss over the fact that the case before it concerned allegations of torture; on the contrary, this was given the central emphasis it deserved, for example, by Lord Brown[32]:

> "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."

20. Lord Brown went on with approval as follows[33]:

> "As the Court of Appeal observed below (at para 56):
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> 'If the court was to conclude after a hearing, much of which had been in closed session attended by the defendants but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants but not the claimants or the public, that the claim should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.' "

21. Lord Brown concluded that an altogether new type of tribunal might need to be set up, or that cases involving allegations against the security services might not be triable at all. Irrespective of this conclusion, his recognition that in all cases involving allegations of torture the determination of state responsibility is a matter of the widest public concern, going beyond the immediate victims, is important. This recognition is lacking in the GP: by its over-emphasis on security over justice the GP fails to give due weight to the absolute prohibition against torture and the fundamental abhorrence on which it is based.

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[30] See Danesh Sarooshi, *Decisions of International Tribunals II: Command Responsibility and the Blaskic Case,* 50(2) Int'l & Comp. L.Q. 452 – 465 (2001) at 460 – 61.

[31] REDRESS, December 2005, *Immunity versus Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes,* page 5, available at http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf. Thus state responsibility as well as individual criminal responsibility is engaged by the breach of the prohibition against torture, and when the question of complicity or participation in torture and/or aiding or abetting torture is considered then other Articles of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts are also pertinent. Article 16, for example, deals with the case when one state aids or assists another state in the commission of an internationally wrongful act: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

[32] *Al Rawi v Security Service* [2011] UKSC 34, para 83.

[33] Ibid.

22. *Al Rawi* is not the only recent case which concerns torture allegations and which precipitated the publication of the GP; the protracted and complex litigation concerning Binyam Mohamed (BM), to which one reference has already been made above,[34] is relevant and has been a factor behind the Government's wish to extend CMPs to ordinary civil claims. Like the Supreme Court in *Al Rawi*, the courts involved in the BM cases recognised that what were involved were allegations of *torture;* the same cannot be said for the thinking behind the GP. Thus in the first Divisional Court decision,[35] in concluding that subject to any public interest immunity (PII) the Government should disclose to BM documents and information in its possession relating to his detention, rendition and treatment, the court emphasised:[36]

> "…we attach particular significance to the nature of the prohibition on State torture which is alleged to have been violated in this case.
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> i) The common law has long set its face against torture, a practice which it has regarded for centuries with a particular abhorrence reiterated most recently in the speeches in the House of Lords in *A v. Secretary of State for the Home Department (No. 2).* When practised by a State as an instrument of State policy it is a particularly ugly phenomenon. As Lord Hoffmann explained in that case, at paragraph 82, the use of torture by a State is dishonourable, corrupting and degrading the State which uses it and the legal system which accepts it.
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> ii) Equally significant in this regard is the status which the prohibition on State torture has achieved in international law. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (New York, 10 December 1984; TS 107 (1991); Cm 1775) ("the Torture Convention"), which came into force in June 1987, now has some 145 State parties. The prohibition on State torture under this Convention and in customary international law has attained a particularly high status in the hierarchy of rules constituting international law. It is now established as a peremptory norm or a rule of *jus cogens,* from which derogation by States through treaties or rules of customary law not possessing the same status is not permitted. In this it resembles the prohibition on genocide, slavery and the acquisition of territory by force. This superior status has been recognised by international and domestic tribunals. *{Prosecutor v. Furundzija,* International Criminal Tribunal for the Former Yugoslavia, unreported, 10 December 1998, Case No. IT - 95- 17/T 10, [1998] ICTY 3; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 197,199; *A v. Secretary of State for the Home Department (No. 2); Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26.) As the International Criminal Tribunal for the Former Yugoslavia explained in *Furundzija* at paragraphs 153-157, the status of the prohibition on State torture as a rule of *jus cogens* has the consequence that at the inter-State level, any legislative, administrative or judicial act authorising torture is illegitimate. Furthermore, the prohibition on State torture imposes obligations owed by States *erga omnes,* to all other States which have a corresponding right and interest in compliance. As a United States court put it in

[34] Para 13.
[35] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579
[36] Ibid, para 142.

> *Filartiga v. Pena-Irala,* (1980) 630 F 2d 876, 'the torturer has become like the pirate and the slave trader before him, *hostis humani generis,* an enemy of all mankind'."

23. In recent years bodies such as the Joint Parliamentary Committee on Human Rights (JCHR)[37] have also examined some of the matters raised in the GP, and it is surprising that no reference to this is made in the GP, which instead looks only at other organs such as the Intelligence and Security Committee (ISC). Once again this reflects the imbalance in the GP between the concerns of justice and the concerns of national security.

24. An example of the JCHR's critical approach is found in its analysis of special advocates where it said that they "have no means of gainsaying the government's assessment that disclosure would cause harm to the public interest",[38] and again that the current system of dealing with closed material "is not capable of ensuring the substantial measure of procedural justice that is required".[39] 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.

25. Unlike in the GP, Lord Dyson in *Al Rawi* explicitly acknowledged the JCHR's concerns:[40]

> "The limitations of the special advocate system, even in the context of the statutory contexts for which they were devised, were highlighted by the Joint Committee on Human Rights in their report on Counter-Terrorism Policy and Human Rights (Sixteenth report): Annual Renewal of Control Orders Legislation 2010 (HL Paper 64/HC 395) (dated 26 February 2010) in the context of the Prevention of Terrorism Act 2005 and cases heard by the Special Immigration Appeals Commission. This report was based on the first-hand experience of those who have acted as special advocates. As the Court of Appeal noted at para 57, it is the Committee's view after five years of operation that the closed material procedure (with special advocates) operated under the statutory regimes is not capable of ensuring the substantial measure of procedural justice that is required. At para 210 of its earlier report, HL Paper 157, HC 394, (published on 30 July 2007), the Committee had concluded:
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> > 'After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong

[37] See for example the JCHR report *Allegations of UK Complicity in Torture* published on 4 August 2009, 23rd Report of 2008–09, HL 152, HC 230, available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf.
[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.
[39] Ibid, para 90.
[40] Loc cit, para 37. Lord Dyson continued: "These views may not sufficiently take account of specific statutory protections…but they do throw light on the limitations of the special advocate system."

> feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.' "

26. In *Al Rawi* Lord Brown too engaged with the JCHR's concerns:[41]

> "One need not take so extreme a view as that expressed by the Joint Committee on Human Rights last year (see Lord Dyson's judgment at para 37**)** to recognise the grave inroads into our fundamental principles of open justice and fair trials that are made by closed procedures…But beyond all these considerations would be the damage done by a closed procedure to the integrity of the judicial process and the reputation of English justice. As Lord Atkin, invoking Milton's *Areopagitica*, famously said in *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322, 335: "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

27. In a recent analysis[42] made before the GP was published, 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."[43] In REDRESS' view this appears to be the way the GP has approached the issues too.

28. The GP refers to the "Control Principle" which it describes as follows:[44]

> "In all intelligence exchanges it is essential that the originator of the material remains in control of its handling and dissemination. Only the originator can fully understand the sensitivities around the sourcing of the material and the potential for the sources, techniques and capabilities to be compromised by injudicious handling. We expect our intelligence partners to protect our material when we share it with them, and we must be able to deliver the same protection of their material. Confidence built up over many years can all too quickly be undermined. That is why, if the trust of the UK's foreign 'liaison' partners is to be maintained, there should be no disclosure of the content or fact of the intelligence exchange with them without their consent."

The GP places considerable emphasis on this "Control Principle" with six explicit references to it; however, while some of these references recognise that it involves *secret intelligence*[45] others refer to *sensitive material.*[46] This is by no means a matter of semantics; as Professor Tomkins notes: "Insofar as the control principle even exists as a legal principle (itself a matter of doubt), it surely relates only to secret intelligence, and

[41] Para 83.
[42] Adam Tomkins, "National Security and the Due Process of Law" , Oxford Journal of Law and Religion, April 15 2011, available at http://clp.oxfordjournals.org/content/early/2011/04/15/clp.cur001.full
[43] Ibid,page26-27
[44] Page 9
[45] Page 9.
[46] Page 34.

there was nothing in those seven paragraphs [in the Binyam Mohammed case] that contained matters of secret intelligence." These paragraphs were the ones which summarised the sleep deprivation, threats, shackling and significant mental stress and suffering US agents intentionally inflicted on BM, recorded in the note held by UK intelligence and compiled by it from what it was told by its US ally.

29. In this context it is also important to recall that the Court of Appeal ruled that publication of the paragraphs did not in its view infringe the "Control Principle" because "'in any democratic society governed by the rule of law', information as to how officials admitted treating a detainee during his interrogation could be characterized neither as 'secret' nor as 'intelligence'."[47] We cannot but endorse what Professor Tomkins has said further:[48]

> "If national security comes to court, as come to court it will, it is not the court, its values, its decision-making, and its processes that must give way in the face of Government claims about what is required in the name of security. It is these claims that must give way if, on examining the evidence, they do not satisfy the court. Decision-making in national security and law-making in national security should be evidence based and evidence driven."

30. It is also relevant to draw attention to The Johannesburg Principles on National Security, Freedom of Expression and Access to Information[49] (the Johannesburg Principles) adopted on 1 October 1995 by a group of experts in international law, national security, and human rights. Although they mainly concern freedom of expression, the Johannesburg Principles underline the importance of not regarding 'national security' as some catch-all concept used to restrict and undermine basic human rights, but rather that "Any 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."[50]

31. The GP makes some reference to approaches other states have adopted to the handling of national security issues in judicial proceedings.[51] These states include Canada, Australia, Denmark and the Netherlands. The GP does not purport to be comprehensive in its comparisons, but says that "in developing the proposals in this Green Paper we have given full and careful consideration to the approaches used by other countries"[52] However, the GP does not specifically explain why, having shown that other states have not extended CMPs to civil claims, it is proposing to do so other than to say "the UK faces a unique and unprecedented set of circumstances".[53] We wish to highlight some aspects of these other approaches to add to what the GP has raised.

32. In Canada, the procedures concerning potential disclosure of sensitive information have altered following the enactment of the Anti-Terrorism Act by the Canadian

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[47] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 5)* [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at paras 73 and 93 (ii).
[48] Loc cit, p 39.
[49] 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.
[50] Principle 1.2.
[51] Appendix J.
[52] Page 64, para 12.
[53] Page 63

Parliament,[54] which amended provisions of the Canada Evidence Act (CEA)[55] to increase the scope of information potentially protected on the grounds of national security, national defence and international relations, and altering the manner in which such a claim by the state (Crown privilege) may be opposed and reviewed. Crown privilege (similar too public interest immunity) also form part of the common law of Canada in a manner that complements Federal statute.

33. There is a positive obligation placed upon all individuals involved in litigation to notify the Attorney General of the potential disclosure of any "information that the participant believes is sensitive information or potentially injurious information."[56] There is a prohibition on the disclosure of notification of the Attorney General or any further information subject to this statutory notice[57]; any entity making decisions involving such information are also required to suppress disclosure of the decision and material contained therein.[58] The Attorney General is also competent to issue an order blocking disclosure[59] that is open to very limited review,[60] although individuals are able to apply to seek determination of the validity of such an order.[61]

34. In such cases the material and order are not considered by the presiding official of the Superior Court in which the civil proceedings are heard. Instead the assessment of conflicting public interest is conducted by the Federal Court, and this procedure was reaffirmed by the Court of Appeal for Ontario in the *Abou-Elmaati* decision in which the Superior Court competence to review privilege was precluded.[62] The Superior Court was trying civil claims against Canada by individuals who allege that Canada was complicit in their torture and ill-treatment while they were in the custody of foreign governments.

35. Section 38.4 of the CEA provides that in criminal proceedings the court may make any order appropriate to protect the right of the accused to a fair trial, but there is no such express provision provided for civil proceedings; it has been said, therefore, that it is by no means clear that a court would be authorised "to offer analogous relief, for example, by granting judgement in favour of a plaintiff whose action was thwarted by a successful...privileges claim."[63] The key problem is that of assessing competing public interest imperatives with regard to state security privilege. While most Canadian decisions have arisen in criminal cases the jurisprudence provides general guidance on the issue.

36. In *Ribic,* the Federal Court established a three stage test to establish the predominant public interest in disclosure or alternatively to maintain secrecy for national security purposes.[64] The first stage of the test requires appraisal of the relevance of the material to proceedings, and in cases of torture this would concern the necessity of such

[54] Anti-Terrorism Act, S.C. 2001, c.41 (ATA).
[55] Canada Evidence Act, R.S.C. 1985, c. C-5, s.38.01 as amended by ATA, S.C. 2001, c.C-41, SS. 43-44.
[56] Ibid, s.38.01 (1)-(7).
[57] Ibid, s.38.02 (1).
[58] Ibid, (1)-(2).
[59] Ibid, s.38.13.
[60] Ibid, s.38.13 (8)-(9), s.38.131 (1).
[61] Ibid, s.38.04.
[62] *Abou-Elmaati v Canada (Attorney General),* 2011 ONCA 95, available at http://beta.images.theglobeandmail.com/archive/01181/Abou-Elmaati_v__Ca_1181424a.pdf.
[63] J Kalajdzic, 'Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases', 1 January 2011, Ottawa Law Review, Vol. 41, No.2, 289-323, at 311, available at http://www.law.georgetown.edu/cnsl/ssa/resourcedocuments/LitigatingStateSecrets_188.pdf.
[64] *Canada (Attorney General) v. Ribic* (F.C.A.), 2003 FCA 246, [2005] 1 F.C.R. 33 available at http://reports.fja.gc.ca/eng/2005/2003fca246.html.

material to demonstrate the liability of the state. The second stage of the test considers whether such material would be injurious to international relations, defence or state security if it were disclosed. Finally, if injurious the court is required to assess competing arguments of public interest. An application for determination of the validity of a security privilege order is not a judicial review but a determination as to whether a statutory ban on disclosure may be confirmed.[65]

37. Mosley J. gave some indication of the potential scale of judicial deference in stating "It is not the role of the judge to second guess or substitute [their] opinion for that of the executive" and that the submission of the Attorney General must be given "considerable weight" on the basis of their access to special information and expertise.[66] Importantly, he said "the judge must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence", the burden of proof being on the state.[67]

38. Where the potential for harm is established, the Court must then apply the third stage test and examine the balance between public interest in disclosure and public interest in barring disclosure on the grounds of national security. In applying the test the burden of proof rests with the party seeking disclosure to provide sufficient evidence that the public interest in disclosure outweighed state national security considerations. Grounds considered relevant in striking a public interest balance include: the nature of the public interest to be protected; whether the evidence would disclose crucial facts; the seriousness of the case; the admissibility and usefulness of the information; whether the party seeking disclosure has established that there are no other reasonable means of access to such information; whether seeking disclosure amounted to 'general fishing.'[68]

39. There is therefore no presumption of non-disclosure, and Mosley J in *Khawaja* was critical of "those holding the black pens [who] seem to have assumed that each reference to CSIS must be redacted from the documents even when there is no apparent risk of disclosure of sensitive information such as operational methods or investigative techniques or the identity of their employees."[69]

40. Thus Canadian courts have sought to reaffirm their own authority: whilst acknowledging the unique position of the Attorney General, the statutory regime leaves it to the Court to adjudicate over privilege claims. This is indicative of the prioritisation of procedural fairness over state protection, and the Court is able to balance interests and give weight to evidence on the basis of its own jurisprudence.[70] In *Khawaja,* the Federal Court indicated its belief that the power to block disclosure had been misappropriated by the state and was being exercised in a manner that could not be reconciled with the proper scope of legitimate competency.[71]

41. This was confirmed in the *Arar Commission* case, in which it was stated that the Court would not prohibit disclosure where the "sole or primordial purpose of the state

[65] *Canada (Attorney General) v Khawaja*, 2007 FC 490, at para 61, available at http://www.icj.org/IMG/Khawaja-Evidence.pdf.
[66] Ibid, para 64.
[67] Ibid, para 65, citing *Ribic* and *Home Secretary v. Rehman*, [2001] H.L.J. No. 47, [2001] 3 WLR 877.
[68] Ibid, para 74. In para 70 the reference to the civil case of *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, 2002 FCA 470 indicates the link between civil and criminal litigation.
[69] Ibid, para 150.
[70] Ibid, para 93.
[71] Ibid, 149.

was to shield itself from criticism or embarrassment",[72] and where it was emphasised that "the purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government."[73]

42. In the *Arar Commission* itself the following Concluding Observations are highly pertinent:

> "In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted."[74]

43. In Canadian jurisprudence the 'control principle' is referred to as the 'Third Party Rule'. In the *Almaki* case[75] involving damages for Canadian state complicity in torture, the Federal Court overturned a previous decision to grant disclosure of secret documents, on the basis of a legal error in failing to give sufficient weight or consideration to evidence of potential injury as a consequence of the disclosure of third party information. Nevertheless, it granted disclosure to the extent that it would not harm international relations and ordered that some of those documents disclosed be redacted.[76]

44. As the GP notes, the Canadian system has adopted through statute a system of special advocates that has similarities to that in place in the UK. However, their use appears to be confined to the operation of immigration law as opposed to use in civil trials. There is no indication that an argument for extending their use in civil trials, based on the common law, would be successful.

45. In Australia there is a distinction between the operation of public interest immunity and the invocation of privilege. The common law definitions of public interest generally concern interests of central government that include national security and the operations of the Australian Security and Intelligence Organisation.[77] However, this common law regime has been supplanted by the operation of the National Security Information (Criminal and Civil) Proceedings Act 2004, enacted to prevent the disclosure of information, "where disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice."[78]

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[72] *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)* (F.C.), 2007 FC 766, [2008] 3 F.C.R. 248, at para 58, available at http://reports.fja.gc.ca/eng/2008/2007fc766.html.
[73] Ibid.
[74] *Report of the Events Relating to Maher Arar, Analysis and Recommendations,* p 304, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.
[75] *Canada (Attorney General) v. Almalki,* 2011 FCA 199 (CanLII), available at http://www.canlii.org/en/ca/fca/doc/2011/2011fca199/2011fca199.html.
[76] Ibid, at para 38.
[77] J Hunter, C Cameron, T Henning (Eds), 'Litigation I: Civil Procedure' 7th Ed., LexisNexis Butterworths Australia, April 2005, at 8.102.
[78] National Security Information (Criminal and Civil) Proceeding Act (2004), Act No.150 of 2004, available at http://www.comlaw.gov.au/Details/C2005C00523.

46. This statutory regime has codified the historic operation of the doctrine of public interest immunity and applies directly to national security information. Where there is risk of disclosure of national security information in civil proceedings, the Attorney General or their representatives is permitted to be present and/or intervene in the proceedings.[79] Essentially, this framework places a positive obligation upon all litigants to formally notify the Attorney General, in good time, that there is the potential for disclosure of information relating to national security. As such, the Attorney General is permitted to be present at hearings where such issues arise and is competent to stay proceedings to consider applications regarding the potential disclosure of national security information. The Attorney General is competent to review the potential information and issue a certificate outlining recommendations and regulations to the court hearing the procedure determining disclosure issues. Regarding the information itself, the Attorney General is competent to provide parties with redacted or summarised copies of the secret documents or statements in question.

47. The court itself is under an obligation to consider hearing the case *in camera* and where the Attorney General issues a certificate to that effect, the court is obliged to hold a separate closed hearing under s.38L on the issue of disclosure and the nature of the information concerned.[80] Where the court has received a certificate of the Attorney General prior to the substantive hearing of the case, the main proceedings must be adjourned pending the outcome of a hearing on national security disclosure, pursuant to s.38L.

48. If the Attorney General has perceived a risk to national security and outlined such concerns in the issue of a certificate, the court will then take full account of this certificate and other relevant factors before making an order.[81] Following a hearing under the auspices of s.38L, the court may order the exclusion of witnesses, the non-disclosure of documents and testimony or alternatively, permit the release of redacted or summarised information.[82] These court orders must provide reasons and may be appealed.[83] This permits the evidence to be adduced by the parties, albeit in limited for whilst simultaneously maintaining the position of the court as the ultimate arbiter on the certificate of the Attorney General.

49. In New Zealand, the use of secret information in litigation has been provided for under the Terrorism Suppression Act 2002 (TSA)[84] and relates to litigation concerning an individuals or organisations that have been designated as terrorist entities. This closed material procedure is also applicable to the statutory regime regulating immigration, particularly where issues of national security are raised.

50. The definition of classified material is provided under s.32 of the TSA in which it is described as "information relevant to whether there are grounds for a designation and held by a specified agency that certifies it cannot be disclosed because it is information of a particular kind, or disclosure would have a particular effect."[85] Such information is

[79] Ibid, s.38AA.
[80] Ibid, s.38H (6), s.38L.
[81] Ibid.
[82] Ibid, s.38L (1)-(8).
[83] S.38N, P, s.39.
[84] New Zealand Terrorism Suppression Act 2002 (No. 34 of 2002), 17 October 2002, available at http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM151491.html.
[85] Ibid, s.32.

deemed relevant if it would disclose the identity of operatives, sources or methods of specific agencies. Furthermore, such information is relevant if it has been received from a third party government or agency or will potentially jeopardise New Zealand's international relations or security as a consequence of disclosure.[86]

51. Where litigation results from a designation decision that an individual or organisation is a terrorist or terrorist entity the court is obliged to determine that case on the basis of information provided, irrespective of whether all parties are privy to the information in question.[87] Furthermore, if requested by the Attorney General, the court must hear the case in an entirely closed environment that excludes all parties and their legal representatives.[88] Nevertheless, where such proceedings take place, the court is under an obligation to provide the entity or individual concerned with a summary of the *kind* of information concerned so far as the summary would not prejudice security.[89]

52. These provisions concern all litigation arising from the designation of an individual as a terrorist. As such, this legislation would not be directly relevant to an 'ordinary' torture survivor seeking damages; however, where the state had been involved in acts giving rise to civil liability for damages that were directly resultant of a designation, this procedure would apply. Nevertheless, due to its specific nature, this statutory regime is unlikely to extend to a civil claim for damages for torture by a designated terrorist, where the allegations of torture are not linked to the designation. In this respect, the specific nature of the statute may limit its application to challenges against state designations rather than receiving wholesale application in torture damages cases.

53. There are further specific regimes within the New Zealand legal system concerning the use of closed material procedures and use of special advocates; however, these are limited to the specific context of immigration procedures and the provisions of the Immigration Act 1987 Part 4A[90] and the Immigration Act 2009.[91]

54. In the Netherlands, information and material arising from the operation of the Dutch security services may be limited where disclosure may jeopardise national security and international relations, on the basis of the Intelligence and Security Services Act 2002. It appears possible for evidence to still be heard *in camera* where there is agreement on this use of evidence, first by a judge and subsequently if the public interest in disclosure is sufficient, with the court in a closed hearing.

55. While Denmark has adopted a model of special advocates that appears to resemble that of the UK SIAC system, we are not aware of any analogous provision regarding secret evidence in civil trials.

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[86] Ibid, s.32 (1)-(3).
[87] Ibid, s.38 (1)-(2).
[88] Ibid, s.38 (3).
[89] Ibid, s.38 (4).
[90] New Zealand Immigration Act 2009 (No. 51 of 2009), 16 November 2009 available at http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440303.html as amended by the Immigration Act 2009 Amendment Act 2010 [New Zealand], No. 10 of 2010, 8 April 2010, available at http://www.unhcr.org/refworld/docid/4c5acba22.html
[91] New Zealand Immigration Act 2009. For a comparative discussion see M. Silverwood, "Open courts and closed files: the use of classified information in terrorism-related litigation" - Paper presented to the Australian and New Zealand Society of International Law Conference 24-26 June 2010, Canberra, available at http://law.anu.edu.au/anzsil/conferences/2010/Submissions/Silverwood.pdf.

56. Hong Kong has also adopted the use of special advocates for use in procedures where the state does not wish to disclose certain sensitive information, this again being an effort to ensure the balance and fairness of a trial where one party is not in possession of all information. There has been subsequent development of the use of special advocates through jurisprudence arising from cases such as *PV*[92] but this too concerned security issues that arose within an immigration context, and there is no indication that they would be adopted in a civil claim for damages.

Conclusions

57. This brief survey confirms that other states have grappled with the difficult issues of secret intelligence and litigation, however; in civil claims for damages variants of public interest immunity have been developed by legislation and precedent to deal with disclosure. Special advocates have been used in closed hearings in immigration cases in broadly similar fashion to their use in the UK in that type of case, as well as in closed hearings to determine disclosure. However, special advocates have not been used in civil damages cases in closed hearings which have then used material which the claimant has not seen, as proposed in the GP.

58. This reinforces our disquiet as to the GP's approach to justice and security, which we have sought to explain throughout this submission. We shall therefore summarise our composite response below to all three questions:

- *How can we best ensure that closed material procedures support and enhance fairness for all parties?*
- *What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?*
- *In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?*

59. We believe that special advocates introduced in civil claims in CMP are not capable of supporting and enhancing fairness for litigants that allege that they have been tortured by UK agents, or related allegations such as complicity in torture. We have reviewed the absolute prohibition against torture and the states' obligations when faced with torture allegations, and the right to reparation of torture survivors and to their having access to justice and the right to a remedy. The courts have recently highlighted and confirmed how special advocates are not appropriate in civil proceedings involving torture allegations. Legitimate national security concerns are capable of being dealt with without this fundamental change to civil proceedings which have been developed over decades. The GP has of course itself set out the well-developed public interest immunity (PII) mechanism in some detail as it currently operates when national security issues are raised, and it is unnecessary to review it here. We do not believe there is a "best mechanism" for communication between special advocates and the individual concerned in civil cases, as the CMP should not be used at all in such civil claims. Extending the already controversial procedure is wrong.

[92] *PV v Director of Immigration* HCAL 45/2004, 16 July 2004, available at http://www.legco.gov.hk/yr04-05/english/panels/ajls/papers/aj0228cb2-917-3e-scan.pdf.

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Kevin Laue, REDRESS UK Legal Advisor. Any inquiries should be directed to Kevin Laue at Kevin@redress.org or on +44 (0)20 7793 1777