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House of Commons
Joint Committee on Human
Rights

Allegations of UK Complicity in Torture

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2008–09**

*Report, together with formal minutes and oral
and written evidence*

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Joint Committee on Human Rights

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Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk

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Summary

There have been a number of reports that UK security services have been complicit in the torture of UK nationals held in Pakistan and elsewhere. In this report we examine what it means for a state to be complicit in torture.

Complicity in torture is a direct breach of the UK's international human rights obligations.

In our view, complicity in torture exists where a state:

- asks a foreign intelligence service known to use torture to detain and question an individual
- provides information to a foreign intelligence service known to use torture, enabling that intelligence service to apprehend an individual
- gives questions to a foreign intelligence service to put to a detainee who has been, is being or is likely to be tortured
- sends interrogators to question a detainee who is known to have been tortured by those detaining and interrogating him
- has intelligence personnel present at an interview with a detainee in a place where he is being, or might have been tortured
- systematically receives information known or thought likely to have been obtained from detainees subjected to torture.

States are also complicit when they act in these ways in circumstances where they should have known of the use of torture.

The Government appears to have been determined to avoid parliamentary scrutiny on this issue. In order to restore public confidence and to improve compliance with our human rights obligations, the Government must take measures to improve the system of accountability for the intelligence and security services. The Government should

Aim to make the Intelligence and Security Committee a proper parliamentary select committee, with independent advice, and reporting to Parliament not the Prime Minister.

Publish all versions of guidance given to intelligence and security service personnel about detaining and interviewing individuals overseas, to allow others to ensure that it complies with the UK's human rights obligations.

Make public all relevant legal opinions provided to ministers.

Set up an independent inquiry into the allegations about the UK's complicity in torture. The inquiry should make recommendations to improve the Government's accountability for the security and intelligence services.

1 Introduction

1. The UK signed the UN Convention Against Torture (UNCAT) in 1985 and ratified it on 8 December 1988. We scrutinise the UK's compliance with the international human rights treaties to which it is a party and published a report on compliance with UNCAT in May 2006.¹ The report covered a range of issues and we published a follow up report in July 2008 dealing with allegations that members of the UK armed forces had used banned interrogation techniques in Iraq. The report focused in particular on discrepancies in the evidence given to the Committee by Adam Ingram MP, then Minister of State for the Armed Forces, and Lieutenant General R. V. Brims, then Commander Field Army, and facts which subsequently emerged in the courts martial of several soldiers in 2007.²

2. In this report, we follow up another aspect of our original report, concerning the obligation on the Government to refrain from acts of torture and protect against acts of torture by others, both within and outside the jurisdiction.³ This work arose following media reports that members of the security services had been complicit in the torture or mistreatment of UK nationals in detention facilities in Pakistan. We held an oral evidence session on this issue on 3 February with Human Rights Watch and Ian Cobain, of the *Guardian*. Mr Cobain subsequently sent us a memorandum relating to similar allegations involving Egypt. We also received a helpful memorandum from Guardian News & Media about some of the legal issues that created difficulties for Mr Cobain's investigation into allegations of UK complicity in torture.⁴

3. We were also contacted by Mr Craig Murray, the former UK ambassador to Uzbekistan, who stated that, while in post, he made the Foreign and Commonwealth Office (FCO) aware that intelligence it received from Uzbekistan, via the CIA, had been obtained using torture. He submitted a FCO internal memorandum from Sir Michael Wood, then Legal Adviser to the FCO, which argued that the receipt of intelligence obtained, or possibly obtained, using torture did not contravene UNCAT.⁵ Mr Murray gave oral evidence on 28 April and we also heard from Philippe Sands, Professor of International Law at University College London, a leading expert on international law, on the meaning of "complicity" in article 4 of UNCAT.

4. We have also kept track of other reports of possible UK complicity in torture overseas, including the case of Binyam Mohamed, who was released from Guantanamo Bay in February. We offered Mr Mohamed the opportunity to give oral evidence but were told that he was medically unfit to do so.

5. We set out all of the various allegations, without commenting on them, in chapter 2 of this report. The nub of the issue is what counts as "complicity" in torture. We analyse this issue and give our view in chapter 3. We deal with the Government's response, and the

¹ Nineteenth Report, Session 2005-06, *The UN Convention Against Torture (UNCAT)*, HL Paper 185-I, HC 701-I (hereafter *UNCAT Report*).

² Twenty-eighth Report, Session 2007-08, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq*, HL Paper 127, HC 527.

³ *UNCAT Report*, paragraphs 38-67 in particular.

⁴ p. 50.

⁵ Ev 57.

difficulties we have encountered in scrutinising the Government's policies and actions, in chapter 4. In our final chapter we set out the questions which still remain to be answered and recommend the form of inquiry which we think is required to get to the truth.

2 Allegations of torture involving the UK

Pakistan allegations

6. Allegations about the possible involvement of the security services in the torture and mistreatment of UK nationals in Pakistan were first brought to our attention by the editor of the *Guardian* in August 2008.⁶ Mr Ian Cobain of the *Guardian* subsequently submitted a memorandum to us in which he said that his newspaper had:

been reporting upon allegations that a number of British terrorists and terrorism suspects have been detained in Pakistan and suffered severe treatment amounting to torture. These individuals say that they have been questioned by British intelligence officials after, in some cases in between, periods of mistreatment. They and their families, and in some cases their legal advisers, say they have been forced to conclude that British officials may have been responsible for their detention and have colluded in their mistreatment.⁷

7. Mr Cobain claims that there “have been at least eleven British nationals and dual nationals detained” in Pakistan and questioned about terrorism allegations since 2000, although the Foreign and Commonwealth Office has stated that only eight British or dual nationals have been held in such circumstances.⁸ His memorandum gives details of seven of the men, as summarised below:

- **MSS**, a UK-born doctor of Pakistani origin, who had arranged to spend some time working in a hospital in Pakistan in 2005. He claims to have been abducted, questioned about the bombings in London on 7 July 2005, tortured, and forced to witness the torture of others. He says that towards the end of his detention and torture he was questioned by two British intelligence officers.⁹
- **Rangzieb Ahmed**, a UK-born convicted terrorist, who was detained in Pakistan between 2006 and 2007. He claims to have been tortured, including by having his fingernails removed, and that during this process he was interviewed by UK officials who specified that they were not consular officials. During his trial, the assertion that the police and security services passed questions to the Pakistani intelligence agency was heard in closed session. This issue was not addressed by the judge in his open judgment, but the judge concluded that although Mr Ahmed was kept in inhumane conditions before he was interviewed by UK officials he was not physically injured.¹⁰ Mr Ahmed’s case was the subject of a recent adjournment debate in the House of Commons, initiated by Rt Hon David Davis MP.¹¹

⁶ Ev 30.

⁷ Ev 46, paragraph 1.

⁸ Annex to Ian Cobain memorandum, January 2009, p. 47, paragraph 24, and see Ev 79-81 and oral evidence given by the Foreign Secretary to the Foreign Affairs Committee, 15 June 2009, HC557-ii, Q112.

⁹ Ev 47-48, paragraphs 16-25.

¹⁰ Ev 48-49, paragraphs 26-37. And see Ev 34.

¹¹ HC Deb, 7 Jul 09, cc940-48.

- **Zeeshan Siddiqui**, a UK-born man with “some history of mental illness” who is associated with a number of terrorists. He was held in Pakistan between 2005 and 2006 and claims to have been severely mistreated before being interviewed six times by British intelligence officers and once by a consular official.¹²
- **Salahuddin Amin**, a UK-born terrorist, convicted in 2007 of planning to attack numerous targets in the UK, including the Bluewater shopping centre. Mr Amin alleged that he was tortured during his detention in Pakistan between 2004 and 2005 and that British intelligence officials interviewed him several times in between periods of torture. Before his trial began, the judge ruled that Amin’s treatment had been “oppressive” but said he did not believe his allegations of torture.¹³
- **Tariq Mahmood**, a UK-born man who disappeared in Pakistan in 2003 and who it is now thought lives in Dubai. Family members claim Mr Mahmood was tortured while held in Pakistan in 2003-04 and that the UK was involved.¹⁴
- **Tahir Shah**, a UK-born man who was detained in Pakistan for 16 days, shortly after the July 2005 bombings in London. Mr Shah claims to have been treated inhumanely and that, on his return to the UK, his passport was returned by an unnamed official who Mr Shah “assumed ... to have been from the Security Service”.¹⁵
- **Rashid Rauf**, a Pakistan-born man with UK nationality who was detained in Pakistan in 2006 on terrorism charges. Mr Rauf claimed to family members that he was tortured in the presence of people speaking in English and American accents. Mr Rauf was later cleared of the charges before being subject to extradition proceedings.¹⁶ He later disappeared in somewhat mysterious circumstances before it was announced that he was killed, on 22 November 2008, following a US missile strike close to the Afghan-Pakistan border.¹⁷

8. Mr Cobain’s allegations were supported by Human Rights Watch, which had also investigated the cases of Messrs Amin, Siddiqui and Ahmed.¹⁸ It concluded that “not only did the British government effectively condone torture by putting questions to detainees in ISI [the Pakistani Inter-Services Intelligence] custody and by visiting detainees who had obviously been tortured without halting cooperating in those cases, the conduct of the ISI has interfered with attempts to prosecute these individuals in British courts”.¹⁹ Human Rights Watch claim that Rashid Rauf was tortured so badly he could not have been tried in the UK.²⁰

¹² Ev 49, paragraphs 38-43.

¹³ Ev 39-40, paragraphs 44-48 and see Ev 34.

¹⁴ Ev 50, paragraphs 49-53.

¹⁵ Ev 50, paragraphs 54-55.

¹⁶ Ev 50-51, paragraphs 56-59.

¹⁷ Annex to Ian Cobain memorandum, January 2009, p. 46-47, paras 20-23 and see letter from the Home Secretary, 22 December 2008, Ev 31.

¹⁸ Ev 45-46, pp12-13.

¹⁹ Ev 43, p6. The ISI is the Pakistani intelligence service.

²⁰ Ibid.

Egypt allegations

9. Mr Cobain submitted a further memorandum about the case of **Azhar Khan**, an associate of several terrorists and terrorism suspects. He has claimed, via an intermediary, that he was “questioned, under torture, on the basis of information that must have been supplied by the UK authorities” during a visit to Egypt in July 2008.²¹ Mr Cobain’s memorandum also referred to the possibility of there being another person detained in the UK at the same time as Mr Khan whom MI5 were interested in and whom “there was every possibility” would be tortured.²²

Binyam Mohamed

10. Binyam Mohamed is an Ethiopian national who was resident in the UK before being arrested in Pakistan as a terrorism suspect in 2002. He was transferred to Guantanamo Bay in 2004 before being released in February 2009.²³

11. The US brought terrorism charges against Mr Mohamed in May 2008, as a result of which Mr Mohamed brought proceedings against the UK Government seeking disclosure of potentially exculpatory material.²⁴ This led to a series of High Court judgments relating to the case, which is still continuing. In August 2008, the High Court found that the UK security services “facilitated interviews” in Pakistan of Binyam Mohamed, the only remaining former British resident then being detained at Guantanamo Bay, while he was being detained unlawfully and without access to a lawyer, by providing information and questions. The High Court found that:

by seeking to interview BM in the circumstances described and supplying information and questions for his interviews, the relationship of the United Kingdom Government to the United States authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing.²⁵

12. This judgment, and some of the evidence on which it was based, particularly the evidence of a security service agent, “Witness B”, led the Home Secretary in October 2008 to refer the question of possible criminal wrongdoing to the Attorney General. On 26 March 2009, she invited the Metropolitan Police to commence a criminal investigation.²⁶

Mr Craig Murray

13. Mr Craig Murray was the UK ambassador to Uzbekistan from 2002 to 2004. His memorandum and subsequent oral evidence alleged that:

²¹ Ev 51, paragraph 5.

²² Ev 54, paragraph 29.

²³ For information about his release, see HC Deb, 24 Feb 09, cc18-19WS.

²⁴ HC Deb, 5 Feb 09, c989-91.

²⁵ *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) (21 August 2008) paragraphs 87-88.

²⁶ HL Deb, 26 Mar 09, cWS51.

- the Uzbek authorities used torture to a “staggering extent” against suspected political or religious dissidents;²⁷
- the information provided under torture was largely planted by the Uzbek authorities, to exaggerate the scale of the terrorist threat in central Asia and provide a firm link to Al-Qaida;²⁸
- the CIA intelligence from Tashkent “was giving precisely the same narrative” and therefore may also have been derived from torture and be inaccurate;²⁹ and
- the US Embassy confirmed to Mr Murray’s deputy that the CIA intelligence “probably did come from torture” but, in the War on Terror, this was not considered to be a problem.³⁰

14. Mr Murray raised his concerns with the FCO and was recalled to a meeting on the issue in March 2003. He stated that he was told:

- there was nothing in UNCAT to prohibit receipt, or possible receipt, of information obtained using torture. This view was latter confirmed in a telegram from Sir Michael Wood, the Legal Adviser at the Foreign Office;³¹
- the UK had a valuable intelligence sharing agreement with the US covering all material and it would not be in the UK’s interest to restrict this agreement to specific categories of material;³²
- the Security Services regarded the Uzbek intelligence as useful;³³ and
- the final intelligence report issued by the Security Services excluded the name of the detainee interrogated, so it was not possible to prove that torture was involved in any particular piece of intelligence.³⁴

Mr Murray went on to argue that the policy on the use of intelligence had changed after the 9/11 terrorist attacks.³⁵ He recalled a “clear direction” from the then Prime Minister Margaret Thatcher “not to use any intelligence that might have come from torture” in the run up to the first Gulf War.³⁶ In his view, Ministers were aware that they were receiving intelligence material derived from torture and Jack Straw MP, the then Foreign Secretary, had read and discussed his telegrams on the subject.³⁷

²⁷ Ev 55.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibi.

³¹ Ev 55-56 and Q98.

³² Ev 56 and Q150.

³³ Ev 56 and Qq87-90.

³⁴ Ev 56 conclusion 4.

³⁵ Q114.

³⁶ Qq85-86, 94.

³⁷ Q120 and Qq96, 103.

15. Mr Murray's allegations are significantly different to those relating to the possible use of torture in Pakistan and Egypt outlined above. He said there was no evidence of British nationals or residents being mistreated in Uzbekistan and no suggestion that British agents were meeting detainees in Uzbekistan or passing on questions for use by interrogators.³⁸ His claim, supported by the memorandum from Sir Michael Wood, is that the UK Government turned a blind eye to the provenance of intelligence which was almost certainly derived from torture in Uzbekistan, partly because it might have been useful but principally to preserve a valuable intelligence sharing agreement with the US. The importance of this agreement to the UK Government has also been a factor in the litigation involving Binyam Mohamed.³⁹

16. Mr Murray was a convincing witness when he appeared before us and his allegations are supported by some documentary evidence. His credibility has not been enhanced by his somewhat bizarre dealings with the Committee, however. When he first approached us about giving oral evidence we asked him for a written memorandum, which is standard practice for select committees. His response was to publish a story on his blog entitled "Parliamentary Joint Human Rights Commission Struck By Cowardice" which alleged that we were consulting party whips about how to deter him from giving oral evidence.⁴⁰ This was entirely untrue, as our subsequent decision to ask him to give oral evidence, despite his comments, demonstrated. In May, Mr Murray published further comments on his blog, suggesting that our Chair was a "stooge" of the Uzbek regime and had somehow been implicated in his dismissal as UK ambassador.⁴¹ Again, these comments are entirely without substance and may only serve to damage Mr Murray's credibility and reputation.

³⁸ Qq 80, 82-3.

³⁹ For example, see HC Deb, 5 Feb 09, c990.

⁴⁰ www.craigmurray.org.uk/archives/2009/03/parliamentary_j.html.

⁴¹ www.craigmurray.org.uk/archives/2009/05/andrew_dismore.html.

3 The meaning of “complicity”

The nature of the allegations

17. It is not alleged that the UK Government or its agents have themselves engaged in torture, or directly authorised torture. The essence of the allegations which we have summarised in chapter 2 above is that the UK Government and its agents have been complicit in the use of torture by others. The alleged complicity is said to have taken a number of different forms, including (but not necessarily confined to) the following:

- requests by UK agents to foreign intelligence services, known for their systematic use of torture, to detain and question a terrorism suspect
- the provision of information by UK agents to such foreign intelligence services enabling them to apprehend a terrorism suspect or facilitate their extraordinary rendition
- the provision of questions by UK agents to such foreign intelligence services to be put to a detainee who has been, is being, or is likely to be tortured
- the sending of UK interrogators to question a detainee who is, or should have been, known to have been tortured by those detaining and interrogating them
- the presence of UK intelligence personnel at interviews with detainees being held in a place where it is known, or should be known, that they are being tortured
- the lack of any apparent action taken by the UK personnel to establish whether torture was occurring and to prevent it from continuing
- the systematic receipt by UK agents of information known or thought likely to have been obtained from detainees subjected to torture, without apparent comment on, concern about or action to establish its provenance.

18. Each of these, it is alleged, amounts to complicity in torture by the various UK agents concerned, which is in direct breach of the UK’s human rights obligations. Moreover, it is alleged that the UK Government’s practice in these various respects amounts to a policy of complicity in torture, which has ministerial authorisation, and which is also in breach of the UK’s human rights obligations.

19. The allegations raise a number of detailed factual questions, to which we return below. Which facts are relevant, however, is determined by a number of prior legal questions. First, is complicity in torture unlawful? Second, if it is, what does “complicity” mean in this context? What are the facts which would need to be proved in order to demonstrate that individual agents have been complicit in torture, or that a Government policy of complicity existed?

Is complicity in torture unlawful?

UNCAT

20. UNCAT expressly prohibits complicity in torture as well as torture itself. Article 4(1) provides:

“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.”

21. Article 6 of UNCAT also requires the UK to take into custody any person present in the UK who is alleged to have committed an act constituting complicity or participation in torture if satisfied, after an examination of information available, that the circumstances so warrant, and it must then immediately make a preliminary inquiry into the facts.

22. The UK is therefore under a positive obligation under UNCAT, both to make it a criminal offence in UK law for any person to commit an act which constitutes complicity or participation in torture, and to investigate credible allegations of complicity or participation in torture, including by detaining any person present in the UK who is alleged to have committed any such act.

ECHR

23. There is no equivalent to Article 4 of UNCAT in the ECHR, but the European Court of Human Rights has long recognised that the deportation or extradition of a person to another State where he is likely to suffer inhuman or degrading treatment or punishment constitutes a breach, by the removing State, of the prohibition of such treatment contained in Article 3 ECHR.⁴² This well established line of Strasbourg case-law can be seen as recognition by that Court of a form of complicity in torture or inhuman or degrading treatment, in the shape of the facilitation by States of torture or inhuman or degrading treatment even where they do not themselves carry out the treatment in question.

General principles of State Responsibility

24. Complicity in torture conducted by other States or their agents is also recognised to be unlawful under general international law principles of State Responsibility for internationally wrongful acts. Torture is recognised to be an internationally wrongful act, under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, regional human rights treaties such as the European Convention on Human Rights, UNCAT and as part of customary international law. The prohibition against torture is recognised as what international lawyers call a “peremptory norm of general international law”, that is, one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁴³ The status of the prohibition against torture as a

⁴² *Soering v UK* (1989) 11 EHRR 439 at paras 33-36; *Cruz Varas v Sweden* (1991) 14 EHRR 1 at paras 69-70; *Vilvarajah v UK* (1991) 14 EHRR 248 at paras 115-116.

⁴³ Vienna Convention on the Law of Treaties 1969, Article 53.

peremptory norm of international law has been recognised by UK courts on a number of occasions.⁴⁴

25. The general principles of state responsibility in international law are now conveniently set out in the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*, which were approved by the UN's General Assembly on 12 December 2001.⁴⁵ They recognise that internationally wrongful conduct often results from the collaboration of more than one State rather than one State acting alone. Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. It provides:

ARTICLE 16

Aid or assistance 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.

26. In international law, particular consequences also flow from "serious breaches" of obligations under peremptory norms of international law.⁴⁶ A breach of such an obligation is "serious" if it involves "a gross or systematic failure by the responsible State to fulfil the obligation."⁴⁷ States are under a positive obligation to co-operate to bring such serious breaches to an end,⁴⁸ and are required not to recognise as lawful a situation created by such serious breaches, nor to render aid or assistance in maintaining that situation.⁴⁹ So, for example, where a State systematically tortures terrorism suspects, other States are under a duty to co-operate to bring such a serious breach of the prohibition against torture to an end, and are required not to recognise the practice as lawful nor to give any aid or assistance to it continuing. We are concerned that these positive obligations in relation to torture, not to acquiesce in torture or to validate the results of it, are not fully appreciated by the Government, which often gives the impression that it is only under a negative obligation not to torture: see, for example, the statement by the Prime Minister in his letter of 18 June 2009 that 'neither the UN Convention Against Torture nor the European

⁴⁴ See, for example, the Court of Appeal in *Al Adsani v Government of Kuwait* (1996) 107 ILR 536 at 540-1; and the House of Lords in *R v Bow Street Metropolitan Magistrate, ex p Pinochet Ugarte (No. 3)* (1999) 2 WLR 827 at 841, 881 and *A and others v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221 at para. 33.

⁴⁵ The *Articles on State Responsibility* are annexed to United Nations Resolution 56/83 adopted by the General Assembly on 12 December 2001. 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 para. 36.

⁴⁶ *Articles on State Responsibility*, Articles 40 and 41.

⁴⁷ Article 40(2).

⁴⁸ Article 41(1).

⁴⁹ Article 41(2).

Convention on Human Rights ... include a positive legal obligation to report or seek to prevent acts of torture carried out by other states abroad'.⁵⁰

27. There is therefore no room for doubt, in our view, that complicity in torture would be a direct breach of the UK's international human rights obligations, under UNCAT, under customary international law, and according to the general principles of State Responsibility for internationally wrongful acts.

28. If complicity in torture is unlawful, the remaining legal question is what, exactly, does "complicity" mean?

What does "complicity" mean?

29. Although UNCAT refers expressly to "complicity or participation in torture", and imposes obligations on states to criminalise it and to investigate credible allegations of it, the Treaty does not define the terms "complicity" or "participation".

30. We took evidence on this question from Professor Philippe Sands QC, Professor of International Law at University College, London and an acknowledged expert on the application of UNCAT.⁵¹ Professor Sands' evidence attempted to shed some light on the meaning of "complicity" in Article 4(1) UNCAT by reference to a number of different sources, including its drafting history, its interpretation by the UN Committee Against Torture (the treaty body charged with overseeing the implementation of UNCAT), and the interpretation by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") of the meaning of "aiding and abetting" in Article 7(1) of the ICTY Statute.

31. We noted, however, that these sources appeared to differ slightly as to the precise ingredients of "complicity" and therefore as to the scope of that concept. According to the judicial interpretation of the concept by ICTY, in the context of a criminal trial for aiding and abetting torture, three elements must be established in order for the offence of complicity to have been committed:⁵²

- (1) knowledge that torture is taking place;
- (2) a contribution by way of assistance, which
- (3) has a substantial effect on the perpetration of the crime of torture itself.

32. The UN Committee Against Torture, on the other hand, appears to have adopted a wider definition of complicity, which includes "tacit consent" and "acquiescence", and includes constructive as well as actual knowledge that torture was taking place (i.e. it is enough if the party who is alleged to be complicit should have known that it was taking place). The UN Committee also appears less concerned with the requirement that the assistance must have had a substantial effect on the perpetration of the crime of torture itself. So for example, the Committee Against Torture has made clear that the involvement

⁵⁰ p. 53.

⁵¹ Ev 60-79 and Qq155-196.

⁵² *Prosecutor v Anto Furundzija* (Case No. IT-95-17/1-T 1988). Article 7(1) of the ICTY Statute provides for individual criminal responsibility: "7(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."

of doctors is to be treated as a form of participation, even if only for the purpose of ensuring that the victim of torture does not die or suffer physical injuries during interrogation.⁵³

33. Professor Sands addressed this apparent difference of approach in his Additional Note of Evidence submitted after we had heard oral evidence.⁵⁴ Any difference of approach between the UNCAT Committee and the ICTY, he said, was to be explained by the fact that they were interpreting different texts. “Complicity or participation” in Article 4 of UNCAT has a wider meaning than “aiding and abetting” in Article 7(1) of the ICTY Statute. Complicity or participation includes “aiding and abetting”, but is not limited to that narrower concept. In Professor Sands’ view, “complicity” in UNCAT would encompass tacit consent that falls short of the contribution by way of assistance that ICTY required, as well as a failure to take steps to prevent abuse in circumstances in which it is known to be occurring.

34. We are grateful to Professor Sands for his assistance in helping us to understand the meaning of complicity. In our view, it is necessary to distinguish between complicity for the purposes of individual criminal responsibility and complicity for the purposes of State responsibility. We consider that a narrower meaning is likely to be adopted in the context of individual criminal responsibility, but principles of state responsibility more readily recognise positive obligations on states (as opposed to individuals) to take action to prevent torture from occurring or continuing. Complicity may therefore be given a wider meaning for the purposes of deciding whether the State is responsible for particular acts which have the effect of allowing torture to occur or continue.

35. We therefore conclude that complicity has different meanings depending on whether the context is individual criminal responsibility or State responsibility:

- **for the purposes of individual criminal responsibility for complicity in torture, “complicity” requires proof of three elements: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime;**
- **for the purposes of State responsibility for complicity in torture, however, “complicity” means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.**

Would the allegations, if proved, amount to complicity?

36. As we noted above, the allegations which have been made are that complicity in torture has taken place in a variety of forms. Assuming complicity in torture to be unlawful, and complicity to mean what we have defined it to mean above, would any of those allegations, if proved, amount to complicity in torture on the part of the UK state, or criminally culpable complicity by individual agents?

⁵³ CAT/CSR.105 at para. 5.

⁵⁴ Ev 78.

37. We are in no doubt that requests to foreign agencies to arrest and detain an individual, the provision of information enabling their arrest, the provision of questions for their interrogation, the sending of interrogators to question a suspect who is being tortured and of observers to sit in on interrogations, are all forms of assistance and facilitation capable of amounting to complicity in torture by the State concerned when those things are done in the knowledge that the person concerned is being, has been or will be tortured by the State which is detaining him, or where that ought to be obvious to the State providing the assistance. Although it may be harder to prove, we are also in no doubt that in principle each of those forms of aiding and abetting torture is capable of making a sufficient contribution by way of assistance to amount to the crime of complicity in torture by individual agents where the other ingredients of the offence are made out.

38. We have found it more difficult to decide whether the passive receipt of information which has or may have been obtained under torture amounts to complicity in torture in the sense we have described above. The House of Lords in *A and others v Home Secretary*, whilst deciding that evidence obtained under torture is not admissible in legal proceedings, nevertheless made clear that in certain circumstances information obtained under torture can be used by the Secretary of State to take action to save life. This is the point made by the FCO in its annual report for 2008, quoted above, where the Government effectively reserves the right to consider and even act on intelligence which is possibly derived from torture where that intelligence bears on threats to life. The passive receipt of information is also not obviously a form of “assistance” or facilitation, because it seems likely that the torture will continue to take place anyway whether the information is received or not by the other State. This would not apply, however, to circumstances where the receipt of such information (that it is reasonable to suspect is produced as a result of torture) is so regular that it becomes an expectation, or where it is part of a reciprocal arrangement (regardless of whether the arrangement is formal or explicit), or where the information is received over a long period with no apparent concern being raised about its provenance.

39. In our 2006 Report on UNCAT we acknowledged that the “one-off” use of information obtained by torture might be justified in a genuine case of necessity to protect life, but pointed out that “care must be taken to ensure that the use of such information [which might have been obtained under torture], and in particular any repeated or regular use of such information, especially from the same sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks.”⁵⁵

40. We remain of the view that whether such passive receipt is capable of amounting to complicity in torture depends on whether there is systematic reliance on such information, or whether the circumstances set out at the end of paragraph 38 above exist. As Professor Sands said in evidence, “there is a world of difference between the one-off receipt of information that comes into your mailbox and a relationship that is premised on regular, systematic, continual reliance against the background of a broader relationship between two sovereign entities.”⁵⁶

⁵⁵ UNCAT Report, above, n.1, at para. 55.

⁵⁶ Q162.

41. The question is, at what point does the systematic receipt of such information cross the line into complicity?⁵⁷ **We agree with Professor Sands’s view, that if the Government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on, systematically receiving and/or relying on the information but not physically participating in the torture, that might well cross the line into complicity.**

42. **Systematic, regular receipt of information obtained under torture is in our view capable of amounting to “aid or assistance” in maintaining the situation created by other States’ serious breaches of the peremptory norm prohibiting torture.** As a number of witnesses to our inquiry put it, the practice creates a market for the information produced by torture.⁵⁸ As such, it encourages States which systematically torture to continue to do so. **We therefore consider that, if the UK is demonstrated to have a general practice of passively receiving intelligence information which has or may have been obtained under torture, that practice is likely to be in breach of the UK’s international law obligation⁵⁹ not to render aid or assistance to other States which are in serious breach of their obligation not to torture.**

43. It follows from the above that, in our view, the following situations would all amount to complicity in torture, for which the State would be responsible, if the relevant facts were proved:

- **A request to a foreign intelligence service, known for its systemic use of torture, to detain and question a terrorism suspect.**
- **The provision of information to such a foreign intelligence service enabling them to apprehend a terrorism suspect.**
- **The provision of questions to such a foreign intelligence service to be put to a detainee who has been, is being, or is likely to be tortured.**
- **The sending of interrogators to question a detainee who is known to have been tortured by those detaining and interrogating them.**
- **The presence of intelligence personnel at an interview with a detainee being held in a place where he is, or might be, being tortured.**
- **The systematic receipt of information known or thought likely to have been obtained from detainees subjected to torture.**

44. We also draw attention to the fact that our views on what sorts of assistance are likely to constitute complicity are shared by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Martin Scheinin, in his recent report to the Human Rights Council of the UN.⁶⁰

⁵⁷ Q155.

⁵⁸ See, to the same effect, the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (International Commission of Jurists, 2009) at p. 85: “States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become ‘consumers’ of torture and implicitly legitimise, and indeed encourage, such practices, by creating a ‘market’ for the resultant intelligence. In the language of criminal law, States are ‘aiding and abetting’ serious human rights violations by others.”

⁵⁹ Recognised by Article 41(2) of the *Articles on State Responsibility*.

⁶⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3 (4 February 2009).

45. The Special Rapporteur expressed his concern about the participation of foreign agents in the interrogation of people held in situations that violate international human rights standards:

The active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices. The continuous engagement and presence of foreign officials has in some instances constituted a form of encouragement or even support. This is particularly the case if – as alleged in Pakistan – persons are held at the request and with the approval of foreign agents. ... [T]he active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture.

46. The Special Rapporteur was also concerned about the sending and receiving of intelligence for operational use. Taking advantage of the coercive environment by receiving intelligence would constitute a violation of human rights law:

States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment ... and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question. ... The Special Rapporteur is equally concerned about the supply of information to foreign intelligence services, when there are no adequate safeguards attached to the further distribution of such information among other governmental agencies in the receiving state.

4 The accountability gap

Government response to the allegations and parliamentary accountability

47. We have corresponded with Ministers on a number of occasions over the last year, in order to get answers to questions arising from the allegations we have outlined above. On 26 February, the Foreign and Home Secretaries said:

The Government's position on the use of torture is clear: we unreservedly condemn it. Our policy is not to participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose. We abide by our commitments under international law, including the UNCAT and European Convention on Human Rights, and expect all other countries to comply with their international obligations. The Government, including the intelligence and security agencies, never uses torture for any purpose, including obtaining information. Nor would we instigate, encourage or condone others in so doing.⁶¹

Other letters from Ministers, as well as statements in Parliament, have contained slight variations on this theme.⁶²

48. The FCO annual report for 2008, published in March 2009, offered a different perspective on the issue of intelligence material which may have originated from torture:

we need to be open in acknowledging challenges and difficult decisions in some areas. One example is the question of the use of intelligence provided to the UK by other countries. The provenance of such intelligence is often unclear – partners rarely share details of their sources. All intelligence received, whatever its source, is carefully evaluated, particularly where it is clear that it has been obtained from individuals in detention. The use of intelligence possibly derived from torture presents a very real dilemma, given our unreserved condemnation of torture and our efforts to eradicate it. Where there is intelligence that bears on threats to life, we cannot reject it out of hand. What is quite clear, however, is that information obtained as a result of torture would not be admissible in any criminal or civil proceedings in the UK.⁶³

49. Statements such as these raise numerous questions. Does the Government's policy "not to participate in, solicit, encourage or condone" torture encompass interviewing detainees in between periods of torture, or providing questions to be asked under torture, or lesser forms of mistreatment? Or is the Government's statement of policy carefully crafted to exclude indirect involvement in torture carried out by others, for example by avoiding the use of the words 'complicity' or 'acquiescence'? The FCO annual report appears to bear out Mr Murray's allegations that Ministers are content to at least receive intelligence "possibly derived from torture", particularly where it "bears on threats to life". What does the UK

⁶¹ Ev 33-34.

⁶² For example, see the letter from the Prime Minister, p. 53, and letter to the *Guardian*, Alan Johnson MP, 10 Jul 09.

⁶³ Cm 7557, p15. And see oral evidence given by the Foreign Secretary to the Foreign Affairs Committee, 15 June 2009, HC557-ii, Q133.

know of the provenance of such material? What efforts are made to investigate how such material was gathered? How much material does the UK receive and rely on which was “possibly derived from torture?”

50. These are important questions of public policy and we appeared to receive the Prime Minister’s support in raising these matters with Ministers. During oral evidence to the Liaison Committee, he said, in answer to a question from our Chair, “I think you are right to raise these issues because of the public concern”.⁶⁴

51. Nevertheless, our repeated attempts to request oral evidence from Ministers have come to nothing. We wrote to both the Foreign and Home Secretaries on 10 February to ask them both to give oral evidence. They replied jointly on 26 February declining our invitation on the basis that they were “unable to add any further detail to that already provided”.⁶⁵ We reiterated our request, pointing out the issues on which we wished to receive further detail, in a letter of 17 March but this approach was also rejected.⁶⁶ A final request for oral evidence on 12 May was not even acknowledged.⁶⁷ The constitutional significance of the ministers’ refusal should not be underestimated. Lord Lester has asked each Department, by written question, on how many occasions and in what circumstances ministers have refused to give evidence to parliamentary Select Committees in the last five years. Of 22 departments, 15 departments replied that there were no such occasions; two were not aware of any such occasion; two said that they held no record; the Treasury said the information was not readily available; the Home Office said that it held no record, but it was a rare occurrence; and the Foreign Office said that the information was not held, but there was one occasion when the Foreign Secretary said that he had nothing to add to his written evidence.

52. The Foreign Secretary did appear before the Commons Foreign Affairs Committee, during its annual human rights inquiry, on 16 June.⁶⁸ He answered a number of questions about allegations of complicity in torture. He emphasised the need for clarity in Government policy in order to maintain an effective intelligence relationship with countries such as Pakistan.⁶⁹ He defended the role of the Intelligence and Security Committee (see para xx below)⁷⁰ and said that the Government would not be publishing the “historical” guidance to security services’ personnel operating overseas (see para xx below).⁷¹ He also faced questions about US waterboarding⁷² and the role of consular officials⁷³ but declined to answer direct questions on allegations of complicity in torture because of current court proceedings.⁷⁴ **We note that the Foreign Affairs Committee was**

⁶⁴ Q150.

⁶⁵ Ev 33-34.

⁶⁶ Ev 35-37.

⁶⁷ Ev 38-40.

⁶⁸ The uncorrected evidence (HC 557-ii) is available on the Committee’s website (<http://www.publications.parliament.uk/pa/cm/cmffaff.htm>).

⁶⁹ Q115.

⁷⁰ Q117.

⁷¹ Qq 114, 116-18, 129-31.

⁷² Qq 121-26.

⁷³ Qq 119-20.

⁷⁴ Qq 127-28.

able to question the Foreign Secretary on a range of issues associated with torture and shed some light on matters we have only been able to explore in writing, as part of its wider inquiry into international human rights issues. This calls into question the reasons why the Foreign Secretary (and the Home Secretary) should refuse to give oral evidence to us.

53. We have also been disappointed by the partial answers we have received to our written requests for information.⁷⁵ For example, Mr Cobain drew our attention to section 7 of the Intelligence Services Act 1994, which provides for the Secretary of State to waive the liability of intelligence service personnel for illegal acts committed abroad in certain circumstances.⁷⁶ It has been described by some as the “James Bond” clause.⁷⁷ We asked some general questions about the number of authorisations under section 7.⁷⁸ Other than for confirmation that section 7 of the Act applies in relation to the functions of the Secret Intelligence Service and GCHQ (and presumably does not apply to the Security Service, although this is not absolutely clear from the Ministers’ letter) we were given no further information “for security reasons”.⁷⁹ The Foreign and Home Secretaries pointed to the 2007 report of the Intelligence Services Commissioner, in which he said that public release of “the number of warrants or authorisations issued to the security and intelligence agencies” would “assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, SIS and GCHQ”.⁸⁰ As a result, we are no nearer to understanding the purpose of section 7, the sorts of situations in which it is used, and the number of current authorisations than we were beforehand.⁸¹

54. We also invited the Government to comment on the allegations made to us by Craig Murray but did not receive a response.⁸²

55. Twice during 2007 we asked Jonathan Evans, the Director General of the Security Service, to appear before us, after he made a speech to the Society of Editors about the level of threat from terrorism. He declined our invitations and also failed to provide us with the written memorandum we also requested.⁸³ We renewed our invitation on 27 January 2009, after Mr Evans gave an interview to the press on his work.⁸⁴ Mr Evans again offered a “private background briefing on the current threat” but declined to give oral evidence,

⁷⁵ Ian Cobain has also observed that his specific questions have received general answers – Ev 51 and annex, p. 47-48 paras 27-34.

⁷⁶ Section 7(1) Intelligence Services Act 1994 provides: “If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.” By s. 7(2), liable means liable under the criminal or civil law of the UK.

⁷⁷ Q51.

⁷⁸ Ev 33.

⁷⁹ Ev 34.

⁸⁰ Ev 36 and *Report of the Intelligence Services Commissioner for 2007*, HC 948, paragraph 35.

⁸¹ The Foreign Secretary similarly refused to answer a question on section 7 of the Intelligence and Security Act when he appeared before the Foreign Affairs Committee in June 2009 – HC 557-ii, Q140.

⁸² Ev 38-40.

⁸³ Sixth Report, 2007-08, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, HL Paper 38, HC 270, (hereafter *Annual Report 2007*) paragraphs 85-89.

⁸⁴ p 45.

arguing that “our parliamentary accountability is to the [Intelligence and Security Committee]”.⁸⁵

56. We fully accept that intelligence co-operation is both necessary and legitimate in countering terrorism, and that a degree of state secrecy is justifiable in this area. However, there must be mechanisms for ensuring accountability for such co-operation. The allegations we have heard about possible UK complicity in torture in Pakistan, the evidence which has emerged during the legal proceedings brought by Binyam Mohamed and the allegations by Craig Murray that the UK knowingly received evidence derived from torture are all extremely serious matters for which Ministers are ultimately accountable. Our experience over the last year is that Ministers are determined to avoid parliamentary scrutiny and accountability on these matters, refusing requests to give oral evidence; providing a standard answer to some of our written questions, which fails to address the issues; and ignoring other questions entirely. Ministers should not be able to act in this way. The fact that they can do so confirms that the system for ministerial accountability for security and intelligence matters is woefully deficient.

Intelligence and Security Committee

57. When challenged about the parliamentary accountability of the security services, the Government points to the Intelligence and Security Committee (ISC), a committee of parliamentarians established under the Intelligence Services Act 1994. The Foreign and Home Secretaries told us that the members of the ISC “discharge their responsibilities with scrupulous care and impartiality” and that the Committee “does not shy from criticising the Government, and the policies of the Agencies, when it believes criticism is warranted”.⁸⁶

58. We have previously drawn attention to the differences between the ISC and a select committee:

- the ISC reports to the Prime Minister, rather than to Parliament;
- it is staffed by Government employees (including Government lawyers), rather than parliamentary staff; and
- its reports are published after redaction, which is often substantial.⁸⁷

Indeed, because the ISC meets in private and its reports are redacted it can be difficult to follow the Committee’s work and to understand its reports.

59. The ISC has been the subject of a modest recent reform. On 17 July 2008, following a proposal in the *Governance of Britain* White Paper, the House of Commons agreed to a new arrangement for appointing members of the ISC.⁸⁸ The Prime Minister remains responsible for appointments to the Committee, but the Commons Members are

⁸⁵ p 45.

⁸⁶ Ev 36.

⁸⁷ *Annual Report 2007*, paragraph 86.

⁸⁸ House of Commons Votes & Proceedings, 17 Jul 08, and Standing Order No. 152E.

recommended by the House of Commons, on the basis of proposals put forward by the Committee of Selection. These proposals are agreed to without debate, unless at least one Member objects: the House of Commons is thus enabled to debate the membership of the ISC, unless the Committee of Selection's proposals are accepted without comment. **We urge Members of the House of Commons regularly to take the opportunity to debate the membership of the ISC, to help ensure that the Committee is subject to frequent scrutiny.**

60. The ISC has published a number of reports which touch on the allegations of UK complicity in torture. The Foreign and Home Secretaries drew our attention to two conclusions in the Committee's 2007 report on rendition, which suggest that the security services became aware by mid-2003 of possible mistreatment of detainees by the US and amended their working methods, and began to develop guidance, in order to protect human rights.⁸⁹ The report appears to give a full, if somewhat opaque, account of how the security services responded to growing awareness of the changed US policy on rendition and interrogation techniques.⁹⁰ Its limitations are exposed by the discussion of Binyam Mohamed's case, however, in which the Security Service's account of his treatment is presented apparently without challenge and relevant extracts of the Director General of the Security Service's oral evidence are so heavily redacted as to make them incomprehensible.⁹¹

61. The work of the ISC was subject to a debate in the House of Commons on 7 May.⁹² Several Members of the Committee alluded to the issue of complicity in torture. The Committee's Chairman, Kim Howells MP, said:

I believe that there are no circumstances where torture can be justified; nor am I convinced that the intelligence that emerges from torture cells is sufficiently reliable to warrant even that most equivocal of justifications – the one that says that torture is valid if it tells us how to find or defuse the ubiquitous ticking bomb. We know also, however, that in this increasingly mobile world ... it is vital that the intelligence and security agencies of this country and those of its civilised and trusted allies are properly empowered to co-operate and exchange intelligence. As long as they do that within the laws laid down to guide their work, they should not have to live with the dread that, by the very act of co-operating with a close ally who may subsequently find themselves mired in a human rights abuse scandal, they might be tarred with the same brush.⁹³

62. Another member of the Committee, George Howarth MP, said:

It is all too easy to say that one should never have anything to do with any intelligence unless one can be absolutely certain that it has been arrived at by the best possible means and meets all of the very highest standards. In some circumstances one is,

⁸⁹ Ev 39.

⁹⁰ Intelligence and Security Committee, *Rendition*, Cm 7171, Jul 2007, (hereafter *Rendition*) paragraphs 50-88 and conclusions D to K.

⁹¹ *Ibid*, paragraphs 98-106 and conclusions M and N.

⁹² HC Deb, 7 May 09, cc390-440.

⁹³ HC Deb, 7 May 09, c397.

frankly, grateful for the information that one gets without asking too many questions about the circumstances in which it was produced.⁹⁴

63. Both of these arguments – the importance of protecting intelligence-sharing arrangements and the ‘ticking bomb’ scenario in which it is best not to ask questions about the provenance of intelligence – have been advanced by the Government in response to allegations of possible UK complicity in torture. In addition, the Foreign and Home Secretaries drew our attention to passages in the judgments of the Law Lords on the case of *A and Others v the Secretary of State for the Home Department* where these issues were discussed.⁹⁵ Neither argument should be dismissed: intelligence gathering and sharing create challenges and dilemmas for the protection and promotion of human rights which need to be recognised. Our concern is that, taken too far, the intelligence sharing and ‘ticking bomb’ arguments could justify almost any involvement in systemic torture conducted by other countries, short of actual participation.

64. Mr Howells said that the ISC “has to work within the circle of secrecy, and yet convince the Prime Minister, Parliament and the public that the often clandestine systems, behaviour and operations that are important element of the business of the agencies that we examine are organised and undertaken according to the laws laid down in this country.”⁹⁶ We agree with this statement of what the ISC has to achieve but we are not confident that the Committee has achieved these aims. In particular, we doubt whether Parliament or the public has been convinced by the ISC that the security services always operate within the law and that transgressions of the law are appropriately dealt with.⁹⁷ We would welcome greater transparency in the ISC’s proceedings, such as public evidence sessions,⁹⁸ but procedural innovations will not be sufficient to convince us, and the public, that the Government is being held to account.

65. The missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services. In our view, this can be achieved without comprising individual operations if the political will exists to provide more detailed information to Parliament about the policy framework, expenditure and activities of the relevant agencies. The current situation, in which Ministers refuse to answer general questions about the Security Services, and the Director General of MI5 will answer questions from the press but not from parliamentarians, is simply unacceptable.

66. A good first step would be for the Government to propose to establish the ISC as a proper parliamentary committee, with an independent secretariat (including independent legal advice), which would establish ministerial accountability to Parliament in this area at a stroke. The recent allegations about complicity in torture should be a wake up call to Ministers that the current arrangements are not

⁹⁴ HC Deb, 7 May 09, c406.

⁹⁵ Ev 39.

⁹⁶ HC Deb, 9 May 09, c394.

⁹⁷ For example, see the comments of Mike Gapes MP, Chairman of the Foreign Affairs Committee, in a question to the Foreign Secretary on 16 June 2009 – HC557-ii, Q93.

⁹⁸ HC Deb, 9 May 09, c393.

satisfactory. We look to the Government to respond positively to this suggestion and not to continue to hide behind a wall of secrecy.

Investigatory Powers Tribunal

67. Ministers have pointed us towards the Investigatory Powers Tribunal as the body set up under the Intelligence Services Act 1994 to determine complaints from individuals that their human rights have been infringed by the security services. If the Tribunal upholds a complaint it can order remedial action, including the payment of compensation. The Tribunal is assisted by the Intelligence Services and Interception of Communications Commissioners, both of whom have statutory access to documents and information relating to the matters they investigate and who submit annual reports to the Prime Minister. These reports are laid before Parliament after redaction.⁹⁹

68. We have no reason to question the independence or diligence of the Commissioners or the members of the Tribunal, but information about their work is limited. The reports of the Commissioners, after redaction, give an indication of workload but are not otherwise illuminating.¹⁰⁰ Only five judgments of the Tribunal are published on its website.¹⁰¹

69. When Mr Cobain raised the allegations about complicity in torture in Pakistan with the FCO and the then Chairman of the Intelligence and Security Committee, Margaret Beckett MP, both suggested that complaints should be raised with the Tribunal.¹⁰² He has told us that “few of the people who have alleged mistreatment ... are able and willing to make complaints to the [Tribunal]. Many of the people to whom I have spoken are, frankly, terrified of reprisals against themselves or against family members in Pakistan”.¹⁰³ He also noted that the Tribunal does not generally examine complaints brought by third parties.¹⁰⁴ In oral evidence to the Foreign Affairs Committee, the Foreign Secretary said that the Tribunal should not be given the power to investigate complaints brought by third parties, although without clearly explaining the basis for his view.¹⁰⁵

70. **We are concerned that the narrow remit of the Investigatory Powers Tribunal precludes investigation of individual complaints, where complainants are reluctant through fear for their safety or otherwise to approach the Tribunal directly, as well as of systemic issues, where a series of complaints suggests that there are wider problems with the policy or operations of the security services.** This latter problem is particularly acute where the Intelligence and Security Committee declines to investigate a set of related allegations, as happened with the *Guardian*'s Pakistan allegations. We have yet to hear evidence from the two Commissioners or the Tribunal and may return to the issue of how the protection of human rights in this area can be enhanced once we have done so.

⁹⁹ See Ev 34.

¹⁰⁰ The most recent reports were ordered to be printed on 21 July as HC 901 and 902.

¹⁰¹ www.ipt-uk.com.

¹⁰² Ev 51, paragraph 63.

¹⁰³ Ev 51, paragraph 65.

¹⁰⁴ *Ibid*, paragraph 64.

¹⁰⁵ Oral evidence given by the Foreign Secretary to the Foreign Affairs Committee, 15 June 2009, HC 557-ii, Q141.

Guidance on dealing with foreign security services and detention issues

71. The ISC report on rendition states that:

From 2004 it became clear to [the Secret Intelligence Service] and the Security Service that their existing guidance to staff on dealing with foreign liaison services was insufficiently detailed given the increasing requirement to cooperate with foreign services in counter-terrorism operations. They therefore began to expand their guidance, and as elements were finalised they were formally issued to staff.¹⁰⁶

The Foreign Secretary, in his evidence to the Foreign Affairs Committee, made clear that, prior to 2004, such guidance as existed was “informal”.¹⁰⁷ Since 2004, guidance has been “formal and has had a comprehensive legal basis”,¹⁰⁸ including “comprehensive legal advice to all officials”.¹⁰⁹

72. As we noted above, the Foreign Secretary has firmly ruled out disclosing what guidance was – and presumably still is – provided to security services’ personnel about their dealings with foreign agencies, including the human rights issues they may face, on the grounds that this may prejudice ongoing legal proceedings.¹¹⁰

73. On 17 March 2009, the ISC released a press notice disclosing that it had written to the Prime Minister about the alleged complicity of the UK security and intelligence agencies in torture or cruel, inhuman or degrading treatment and made recommendations.¹¹¹ The letter was based on “further, in depth, evidence” from the agencies and the FCO and was prompted by “a number of new developments” including new information about the Binyam Mohamed case. The Prime Minister told us that the ISC’s letter “addressed issues which remain the subject of legal proceedings and police investigation” and he “must therefore consider carefully before deciding whether and in what form it can be published, and the timing of any publication”.¹¹² **The ISC’s letter on alleged complicity in torture has yet to be published, over four months after it was submitted to the Prime Minister. We urge the Prime Minister to make its contents public, with the minimum of redaction, as soon as possible.**

74. On 18 March, the day after the ISC published its press notice, the Prime Minister made a written ministerial statement to the House of Commons, to announce the following four actions, in order to “protect the reputation of our security and intelligence services and to reassure ourselves that everything has been done to ensure that our practices are in line with United Kingdom and international law”:

¹⁰⁶ *Rendition*, paragraph 82.

¹⁰⁷ Q114.

¹⁰⁸ Q131.

¹⁰⁹ Q114.

¹¹⁰ Paragraph 52.

¹¹¹ www.cabinetoffice.gov.uk/media/143156/090317_allledged.pdf.

¹¹² p 53.

- guidance to intelligence officers and service personnel about the standards applied during the detention and interviewing of detainees overseas will be published, once it has been consolidated and reviewed by the ISC;
- Sir Peter Gibson, the Intelligence Services Commissioner, has been invited to monitor compliance with the guidance and report to the Prime Minister annually;
- the ISC has been asked to follow-up its reports on detention and rendition; and
- potential criminal wrongdoing will be referred to Attorney General, who will consider whether there is a basis for inviting the police to launch an investigation.¹¹³

75. The Prime Minister told us that “work was underway to provide consolidated guidance to the ISC” and that, after review by the ISC, the guidance would be published “in order to make clear the very high standards which apply”. The Government would “aim to keep any redactions that may be necessary for national security reasons to a minimum”.¹¹⁴ **We welcome the Government’s decision to consolidate and publish guidance to security services’ personnel on work in detention and interrogation. We also welcome the Prime Minister’s statement that redaction prior to publication will be kept to a minimum.**

76. It is not clear to what extent the guidance will be revised during this process. If the process of consolidation and review does not involve substantial revision it is difficult to understand why the Foreign Secretary should categorically rule out publishing post-2004 guidance. **We recommend that the Government clarify whether the Government or the ISC will be revising existing guidance as part of the consolidation and review process. We also recommend that the Government should release earlier versions of the guidance, subject to any necessary redaction.**

77. We asked the Prime Minister whether Sir Peter Gibson’s reports on compliance with the guidance will be made public.¹¹⁵ He confirmed that Sir Peter will focus on new cases not “cases currently being examined in the courts and elsewhere [which] are historical” and that he would encourage him to “focus on the systemic issues you describe rather than individual cases”. On publication, the Prime Minister said Sir Peter “will cover compliance in this area in his published annual reports as Intelligence Services Commissioner”.¹¹⁶ **We welcome the appointment of Sir Peter Gibson to monitor compliance with Government guidance to security services’ personnel on detention and interrogation issues. We call on Sir Peter to ensure that he publishes as much information as possible on his work in this area in his annual reports, which we look forward to scrutinising.**

¹¹³ Paragraph 12.

¹¹⁴ p. 53.

¹¹⁵ Ev 37.

¹¹⁶ p. 53-54.

5 The way forward

Background

78. We considered the question of the intelligence services' co-operation with foreign interrogators in our 2006 UNCAT Report.¹¹⁷ We did so in the light of the finding by the High Court in 2006 that the UK security and intelligence services provided intelligence information about two British residents to the Gambian authorities which then directly or indirectly found its way into the hands of the U.S. authorities, which it is alleged subjected them to torture.¹¹⁸ We warned then that when working co-operatively with foreign intelligence agents, whether relying on information supplied by them, attending interrogations, or providing information to enable their apprehension or to be used in such interrogations, safeguards are required to ensure that UK officials do not support or become complicit in the use of torture or inhuman or degrading treatment.

79. We recommended that the Intelligence and Security Committee ascertain the facts about the precise role played the UK security and intelligence services in such cases and, for the future, called for all feasible steps to be taken to ensure that information exchanged with foreign intelligence services has not been obtained from, and will not be used in, acts which would be regarded as human rights violations. We called for a more proactive approach to be taken by the UK when establishing the framework arrangements for intelligence sharing with other intelligence agencies, by making clear the minimum standards which it expects to be observed and monitoring for compliance with those standards, and for independent scrutiny of those arrangements.¹¹⁹

80. The Government, in its response to our 2006 Report, dismissed the need for any change of approach to intelligence sharing.¹²⁰ It again missed our point about passive receipt of information which may have been obtained by torture,¹²¹ repeating the now familiar formula that “the Government, including the intelligence and security agencies, never uses torture for any purpose, including to obtain information, nor would it instigate others to do so.” It said that all intelligence received from foreign services is carefully evaluated, and that where it is clear that intelligence is being obtained from individuals in detention, the UK agencies make clear to foreign services the standards with which they expect them to comply.

81. Since then, as we have documented in this Report, a disturbing number of credible allegations of UK complicity in torture have emerged, and none of the existing accountability mechanisms have come anywhere close to answering the questions raised or ensuring that the relevant information is placed in the public domain. We conclude this

¹¹⁷ UNCAT Report, above, n.1, at paras 57-60.

¹¹⁸ *Al-Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC Admin 972.

¹¹⁹ UNCAT Report, above, n.1, at para. 56.

¹²⁰ Thirtieth Report, Session 2005-06, *Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)*, HL Paper 276, HC 1714, at p. 9.

¹²¹ See para. 39 above and UNCAT Report, above, n.1, at paras 55-56, where we expressed the view that “the fundamental importance of the obligations on the UK concerning torture makes it incumbent on the intelligence services to move beyond the essentially passive stance towards the methods and techniques of foreign intelligence agencies.”

report by attempting to summarise the most significant questions which remain unanswered, identifying the most important documents which ought to be published, and making recommendations as to the form of inquiry which we consider is now necessary to get to the bottom of these serious allegations about the UK's disregard for one of the most fundamental norms of customary international law, the prohibition against torture.

Key unanswered questions

82. The allegations about UK complicity in torture which we have summarised in this report raise a number of important questions to which satisfactory answers have yet to be provided. Each allegation raises detailed factual questions about the conduct of UK officials in relation to the individual in question and it is clearly of the utmost importance that these factual questions be properly inquired into and the facts satisfactorily established as to what actually happened in each case.

83. In addition to these detailed factual questions, however, the allegations of complicity, taken as a whole, raise a number of unanswered questions of a more systemic nature, which go to the heart of whether UK agents and ministers have, wittingly or unwittingly, been complicit in torture carried out by other States. It is vital that these questions be answered if lessons are to be learned for the future. In our view, these more systemic questions fall into four broad categories:

(1) questions concerning both the state and date of knowledge of UK agents and ministers about the treatment of detainees by foreign intelligence services, e.g.

- Precisely when did UK ministers and agents become aware of the US change of policy after September 11 2001, including the use of “enhanced interrogation techniques” such as waterboarding?¹²²
- What did UK ministers and agents know about the systematic use of torture by the Pakistani Intelligence Services?
- What did UK ministers and agents know about the use of torture in Uzbekistan?

(2) questions concerning the content of relevant UK policies/guidance about involvement in torture, e.g.

- What instructions/guidance existed before January 2002 for intelligence personnel concerning the standards to be applied in relation to detention and interviewing of detainees overseas?
- What did the January 2002 instructions for SIS and Security Service Personnel say?
- How was the policy changed in April or May 2004 following the disclosure of the abuse at Abu Ghraib?

¹²² Professor Sands' evidence (Q181) was that he thought it was probably as early as 7 February 2002: "I would be astonished if the British Government did not know the full details of that change of [US] policy because they were already at that point involved in joint operations in Afghanistan. They must have known that a different standard was being applied in relation to the treatment of detainees."

- Were any further changes made to the 2002 policy before the Prime Minister's announcement on 18 March 2009 that it is subject to review?
- What changes are now proposed to the policy?
- What does the current FCO Consular Guidance, which instructs staff to ask detainees whether they have suffered abuse and mistreatment and to look out for signs of mistreatment, say?¹²³
- What does the current FCO general guidance to staff, on how to respond to allegations of mistreatment or torture, say?¹²⁴
- Have any changes been made to that guidance since 9 September 2001?
- What changes are currently being contemplated to that guidance?
- Are there, or have there been, any other relevant policies/guidance?

(3) questions concerning what legal advice about the relevant human rights standards was given in relation to those policies, e.g.

- Was legal advice sought before the drawing up of each of those policies/instructions?
- If so, who gave legal advice in relation to them: service lawyers, departmental lawyers or the Law Officers?
- What legal advice was given about the relevant human rights standards before the adoption of each of those policies?
- What if any consideration was given to UNCAT generally, Article 4 of UNCAT specifically and the principles of state responsibility for complicity in internationally wrongful acts in drawing up each of those policies?
- who will provide legal advice about the relevant human rights standards to the current review of policy announced by the Prime Minister on 18 March?

(4) questions concerning which ministers knew what about those policies, e.g.

- Which minister(s) approved the content of each of the relevant policies?
- Which ministers were aware of the content of those policies?

Key unpublished documents

84. Some of the key unanswered questions that we have identified above will only be satisfactorily answered by the publication, to the fullest extent possible consistent with national security, of a number of key documents which so far the Government has refused to place in the public domain.

¹²³ Referred to in Ev 40.

¹²⁴ Ibid.

85. As we indicated in chapter 4 above, these include all versions of the instructions/guidance given to intelligence officers and security service personnel concerning the standard to be applied in relation to the detention and interviewing of detainees overseas:

- any such guidance which existed prior to January 2002;
- the January 2002 version;
- all subsequent changes to that policy; and
- the draft currently being considered as part of the review announced by the Prime Minister on 18 March 2009.

86. Article 10 of UNCAT requires the UK to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement and other personnel who may be involved in the interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. In its most recent report on UK compliance with the UN Convention Against Torture (in 2004), the UN Committee made a number of recommendations, including that the UK:

ensure that the conduct of its officials, including those attending interrogations at any overseas facility, is strictly in conformity with the requirements of the Convention and that any breaches of the Convention that it becomes aware of should be investigated promptly and impartially ...

87. The Prime Minister has already indicated that the new guidance will be published, once it has been consolidated and reviewed by the Intelligence and Security Committee. We asked the Prime Minister for an opportunity to comment on a draft of this guidance, given our expertise on the relevant human rights standards, but he refused in his letter of 18 June. We are puzzled as to the reasons for this refusal, given the Government's intention to publish the final version. **We recommend that the Government publish immediately all versions of the instructions/guidance given to intelligence officers and security service personnel concerning the standard to be applied in relation to the detention and interviewing of detainees overseas, including the current draft being considered by the Intelligence and Security Committee, to ensure that it fully and correctly reflects the UK's human rights obligations.**

88. Other key unpublished documents are copies of the relevant legal advice given to the Government about the relevant human rights standards concerning torture and complicity in torture. As we mentioned above, there is already in the public domain the memorandum from the Senior Legal Adviser to the Foreign Office, Michael Wood, dated 13 March 2003, which says:

Your record of our meeting with HMA Tashkent recorded that Craig had said that his understanding was that it was also an offence under the UN Convention on Torture to receive or possess information under torture. I said that I did not believe that this was the case, but undertook to re-read the Convention.

I have done so. There is nothing in the Convention to this effect. The nearest thing is Article 15 which provides [for the inadmissibility in evidence of any statement which is established to have been made as a result of torture.].

This does not create any offence. I would expect that under UK law any statement established to have been made as a result of torture would not be admissible as evidence.

89. We accept, as Professor Sands pointed out in his evidence to us, that this short memo responding to a specific query should not be treated as a formal, fully reasoned legal advice. However, we are concerned that this response from the Foreign Office's most senior lawyer makes no mention of the requirement in Article 4(1) UNCAT that States criminalise "complicity or participation in torture". As Professor Sands commented: "In a formal and limited sense Mr Wood's response is correct, but it seems not to address the issue in the round. ... there may be circumstances in which the receipt or possession of information that has been obtained by torture may amount to complicity in torture, within the meaning of Article 4(1)."

90. The memo from the Foreign Office Legal Adviser raises a number of important questions. As Professor Sands also said in his evidence, it may well be that Sir Michael Wood, other lawyers or the Law Officers address the meaning and effect of Article 4 of UNCAT in other more reasoned opinions, but this memo does not address that and therefore "it does not give a complete answer."¹²⁵ We do not know whether other, more reasoned advices were given to ministers or to the intelligence and security services. It is important, in our view, to ascertain whether the Government was ever advised as to the possibility that systematic reliance on information which may have been obtained under torture risks at some point crossing the line into complicity in torture for which the UK would be responsible under the relevant legal standards.

91. In the United States, President Obama has placed the relevant legal opinions from the Department of Justice in the public domain in order to assist congressional and public scrutiny of the US Government's former policy in relation to interrogation of detainees. These include the four notorious "torture memos", published by the US Government on 16 April 2009, which contain detailed accounts of the "enhanced interrogation techniques" used on certain detainees, including waterboarding and the use of insects in confinement boxes for detainees with a fear of being stung. On releasing these advices, the President said "it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution."

92. We asked the Home and Foreign Secretaries to follow the US example, by publishing all relevant legal opinions provided to ministers concerning the use of information which may have been obtained by torture, and in particular any opinions concerning Article 4 UNCAT.¹²⁶ They refused, on the basis that "it is not the Government's normal practice to publish internal legal advice, as Legal Professional Privilege attaches to such advice

¹²⁵ Q157.

¹²⁶ Ev 38.

This is in order to ensure that full and frank legal advice can be given, in the interests of good governance.”¹²⁷

93. **We do not accept, in this instance, that it is “in the interests of good governance” for the Government to refuse to waive its legal professional privilege by publishing the relevant legal advice. On the contrary, we consider that good governance demands it and that the Government’s invocation of legal professional privilege is another disappointing example of resort to state secrecy to prevent proper parliamentary and public scrutiny of an issue of great public concern.**

94. In a public lecture on The Rule of Law in 2006, Lord Bingham, the recently retired Senior Law Lord, was critical of the Government’s reliance on legal professional privilege as the reason for not publishing the Attorney General’s legal advice on the lawfulness of the Iraq war. He said:

There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer’s opinion on the lawfulness of war: it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client. If the government is sued for damages in negligence for (say) injuries caused by an army lorry or a mishap in a military hospital, I see no reason why the ordinary rules of client professional privilege should not apply. ... An opinion on the lawfulness of war, the ultimate exercise of sovereign power, involving the whole people, seems to me to be quite different. And the case for full, contemporaneous, disclosure seems to me even stronger when the Attorney General is a peer, not susceptible to direct questioning in the elected chamber.

95. Although Lord Bingham acknowledged that “this is not an accepted view”, it could be said that his view was ultimately vindicated: the Attorney General’s advice on the legality of the war was eventually, following great public pressure, published.

96. We regard Lord Bingham’s “public interest” exception to the Government’s legal professional privilege to apply with equal force here. There is great public concern about whether the UK has been complicit in torture conducted by other States. The legal advice which the Government received about the relevant human rights standards is central to the inquiry into whether there was such complicity and if so who is accountable for it. The United States Government has shown the way by publishing the relevant legal advice given by the Department of Justice, in order to assist the ongoing inquiries into the US’s policy on the treatment of detainees. **We call on the Government to follow the American example by immediately putting into the public domain all relevant legal opinions provided to ministers. These should include any opinions concerning the relevant legal standards on torture and complicity and the implications of those legal standards for the Government’s policies on the use of information which may have been obtained by torture and the sharing of information with foreign intelligence services. They should also include any relevant opinions concerning Article 4 UNCAT and the general principles of state responsibility for complicity.**

¹²⁷ Ev 40.

Inquiry or prosecution?

97. On 26 March 2009 the Attorney General announced that she had decided to invite the Metropolitan Police to investigate the allegations of possible criminal wrongdoing in one of the cases of alleged complicity, that of Binyam Mohamed. This followed the judgments of the High Court in the civil proceedings in that case. One of the matters which it is likely that the police and the Crown Prosecution Service are considering is whether or not criminal charges should be brought against “witness B” in that case, who is an intelligence officer who interviewed Mr. Mohamed in Pakistan pursuant to the Government’s then policy.

98. During the recent debate on overseas torture in the House of Commons,¹²⁸ David Davis MP contrasted the American approach to the UK’s approach to the subject of torture: whereas the Americans have been open in publishing the details of their policies and made clear that junior officers who were acting in accordance with those policies will not be prosecuted, the UK has done the opposite. The policies remain secret and there is, apparently, a police investigation into whether charges should be brought against a relatively junior intelligence officer who was implementing the policy.

99. We share Mr. Davis’s concerns about the way in which the Government is currently dealing with the allegations that it has been complicit in torture. We do not consider that the possibility of prosecutions should be ruled out, but nor do we believe that a criminal investigation is, at this stage, the best way to get to the bottom of the many unanswered questions that these allegations raise. **In view of the large number of unanswered questions, we conclude that there is now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK’s complicity in torture.** Decisions on possible prosecutions should await the outcome of any such independent inquiry.

100. A model for such an independent inquiry exists in the shape of the Canadian Arar Commission, an independent body with a judicial chair and security cleared lawyers, which investigated similar allegations of complicity by Canadian agencies in the rendition and torture of a Canadian citizen, including by the provision of intelligence information to the US by Canadian police.¹²⁹ We met some members of the Commission during our visit to Canada in 2005 in connection with our work on Counter-Terrorism Policy and Human Rights.¹³⁰ We were impressed by its work. The Commission’s remit required it to investigate and report on the actions of Canadian officials in relation to Mr. Arar and also to make recommendations about an independent, arms-length review mechanism for the police’s activities with respect to national security. The Commission made a number of recommendations, including some concerning increased independent scrutiny of the security services and intelligence agencies.

101. We recommend that the independent inquiry which is set up to investigate allegations of UK complicity in torture should also be required to make

¹²⁸ HC Deb 7 July 2009 cc 940-43.

¹²⁹ *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, 2006).

¹³⁰ See Twenty-fourth Report, Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240, HC 1576 at para. 151; *UNCAT Report*, above, n. 1, at para. 60.

recommendations about improving the accountability of the security and intelligence services, and removing any scope for impunity, having regard to the recommendations recently made on this subject by bodies such as the UN Special Rapporteur, the Eminent Jurists Panel of the International Commission of Jurists, and the Council of Europe.

102. We also recommend that any inquiry should also look into whether there was any connection between the UK Government's controversial view of the limited territorial scope of application of UNCAT on the one hand¹³¹ and the adequacy of its guidance to its intelligence and security operatives on the other.¹³²

¹³¹ *UNCAT Report*, above, n.1, at paras 69-73; Government response to UNCAT Report, above, n. 121, at p. 10.

¹³² The UK Government maintained its position that UNCAT does not apply to the actions of its agents overseas, long after even the Bush administration had explicitly accepted that UNCAT has extra-territorial application: see e.g. statement of US Secretary of State Condoleezza Rice at Andrews Air Force Base, 4 December 2005.

Conclusions and Recommendations

1. There is [...] no room for doubt, in our view, that complicity in torture would be a direct breach of the UK's international human rights obligations, under UNCAT, under customary international law, and according to the general principles of State Responsibility for internationally wrongful acts. (Paragraph 27)
2. We [...] conclude that complicity has different meanings depending on whether the context is individual criminal responsibility or State responsibility:
 - for the purposes of individual criminal responsibility for complicity in torture, “complicity” requires proof of three elements: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime;
 - for the purposes of State responsibility for complicity in torture, however, “complicity” means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place. (Paragraph 35)
3. We agree with Professor Sands's view, that if the Government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on, systematically receiving and/or relying on the information but not physically participating in the torture, that might well cross the line into complicity. (Paragraph 41)
4. Systematic, regular receipt of information obtained under torture is in our view capable of amounting to “aid or assistance” in maintaining the situation created by other States' serious breaches of the peremptory norm prohibiting torture. We therefore consider that, if the UK is demonstrated to have a general practice of passively receiving intelligence information which has or may have been obtained under torture, that practice is likely to be in breach of the UK's international law obligation not to render aid or assistance to other States which are in serious breach of their obligation not to torture. (Paragraph 42)
5. It follows from the above that, in our view, the following situations would all amount to complicity in torture, for which the State would be responsible, if the relevant facts were proved:
 - A request to a foreign intelligence service, known for its systemic use of torture, to detain and question a terrorism suspect.
 - The provision of information to such a foreign intelligence service enabling them to apprehend a terrorism suspect.
 - The provision of questions to such a foreign intelligence service to be put to a detainee who has been, is being, or is likely to be tortured.

- The sending of interrogators to question a detainee who is known to have been tortured by those detaining and interrogating them.
 - The presence of intelligence personnel at an interview with a detainee being held in a place where he is, or might be, being tortured.
 - The systematic receipt of information known or thought likely to have been obtained from detainees subjected to torture. (Paragraph 43)
6. We note that the Foreign Affairs Committee was able to question the Foreign Secretary on a range of issues associated with torture and shed some light on matters we have only been able to explore in writing, as part of its wider inquiry into international human rights issues. This calls into question the reasons why the Foreign Secretary (and the Home Secretary) should refuse to give oral evidence to us. (Paragraph 52)
 7. We fully accept that intelligence co-operation is both necessary and legitimate in countering terrorism, and that a degree of state secrecy is justifiable in this area. However, there must be mechanisms for ensuring accountability for such co-operation. The allegations we have heard about possible UK complicity in torture in Pakistan, the evidence which has emerged during the legal proceedings brought by Binyam Mohamed and the allegations by Craig Murray that the UK knowingly received evidence derived from torture are all extremely serious matters for which Ministers are ultimately accountable. Our experience over the last year is that Ministers are determined to avoid parliamentary scrutiny and accountability on these matters, refusing requests to give oral evidence; providing a standard answer to some of our written questions, which fails to address the issues; and ignoring other questions entirely. Ministers should not be able to act in this way. The fact that they can do so confirms that the system for ministerial accountability for security and intelligence matters is woefully deficient. (Paragraph 56)
 8. We urge Members of the House of Commons regularly to take the opportunity to debate the membership of the ISC, to help ensure that the Committee is subject to frequent scrutiny. (Paragraph 59)
 9. The missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services. In our view, this can be achieved without comprising individual operations if the political will exists to provide more detailed information to Parliament about the policy framework, expenditure and activities of the relevant agencies. The current situation, in which Ministers refuse to answer general questions about the Security Services, and the Director General of MI5 will answer questions from the press but not from parliamentarians, is simply unacceptable. (Paragraph 65)
 10. A good first step would be for the Government to propose to establish the ISC as a proper parliamentary committee, with an independent secretariat (including independent legal advice), which would establish ministerial accountability to Parliament in this area at a stroke. The recent allegations about complicity in torture should be a wake up call to Ministers that the current arrangements are not

satisfactory. We look to the Government to respond positively to this suggestion and not to continue to hide behind a wall of secrecy. (Paragraph 66)

11. We are concerned that the narrow remit of the Investigatory Powers Tribunal precludes investigation of individual complaints, where complainants are reluctant through fear for their safety or otherwise to approach the Tribunal directly, as well as of systemic issues, where a series of complaints suggests that there are wider problems with the policy or operations of the security services. (Paragraph 70)
12. The ISC's letter on alleged complicity in torture has yet to be published, over four months after it was submitted to the Prime Minister. We urge the Prime Minister to make its contents public, with the minimum of redaction, as soon as possible. (Paragraph 73)
13. We welcome the Government's decision to consolidate and publish guidance to security services' personnel on work in detention and interrogation. We also welcome the Prime Minister's statement that redaction prior to publication will be kept to a minimum. (Paragraph 75)
14. We recommend that the Government clarify whether the Government or the ISC will be revising existing guidance as part of the consolidation and review process. We also recommend that the Government should release earlier versions of the guidance, subject to any necessary redaction. (Paragraph 76)
15. We welcome the appointment of Sir Peter Gibson to monitor compliance with Government guidance to security services' personnel on detention and interrogation issues. We call on Sir Peter to ensure that he publishes as much information as possible on his work in this area in his annual reports, which we look forward to scrutinising. (Paragraph 77)
16. We recommend that the Government publish immediately all versions of the instructions/guidance given to intelligence officers and security service personnel concerning the standard to be applied in relation to the detention and interviewing of detainees overseas, including the current draft being considered by the Intelligence and Security Committee, to ensure that it fully and correctly reflects the UK's human rights obligations. (Paragraph 87)
17. We do not accept, in this instance, that it is "in the interests of good governance" for the Government to refuse to waive its legal professional privilege by publishing the relevant legal advice. On the contrary, we consider that good governance demands it and that the Government's invocation of legal professional privilege is another disappointing example of resort to state secrecy to prevent proper parliamentary and public scrutiny of an issue of great public concern. (Paragraph 93)
18. We call on the Government to follow the American example by immediately putting into the public domain all relevant legal opinions provided to ministers. These should include any opinions concerning the relevant legal standards on torture and complicity and the implications of those legal standards for the Government's policies on the use of information which may have been obtained by torture and the sharing of information with foreign intelligence services. They should also include

any relevant opinions concerning Article 4 UNCAT and the general principles of state responsibility for complicity. (Paragraph 96)

19. In view of the large number of unanswered questions, we conclude that there is now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK's complicity in torture. (Paragraph 99)
20. We recommend that the independent inquiry which is set up to investigate allegations of UK complicity in torture should also be required to make recommendations about improving the accountability of the security and intelligence services, and removing any scope for impunity, having regard to the recommendations recently made on this subject by bodies such as the UN Special Rapporteur, the Eminent Jurists Panel of the International Commission of Jurists, and the Council of Europe. (Paragraph 101)
21. We also recommend that any inquiry should also look into whether there was any connection between the UK Government's controversial view of the limited territorial scope of application of UNCAT on the one hand and the adequacy of its guidance to its intelligence and security operatives on the other. (Paragraph 102)

Formal Minutes

Tuesday 21 July 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Dubs	Mr Virendra Sharma MP
Lord Morris of Handsworth	
The Earl of Onslow	
Baroness Prashar	

Draft Report (*Allegations of UK Complicity in Torture*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 102 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Twenty-third Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 11 November 2008, 16 December, 13 January, 24 February, 3, 10, 17 and 31 March, 12 May, 23 June and 7 July.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 13 October at 1.30pm.]

Witnesses

Tuesday 3 February 2009

Page

Mr Ian Cobain, Senior Reporter, *The Guardian*, **Mr Brad Adams**, Human Rights Watch and **Mr Ali Dayan Hasan**, Senior Researcher, Asia Programme, Human Rights Watch.

Ev 1

Tuesday 28 April 2009

Mr Craig Murray, former British Ambassador to Uzbekistan.

Ev 13

Professor Philippe Sands QC, Professor of Law, University College London

List of written evidence

1	Letter from the Chair of the Committee to the Rt Hon Jacqui Smith MP, Home Secretary, dated 16 October 2008	Ev 30
2	Letter from the Rt Hon Jacqui Smith MP to the Chair, dated 10 November 2008	Ev 30
3	Letter from the Chair to the Rt Hon Jacqui Smith MP, dated 9 December 2008	Ev 31
4	Letter from the Rt Hon Jacqui Smith MP to the Chair, dated 22 December 2008	Ev 31
5	Letter from the Chair to the Rt Hon Baroness Scotland of Asthal QC, Attorney General, dated 10 February 2009	Ev 31
6	Letter from the Rt Hon Baroness Scotland QC to the Chair, dated 12 February 2009	Ev 32
7	Letter from the Chair to Rt Hon Jacqui Smith MP, Home Secretary and the Rt Hon David Miliband MP, Foreign Secretary, dated 10 February 2009	Ev 33
8	Letter from the Rt Hon Jacqui Smith MP and the Rt Hon David Miliband MP to the Chair, dated 26 February 2009	Ev 33
9	Letter from the Chair to the Rt Hon Jacqui Smith MP and the Rt Hon David Miliband MP, dated 17 March 2009	Ev 35
10	Letter from the Rt Hon Jacqui Smith MP and the Rt Hon David Miliband MP to the Chair, dated 20 April 2009	Ev 36
11	Letter from the Chair to the Rt Hon Gordon Brown MP, Prime Minister, dated 26 March 2009	Ev 37
12	Letter from the Chair to the Rt Hon Jacqui Smith MP and the Rt Hon David Miliband MP, dated 12 May 2009	Ev 38
13	Letter from Rt Hon Alan Johnson MP, Home Secretary and Rt Hon David Miliband MP to the Chair, dated 29 June 2009	Ev 38
14	Human Rights Watch	Ev 40
15	Ian Cobain, <i>The Guardian</i>	Ev 46; 51; page 40
16	Mr Michael Davies	Ev 54
17	Mr Craig Murray	Ev 55; 58
18	Professor Philippe Sands QC	Ev 59; 60; 78
19	Letter from Andrew Tyrie MP, Chairman of the All-Party Group on Extraordinary Rendition to the Chair, 28 January 2009	Ev 79

20	Letter from the Chair to Jonathan Evans, Director General, MI5, dated 27 January 2009	Page 45
21	Letter from Jonathan Evans to the Chair, dated 3 February 2009	Page 45
22	Memorandum submitted by Guardian News and Media, dated 5 June 2009	Page 46
23	Letter from the Rt Hon Gordon Brown MP, Prime Minister, to the Chairman, dated 18 June 2009	Page 49

Written Evidence

Annex to the memorandum submitted by Ian Cobain, *The Guardian*, January 2009

MSS

1. The FCO denies that it was unhelpful to MSS's father, and says it offered considerable assistance until the whereabouts of MSS became known.
2. MSS says that since his return to the UK he has been approached on a number of occasions by individuals who have identified themselves as officers of the Security Service.

Rangzieb Ahmed

3. During the abuse of process hearing that preceded Ahmed's trial, the court heard that he received no consular assistance in detention, and was seen by a consular official for the first time shortly before being put aboard a flight to the UK. Helen Rawlins, head of the consular section in Islamabad, told the court that she took up the post in March 2007, and it was May 2008 before she learned of Ahmed's detention. Consular access was then denied.
4. Ahmed has told the Guardian, via his solicitor, that he has been refused permission to correspond with the newspaper's journalists, telephone them, or receive visits from them in prison.
5. The Guardian has been considering whether it should pursue legal action in an attempt to bring some of the judge's closed ruling into the public domain. We wrote to Ahmed's solicitor, seeking his advice, and he turned to the court for guidance.
6. After a hearing on the matter was held, in camera, the judge ruled: "Submissions have been made to me by counsel for Rangzieb Ahmed that three distinct parts of the closed judgement should be removed from that part of the judgement and included in the open part. "I do not propose to deal in detail with those submissions. I have borne in mind, and I have throughout, the guiding principle and importance of open justice. As I said in the course of argument I would very much prefer that all my reasons could be made available to the public. As it stands, because of the exclusion of important parts of the evidence and my reasoning from the open judgement, people may find it difficult to understand why I reached the conclusions that I did. That is unfortunate and does nothing to improve the public's confidence in the judiciary.
7. "However, having made a ruling allowing some of the evidence to be given in camera, I have had to consider against the criteria on which I made that decision what can properly be included in an open judgement and what needs to remain, for the time being in a closed judgement.
8. "I have reconsidered those matters which I was asked to look at. I have also sought and received confirmation that the reasons for the original in camera order remain intact. My conclusion is that the judgements should remain in their present form. The matters which

I am invited to put in the open judgement are so intertwined with matters in the closed judgement that I consider it is impossible to disentangle them."

Salahuddin Amin

9. Amin's description of the room in which he says he was tortured, with a few pieces of furniture and a small CCTV camera above a glass-fronted cupboard appears similar to that described by Rangzieb Ahmed.

10. Amin says he was not hooded on surrendering to ISI officers at his uncle's home. He says he was driven to an ISI prison and hooded once he was inside. He has given a detailed description of the route to the prison and its exterior.

11. Last April Waqar Kiani drove along the route described by Amin. He found himself at a building in central Rawalpindi that matched Amin's description. Local people told Waqar that it was known to be an ISI facility.

12. On May 1 last year, after The Guardian reported on Amin's allegations of British collusion in torture in some detail, we published a letter from Tony McNulty, then Minister of State at the Home Office, in which he said: "the government unreservedly condemns the use of torture as a matter of fundamental principle and works hard with its international partners to eradicate this abhorrent practice worldwide. The security and intelligence agencies do not participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment. For reasons both ethical and legal, their policy is not to carry out any action which they know would result in torture or inhuman or degrading treatment."

13. A response from Amin's solicitor, Tayab Ali, was published on May 5: "I would like to thank Tony McNulty for taking the time to respond to your leader of April 30. However it is unfortunate that he has issued a blanket denial rather than addressing the specific allegations levelled at the security services and the government. In order to assist I again clearly state that which has been asserted against the government, namely that the security services (MI5) or secret intelligence service (MI6) at the very worst instigated and at the very best turned a blind eye to the illegal detention, mistreatment and torture of British citizens in Pakistan.

14. "I hope McNulty will be able to answer the following questions: Did the British government or its agencies request that the Pakistani authorities should detain Salahuddin Amin? Why did the British government wait for 10 months before arranging to have Amin brought into UK jurisdiction from Pakistan? What did British intelligence officers in Pakistan think was happening to Amin in between their MI5 interrogations? Does McNulty agree that providing assistance in the detention of a person by an organisation notorious for abuse and illegality renders the helper morally and legally complicit in later abuse? Why did British consular officials fail in their duty to visit Amin and offer him protection? Why has the ISI not provided one single document relevant to their 10-month detention of Amin. Can McNulty explain why the government's responses to Amin's allegations were only provided in secret hearings during Amin's trial? What was the government so keen to hide from the public?

15. "If it is to be accepted that it is government policy not to carry out any action that would result in torture then, based on the allegations made by these individuals, there appears to have been a gross failure in that policy. In these circumstances I am sure McNulty must agree it is essential that an urgent independent inquiry establishes why this policy has failed.

16. Amin had been able to telephone and write to the Guardian, but I have been denied access to visit him for the last 12 months. A reporter from our sister paper, the Observer, was recently admitted to the same prison and allowed to interview convicted terrorists. He was not asking questions about allegations of British collusion in torture. Last month, however, Amin's solicitor told me that Amin says he has now been barred from telephoning me for "security reasons".

Rashid Rauf

17. In December 2007, Pakistani officials announced that Rauf had escaped from custody. He is said to have been allowed to pray, unguarded, at a mosque in Rawalpindi while being taken from court to a prison south of the city. He is said to have then slipped out of the back of the mosque.

18. Rauf's lawyer in Islamabad, Hashmat Ali Habib, says that he had heard reports of his client's escape several hours before the time of his escape given in the officials account. He told the Guardian in December 2007: "It wasn't an escape from custody. You could call it a 'mysterious disappearance' if you like, but not an escape. The Pakistanis are simply not interested in handing him over to the British. They never have been, although it is not clear why not."

19. Habib indicated in December 2007 that he believed Rauf to have been returned to ISI custody. He also said it was possible that Rauf's death would be announced at some point in the future: "Perhaps it will be announced that Rashid was caught in crossfire during a police operation."

20. On November 22 2008, Pakistani officials announced that Rauf was one of several people killed when a number of Hellfire missiles were fired a US Predator drone at a target in the village of Khaisoor, close to the Afghan border. Relatives of Rauf are reported to have said they do not believe the official account of his death.

Other detainees

21. The Foreign Office has said, in a number of answers to PQs from Andrew Tyrie MP, that it believes there to have been six British nationals or dual nationals held in Pakistan since 2000 and questioned about terrorism allegations. According to the reply from Kim Howells, then Minister of State with responsibility for counter-terrorism, two detainees who were mono nationals were seen by British officials other than consular officials. It is not clear from his answer whether any dual nationals were seen by British officials other than consular officials. Dr Howells subsequently wrote to Mr Tyrie amending to eight the total number of British nationals or dual nationals held in in such circumstances. He did not state whether either or both of the additional two had been seen by non-consular British officials. The Guardian finds the figure of eight to be puzzling, as we believe there to have been at least eleven British nationals and dual nationals detained in such

circumstances since 2000, all of whom are thought to be known to the FCO.¹³³ It is not clear to us what the total number may be.

Calls for an investigation

22. There have been a number of calls for an investigation into these allegations.

23. The Foreign Affairs Committee said in its Human Rights Annual Report published in July last year: "We conclude that it is extremely important that the veracity of allegations that the Government has 'outsourced' interrogation techniques involving the torture of British nationals by Pakistani authorities should be investigated."

24. The same month, John McDonnell said of his constituent MSS: "I believe that there is now sufficient evidence from this and other cases to demonstrate that British officials outsourced the torture of British nationals to a Pakistani intelligence agency." Mr McDonnell added: "This warrants the fullest investigation by the Intelligence and Security Committee, which is best placed initially to undertake such an inquiry. I would expect the government to cooperate fully with such an investigation and eventually for the prime minister to make a statement to parliament on how this practice has been allowed to develop and what action is to be taken."

25. Andrew Tyrie, chair of the All Party Parliamentary Group on Extraordinary Rendition, said: "Any torture of British nationals by Pakistani authorities would be utterly unacceptable. If credible allegations implicating British officials in such mistreatment have been made then they require investigation. The ISC appears to be the most suitable body to examine these issues."

26. The Guardian also called for an inquiry in its leading article of July 15 last year that said: "Two bodies have responsibility for oversight - the intelligence and security committee (ISC), chaired by Margaret Beckett, and the investigatory powers tribunal (IPT), presided over by Lord Justice Mummery. If there are British citizens who have been tortured and who are living in fear, these bodies should seek out, and test, their evidence - and, where appropriate and possible, offer them due protection. The ISC - whose reports are evidenced by the security services to show a clean pair of hands - has powers to determine its own procedure. There have been a number of instances where it has reported on specific cases which raise general questions about policy. The IPT is a more shadowy body that observes confidentiality in the great majority of its dealings. In general, it is reluctant to investigate cases in the absence of first-hand complaints. But where parliamentarians believe there are individual cases which merit investigation, there is a very strong argument for Lord Justice Mummery taking a proactive interest."

Official responses

27. Asked about these allegations, the Home Office issued a statement on behalf of the Security Service in June last year that did not address the specific claims, but denied that the Service was involved in torture.

¹³³ James McLintock, aka Mohammed Yaqub; Moazzam Begg; Ahmed Omar Saeed Sheikh; Richard Belmar; Tariq Mahmood; Salahuddin Amin; Zeeshan Siddiqui; Tahir Shah; MSS; Rashid Rauf; Rangzieb Ahmed.

28. It said: "The Government unreservedly condemns the use of torture as a matter of fundamental principle and works hard with its international partners to eradicate this abhorrent practice worldwide. The Security and Intelligence Agencies do not participate in, solicit, encourage or condone the use of torture or inhumane or degrading treatment. For reasons both ethical and legal, their policy is not to carry out any action which they know would result in torture or inhuman or degrading treatment. The ISC gave the Security Service a clean bill of health in its 2005 report on torture. When Security Service personnel had come across instances when poor treatment of detainees was suspected, the Report commended that MI5 officers notified the detaining authorities immediately and this was followed up with an official complaint from London. All Security Service staff have an awareness of the Human Rights Act 1998, and are fully committed to complying with the requirements of the law when working in the UK and overseas. The main laws are Regulation of Investigatory Powers Act 2000, Security Service Act 1989, Intelligence Services Act 1994."

29. This FCO's response to the FAC's calls for an investigation was as follows: "The Government absolutely denies the serious allegation that it has "outsourced" torture as a way of extracting information. We unreservedly condemn the use of torture and our clear policy is not to participate in, solicit, encourage, or condone the use of torture or inhuman or degrading treatment for any purpose.

30. "The Government takes allegations of mistreatment very seriously. As the Foreign Secretary told the House on 17 July: "The Security Service has checked for any relevant information in light of the media allegations and informed [him] that there is nothing to suggest that it has supported torture in Pakistan or anywhere else'.

31. "If there was a question of any person acting in an official capacity being engaged in an act of torture then this would be a matter for the police. If any individual believes that their Human Rights have been infringed as a result of actions carried out by, or on behalf of, any of the intelligence services then they should take their case to the Investigatory Powers Tribunal."

32. The Intelligence and Security Committee has declined to examine these allegations. During the Commons debate on the ISC's annual report, in July last year, David Winnick asked the then chair, Margaret Beckett: "My right hon. Friend probably heard my intervention on the Home Secretary in which I mentioned the serious allegations that a British national had been tortured by Pakistan's secret service and MI5 was aware of it, which has been denied. I do not want my right hon. Friend to commit herself, but will the Committee consider looking into those allegations and investigating accordingly?"

33. Mrs Beckett replied that such allegations are a matter for the Investigatory Powers Tribunal: "As I have already indicated, individual cases are matters for the tribunal. The Intelligence and Security Committee investigates the policy and, indeed, the implementation of the policy by the agencies; the tribunal looks at individual cases. However, I assure my hon. Friend that the Committee is aware and very mindful of the serious concerns that he has raised."

34. We have asked the current chair of the ISC, Dr Howells, whether he shares his predecessor's views on this matter, but have yet to receive a response.

Letter from the Chair to Jonathan Evans, Director General, MI5, dated 27 January 2009

I am writing in respect of the interview you gave to journalists from six national newspapers, on 6 January. According to your website, this was the first time that a serving Director General of the Security Service had given an interview to the press. I understand that amongst the subjects discussed was the level of threat from international terrorism.

I applaud your decision to be interviewed by the press. While there are undoubtedly many aspects of your work which cannot be discussed publicly at present, your views on the security threat facing the UK are highly influential on Government policy and need to be better understood, and scrutinised, by Parliament and the public. I hope that this initiative can be the beginning of a process by which the Security Service does more to inform Parliament and the public of its views and concerns and is willing to be questioned about them.

You may recall that the Joint Committee on Human Rights, which I chair, wrote to you in 2007 in order to find out at first hand your assessment of the security threat facing the UK. We required this information in order to understand the context in which the Government had brought forward its Counter-Terrorism Bill. Unfortunately, you declined to provide us with the information that we had requested.

I now wish to renew my invitation for you to meet my Committee, on the same basis as you recently met the press, so that you can provide us with information about the level of threat from international terrorism, and deal with our questions. Such a meeting will assist our ongoing scrutiny of the Government's counter-terrorism policy and I hope may initiate a more constructive dialogue between the Security Service and Parliament.

I look forward to receiving your reply on whether you are willing to accept my Committee's invitation.

Letter from Jonathan Evans to the Chair, dated 3 February 2009

Thank you for your letter of 27 January.

This Service is of course happy to give an account of its actions, views and concerns, and be questioned on them. The mechanism set up by statute to effect this is the Intelligence and Security Committee of parliamentarians. I regularly give evidence to that Committee and they question me. This is a challenging but constructive process, and of course regular reports on aspects of the ISC's work are published.

I am grateful for your invitation to meet your Committee. As I have said previously, I am prepared to provide your Committee with private background briefing on the current threat, as I have periodically done for the Home Affairs Select. But our parliamentary accountability is to the ISC.

I have copied this letter to Kim Howells.

Memorandum submitted by Guardian News and Media, dated 5 June 2009

Investigating torture: Legal issues that face journalists

Prisoners' visits, telephone calls and correspondence

Journalists face many hurdles when trying to investigate allegations of torture. For example, huge obstacles are placed in the way of any journalist planning to visit a prisoner in order to discuss and assess any allegations of torture. Prisoners are also frequently prevented from making telephone calls or writing to journalists (currently, serving prisoners Salahuddin Amin, Rangzieb Ahmed have been told that they cannot contact journalists this way).

It is extremely difficult to get permission for a journalist to meet with a prisoner to investigate allegations of torture or collusion with torture. It is rare for a media interview with a prisoner to be granted until we reach the stage of threatening to issue judicial proceedings (or even later). This requires huge resources in terms of legal advice and correspondence, and it often is the case that a visit is not agreed to until we have issued proceedings for judicial review of the refusal to grant a visit. The resulting delay (and expenditure of time and resources) prejudices any journalistic investigation into such serious allegations concerning the criminal justice process, such as allegations of UK complicity in unlawful detention and torture in other jurisdictions. It deters many newspapers from pursuing such stories.

The Prison Service interprets the current case law in a very narrow way. It implements the letter but not the spirit of the decisions in *Simms and O'Brien* 1999 and *Hirst* 2002. There is an artificial distinction between communications in face-to-face meetings and by letter or telephone; visits in person are only deemed appropriate in 'exceptional circumstances' where a person seeks to highlight an unsafe conviction or sentence, and telephone interviews are only allowed where a prisoner wishes to make serious representations about matters relating to prison or prisoners. Any request we make for access to interview or to talk to a prisoner about allegations of torture, or other matters of important public interest about the criminal justice system that do not fit within the above criteria, is subject to unacceptable delays and legal wrangling. It takes around 12 months of legal work to achieve an agreement for a journalist to visit a prisoner.

The Prison Service's standard letter in response to a request states that visits are normally only allowed once the prisoner has exhausted all avenues of appeal. However, this restriction is only relevant to particular allegations concerning miscarriage of justice in a prisoner's own case. It is wholly irrelevant to an enquiry into allegations of torture or other matters relating to the criminal justice system in its broader sense. The rules fail to recognize that there are many legitimate avenues of enquiry for journalists concerning the human rights of prisoners, and that a media visit is not always solely concerned with a miscarriage of justice in the sense of a wrongful conviction in the UK. An investigation may also be concerned with other aspects of the criminal justice process, including that prisoner's experience while being held in detention in another country. These are matters that should be protected by Article 10, the right to freedom of expression.

In-camera hearings: Criminal Procedure Rules 2005 (5.1. 2005 No. 384) Pt 69

The whole process under the Criminal Procedure Rules is deeply flawed. First, there is no requirement to put the media on notice of an in-camera application, save for putting up a notice in the precincts of the court. Often the media will not even know that there is an application. The timescales for responding to the initial application are tight, and if the deadline is missed the media have lost an opportunity to challenge a decision to hold a secret hearing. In these circumstances, the media have no realistic prospect of challenging evidence submitted in support of an application, for example by showing that allegedly secret information is already in the public domain. Unlike other cases, where there is a right to an oral hearing on appeal, there is no such right in relation to in-camera hearings and all the submissions are in writing. The media do not get a fair hearing in these cases.

The Criminal Procedure Rules restrict the rights of the media to appeal against in-camera orders. Rule 69.4 (b) states that the appellant (any person directly affected by such an order) must serve advance written notice of intention to appeal against any such order, "not more than 5 business days after the Crown Court Officer displays notice of the application for the order". Unless a reporter is in the vicinity of the court at all times during a relevant trial, and is able to respond extremely promptly, it is not possible to comply with these requirements.

The danger is that in-camera hearings may be used to conceal evidence of British collusion in torture. There is no opportunity to test the evidence given by intelligence officers and others (and issues of general importance to the media and public are not always issues raised by, or of concern to, the parties).

It is disturbing that so many in-camera hearings and closed judgments are based on 'national security' considerations, even where it is accepted by all parties that there is nothing in the content of the information concerned that is in itself a threat to national security. Instead, the argument is put that national security would be threatened if information received as a result of cooperation with other states is disclosed. Where allegations are made about British collusion or knowledge of torture taking place in other jurisdictions, it will almost always involve some information obtained from or provided by another jurisdiction.

The UK government will always argue that any information obtained as a result of intelligence sharing with other jurisdictions should not be disclosed, and so information about torture taking place in other jurisdictions will invariably be kept secret and heard in camera. These claims often appear to be made without actually providing evidence that the country concerned believes that secrecy is necessary in the particular instance (for example, the Binyam Mohamed case). This clearly has implications for the principles of open justice and the need to investigate serious crimes, and it means that journalists face an almost impossible task in attempting to investigate and report on matters of such important public interest.

Closed judgments

The 'closing' of court judgments is a matter of grave concern. In the case of Binyam Mohamed (in which we have made submissions to the court on behalf of UK media, that 7 paragraphs concerning his treatment should be reinstated into the judgment) the Council

of Law Reporters expressed its concern about the frequency in which cases are heard in camera and closed judgments issued. The Council in its submissions pointed out that there is no requirement that these judgments or transcripts should ever be put into the public domain and they may be lost completely, even when any relevant national security concerns have faded into the distant past.

It is essential that a system is devised so that whenever a court gives a closed judgment, the media are allowed (or even invited) to make representations in support of the open justice principle. In many cases, both the judge and the parties involved are content to proceed in secret and there is no-one there to represent the public and to make the case for open justice. There should also be a system of review of all closed judgments to check whether it continues to be necessary to keep these judgments secret. There should be a register of closed judgments so that these important decisions to restrict access to information about court hearings can be tracked and the public or the media should be able to make a challenge to the orders and apply for access to closed material at a later date if appropriate.

Access to evidence

Journalists are finding it increasingly difficult to get access to evidence, even where it has been referred to in open court. This is despite the fact that there is a protocol between ACPO, CPS and the media on the provision of such evidence. (copy attached).

For example, in the case of Rangzieb Ahmed, Greater Manchester Police initially refused to provide us with a photograph used in open court (during an abuse of process application - but we requested the material after the criminal proceedings had ended), which showed Mr. Ahmed's fingernails, some of which had been removed during torture. It was only after our legal department became involved and referred GMP to the ACPO protocol, that GMP eventually relented and provided the material.

The difficulties associated with this case have been commented on by the Readers' Editor for the Guardian (article attached), and this case highlights some of the difficulties faced by journalists where there are in-camera hearings and closed judgments.

Summary

The investigation into allegations of serious crimes, such as collusion with torture, must be recognized as a legitimate and important area of journalistic inquiry and a matter of great public interest. The current attitude of the Prison Service fails to take account of the wider public interest in investigating such matters: the Prison Rules on media visits should be reviewed. It is only the most determined journalists and news organizations that are prepared to devote considerable amounts of their legal department's time and resources to seeking access to prisoners, that are able to overturn what has become a blanket initial refusal to grant media visits to prisoners making such grave allegations.

The Crown and prosecuting authorities too often treat journalists as the enemy rather than abiding by their own protocols on access to evidence.

Scant regard is paid to the principles of freedom of expression and open justice. The increasingly routine reliance on in-camera hearings and closed judgments threatens to close forever a whole chapter of evidence relating to the British intelligence services'

practices and government policy on those held in other jurisdictions, who are often subjected to cruel, inhuman and degrading treatment.

These are some of the key legal issues that often impede a journalistic investigation into allegations of torture. Together, these factors have restricted news organizations' ability to investigate fully, and report on, these allegations of torture in other jurisdiction, and UK collusion in that torture.

4 June 2009

Letter from the Rt Hon Gordon Brown MP, Prime Minister, to the Chairman, dated 18 June 2009

Thank you for your letter of 26 March following my written statement on detainees. I shall respond to your specific questions in the order in which you posed them.

On the subject of “collusion” in torture carried out by others, I am glad that you welcome my statement and the measures the Government has taken so far in response to allegations of complicity in torture overseas. I repeat that the UK will not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose. Nor, for the avoidance of doubt, will we “collude” in torture carried out by others.

On the point of law which you raise, neither the UN Convention Against Torture nor the European Convention on Human Rights, which is incorporated directly into UK law by the Human Rights Act, include a positive legal obligation to report or seek to prevent acts of torture carried out by other states abroad. However, the UK is committed to the prevention of torture, and our efforts in this regard include a combination of project work and diplomatic activity to build other states' capacity and awareness of human rights. We also encourage ratification and implementation of the Optional Protocol to the Convention Against Torture, including the establishment of national preventative mechanisms.

You also asked about the letter which the Chairman of the Intelligence and Security Committee (ISC) sent me on 17 March concerning allegations of complicity in torture. This was a letter rather than a formal report. As the ISC stated in its press announcement, it addressed issues which remain the subject of legal proceedings and police investigation. I must therefore consider carefully before deciding whether and in what format it can be published, and the timing of any publication.

I can assure you that it remains the Government's wish to consolidate for review by the ISC, and then publish, the guidance under which UK officers work in detention and interrogation circumstances, in order to make clear the very high standards which apply. Work is underway to provide consolidated guidance to the ISC. We have already provided all potentially relevant original material.

With regards to publication, the Government will aim to keep any redactions that may be necessary for national security reasons to a minimum and will take the ISC's views into account. There are no plans for wider distribution prior to publication.

Sir Peter Gibson has agreed to monitor compliance with the consolidated guidance once it has been finalised, and will cover compliance in this area in his published annual reports as Intelligence Services Commissioner. The cases currently being examined in the courts and elsewhere are historical and so will not be relevant to Sir Peter's remit.

The content of Sir Peter's annual reports is, of course, a matter for him to determine. However, I would expect and will encourage him to focus on the systemic issues you describe rather than the individual cases. As you have noted, individual complaints fall to the Investigatory Powers Tribunal to consider.

List of Reports from the Committee during the current Parliament

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 nd , 4 th , 8 th , 9 th and 12 th reports of Session 2008-09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882

Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008-09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

Oral evidence

Taken before the Joint Committee on Human Rights on Tuesday 3 February 2009

Members present:

Mr Andrew Dismore, in the Chair

Dubs, L
Lester of Herne Hill, L
Onslow, E

Dr Evan Harris
Mr Virendra Sharma
Mr Edward Timpson

Witnesses: **Mr Ian Cobain**, Senior Reporter, *The Guardian*, **Mr Brad Adams**, Human Rights Watch and **Mr Ali Dayan Hasan**, Senior Researcher, Asia Programme, Human Rights Watch, gave evidence.

Q1 Chairman: Good afternoon everybody and welcome to an oral evidence session of the Joint Committee on Human Rights. This is part of an inquiry into the UN Convention Against Torture: allegations of abuse and mistreatment involving UK agents in Pakistan. We are joined by Ian Cobain, reporter from *The Guardian*, Brad Adams, Director and Ali Dayan Hasan, Senior Researcher, Asia Programme, of Human Rights Watch. Welcome to you all. I should start by mentioning our terms of reference for everyone generally. Our remit relates to the human rights in the UK so we will be focusing on the activities of UK agents who are subject to the Human Rights Act and not UK foreign policy or the activities of Pakistani agencies; and we cannot investigate individual cases. So those are the terms of reference within which we have to operate. I do not think that any of the cases that have been referred to are *sub judice*; if any new cases are referred to we may have to check as we go along because obviously if they are *sub judice* we cannot deal with them. Perhaps I could start off by asking Ian, what are the main features of the allegations you have investigated?

Mr Cobain: Each of these allegations concern British nationals or dual nationals against whom there may for a while have been a suspicion that they were involved in terrorist activities, although in some instances it is now accepted that they were not. Each of them were detained in Pakistan by one of the Pakistani intelligence agencies and each of them, in different ways, have made allegations or allegations have been made on their behalf that they suffered severe mistreatment that amounts to torture—very clearly was torture—and that they were forced to conclude that there was a degree of British collusion in that mistreatment, usually because they say that they were mistreated and then questioned by British officials. In some instances they say that they saw the British officials just once; in other instances they say that they saw these British officials on a number of occasions and that where there is a pattern—it does appear that there is a pattern, which I think is interesting—the allegation is that they would be tortured, they would be asked a series of questions under torture, they would give answers and would then be asked the same questions by British officials who would identify themselves as being from the

British Government and specified that they were not consulate officials. In some instances the allegation is that the torture would then resume with a different set of questions; then it would end and British officials would come along and ask that same set of questions again.

Q2 Chairman: Is there any suggestion that British officials participated in or directly witnessed torture?
Mr Cobain: None whatsoever.

Q3 Chairman: So what you are suggesting, it seems to me, is complicity in what was going on?
Mr Cobain: That is the allegation; the allegation is that there was complicity, yes.

Q4 Chairman: And if there was complicity then that would be a clear breach of Article 5 of the United Nations Convention Against Torture.
Mr Cobain: I believe so, yes.

Q5 Chairman: And under Article 6 the government would have the obligation to arrest anybody within the jurisdiction who was involved in that.
Mr Cobain: That is my understanding, although I am not a lawyer.

Q6 Chairman: I will ask Human Rights Watch now what additional or corroborating evidence do you have that the UK has been complicit in torture by Pakistani Intelligence Services?
Mr Hasan: We have in the course of our research come across statements provided to us off the record by Pakistani Intelligence agencies, by officials serving in former—

Q7 Earl of Onslow: You say off the record?
Mr Hasan: Yes, off the record admissions of accounts of what happened, i.e. these people do not wish to be named, they wish to remain anonymous, they have given us permission to use the account where we have asked for it. What I have been told personally and we have been told organisationally is that there was awareness on the part of British intelligence agents that this mistreatment was taking place; in fact that it was, as one former Pakistani official said to me, “The manner in which we process detainees and our British counterparts are aware of

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that". So we have repeatedly come across this and this involves not just Pakistan's Inter-Services Intelligence, ISI, which is the military intelligence, but also the Intelligence Bureau, which is a civilian intelligence agency.

Q8 Chairman: So the evidence that you have—putting the Pakistani intelligence services to one side—what is the evidence you have of British involvement directly in this? Do you have evidence of British officials witnessing or participating in torture or is it *ex post facto* complicity?

Mr Hasan: No. We have no evidence of British officials participating or witnessing torture. What we have are statements that we believe to be credible—in one instance from one of the victims himself while he was still in Pakistani custody, and this statement was smuggled out to us through intermediaries within the Pakistani prison system and others. That statement alleged that shortly after this person had been put through severe torture he had been visited by British intelligence agents. We draw that conclusion of complicity from the following: if there is overwhelming physical evidence that physical mistreatment or torture has taken place an interrogating agent cannot fail to notice that the person is in a state of physical disrepair.

Q9 Chairman: So your source is saying that the person who was under interrogation had physical, visible marks that he had been beaten up, or whatever he had been, when he was interviewed by a British intelligence officer?

Mr Hasan: Absolutely.

Q10 Chairman: And that the British intelligence officer would have seen quite clearly that he had been subject to some form of mistreatment?

Mr Hasan: Quite.

Q11 Dr Harris: Can I ask you to respond to this point, that the minister says in a letter to us that the government never uses torture for any purpose, including to obtain information, nor does it instigate others to do so. Do you think the government could go further than that, or would need to go further than saying it simply would not instigate it or take part in it, in order to comply with the Convention obligations?

Mr Cobain: What I would like to see is the individual allegations being addressed rather than a blanket denial. When asked about this the government officials, government agencies say, "Look, we do not get involved in torture", but the allegation is that they clearly do and there is some evidence for those allegations. What I would like to see is the specific allegations being addressed in some way.

Q12 Dr Harris: The government may not actually believe that torture takes place in Pakistan at all. As I understand it from the evidence submitted in the submission from Human Rights Watch you refer to Lord Malloch-Brown's answer to the Foreign

Affairs Committee when he says—and I am quoting you paraphrasing him—"He did not know whether he was 'prepared' to go further by stating that the ISI was guilty of practising torture." Is it your view that that is a problem or do you think that the government does recognise that torture takes place, albeit not by UK agents?

Mr Adams: There is no doubt that the British Government is aware that torture takes place systematically. We have had discussions again with officials, who I would not feel comfortable quoting because they did not expect to be quoted, in Islamabad and in London where we have discussed this matter. There is no serious official in the British Government who would deny that this is a widespread and systematic problem. One simply has to read the newspapers in Pakistan on a daily basis, read State Department reports, read our reports, read Amnesty International reports, read the reports of the Human Rights Commission in Pakistan, talk to government officials and there is no basis for anybody to suggest that this is not a common practice.

Q13 Chairman: The discussions you had with the officials, they were British officials?

Mr Adams: British officials. We have raised these allegations with British officials but only in settings where we cannot identify the officials because that is the nature of the conversations.

Q14 Dr Harris: Lord Malloch-Brown said what he said and I wanted to ask in the court cases, such as there have been, whether it has been the line, as far as you know, of the British Government that there is not any torture, far less any UK involvement in torture.

Mr Cobain: In one case there was a ruling from the judge in the case of Salahuddin Amin that he had suffered treatment which was physically oppressive but which fell short of torture and because of that ruling the judge decided that his trial should proceed. This is a man who spent ten months as a prisoner of the ISI. In another court case it is impossible to know what the judge ruled—he issued two rulings, one public and one in camera ruling. In his open ruling he made it clear that people reading the open ruling should not make too many assumptions about what is in the closed one on the basis of reading just the open one; so there is that sort of health warning. It is impossible to know what the government's response was in either of those trials because on each occasion they were held in camera so the press and the public were excluded from the hearings before the government gave their response to the allegations of torture. I cannot speculate what was said in camera, I just cannot do that, but I do know that the evidence of the Crown's own pathologist in one of these cases—one of these individuals had three fingernails missing by the time he returned from Pakistan—was that the fingernails were parted from his fingers as a result of some sort of traumatic incident. He claimed that they had been ripped out with pliers—maybe that was the case, maybe it was not—but one of the fingernails at least

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had parted company with his fingers just a few months before his repatriation to the UK; in other words, this had happened while he was in Pakistani custody.

Q15 Dr Harris: What you really need to bolster the case is a court ruling that torture has taken place and therefore the throwing out of some charges on that basis, but so far it is possible that the courts are generally assuming that these suspects are making up these allegations as a way of escaping—

Mr Cobain: We do not know what the court ruling is unfortunately. In the case of Rangzieb Ahmed we just do not know what the judge ruled—we do not, it was a secret ruling. We know he ruled that the trial should proceed and he was then tried and convicted but we do not know what else was in the judge's closed ruling.

Mr Adams: I am a lawyer and as a legal matter the judge had to make a threshold decision based on the evidence whether the evidence was such that the entire case should be thrown out, even if the defendant was guilty of the charges that were preferred. The judge decided not to do that and it is in his ruling; that is in the public statement of the judge in the open ruling.

Q16 Chairman: So if he had been tortured, in the nature of the evidence as a whole that would have been insufficient to completely pollute the whole trial?

Mr Adams: It is a very big decision for a judge to throw out an entire case, particularly where there may be strong evidence against a defendant—I do not know the evidence in this case—on the basis that the conduct of the government was so prejudicial and so beyond the law that the whole case should be dismissed. In other words, that would possibly result in a guilty person being released because of state misconduct. What we do not know, as Ian is saying, what happened in camera and we do not know what evidence may have been dismissed because of accepting allegations of torture. Ali can tell you; he has been a witness in two of these cases.

Mr Hasan: If I may, I have been a witness in the case of Salahuddin Amin and Rangzieb Ahmed as an expert witness and all the claims that we make in the document that we have submitted to you about the state of torture in Pakistan, we routinely describe torture in Pakistan as systemic, endemic and widespread. These claims were accepted by all parties in these cases, so the prosecution and the defence accept our map, if you will, of the state of torture in Pakistan. Further, I would like to draw your attention to the fact that what happens in Pakistan, because torture is so widespread, that often when suspects appear in court they are in some kind of state of physical disrepair and often you have visible injuries. But in the case of one of these British citizens those injuries and that state of disrepair was so marked that the Pakistani judge ordered

immediate medical treatment because it was evident that this person was in great physical distress.

Q17 Chairman: Your point is that if it was evident to the Pakistani judge it would have been evident to the British Security Service.

Mr Hasan: That is precisely my point and that appearance in the Pakistani court took place after the meeting with the British security agents, so I find it mind boggling really how British security agents could have failed to notice that this person had evidently undergone serious violence.

Q18 Dr Harris: Mr Cobain, do you think it is relevant that they are asking the same questions because it seems that there are two options the UK agents could have in the allegations. One is that they could use the answers obtained under torture to ask different questions based on those answers, but are you assuming that they are careful not to do that in order to preserve the evidence that is coming from *de novo* questioning without torture taking place there and then?

Mr Cobain: I must admit that that is not one I had thought of asking myself. Is that significant? Maybe it is. A couple of these detainees have said that there are CCTV cameras or some sort of camera in the room and I do not know what all that is about either. It is a question I am going to have to consider in the future.

Mr Adams: Can I come back to your question about whether the British Government directed or instigated their line? The British Government would not meet its CAT obligations and its domestic legal obligations simply by saying that they did neither of those two things. The British Government must not be complicit and complicity is a much broader legal term than instigation.

Q19 Dr Harris: So when they talk and Lord Malloch-Brown says, “We do not actively outsource”—again in your submission you quote him as saying that—“We do not actively outsource torture” I think is the term you use, that leaves open the question of passive outsourcing.

Mr Adams: Yes.

Q20 Dr Harris: And you are saying that would be a breach?

Mr Adams: I would go further than that; I would say that the pattern of conduct, both of the British Government and of the American Government in their close, systematic and continuous counter-terror cooperation with the Pakistani authorities has actively encouraged this kind of behaviour.

Q21 Dr Harris: My last question is: do you understand why there is some scepticism in some quarters about these allegations? I guess they come from terrorist suspects who may be seen as either particularly vile or particularly desperate, or both, and they are to a certain extent written for the purposes of a story in a newspaper, and there is not much of a story in torture allegations proven, unfounded or UK agents not involved in torture. So

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can you understand the scepticism that may exist either in government or indeed in the judges in some of these cases?

Mr Cobain: I think it is right to start with a sceptical approach—after all, as you say, most of them are people against whom there are very serious allegations, although not all of them. Two of them have been convicted of very serious criminal terrorist offences: one was convicted of attempting to mount a terrorist attack which was designed to cause widespread loss of life, a huge amount of suffering and a lot of economic damage. So, yes, we should start with a sceptical approach, but we should also ask ourselves if we disbelieve these people is our disbelief based upon a belief that the ISI and other Pakistani intelligence agencies do not torture people? Can we really believe that? I know that Human Rights Watch, who have a lot more experience of Pakistan than I, do not believe it; I do not believe it; and most people who look at these matters do not believe that the ISI do not torture people. That is what you would have to believe. Salahuddin Amin spent ten months as a prisoner of the ISI being questioned about very serious terrorism matters; is it likely that he was tortured? I would have thought it is likely. Is it perhaps inevitable? Some people would say yes, it is inevitable.

Chairman: What we are interested in today is UK complicity allegations, so let us move on.

Q22 Earl of Onslow: The question I wanted to ask you follows from what you were saying before. If one takes the parallel of intercept evidence, which is not allowed to be used in court but you can use it as a primary source because you now know theoretically where to look, would it be reasonable to say that that is exactly the attitude of the UK intelligence officers, who once they have the information which has been obtained by torture then know where to look, and that presumably does produce a complicity?

Mr Cobain: In one case definitely not. In the case of one of these individuals, who was successfully prosecuted, he was prosecuted on the basis of evidence that was largely, if not entirely, gathered in the UK and Dubai before he travelled to Pakistan. He was under surveillance in the UK and under surveillance in Dubai and that surveillance evidence was used against him in court to prosecute him. He then travelled to Pakistan where, according to his evidence, he appeared to be under surveillance while entering the country by an individual whom he met, who he saw later after being detained by the ISI. He most definitely was not prosecuted on the basis of any information at all that was allegedly gleaned under torture in Pakistan. In the other case it is a little more complicated than that but, yes, in a sense that is what the allegation is. He is a man who made a series of admissions under torture; he was then repatriated to the UK and he then made similar allegations while being interviewed by British police officers and it was all videoed and it was very clear that there was no mistreatment of this individual at all while he was in the UK. So that is allegedly what happened in the case of the second person here.

Q23 Lord Dubs: In the cases you have described you have somebody tortured by the Pakistani authorities and then the British people interview them at some time later. My two questions are how much later; and, secondly, how certain are you that there was some eavesdropping on those conversations with the British people which might have influenced the answers?

Mr Cobain: In the case about which we know the most—there are some cases about which the allegations as well as the facts are very sketchy—it seems to be about ten to 14 days. In one instance we know that British authorities passed questions to his Pakistani interrogators before they went to see him and we know this because it was said in court by the defence and was not contested by the Crown. I have reason to believe that the reason it was not contested by the Crown is because the Crown had disclosed that fact to the defence. So some people would suggest that that is evidence of collusion in torture right there.

Q24 Lord Lester of Herne Hill: I am just worried about the *sub judice* rule about that case because is that not the case where you tell us in your memorandum that they are planning to appeal?

Mr Cobain: There will be an appeal.

Chairman: There is no appeal lodged, we understand.

Q25 Lord Dubs: Mr Cobain, we put your allegations to the Home Secretary and she said they had “no basis” and that “UK officials acted properly at all times”. Did the government ask you about your allegations as part of its own inquiry? And how do you respond to the Home Secretary’s refutation of what you wrote?

Mr Cobain: Could you read again what the Home Secretary said a bit more fully? Can I ask for that?

Lord Dubs: It says that there is no basis and that “UK officials acted properly at all times”. Those are the actual quotes.

Q26 Dr Harris: It says, “It is my understanding that there is no basis to the allegations.”

Mr Cobain: After having asked the Security Service, is that what she wrote?

Q27 Dr Harris: It says: “I can say that the Security Service have checked for any relevant information in the light of the allegations and my understanding is that.”

Mr Cobain: So what the Home Secretary wrote is that she had been assured that there were no problems in terms, is that right?

Q28 Chairman: Basically she is saying that she asked the Security Service, they checked and they are saying that there is no basis to the allegations. But Lord Dubs is asking you whether the government asked you for the details of what you are actually alleging beyond what was in the newspaper?

Mr Cobain: I gave all of the details of what the allegations were and the response I received was a blanket denial of any involvement in torture. I was

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told that the Security Service and other British Government agencies do not engage in torture in any way, shape or form, and we comply with the law and these are the laws within which we operate. The individual allegations were not addressed by any of the responses I received.

Q29 Lord Dubs: That was a written response, a letter to you, was it?

Mr Cobain: That was; that was an email.

Mr Adams: For our part we have not received a response even though we have raised this at the highest level in the Foreign Office. Furthermore, it is my understanding that none of the lawyers who have represented individuals in these cases where the allegations have been made have been approached to find out what they might know. So I do not think there is any sign of a proactive inquiry here, if that is what you are getting at.

Q30 Lord Dubs: I will move on to a further point. According to the Home Secretary the Security and Intelligence Agencies do not—and I pick these words carefully—“participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment”. Does this statement cover the activity you allege British intelligence officers have been involved in, in Pakistan? You use the word “complicit”; is this a semantic point that complicit means something different from participate in, solicit, encourage or condone or is something else going on?

Mr Adams: I think there is no question that this is condoned when information that is elicited under torture is then used and is not just used for intelligence purposes and law enforcement purposes but is attempted to be used—and we do not know how successfully because some of the decisions have been made in camera—in court cases. So we do not know how much of the information that may have been elicited through torture has been used. But that is certainly condoning. Encouraging—I also think that this is encouraged, when this kind of cooperation exists. Put yourself in the shoes of the ISI or the Intelligence Bureau or Pakistani law enforcement people; you are operating with colleagues from a foreign government, you are discussing individual cases, you are torturing these people and mistreating them and the information you are giving them is passed to those agencies and there is not only no negative response—in other words the UK Government, we would like, to be conditioning their cooperation on the absence of torture—but it is business as usual, the cases proceed and then you are invited in to interrogate these people. That seems to me to be at the very least encouragement.

Mr Hasan: If I may expand on that? At the Pakistani end, particularly during the Musharraf Government, government officials and security officials in particular were fairly open about this. I was repeatedly told, “You are a British citizen, go and talk to your own government.” We are being asked to do this; we are under pressure to do this, that is the whole discourse.

Q31 Chairman: This is what the Pakistanis say?

Mr Hasan: This is what the Pakistanis say and say it repeatedly, every time you present them with this kind of allegation. Quite often it is not done in a formal setting at all, these are private conversations that are taking place. The idea is to understand what is going on rather than to level public blame and this is the response I have received far too many times and in far too many different contexts for me not to take seriously.

Q32 Chairman: So your allegation here, to use the Home Secretary’s words, is not that they are participating in it but your allegation is that the Pakistani security people are saying that British security people are soliciting, encouraging and condoning it.

Mr Hasan: Quite, yes.

Q33 Lord Dubs: In which case you have partly answered my next question, which was the other way around, which was to say that the Home Secretary also said that the UK’s rejection of the use of torture “is well known by our liaison partners”. Would not that also have the opposite influence on the Pakistani intelligence service from the one you have described? In other words, your argument is that we are condoning it and they know we are condoning it and that gives them a green light. But the Home Secretary would also say that she said the opposite; would that not be sending an opposite message to the Pakistani Intelligence Service?

Mr Hasan: The way I see it is that Pakistan’s use of torture is well known to the British Government and the problem here is that the onus is on the Pakistani security agency to provide information and they are providing that information and the British Government fails to question how that information has been secured. Given this whole context it becomes absolutely clear that they are condoning this kind of activity. Again, in private conversations—and I cannot name the individual—British intelligence officials, former British intelligence officials have expressed some level of distress at this kind of activity that has gone on and have even suggested to me that when this kind of information makes its way into the public domain it does so because there are elements within British Security Services that are deeply uncomfortable with being party to this kind of activity. To me that is not just an admission of regret, it is also an admission of some level of complicity, with particular reference to the case of Rashid Rauf, this gentleman is now suspected killed on 22 November last year and accused of the Heathrow airline plot. I was told by a British intelligence source who I cannot name that because the Pakistanis mistreated that individual while he was in custody it became effectively very, very difficult to try him in Britain for any offences. This was later. What we are seeing is a progression. These are cases that we have monitored and talked about. *The Guardian* has of course done the work that it has done; and, for example, when Rangzieb Ahmed was transported to Britain Human Rights Watch went to great lengths to let the media know

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that this was happening because we knew that a transfer was taking place which may or may not be taking place with the consent of the individual concerned. So there is a pattern to this and I think what we need to concentrate on is the pattern that spans several cases.

Q34 Lord Lester of Herne Hill: I do not want to make a fortress out of a dictionary but can we just go back to these words “participate in, solicit, encourage or condone”? Mr Adams said that the word “complicit” is a very wide one. Are there not words like “aid” or “facilitate” or “permit” which go wider than participate in, solicit, encourage or condone, which on your view would be equally involving complicity. If you aid someone that is not participating in, necessarily, not soliciting, not encouraging or condoning; if you facilitate, the same thing; if you permit, the same thing. What is your comment on that? In other words, is there an area not covered by those words, which would be reprehensible or am I simply being semantic?

Mr Adams: No, I think it is possible that the Home Office has been trying to use semantics to try to avoid responsibility. We would have to look at each one of those words; I would not want to say that they all fit if they do not. It is even possible that if there were an independent inquiry into this we would find that “participate” also applied. As Ali said, there are officials who have been involved in this and others who think that it is reprehensible. We have interviewed CIA and FBI officials and the same debate is happening there. If this were the US we were talking about there is much more evidence about it, but there again the US Government has said, “We do not participate, we do not torture.”

Q35 Chairman: But none of the allegations that any of you have put to us involve participation.

Mr Adams: If your definition is being in the room at the time that someone was tortured then we do not have this. Can I say also in terms of the cases, we have screened out more information than we have included, so back to your question. We are not just repeating everything anyone says to us; our business is to judge the information we have, see if it passes the credibility test and there is a lot of information that is not front of you because we have not deemed it to be credible.

Q36 Chairman: Can I ask you a couple of quick questions about the Rauf case, which you mentioned, Mr Hasan. I recall your memorandum which said that he had been very badly treated and the marks were so physical he could not possibly be put on trial. I also recall reading somewhere that his escape from custody was rather peculiar; is that right?

Mr Hasan: Yes, it was. He went to say his prayers and walked out of the mosque. It was something that puzzled us greatly and it is open to speculation as to how this occurred and why this occurred and the speculation largely has centred around the ISI ensuring that he was not handed over to Britain. Equally there is speculation that he could not be

handed over to Britain for the reasons that I outlined earlier. Now we are told that he is dead; there is no body and we have no confirmation of the fact that he is dead.

Q37 Chairman: He is supposed to have been killed in a drone attack?

Mr Hasan: In a drone attack.

Q38 Chairman: And how soon after his escape was he killed?

Mr Cobain: About 11 months.

Mr Hasan: He was killed in November 2008.

Q39 Lord Dubs: The British Government has been lobbying Pakistan and India to ratify the UN Convention Against Torture. From your perspective how committed is the UK to the eradication of torture worldwide, as a broad political principle?

Mr Hasan: I would say that the commitment is proven where it comes under the severest test and in the case of Pakistan and the counter-terrorism cooperation there, which has been my work experience, I find that that commitment waivers because would the Government of Pakistan take the United Kingdom seriously on this matter is the question? Given what we have laid out before you I find that the Government of Pakistan would view with some irony any submission by the United Kingdom that Pakistan ratified the Convention Against Torture, given this history.

Mr Adams: Can I say that I work more broadly with the British Government, all through Asia and in other contexts, and I think it is a question of the general versus the specific, as Ali said. I think the commitment generally is quite sincere and quite broad. I work in countries where the British Government is working very hard to eradicate torture and takes these allegations quite seriously. The problem of course is when you deal with things like counter-terrorism where it becomes in the national interest of Britain and exceptions seem to be made. So I would think that the general principle is observed by most people in the foreign service; they make unequivocal statements to governments when we raise it with them. If we go to them, for example, in Nepal and say, “Will you please raise this with the Nepali Army?” they are quite good—quite strong, quite committed; but there is no national interest for Britain in Nepal and no cases where they have to decide whether to make exceptions.

Q40 Earl of Onslow: One question which has sprung into my mind as a result of it is do we have evidence of Immigration Tribunals refusing to send people back to Pakistan because of liability for torture, because if that is the case it means that the government must know?

Mr Adams: I know that there are Pakistanis who obtain asylum here on religious grounds; I cannot cite a specific case.

Mr Hasan: Also on the grounds of political persecution; whether that includes the specific allegation of talking or not, we cannot answer.

Chairman: I think we have gone off piste!

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Q41 Earl of Onslow: I have gone off piste, I quite accept that. I am now going to go back on piste. Leaving aside individual allegations do you think that the Intelligence and Security Services are committed to complying with the Human Rights Act and the United Nations Convention Against Torture?

Mr Adams: I will try to answer that question. I think generally yes but there are apparently some glaring exceptions. I think the pressure on counter-terror has been enormous, from the Prime Minister and from other political actors in this country, and I think that what has probably happened here is that the focus has been on results and not on process. What is unclear to us—because we simply cannot know—is when agents of British Intelligence and Security Services have acted in the way we believe they have, whether that has been approved as policy or been seen as an exception. As Ian said, we would be much happier if they would deny specifics and then they could specifically say what they have done in cases where this has come to their attention. I would love to think that people who have done this have been disciplined or there has been some internal discussion about the fact that we should not do this and that these are truly exceptional cases. But as long as the replies are general we will never know that and we have no reason to have confidence that that is the case.

Q42 Chairman: Over what period are these allegations covered? Do you see what I am getting at? If you put all the allegations end to end over what period of time?

Mr Hasan: Through to the end late 2007.

Mr Cobain: Late 2003 to late 2007.

Q43 Chairman: So it is quite a long period. I do not want anyone to identify their sources but is there any question that this could be one or two rogue officers or is it a systematic thing with lots of different people involved?

Mr Hasan: It involves several different officers. I am not clear on which particular intelligence agencies are involved. Certainly at the Pakistani end there are at least two—one that deals with one which is a military intelligence agency and the other that is a civilian one, so they are dealing with their respective counterparts. These are an array of individuals rather than specific individuals.

Q44 Chairman: It is not one rogue?

Mr Hasan: No.

Q45 Earl of Onslow: How many sets of interrogatees are there? You have produced two strong cases. Of what percentage of the people being interrogated does that comprise? Are you saying that this is a generic thing which happens practically the whole time, which you are saying about the Pakistan Intelligence Services, they do it as a matter of habit? You said that in these cases you feel that British Intelligence officers knew what was going on and took advantage of it, as I understand it. You produce these two cases and I am trying to get how

widespread is it, because they have presumably picked up quite a lot of people? If they picked up 100 and it is two people or if they picked up three and it is two people—do you see what I am getting at?

Mr Hasan: I see what you are saying. These are very serious allegations and we cannot make them lightly. Therefore we restrict ourselves to cases that we can document or where we feel that there is enough evidence for us to make an informed claim. I can tell you from my broader experience in working on these issues that there is always a greater body that you cannot get to for reasons of probity, for the best reasons in the world as I outlined. It is very difficult to come up with numbers. There are numbers that have been given. The British Government has provided this figure of eight. We know of 11 British citizens, high profile British citizens who have been held in Pakistan and have alleged some level of mistreatment. What the absolute number is and what the scope and extent of this is I really cannot say. I cannot give you a number, if that is what you are asking.

Mr Adams: Can I just say that this inquiry at this point has been mostly about British citizens. The British Government will have an interest in many more cases than just British citizens, for its own security reasons, and there are—if you want to talk numbers—thousands of people tortured every year in Pakistan.

Q46 Earl of Onslow: It is outside our remit, I am afraid.

Mr Adams: That is what I want to ask of you because your remit, I understand—

Q47 Chairman: Our remit would include alleged complicity of British agents in the torture of overseas nationals, that is true; but at the moment the only evidence we have had from both of you has been in relation to people who are UK nationals or ended up in UK courts.

Mr Adams: Because we have focused on that subject. If you broaden the inquiry—and since you are interested in CAT, which has universal application, and I am sure your inquiry could be broader, as you just suggested—that would draw on a lot more cases because we know that the British Government and the American Government and other governments that are working in cooperation with the Pakistanis have access to detainees in a much broader number of cases and in many cases—and here I can speak with much more precision about the US and whatever relevance to Britain—they are not interested in the court case, they are interested in intelligence. So they would have access to information that was elicited through torture that they would be using for intelligence purposes and not for criminal trials.

Q48 Chairman: If you have any specifics about UK involvement send us another memorandum—that is specifics, not general allegations.

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Mr Adams: Yes.

Lord Lester of Herne Hill: If I may I would like just to be a bit practical and focused for my own point of view and the Committee's. In the Human Rights Watch memorandum to the Foreign Affairs Committee inquiry you made it absolutely clear that you were focusing on Salahuddin Amin and Rangzieb Ahmed, as two examples. In Mr Cobain's memorandum he tells us a lot about those two cases. The question I am driving at is going to be if we were minded to look into these cases what actually could we discover because if you take, first of all, the Salahuddin Amin case, looking at Mr Cobain's memorandum, particularly at paragraphs 46 and 47 in UNCAT 23, we discover that he said he did not tell the British Security officers that he was being tortured because he assumed that they had requested he be treated in that way. We are then told what his counsel, Patrick O'Connor QC told the jury; then we are told that the judge ruled that his treatment before he was brought to the UK was oppressive but he did not believe his allegations of torture. That is what we know from these memoranda about that case. So far as the other case is concerned, Rangzieb Ahmed, we know from Mr Cobain's memorandum that the judge did not address the matters about torture in open court in open judgment, but there is a plan to be an appeal against his conviction and the ruling on the abuse application and a plan to bring civil proceedings, in which the British state will be accused of failing in its duty of care towards him while he was in Pakistani custody. I quite understand Mr Hasan's emphasis on only making the really serious allegations that could stick but what is your view as to what this Committee could possibly do, given that in one case there are likely to be civil proceedings and a criminal appeal and in the other case the judge has already ruled, throwing out the allegations of torture as a finding of fact. What would be left for our Committee to do on those two cases? I am sorry to have taken so long to ask the question.

Chairman: I think actually we cannot do anything on those two cases because they are individual cases which we cannot investigate.

Q49 Lord Lester of Herne Hill: Obviously you are saying that those cases would show complicity by British officials and what I am asking you is if we were minded to how could we discover that on the basis of what you have given us so far?

Mr Adams: If you do not have a remit to take up individual cases I think the Security Services should be asked to explain to you how they wake up in the morning in Pakistan and do their work; and how they have done it in a way that does not create the reality or the appearance that they are condoning or encouraging the methods that Pakistani law enforcement, intelligence and security services use. Short of them producing something in writing or a very persuasive account of how at the most senior levels they have told the Pakistanis that they will not cooperate with them as long as the cases that they are interested in involve these methods they have a problem. I think that these are very fair questions; I

think the burden shifts very quickly to the Security Services if they cannot or will not answer these questions. It is a very difficult environment—we are not saying it is not. We have a terrorism programme at Human Rights Watch; we are just as concerned about it as anyone else. Ali lives in a country where bombs are going off. The Marriott Hotel was demolished—that is where I used to stay when I go there. I was here on 7/7 and I am an American, so do not worry that we are not interested in addressing terrorism; but there are right ways and wrong ways to do it. It is a difficult environment but the British Government should be exemplary; there is no reason for them not to. We now know that it does not work to engage in this kind of conduct. So these questions could be asked and if they keep giving blanket denials I think you have some sense of what the answer is.

Q50 Earl of Onslow: Following on from that, which I agree totally with Lord Lester's question which is very apposite, Section 7 of the Intelligence Services Act exempts MI6 agents—and I would presume MI5 agents as well, would it not—from liability for criminal acts committed abroad in certain circumstances. Does this, in your view, provide exemption from those people under the Human Rights Act? Does it mean that they are not subject to the Human Rights Act, bearing in mind that Section 7 exemption?

Mr Adams: This will be a question for a British court at some point, I believe, if the case is ever brought to it. The British obligation is a Treaty obligation under CAT and it should take precedence over an Act of Parliament—that is the normal construction of the laws. I think that what has happened here—and this is where I think we are getting into semantics—it is possible for government to say that an act is not illegal that we would think, on the face of it, is illegal because of the provisions of the Criminal Justice Act 1988 and the Intelligence Act 1994. We just discovered the exemption in the Criminal Justice Act 1988 and everyone I have spoken to, lawyers and otherwise, were unaware of it. That is probably our fault—maybe in our business we should have known about this. But this is quite an interesting exception and if you want to think about what questions you can ask, is there a general exemption that has been given or is it a case by case exemption, if exemptions have been given? I doubt that the Home Secretary wants to be in the business of giving case by case exemptions, so I would guess, without knowledge, that there is a blanket exemption sitting out there.

Q51 Chairman: A bit like the James Bond get out clause, is it not? All the things that James Bond gets up to in the films abroad that would be criminal offences are not because of this.

Mr Adams: Yes.

Q52 Chairman: That is a fictional example but it shows the extent to which this operates.

Mr Adams: Yes. We focused on physical acts against people in our memo to you. It is conceivable—and I am not suggesting this—that the Intelligence Service

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may have to bribe people, for example, from time to time to do their work and different people have different views about paying people money in exchange for information that might be in violation of a bribery law. But when it comes to murder, torture, other kinds of mistreatment one would expect those to be completely out of bounds, and it is not clear that they are under British law, which is actually quite a bit surprise.

Q53 Earl of Onslow: Surely if you deliberately target a human being with a drone weapon of one sort or another and he is not actually attacking the difference between murder there and an act of war is actually quite difficult to define; would you accept that?

Mr Adams: It can be but I would not say it would be in Pakistan—Britain is not at war with Pakistan; it is not a field of operations.

Q54 Earl of Onslow: Looking at the Rauf case it was obviously deliberately targeted. I know it was done by the Americans but I assume that we have the same sort of view on this.

Mr Adams: Our view is that if those are the facts that that was not an act of war; there is no allegation that there is an international or internal conflict in that part of Pakistan where he was killed; that is not the position of any government, and the Pakistani government very strongly does not want that to be the position legally. I actually would hope that the British Government would not have the same view as the US on that particular tool.

Q55 Earl of Onslow: It does seem to be deliberately bumping off as opposed to seizing a hill, and it is difficult, I understand.

Mr Hasan: To return to Lord Lester's question. In the appendix in this current document that we have provided we provide not two but three cases and, in addition to those which I have mentioned, the Rashid Rauf case. The purpose here for listing these cases is not so much to go into these individual cases but to perhaps glean some kind of pattern out of them and to see what the systemic issues are at play here. So it is not so much about these individual cases.

Chairman: That is exactly what our remit is.

Q56 Mr Timpson: Can I move on and have a look at the work and role of the Investigatory Powers Tribunal and its role in looking at complaints made against the Intelligence Services and Security Services. The Report of 2007 was fairly silent on the type of work that the Tribunal was doing and its own website only has, I believe, four cases on there that we can look at. What experience do you have of the Tribunal in terms of its cases and do you have a view about their outcome as well?

Mr Adams: We do not have any experience of this.

Mr Cobain: I can try and help but there is probably going to be a limit as to how much I can help you with questions about the Investigatory Powers Tribunal, the reason being that I do not know an awful lot about it and it could be that that is by

design, if you like. *The Guardian* has described the IPT as a fairly "shadowy" organisation in the past. It generally does not sit in public. It has no need, as I understand it, actually to have oral hearings when it receives a complaint. During the last debate on the ISC's annual report or thereabouts, the then Chair of the ISC, Margaret Beckett, was asked by I think Chris Mullen whether it was true that the IPT had never upheld a single complaint and Mrs Beckett said she did not really know. I understand that it has upheld a complaint but I only have knowledge of one that it has upheld. When we spoke to the IPT the Tribunal has made it clear that it will not generally entertain third party complaints. Most of the people making these allegations would not be in a position to go anywhere near the IPT and those who are in some instances are too frightened to go and lodge a complaint with the IPT. One of your colleagues, John McDonnell has lodged a complaint with the IPT, as I understand it, on behalf of his constituent, the man who I identified by the initials MSS. I believe he has had an acknowledgement but where else it has gone I just do not know.

Q57 Mr Timpson: From what you say do you have reservations about the ability of the Tribunal to properly investigate these types of cases we have been talking about today and also to give proper redress as well?

Mr Cobain: Absolutely. They will not generally accept third party complaints; most of these matters are never going to come before the IPT other than as a result of third party complaints. If it is the case that some sort of pattern can be discerned in some of these allegations, that there is a hint of a pattern there and that pattern might result from some sort of policy, then the IPT is not the place to examine this because they will only look at one allegation at a time and they will only look at those allegations that are brought to them, and so far only one allegation has been brought to them.

Q58 Lord Lester of Herne Hill: They are a very independent body. If you look at their composition, Lord Justice Mummery is President; Mr Justice Burton, as he then was, is Vice President; the rest of legally qualified, with three independent Silks. So in terms of its independence and impartiality it is quite impressive.

Mr Cobain: That may be the case but in terms of its remit it may be slightly more hamstrung and it may be that what is required, if people are interested in pursuing this matter further, is a more proactive approach.

Q59 Chairman: Basically the criticism here is individual complaints, only one upheld; but there is no systemic investigation about looking to join the dots.

Mr Cobain: Yes. You asked earlier whether there was any suggestion of a policy or whether they were talking about the allegations may concern one or two rogue officers—I think was the expression you

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used—in Islamabad; that is the great question is it not? Is there a pattern and does the pattern suggest a policy?

Q60 Chairman: So no matter how highly qualified these individuals are their terms of reference does not allow them to join the dots.

Mr Cobain: That would be the criticism that some would make.

Q61 Mr Timpson: Have you detected any desire for greater transparency of this Tribunal? Is there any prospect that we are going to have more openness in the way it proceeds and the way it informs?

Mr Cobain: If that is the case I am not aware of that, if that is the case.

Q62 Lord Lester of Herne Hill: Going back to the Rangzieb Ahmed case and bearing in mind the possibility of further proceedings, Mr Cobain's memorandum points out that the judge heard arguments about complicity and torture in private and gave a judgment in private. Do any of you have any suggestions as to how judicial proceedings of this character on those questions could be made more transparent, given the procedural rules about evidence being heard in camera and national security considerations and so on and so forth?

Mr Cobain: We considered this ourselves and we wondered whether we should be challenging the decision to keep much of his judgment in secret. Of course, we did not know what it was that we were hoping to challenge. So we wrote to Rangzieb Ahmed's solicitor and said, "Could you advise us on this?" and he indicated that he could not as a result of an order of the court, but there was a hearing held in camera at which it was made clear that this was something we were seeking some help with. As a result of that the judge issued a judgment in open court in which he said in terms that there were three parts of his report which it might be argued should be brought into the public domain in the public interest. He did not say that he felt there was no merit in these arguments, or there would be no merit; but because of the way in which he had agreed to hear evidence—and that evidence has already been heard—in terms, the way I read his judgment, he was saying, "My hands are closed at this time and may be it will be for another court to decide somewhere down the line." I would add that there does seem to be a tendency to use the Contempt of Court Act to keep certain matters secret. The Contempt of Court Act of 1981—was it?—as I understand it was designed entirely to protect judicial proceedings from undue outside interference, but at the moment what is happening is that material that is being discussed and heard in camera if, for example, I were to hear of what some of that material was and sought to report it to speculate upon it or broadcast it in any way, shape or form then I have little doubt that I would be arrested and face a prosecution and a possibility of prosecution for contempt of court. Yes, clearly we would like to see a lot more of this

information brought out into the public domain, but at the moment we are at a bit of a loss to figure out how to do that.

Q63 Lord Lester of Herne Hill: I am not clear whether your newspaper or Human Rights Watch have developed a position as to what is wrong with the present position and what should be done about it because my understanding—and I should declare an interest because I did Spy Catcher many years ago—is that that case and others illustrate is that the court sits in camera for good and sufficient reason but the judge then has to decide at the end of the proceedings what should be in the public domain as far as judgment and evidence are concerned—they are two different matters. Of course, both of those decisions are capable of being challenged in court. Are you suggesting that there is something fundamentally wrong with that and, if so, would it be possible for you to write to us to explain what your position is because now is not really the right time to go into it.

Mr Cobain: Yes, we can consider that and I will send you another memorandum; I will take some advice on that.

Q64 Lord Lester of Herne Hill: Will you take some legal advice?

Mr Cobain: I certainly shall.

Mr Adams: Can I just say that we would do the same but I think there are a couple of obvious things that could be discussed right now. One is that allegations of torture should be made in open court. It is very easy for the Crown to assert national security and then bring in a whole range of evidence under that umbrella. It is hard for me to understand how the specific allegations of torture and the facts in that case could have national security implications for the British Government, except that they may expose the kind of complicity which we allege, which could make it harder for Britain to continue operating the way they are in Pakistan, which would be a very broad view of national security. I think a more narrow view would suggest that Britain could change the way they operate if, for instance, there was public outrage at evidence that was made in open court, or if the judge made a ruling that the government had to take notice of. It seems extraordinary to me that the specific allegations, those factual allegations could not be made in open court, with certain parameters about how you describe them and who was there. There could be a reason you do not want to identify individuals necessarily in the British Government—there are sources and methods issues, but it could be crafted. If you read the transcript of the Rangzieb trial, Mr Justice Saunders seemed anguished about this. He is very open about how it is a very hard decision, there are factors on both sides and in the end he deferred to the national security claims of the Crown.

Q65 Lord Lester of Herne Hill: When you both produce your extra work on this could you include any comparative material illustrating how, in your view, it is better done in our common law

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jurisdictions, including the United States, Canada, South Africa and Australia? If you are able to do that through your great network that would be helpful to us. That is judicial oversight. Could I move on to parliamentary oversight? The Intelligence and Security Committee, established under the 1994 Act is what I am concerned about. Are you confident that that Committee can and will investigate your allegations thoroughly and impartially?

Mr Adams: I think that your Committee would know more about that than we would and the fact that we are with your Committee and not that Committee may answer your question.

Q66 Lord Lester of Herne Hill: Have you been asked by the Committee to produce a memorandum or to meet them in the way that you have been asked on this occasion by us?

Mr Adams: No.

Q67 Lord Lester of Herne Hill: Again, maybe a comparative view might be helpful in other parliamentary democracies in particular, and maybe also the United States system of government. How would you improve parliamentary oversight of the intelligence and security agencies? Without writing a PhD thesis any help on that would be gratefully received, I am sure.

Mr Cobain: I would have to give a very similar answer to Mr Adams, in that I would be very nervous about suggesting to Parliamentarians here how that could be better achieved. If I could quote one thing—from some words I saw last night—“In a democratic society it is vital that the security and intelligence agencies should be well regulated by the law and subjected to rigorous oversight, with as much transparency as is possible to achieve without compromising our operations.” I think that all of us would agree with that and certainly the Security Service could agree with it because it has come from their website. Does that happen at the moment? I do not know; that is a matter for yourselves really.

Chairman: Basically give us the job but I think that is somehow rather unlikely!

Q68 Earl of Onslow: When President Obama came to power he immediately ordered studies: one, to study and evaluate whether the interrogation practices and techniques in the US Army Field Manual, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary; and to study and evaluate the practices of transferring individuals to other nations, etcetera, etcetera. There has been no equivalent review of UK policies. In your view do you think that there should be an inquiry into allegations of complicity by UK intelligence agencies with the practice of torture by foreign intelligence agencies?

Mr Adams: We made that recommendation in our submission, yes.

Q69 Earl of Onslow: If so, how do you suggest that such an inquiry should deal with the sensitive intelligence information in a way that both protects national security and commands public confidence? As the website said, and with which you agree, it is a difficult and delicate process.

Mr Adams: The most famous inquiry ever that I know of in these matters was the Church Inquiry into CIA practices in the 1970s and this has stood the test of time; it is exemplary; it led to serious reform. There was great disquiet in the security services in the US, of course, about it because it exposed many misdeeds and illegal acts, but it led to a lengthy period where the CIA did not do the things that they had been accused of. Then came the Bush Administration and things went backwards. So I think that there probably is a lot of expertise out there about how that was conducted. I do not want to say this just because it was the US because a lot of congressional oversight has started to deteriorate over here—it is not what it used to be. But these things can be done. Just as I was describing about the Rangzieb case, I am not suggesting that we name which British agent was in the room with Rangzieb and what that person should have done—I do not think that would be an appropriate decision by the court. It may be appropriate in a civil case some day, we will see. But the description of what happened and then having that information in daylight can lead to policy formulations that make sure that that kind of thing does not happen again, and as long as there is no sunlight on these things that is very unlikely to happen. There is no reason why parliamentary Committee could not reach that level of detail. I am surprised that your remit does not allow individual cases; I do not know if that is your decision or the decision of—

Q70 Chairman: The other House.

Mr Adams: That, I think, would hamstring such an inquiry by any parliamentary Committee—you have to have cases and if you do not have cases you cannot go from the specific to the general.

Q71 Dr Harris: I just want to come back to the words used by the government to justify their position because they say that they do not instigate torture and they also say that the intelligence agencies do not participate in, solicit, encourage or condone, and the minister said, as you say, at the Foreign Affairs Committee that they do not actively outsource. What more would you want them to say, regardless of what actually happens, to be confident that their policy is in line with their obligations under UNCAT. Either of you? Is there some verb that is missing or are you happy with what they have said, they are just not meeting that in fact?

Mr Adams: All that is passive language; I would like to see some active behaviour where they can say, “We have told the Pakistanis that we will not cooperate in any case where there is torture.” Why not have all the interrogations videotaped? Why not have British agents looking through two-way glass? Why not have the interrogations audio taped? There are new ways to have some security that nothing has

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happened. Why not have British agents go and make sure that they talk to the lawyers and the individuals who are detained about their treatment? They may lie and say that they were tortured but British agents, law enforcement agents know how to separate fact from fiction.

Q72 Chairman: They are not required to do that by UNCAT. It is an impression whether they are required to do that by UNCAT, but I was wondering whether you think they are required to report to the UN cases of torture that they see by a state agent and by another state's agent? Positive duties.

Mr Adams: Not just that duty but an obligation under British law to use the legal system to address such cases. For instance, if Captain So-and-So was engaged in torture in Pakistan and the British Government knew it and then he lands at Heathrow I think they have a case and it should not require human rights groups like us to go and try and make it for them, which is normally how it works.

Q73 Chairman: You think it is the obligation of Article 6.

Mr Adams: Yes.

Q74 Dr Harris: You think that that is missing from the methods used by the government?

Mr Adams: If I can give you an analogy? I first ran into the British Government internationally in Cambodia—I worked for the UN human rights

office there—and the British Government had an exemplary reputation for its prison service. There were British prison officials going around the world giving training and in Cambodia, from the Prime Minister to Members of Parliament they think that torture in prison is just fine. I watched this British guy who had worked at Wormwood Scrubs read the riot act to the Cambodians about how prison is about depriving people of their liberty—nothing more—and the prisoners were to be treated humanely. I was quite impressed and quite proud of that person. He and his subsequent work and people he worked with had a profound impact, I can tell you, on prison conditions in Cambodia because they changed dramatically over a decade because of this kind of pressure and training from people outside, and this is what we do not see here.

Q75 Chairman: What you were saying earlier on is this sort of thing is going on in other countries, in other areas but not when it affects national security.

Mr Adams: This is what I surmise, yes.

Q76 Chairman: Thank you all very much for your evidence; we have come to the end of our questioning. It has been a very informative and quite probing session and I anticipate that we have a number of issues that we will want to invite the Home Secretary to come and answer on a future occasion. Thank you for coming and the Committee stands adjourned.

Mr Adams: Thank you for holding this hearing.

Tuesday 28 April 2009

Members present:

Mr Andrew Dismore, in the Chair

Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Earl of Onslow

Baroness Prashar
Dr Evan Harris
Mr Virendra Sharma
Mr Edward Timpson

Witness: Mr Craig Murray, former British Ambassador to Uzbekistan, gave evidence.

Q77 Chairman: This is a public evidence session of the Joint Select Committee on Human Rights as part of its ongoing inquiry into the United Nations Convention Against Torture and allegations of complicity in torture. Our first witness today is Mr Craig Murray, former UK Ambassador to Uzbekistan. I should start by reminding everyone of the remit of the Joint Committee which relates only to human rights in the United Kingdom, so it can focus only on the activities of UK agents who are subject to the Human Rights Act and not on UK foreign policy or the activities of foreign government or agents, except to the extent they are strictly relevant to the issue of whether any UK personnel are complicit in acts of torture. We also cannot investigate individual cases. Those are the terms of reference set by the House of Commons and House of Lords. Mr Murray, perhaps I may start by pinning down what you do not allege before going on to what you do allege. Your memorandum refers to torture in Uzbekistan in 2002/03. Was all of that torture conducted by the Uzbek authorities or were any UK or US agents directly involved?

Mr Murray: Torture was not conducted by any UK authorities and to my knowledge no UK agents were ever directly involved in committing torture. The US secret services, in particular the CIA, had very close liaison with the Uzbek security services of which I was well aware at the time. While I was ambassador I was not aware of any direct US involvement in torture. My understanding was that they were supplying questions and getting answers.

Q78 Chairman: These are American agents?

Mr Murray: Yes. Earlier this year I had the opportunity to meet a defector from the Uzbek security services, a Major Yakubov, who has since been given political asylum in this country. I had a long talk with him and he seemed to me very credible. He alleges that he was present at an interrogation session during which a prisoner was beaten and a CIA agent was in attendance.

Q79 Chairman: But not a UK agent?

Mr Murray: No.

Q80 Chairman: It has been suggested in relation to other cases involving detainees in Pakistan, Egypt and Morocco that UK agents proposed questions to be asked under torture. Do you have any evidence of that having happened in Uzbekistan?

Mr Murray: No. I do not believe that we passed on questions for specific interrogees in Uzbekistan.

Q81 Chairman: There have also been allegations in relation to Pakistan, Egypt and Morocco that UK agents who interviewed suspected terrorists should or must have known at some stage that those suspects had been tortured on a previous occasion whilst in the custody of those countries. Is there any evidence of that having happened in Uzbekistan?

Mr Murray: I do not quite understand what you mean.

Q82 Chairman: For example, it has been alleged that in Pakistan in some cases suspects have been tortured by the Pakistan Secret Service and a British agent has come along and asked questions afterwards and it should have been obvious to that agent that the individual had been subjected to torture.

Mr Murray: There were no UK agents meeting interrogees in Uzbekistan at all as far as I am aware.

Q83 Chairman: There is no evidence of any UK nationals or residents being tortured in Uzbekistan?

Mr Murray: Not that I believe, no.

Q84 Mr Sharma: When you raised concerns with the FCO about the US intelligence material what response did you expect?

Mr Murray: I genuinely believed that there must be no awareness in Whitehall that the intelligence it was receiving came from torture. That was the premise on which I acted. Having first checked with the American embassy by my deputy that it was credible that these intelligence reports came from torture, I sent a telegram in late October or early November 2002 to say we were receiving intelligence from torture. I genuinely expected to get a response that we must stop receiving that kind of intelligence from Uzbekistan. I received no reply at all. Essentially, I sent the same telegram again at the end of January/ beginning of February 2003 to which also I received no written reply, but I was summoned back to a meeting in London in early March 2003 at which I was told it was better not to put these things in writing.

Q85 Mr Sharma: In your experience had the US and UK authorities previously taken a strong line against the use of information received under torture or had you not encountered these issues before?

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Mr Murray: I had encountered the issue before when I was working in a unit known as the embargo surveillance centre which was tasked with preventing Iraqi attempts at weapons procurement in the run-up to the first Gulf War in the early 1990s. Essentially, we were an intelligence analysis unit and we commissioned action. The question of intelligence that appeared to have been obtained from torture did arise on that occasion. I had direct contact with the question then. As a unit we reported directly to 10 Downing Street, not to a government department.

Q86 Chairman: Did you get the impression that there was UK complicity on those occasions?

Mr Murray: On that occasion we received a clear direction from the then prime minister, Mrs Thatcher, now Baroness Thatcher, that we were not to use any intelligence that might have come from torture.

Q87 Earl of Onslow: You tell us in your memorandum that a senior FCO official told you that the Security Services found the Uzbek intelligence received from the US to be useful. What value do you think the Security Services got from this material?

Mr Murray: I found that puzzling, and I still do, because whenever the British embassy in Tashkent was able to check it out separately against facts on the ground it never once found any of piece of intelligence that was valuable. None of it related to any security threat to the UK. It was virtually all concerned with alleged Islamist threats to President Karimov and his Government in Uzbekistan. It was quite easy to demonstrate that much of it was simply untrue. To give one example of many, there was intelligence pointing to a jihadist training camp in the hills just over the Uzbek border.

Q88 Earl of Onslow: Was this in Afghanistan?

Mr Murray: It was in Tajikistan¹. My defence attaché, Col Ridout, had been to the precise coordinates given and knew for a fact that there was nothing there. That was fairly typical. The intelligence material was being provided to the CIA by the Uzbek Security Services and the point of it was to exaggerate the threat to the Uzbek Government in order to justify the alliance with the Karimov regime.

Q89 Earl of Onslow: Did you see the majority of this intelligence so you could make that judgment?

Mr Murray: I believe I saw all of it.

Q90 Earl of Onslow: In your view it was basically totally useless and was concerned only with the internal Uzbek situation?

Mr Murray: Over 95% of it was concerned with internal Uzbek matters. Some of it was concerned with other parts of central Asia. I recall one piece concerned with Germany but none of it related to anything like a specific terrorist plot in Europe.

Q91 Chairman: Did that information come via the CIA or direct to you from the Uzbeks?

Mr Murray: It came to me from MI6 which had received it from the CIA.

Q92 Chairman: I meant the embassy.

Mr Murray: It would go from the American embassy in Tashkent back to Washington and from Washington to London and then from London to me. That was the route by which I received it.

Q93 Chairman: None of it came directly to you or anyone in your embassy from the Uzbeks?

Mr Murray: No.

Q94 Earl of Onslow: It has been argued that the UK intelligence-sharing agreement with the US will be jeopardised if the UK asks not to receive evidence obtained from torture. Does this suggest that ministers were reluctant to see such material but did not want to risk arguing with the Americans? Since you have just said that Lady Thatcher said under no circumstances was torture to be used presumably the statement you have just made blows a hole in the whole argument that we should be careful about using information obtained by torture provided by the CIA.

Mr Murray: What happened was that the policy had changed since Lady Thatcher's day. At the time I drafted the first telegram, to which I referred in answer to Mr Sharma, I did not know that the policy had changed since Lady Thatcher's day. If I may refer to the documents on waterboarding and other torture techniques released recently in the United States on the orders of President Obama, if we are continuing to receive, as we are, all the intelligence reports put out by the CIA we are complicit in a huge amount of torture. I was just seeing a little corner of it in Uzbekistan.

Q95 Earl of Onslow: Did you accept the legal advice of Sir Michael Wood?

Mr Murray: No, sir.

Q96 Earl of Onslow: I would like to pursue a little further the change of policy. If Lady Thatcher said that the information was not to be accepted and Mr Major, Mr Brown or Mr Blair said the same thing presumably the Americans would react in the same way as they did Lady Thatcher.

Mr Murray: I do not think that the particular material under consideration when we had guidance from Number 10 not to look at anything that might come from torture at the time of the first gulf crisis was actually CIA material. It might have come from another source. But certainly in terms of the change of policy I was very surprised. I had been on Foreign Office human rights training courses and the fact we had a policy not to accept intelligence from torture

¹ Footnote from witness: This might be better expressed as "in the Tien-Shan mountains". The borders in this mountain area are very convoluted, to the extent of there being at least five enclaves of countries within other countries. I am afraid other than in the hilly border country, I cannot recall the exact location—but that does not in my view invalidate the example.

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was what I would have expected the position to be. When in early March 2003 at the meeting in London I was told that it was now policy to accept intelligence that may have been obtained from torture I was very surprised. I was told directly that that had been agreed, that it had the authority of the secretary of state and had come from Jack Straw. I was told that he had discussed it at a meeting with Sir Richard Dearlove. Whether or not there were other meetings about which I was not told I am unaware, but I know for sure this was the situation because I was querying it. I said this was not what we did, it was not our policy and I was told directly that, yes, it was the policy; I was a civil servant and I must follow it. We will accept intelligence that has come from torture as long as we do not do the torture ourselves in accordance with the legal advice of Sir Michael Wood which I was given on that occasion.

Q97 Chairman: Was the policy of Mrs Thatcher's government set out in writing in any document? Did you see anything like that, or were you just informed that this was how it was?

Mr Murray: I think we were just informed that this was how it was. I do not recall seeing a policy paper on the subject, but there is no doubt that that policy was taught on Foreign Office human rights courses.

Q98 Mr Timpson: You have touched on the legal advice from Sir Michael Wood, the senior legal adviser at the Foreign Office. Your previous answers seem to suggest that you do not agree with the advice that the receipt or possession of information obtained under torture is not prohibited by UNCAT. Did you accept that legal advice? If not, did you seek to challenge it?

Mr Murray: Sir Michael Wood was the legal adviser which is a formal title. He had many other legal advisers under him. Within government circles there is no internal method of challenging the legal advice of the Foreign Office legal adviser on a point of international law. In my telegram of 22 July 2004, which in my 20-year career was the last telegram I sent before I was sacked, I challenged Sir Michael Wood's legal advice. I pointed out that he appeared not to have taken into account article 4 of the convention about complicity in torture. I presume the Joint Committee is aware of the human rights situation in Uzbekistan and the record of that country for torture. My team investigated scores if not hundreds of cases involving the arrest of political dissidents in Uzbekistan. I never came across a single case in which torture was not credibly alleged. I do not believe in shock value so I will not enumerate them, but the most horrible forms of torture imaginable were always used against dissidents under questioning in Uzbekistan. In early 2003 the United Nations Special Rapporteur on Torture, Professor Theo van Boven, produced an official UN report.

Q99 Chairman: We are straying a little beyond our terms of reference.

Mr Murray: I do not agree.

Q100 Lord Lester of Herne Hill: I ought to declare an interest. Together with Sir Samuel Silkin, the then Attorney General, I appeared as counsel in *Ireland v UK* in which we gave an undertaking to the European Court of Human Rights that the British Government would never again use torture or inhuman or degrading treatment following what had happened in Northern Ireland. In the documents that you were given, including Sir Michael Wood's advice, did you see anything to indicate that there was a positive obligation on the United Kingdom to take steps to minimise the risks of torture?

Mr Murray: I was aware of that from my own reading of the UN Convention Against Torture but nothing which was given to me in the context of all the discussions I had with the FCO on this matter would have indicated that. I go back to the point I was making. Given that the United Nations said that torture was a routine investigative technique in Uzbekistan, we could be sure with almost 100% certainty that any piece of intelligence coming to us from an Uzbek interrogation had been obtained by torture. The case I put to the FCO was that if you kept receiving weekly intelligence reports of interrogations in which you knew torture was routinely used and kept using them then without doubt you would be complicit in torture under article 4 of the UN convention. I have never met an international lawyer not in government employ—I have spoken to at least 30 or 40 on precisely this point—who does not agree with that.

Q101 Dr Harris: Mr Murray, is it fair to say that in their recent statements the government have not made the link you have just made, namely that regardless of its use in a criminal court being in receipt of evidence that is likely in all the circumstances to have come from an interview where torture has been used is not equivalent to being complicit under article 4? Do you agree that that may be their position?

Mr Murray: I think the essence of the government's position is that if you receive intelligence material from people who torture, be it CIA waterboarding, or torture by the Uzbek authorities or anywhere else, you can do so ad infinitum knowing that it may come from torture and you are still not complicit.

Q102 Dr Harris: The government say that they condemn the use of torture, do not participate in, solicit, encourage or condone the use of torture and work hard to eradicate it, but they also say in their response to our report on the UN Convention Against Torture: "£Our rejection of the use of torture is well known by our liaison partners. The provenance of intelligence received from foreign services is often obscured as intelligence and security services, even where they share intelligence, rarely share the details of their sources. All intelligence received from foreign services is carefully evaluated. Where it is clear that the intelligence is being obtained from individuals in detention the UK agencies make clear to foreign services the standards

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which they expect them to comply with.” That does not say what you think it ought to say, but do you accept that their position is different from yours and that their current position is consistent with what Sir Michael Wood essentially said?

Mr Murray: Their position remains the one outlined by Sir Michael Wood, and it was put to me that if we received intelligence from torture we were not complicit as long as we did not do the torture ourselves or encouraged it. I argue that we are creating a market for torture and that there were pay-offs to the Uzbeks for their intelligence co-operation and pay-offs to other countries for that torture. I think that a market for torture is a worthwhile concept in discussing the government’s attitude.

Q103 Dr Harris: In your evidence you assert that Jack Straw himself as foreign secretary endorsed Sir Michael Wood’s view set out in that memorandum?

Mr Murray: Yes.

Q104 Dr Harris: That would not be a surprise in a sense given the government’s position that the Wood memorandum is at least consistent if not congruent with the government’s then, and presumably currently, position?

Mr Murray: What you say about the government’s position is true, but it has done everything possible to disguise its position. I received an email from the Bishop of Bath and Wells who had written to a government minister to say he was worried about the possibility that we were using intelligence from torture as highlighted by the Binyam Mohamed case. He got the reply that was always given which was to refer to the first part of the government’s position that you cited—the bit about condemning torture unreservedly—but not the second part. The government do not volunteer the fact that they very happily accept this information. I make it absolutely plain that I am talking of hundreds of pieces of intelligence every year that have come from hundreds of people who suffer the most vicious torture². We are talking about people screaming in agony in cells and our government’s willingness to accept the fruits of that in the form of hundreds of such reports every year. I want the Joint Committee to be absolutely plain about that.

Q105 Dr Harris: You argue that article 4 places a duty on you and any representative of the government to try to eliminate torture wherever it is found. When you were told not to put these things in writing do you think they were part of your compliance with article 4 of UNCAT?

Mr Murray: Yes, articles 4 and 5. In particular, article 5.2 provides essentially for universal jurisdiction which means that where for example the Uzbek Government or American Government do

not prosecute those concerned we and any other state have a duty to prosecute, but we need the information. Therefore, my reporting back was in compliance with our obligations under UNCAT.

Q106 Dr Harris: We come back to the fundamental problem that since the government do not think that to be in regular receipt of intelligence that may or is likely to have come from torture comes within what they believe to be their duty, which is not to participate in, solicit, encourage or condone torture—I understand the point that you and other lawyers make—it does not stop you from carrying out your UNCAT duties if they ask you not to make a complaint that they are receiving that intelligence because they do not accept that mere receipt is a breach of UNCAT. Is that a fair characterisation of that aspect of your difference with the government?

Mr Murray: That is a reasonable way to express it. The telegrams that I wrote at the end of 2002 and beginning of 2003 were expressed quite specifically in terms of my concern that British government ministers were acting illegally by receiving this material under UNCAT. My telegrams said that the secretary of state might be acting illegally by being in receipt of that material.

Q107 Dr Harris: Can you clarify why you think they described those telegrams as unwise? You do not quote but say that they reported in that conversation that such sensitive questions were best not discussed on paper.

Mr Murray: It is always difficult to answer why somebody said something. You can say what they said, but obviously I am not inside their minds.

Q108 Dr Harris: Did you ask why?

Mr Murray: I would like to put this to you: two telegrams were sent by a British ambassador stating that the secretary of state might be acting illegally. I did not receive any written answer to those two telegrams. It would be extremely unusual for a Foreign Office ambassador to write back on any serious policy problem and not receive any reply from the department. To send two telegrams which actually allege illegality by your own secretary of state and not get a written refutation is quite extraordinary. Instead, I was summoned to a meeting at which I was told that these things were better not put in writing. I was able to get the Sir Michael Wood letter which, if you like, is a peek into a secret policy because I was able to insist on my right to have something from legal advisers saying that I was not acting illegally by receiving this material.

Q109 Dr Harris: We have already established their argument is that they have a different interpretation of the law from you. We shall be questioning them again about it because to question you is of limited value given your position. However, it may be—I am not saying this is the case—they would say that no one else is saying what you are saying about the use of torture or that people who report it are ignored, and you are not necessarily the most unbiased or

² Footnote from witness: In talking of hundreds of pieces of intelligence from torture, I should clarify I do not mean that many came from Uzbekistan alone. As I said, I was seeing but a small corner of a worldwide system that included waterboarding, rendition and intelligence from torture from many countries.

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neutral witness because it may be seen that you have a grudge to bear. I do not want to go into your personal situation. Are you aware that that is part of their case, or are you happy that, even though you disagree, they are dealing with it on the legal position as they see it?

Mr Murray: Facts are stubborn things.

Q110 Dr Harris: I did not mean facts. To put it in cold terms, are they sticking to their legal disagreement with you or do you believe there is a campaign to undermine your credibility?

Mr Murray: For the past five years they have been telling people that I am an alcoholic and saying all kinds of things about me which are simply not true. I should say that I am not and never have been. Part of their reaction was to try to undermine me. It is undoubtedly a fact that I sent those telegrams saying we should not be receiving intelligence from torture, that I was called back to London for a meeting at which I was told the policy was that we could receive intelligence from torture and that that policy was not being publicly acknowledged.

Q111 Dr Harris: My final question is about what the UK Government did. There is torture going on in Uzbekistan, which is a separate question from whether we are using the intelligence. You were in charge of the embassy. Do you believe that part of your mission there was to seek to dissuade the Uzbek authorities from breaching the convention to which presumably they had signed up? If that was not part of your work there should you have considered your position earlier since you might have thought it unsustainable to carry out a mission that did not include one of the key things that it ought to have included?

Mr Murray: As a result of the policy change we have been discussing, where we did not receive intelligence from torture and then decided it was okay, we then ended up with a schizophrenic policy. A major part of my duty as ambassador, which was acknowledged, supported and led by the human rights policy department in the Foreign Office, was to campaign and work for an improved human rights record in Uzbekistan, including urging the Uzbek Government to clean up its act in general and specifically on torture. That was the left hand, if you like. At the same time, the right hand was lapping up the results of the torture on the intelligence side. The difficulty was that it resulted in a schizophrenic position and that reflects exactly the sort of government position you read out. On the one hand we say we unreservedly condemn torture and on the other hand we say that whilst unreservedly condemning it we will receive its results. It makes no sense.

Q112 Chairman: Did you raise directly with the Uzbekistan Government concerns about their human rights record in general and about particular acts of torture?

Mr Murray: Yes, on numerous occasions.

Q113 Chairman: Was that face to face rather than in any document or memorandum?

Mr Murray: It was face to face but also in terms of formal diplomatic notes.

Q114 Chairman: I want to probe ministerial responsibility a little further. You have made some serious allegations both generally and to us today. When do you think the policy might have changed? Was it a consequence of 9/11 or before it? You had been in the Foreign Office throughout that period.

Mr Murray: I am sure it changed post-9/11. Forgive me for making a suggestion to the Joint Committee, but were I you I would be fascinated to discover when the Foreign Office first found out that the CIA had started waterboarding. We have seen from the documents released in the United States in the past couple of weeks that they were waterboarding from July 2002. That is very much in the period I am talking about. I started to send my telegrams in the autumn of 2002 and it was then we were told by the US embassy in Tashkent that their view was that torture was okay in the war on terrorism.

Q115 Chairman: When did you start in Tashkent?

Mr Murray: I started in August 2002.

Q116 Chairman: So, it began more or less from the start of your service there?

Mr Murray: Yes. The UK will have received intelligence from all of the 180 waterboarding sessions with Khalid Shaikh Mohammed and other suspects. I think it quite likely that was the trigger that led us to reconsider our policy on whether to receive intelligence from torture. We have an agreement with the CIA whereby that body and the SIS share all intelligence reports. When the CIA started to go in for torture we had either to resile from the agreement or go along with torture ourselves. My expectation is that the time when the UK first knew about waterboarding is the key to the answer to your question.

Q117 Chairman: As far as you are aware, were the Attorney General or Solicitor General ever asked for an opinion on the legal position, or did they ever offer one?

Mr Murray: No, but whenever I raised these issues I was referred to Sir Michael Wood; I was never referred to the law officers.

Q118 Chairman: Do you know whether anybody else asked the law officers?

Mr Murray: Not to my knowledge. I should say that I have known Sir Michael Wood for some years and if there were an opinion by the law officers he would have referred me to it.

Q119 Chairman: Did you ever have direct access to ministers to discuss any of these issues with them face to face?

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Mr Murray: No, I did not. I asked but obviously that was like putting it in writing; it was something better not done.

Q120 Chairman: When you sent your original telegrams do you know whether Jack Straw actually received them or do you believe they were headed off at the pass by officials?

Mr Murray: I know for sure that Jack Straw read them. I was told at the meeting in March that he had specifically discussed my telegrams with both Sir Richard Dearlove and Sir Michael Jay.

Q121 Chairman: To summarise where we are, we were not directly involved in torturing anybody in Uzbekistan, but effectively there was a chain that ended up with you in Tashkent via the CIA and MI6 in London. It is not like the allegations we have received regarding Pakistan, for example, where basically we are in the prison cell asking the questions and somebody may have been tortured. This is a much more remote chain of circumstances. Your argument is that because Uzbekistan is a country where torture is almost a way of life in that country evidence was being obtained by the CIA indirectly from the Uzbeks and then supplied to MI6 and the sum totality must have been known to ministers. Although we were not directly involved through that chain that is sufficient in your view to create an allegation of complicity by the UK in torture in Uzbekistan?

Mr Murray: I would agree with that.

Q122 Chairman: That is a summary of your case?

Mr Murray: I would add one point. My case is that because as an ambassador I was fortunately a member of the senior civil service and I was arguing against this I was able to be given high-level policy direction and be told that ministers had decided we would get intelligence from torture. The fact that ministers made that decision was the background to what was happening in Pakistan, for example. It is not that MI5 operatives were acting independently; they were pursuing a policy framework set ministerially.

Q123 Chairman: So, ministers specifically used the words “torture”, “evidence from the CIA” and “no questions: turn a blind eye”?

Mr Murray: Ministers certainly had before them and read my telegrams which said that this was torture and detailed the type of torture involved.

Q124 Chairman: What you just said was that ministers said it was okay to use torture?

Mr Murray: No; I think I said that ministers said it was okay to use intelligence from torture.

Q125 Chairman: Therefore, the inference is that it is not just turning a blind eye or “ask no questions, tell no lies”; it is specific knowledge?

Mr Murray: Nobody argued to me once that the Uzbek intelligence we were discussing did not come from torture; everyone accepted that it came from

torture and the question was whether or not we accepted it. Nobody said that it was not actually torture.

Q126 Lord Dubs: Presumably, when you were in post in Uzbekistan you had frequent or occasional meetings with other British ambassadors in the region.

Mr Murray: Hardly ever. We met in Brussels on one occasion, but, no, we did not have regional meetings.

Q127 Lord Dubs: But you occasionally met other ambassadors even if it was just in Brussels. Did you ever discuss with your ambassadorial colleagues the issues that you have just raised with us; in other words, the change in British Government policy and so on?

Mr Murray: I did indeed.

Q128 Lord Dubs: What was their response?

Mr Murray: I think that in most cases the best way to sum up their response was “rather you than me”.

Q129 Chairman: Do you mean “rather you than me” in terms of raising the issue?

Mr Murray: It was “rather you than me raise the issue”. When I drafted the first telegram, which was genuinely drafted in the expectation that the government would want to stop the practice if they knew of it, I showed it to a colleague in my political section in Tashkent. He handed it back to me saying that it was a long resignation note. “Rather you than me” was truly a comment by one of my ambassadorial colleagues. I want you to think back to the period late 2002/early 2003 when we were gearing up to the war in Iraq with dodgy dossiers about weapons of mass destruction. At that stage to say intelligence was unreliable was quite a difficult thing to do internally because it cut across all the false intelligence on Iraqi issues as well. There was a feeling that if you raised these things you would get in trouble, as indeed I did.

Q130 Lord Dubs: You told us earlier in this session that you noted a change in British Government policy.

Mr Murray: Yes.

Q131 Lord Dubs: Leaving aside the question whether or not your ambassadorial colleagues should have raised their concerns with you, surely did you not ask them if they were aware of this and, if so, how they felt about it?

Mr Murray: I think we did. My general point is that my ambassadorial colleagues all sympathised with the position I was in and tended to agree with me that we should not be doing this sort of thing, but they were not willing to put at risk their own careers. It was perceived that you were not allowed to disagree and if you cast any doubt on the war on terror and war in Iraq initiatives you would get your head chopped off in career terms. I would like you to consider the following seriously: I was seeing intelligence in Uzbekistan whose purpose, as I have told you, was to exaggerate the Islamic threat in

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central Asia. Absolutely contemporaneously with the intelligence on Iraqi weapons of mass destruction, which exaggerated that threat, waterboarding was happening in the US which we now know was aimed largely at persuading al-Qaeda operatives to confess to a link with Iraq. There was a vogue for false intelligence and that built up the rationale for the war in Iraq, the alliance with Uzbekistan and other things.

Q132 Chairman: I think this takes us beyond our terms of reference.

Mr Murray: I do not think it does. Torture gives you false intelligence; it does not give you the truth. There was an appetite for false intelligence.

Q133 Lord Dubs: I want to ask one further question about the change in British Government policy to which you have referred. When you spoke to other British ambassadors were they aware of the change in that policy or was it you who told them?

Mr Murray: I believe it was I who told them. There was never any official communication I saw of this change in policy. No telegram ever went out saying that we now receive intelligence from torture; it was something that you were just meant to absorb as the practice. It was not written down.

Q134 Chairman: The ambassadors you were talking to were also from countries with rather questionable human rights records?

Mr Murray: Yes, though in most cases not as bad.

Q135 Lord Bowness: You suggested we should find out when the United States started water-boarding. First, did I understand you to say that information was given to you by the US embassy in Tashkent that they had started it? Second, you said that Sir Michael Wood had lots of legal advisers and when one referred to "Sir Michael Wood's legal advice" it was not necessarily his advice. Are you able to be specific on the record and tell the Joint Committee who was present at the meetings when you were told it had become acceptable to receive intelligence obtained from torture? Can you say specifically with whom you discussed this?

Mr Murray: On the first point, I did not suggest you should find out when the US started to waterboard because we more or less know it. I suggest you find out when the UK first knew the CIA was waterboarding and what steps the UK then took regarding receipt of intelligence from that activity. As to the second point, it was Sir Michael Wood himself. I merely said that he had a lot of people under him but nobody above him; there was no one higher to whom I could go, but Sir Michel Wood was himself present at the meeting giving this advice. The other person present was Linda Duffield, the director for wider Europe at the Foreign Office. She specifically said she had been asked to hold the meeting by Jack Straw and Sir Michael Jay. Also present was Matthew Kidd, head of the permanent under-secretaries' department, the liaison department between the FCO and MI6.

Q136 Earl of Onslow: In my view the allegation you make that there has been a definitive policy change means that once the government have said evidence obtained under torture may be accepted that is complicit; they are encouraging it. Other than your memory of what Mrs Thatcher said, do you have documentary or other evidence that this was definitely the policy, which is what it should be, so we can see that the change has been real, substantial and established? If that is the case this is an extremely serious allegation to make against the government. Do you see what I am getting at and why?

Mr Murray: Yes, I do. I am sorry to say I do not have any documentary evidence to support my memory of that occasion. I suggest that you ask Lady Thatcher; I am quite sure she would be prepared to confirm it.³

Q137 Lord Bowness: You have referred a number of times to that policy being contained in standard Foreign Office briefings. Presumably, something must have been circulated amongst the FCO and ambassadors as to what our policy was on human rights.

Mr Murray: I am quite sure that it was in human rights training courses. I volunteered to go on one such course. Probably most ambassadors have been on human rights training courses, and I am quite certain that this would be contained in the training materials.

Q138 Chairman: What would be contained in the training material would be the correct policy from your point of view?

Mr Murray: Yes.

Q139 Chairman: On the one hand you have the policy as expressed in all the paperwork but on the other hand something rather different is going on underneath?

Mr Murray: I think that is true.

Q140 Chairman: If we were to ask for the FCO training manuals now we would find them squeaky clean?

Mr Murray: Probably.

Q141 Dr Harris: Were we grateful to the Americans for the intelligence we received, or did we just say, "Oh, fine"?

Mr Murray: The intelligence that I saw in Uzbekistan in particular was not of any use to us that I could see.

Q142 Dr Harris: What I meant was: did we express gratitude to the Americans for sharing it with us either out of politeness or self-interest? You report that Linda Duffield told you Jack Straw had discussed the question with Sir Richard Dearlove

³ Footnote from witness: The view of Mrs Thatcher was conveyed to the Embargo Surveillance Centre by the Defence Intelligence Service. It may well feature in their records.

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and the worry about the UK-US intelligence-sharing agreement which stipulated that all intelligence must be shared. Influential figures in the US believed this was unfair and one-sided because they sent us more than we sent them and therefore it was not in our interests to abandon the universality principle. Is it the case that because we wanted to keep that arrangement we were prepared to say, "Thank you very much; we appreciate it. Please do not abrogate the agreement", indicating gratitude for the intelligence? You may not be able to say anything about that.

Mr Murray: What I can say is that from my 20 years in the Foreign Office I have no doubt that the UK/US intelligence-sharing agreement is extremely highly prized by the people on the security and strategy side in the Foreign Office. The abrogation of it in any form would be unthinkable to them largely because they tend to have a rather narrow view of the world, but it is certainly something that very much influences people.

Q143 Dr Harris: The point is that if we had said, "Thank you very much", that is more likely to give rise to argument about what represents encouragement than just passive receipt of the information. Whether we were grateful because of what it contained or expressed our gratitude because we were pleased to be in that receiving relationship is irrelevant if the sender of the material thinks you are genuinely grateful for being sent the material.

Mr Murray: It is worse than that because there was direct liaison between MI6 and the Uzbek Secret Service. MI6 about once a year would send somebody out to meet the Uzbek intelligence agencies and gratitude was definitely expressed for the intelligence material passed to them.

Q144 Chairman: To the Uzbeks direct from MI6?

Mr Murray: Yes; there was an annual visit.

Q145 Chairman: Were you present at any of those meetings?

Mr Murray: I did not go to the meetings.

Q146 Chairman: So, an MI6 operative met some spook from Uzbekistan, handed over a bottle of whisky and said, "Thank you very much", but you were not present at any of those meetings?

Mr Murray: I met the MI6 operative; he stayed with us in the embassy. I would see him off to his meeting but I did not go to it.

Q147 Chairman: That is a direct link between MI6 and the Uzbek security services which we did not know about before.

Mr Murray: It had been going on annually. When I was ambassador I stopped it for all those reasons.

Q148 Chairman: How did you stop it? Did you tell MI6 that they were no longer welcome or that their operative had to find himself a grotty hotel?

Mr Murray: I said that we should stop this; it was not good and they were no longer welcome.

Q149 Dr Harris: What you are saying is that even though you were not there you are confident from meeting this chap that he would have expressed thanks—I want you to use your own words—for intelligence material that had emanated from Uzbekistan, even via the US. I want you to be careful because that is a serious point. If you are making that point it goes to complicity rather than someone being a passive recipient which is what the government would have us believe they are.

Mr Murray: I have no doubt that MI6 told the Uzbek Government we valued their intelligence co-operation and the material that was passed on.

Q150 Chairman: Is the UK-US intelligence-sharing agreement documented in a memorandum of understanding or anything, or is it a secret?

Mr Murray: It is secret; it is not published. I believe there are about four different memoranda of understanding and there is a composite agreement which encapsulates them. I have not looked at them for years, and I would not be allowed to look at them now.

Q151 Chairman: Is it fair to say that the material that came from the CIA from Uzbekistan was one small parcel of a much bigger parcel of all sorts of stuff coming to MI6 from all over the world?

Mr Murray: If there is one thing you take from my evidence it is that when you look at waterboarding and the extraordinary rendition programme there was no CIA intelligence report to emerge as a result of torture and extraordinary rendition of which MI6 did not get a copy. Everything is copied. That is the fundamental working of the agreement. Everything is copied between MI6 and the CIA and between GCHQ and NSA, though the latter does not come within your remit.

Q152 Chairman: But when I say that this mass of intelligence will be coming over some will be a subset from dubious sources, of which one will be from Uzbekistan, and a lot will be general intelligence that may have been obtained perfectly legitimately.

Mr Murray: Yes.

Q153 Mr Timpson: Why do you think no one else has come forward and made these serious allegations?

Mr Murray: It worries me enormously. It seems to me there is something fundamentally wrong. I would hope that by now the evidence you have been hearing from different people has built up a picture of complicity in torture. Why am I the only senior British civil servant who as far as I am aware has put down in writing that we should not get intelligence from torture because it is illegal and against UNCAT? I find it quite extraordinary that one can make people go along with it. You could also ask why lawyers in the United States produced a top secret legal opinion to say that waterboarding,

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putting people in boxes with insects and slamming their heads against walls was legal. The sad truth is that it seems government organisations, civil services and government lawyers will go along with the most terrible and inhumane things that their political masters tell them to do and the percentage of people who stand up and say it is wrong, immoral, illegal and you should not do it is very small.

Q154 Mr Timpson: The strongest support for your case would be corroboration from another independent source but we do not have that. I am trying to get to the bottom of it. If these allegations are true why is it that no one else has come forward when someone has already come out with these allegations?

Mr Murray: I do not think the government has ever denied anything I have just said to you. I would be very surprised if they said that anything I have told you was factually wrong. I published a book on this matter which was a recollection of my time in Uzbekistan. I will not mention the title in case I am accused of advertising, but I had to go through the clearance process that civil servants undergo when they publish a book. I have here the table of comments and the things that the Foreign Office asked me to change. It is fascinating that they did not ask for any changes to the account I give in the book about my meeting with Sir Michael Wood and Linda Duffield. They asked for only one very small change. The Foreign Office has not denied the facts that I am telling you.

Chairman: Thank you very much.

Witness: **Professor Philippe Sands QC**, Professor of Law, University College London, gave evidence.

Q155 Chairman: We are now joined by Professor Philippe Sands QC, professor of international law at University College London. Welcome and thank you for coming. We would like to ask you some questions about what “complicity” means. It may help if I read out the memorandum by Sir Michael Wood that we debated in the previous session because that is the nub of what we are talking about. The memorandum is about the previous witness and is dated 13 March 2003: “Your record of our meeting with HMA Tashkent recorded that Craig had said that his understanding was that it was also an offence of the UN Convention on Torture to receive or possess information under torture. I said that I did not believe that this was the case, but undertook to re-read the Convention. I have done so. There is nothing in the Convention to this effect. The nearest thing is Article 15 which provides [for the inadmissibility in evidence of any statement which is established to have been made as a result of torture]. This does not create any offence. I would expect that under UK law any statement established to have been made as a result of torture would not be admissible as evidence.” In your evidence to us you say that, “In a formal and limited sense Mr Wood’s response is correct, but it seems not to address the issue in the round . . .” Is Sir Michael Wood’s legal advice incorrect because it fails to mention the offence of complicity under article 4?

Professor Sands: First, I would not treat this document as a formal legal advice in that sense; it is a letter addressed to another civil servant that purports to address a very narrow question and does not purport to give a full reasoned legal opinion on the subject. What I say in my written evidence is that insofar as the letter seeks to address a very narrow question it is not formally inaccurate but it misses the bigger point which was addressed in the previous witness’s contribution, namely in what circumstances might the receipt of information obtained through torture constitute complicity within the meaning of article 4 of the convention. For apparently obvious reasons it does not deal with

that, but it is important to recall that article 15 says what it says. That article does not say it is not appropriate to rely on information obtained by torture for purposes other than court proceedings. This issue arose—it is probably appropriate to jump straight to it—in the case of *A & Ors* which was a decision of the House of Lords on 8 December 2005 in which the main speech was given by Lord Bingham. I refer in particular to paragraph 47. That issue arose directly in argument. It is one thing for article 15 to exclude the possibility of relying on torture evidence, as one might call it, in legal proceedings, but it is quite another to raise the question whether it can be used for other purposes. Lord Bingham said: “If under such torture a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and if possible arrest the terrorist who planted it. There would be a flagrant breach [of the obligation not to torture] for which the United Kingdom would be answerable, but no breach of [other obligations of the convention]. Yet the Secretary of State accepts that such evidence would be inadmissible [in court proceedings].” The key sentence is: “This suggests that there is no correspondence between the material on which the Secretary of State may act and that which is admissible in legal proceedings”; in other words, a tiny door is open to use in certain limited circumstances material that may have been obtained by torture, but that does not mean that all material used or obtained in all circumstances does not cross the line into complicity. The grey, complex area is: at what point does the systematic receipt of information cross the line into complicity?

Q156 Chairman: Basically, what Lord Bingham is saying is that you could use a one-off piece of torture evidence as a shield to protect people but you cannot use it as a sword as part of a prosecution case?

Professor Sands: We know that Lord Bingham is a man who chooses his words very carefully. I think he recognises a commonsensical reading of the convention, but he is not saying that the systematic

participation in the receipt of hundreds or thousands of pieces of information obtained in a situation in which torture is known to occur would not cross the line into complicity. He simply does not address that issue. We can speculate as to what he would say but that is not what he is addressing here.

Q157 Chairman: I think we shall come in more detail to the qualitative or quantitative line and where it is drawn. But what do you think is the significance in practice of Sir Michael Wood's advice in these circumstances, and more generally within the Foreign Office, as its advice became more widely known?

Professor Sands: In a sense you are asking for speculation. I have known Michael Wood for many years and have very great respect for him. I know him to be a man who gives robust, independent advice. As I read this letter I interpret it as intending to head off an irritant. A problem has arisen; someone is raising issues. What is the bare minimum that needs to be said in order to get rid of the issue? It does not address other issues including article 4. In my evidence I indicate that it may well be that Sir Michael Wood, other lawyers or the law officers address the meaning and effect of article 4 of the torture convention, but this does not address that and for that reason it does not give a complete answer.

Q158 Dr Harris: You describe Lord Bingham's words as providing a small opening to enable the government to come up with a position, but is it not the case that the government has leapt through it and relied very much on that approach? The 2008 annual report of the Foreign and Commonwealth Office on human rights published in March 2009 says: "The use of intelligence possibly derived through torture presents a very real dilemma given our unreserved condemnation of torture and our efforts to eradicate it. Where there is intelligence that bears on threats to life we cannot reject it out of hand. What is quite clear however is that the information obtained as a result of torture would not be admissible in any criminal or civil proceedings in the UK." They are just saying that is the position and they rely on that. They do not have to work very hard to do that, do they?

Professor Sands: In a sense they are fudging; they are expressing a commonsensical position. You get the odd bit of information that has been provided under torture. It provides information that may head off some serious attack. What do you do? Do you just ignore it? They are saying no. But what they are not addressing is whether or not there is a policy of systematic reliance on such information.

Q159 Dr Harris: What I have just read out is consistent with Lord Bingham's judgment in your view.

Professor Sands: It may be. What I do not know is the factual background against which that is written. I have information about what is in the public domain. I have access to certain information through my professional practice as a barrister

which for reasons you understand I cannot address in this forum. If they are talking about a very limited piece or pieces of information that may be one thing. It is quite another thing, if we take the scenario of those words, to imagine a situation in which Her Majesty's Government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on and received all the information but did not participate physically in the torture. I do not think Lord Bingham had that in mind.

Q160 Dr Harris: But what Mr Murray described as a schizophrenic approach could arise where they worked to stop torture. Let us take the instance of the government being merely a passive recipient of information but they know that it may well have been obtained under torture because they know it happens. They have no intention to use it in any proceedings, to comply with the judgment in *A & Ors*, but it may be stuff that they feel they are entitled to according to the bit of Lord Bingham's speech that you read out. They will not know in advance; they cannot say, "Give the information to us next April because we think that it will contain information about a bomb in the House of Commons." Is it not the case that, even though in Mr Craig's words it seems schizophrenic, by being merely a passive recipient as long as they do everything else to stop it that is a consistent and possibly lawful policy given the case law provided by the House of Lords decision to which you have alluded?

Professor Sands: I do not think I can give a better answer than the one I have given. It might be depending on the particular facts, the regularity of the flow of information and the context in which the information arrived. I take your point, but perhaps I may turn it around a slightly different way. I have set out the criteria that I believe need to be met on the basis of case law and practice to determine when complicity arises. Essentially, there are three factors. First, there must be knowledge that torture is or is likely to take place.

Q161 Chairman: Does that include constructive knowledge?

Professor Sands: I think it would. In my view turning a blind eye in the face of overwhelming evidence would constitute knowledge for the purposes of the Committee Against Torture. Second—this is the crucial issue—there is a contribution by way of assistance. The question then becomes: at what point does the regular receipt of information that is known to have been obtained by torture amount in some way to a contribution? It depends on the factual scenario against which that happens. The third element is some material or substantial effect on the perpetration of the crime. If you go through those three elements you can begin to see a situation in which one-off accidental reliance on information would be in one category but systematic reliance on such information in the circumstances of knowledge

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of the background to an ongoing relationship with another state might well cross the line into complicity.

Q162 Chairman: It is the contribution by way of assistance that has a substantial effect on the perpetration of the crime, so those are two of the three elements in the wording you identify in the ICTY judgment. I have no wish particularly to defend the government, but in a legal sense it is hard to see why passive receipt—I shall come on to receipt with gratitude—via an email box that you do not close, even with knowledge that torture is taking place and the rest of your embassy is saying, “Don’t torture”, is in itself is contribution by way of assistance or that it has a substantial effect on the perpetration of the crime, because the fact that you are receiving it passively is not the reason they are doing it, is it?

Professor Sands: That would appear to be what Lord Bingham had in mind in the passage I read out, but what I am suggesting is that you must distinguish between different situations. There is a world of difference between the one-off receipt of information that comes into your mailbox and a relationship that is premised on regular, systematic, continual reliance against the background of a broader relationship between two sovereign entities.

Q163 Chairman: What goes to that relationship is the fact that you thank them and appear to approve it, or at least you receive the information and seek to maintain an active relationship in intelligence receipt. That is one of the facts of the case that is different from mere passive receipt.

Professor Sands: I think it is in that direction; it is not so much a letter of thanks and appreciation for what they have just received. The question is: when do you cross the line into encouraging it?

Q164 Chairman: Is there a difference when it comes through third-party countries? In Pakistan we have MI6 and MI5 and a clear allegation of torture in prison. Here we have Uzbeks who do the torturing; the information goes to the CIA and the CIA send it to MI6, effectively laundering the information. Presumably, they take out some of the source material and say, “This is what we have found out.” Is there a break in the chain there?

Professor Sands: I do not think there would be. The encouragement can be direct or indirect. If you are aiding and abetting it can be done directly or indirectly. If essentially you are sending a signal to a state that it is all right to have a policy of abuse and torture and you will continue to have a sensible sovereign relationship with that state notwithstanding those practices that constitutes a pattern of encouragement and at some point that would constitute a contribution.

Q165 Chairman: To go back to Uzbekistan, Mr Murray said that an MI6 operative would go there once a year and say, “Thank you very much.” He stopped that and started to make representations to

the Uzbeks to stop torturing. Does that change the position when we have no direct line to the Uzbeks other than via Mr Murray saying, “Don’t torture”?

Professor Sands: Not if the Government of Uzbekistan is getting signals from elsewhere which allow the regular flow of information.

Q166 Chairman: From the CIA but not MI6?

Professor Sands: It could be through other channels bypassing Her Majesty’s Ambassador in Tashkent or through a third government or private actor. There are lots of ways in which these things happen. I do not think that the chain of causality is the crucial issue. The question to ask oneself is: at what point does the act of an individual associated with the British Government cross the line into encouraging a particular pattern of practice?

Q167 Dr Harris: I am a little confused. I thought it was common ground even within the government that “encouragement”, using its normal meaning, would be something they do not do because they say they do not instigate others to do so, and I think I have heard ministers say that they do not encourage it. I do not have the quote to hand. I also thought that that was your opinion and you were exploring only the meaning of complicity which I understand, based on the dictionary definition, to be something short of encouragement, because if complicity is encouragement you use the term “encouragement” at least in criminal law in this country. Therefore, you accept that as soon as you say this complicity amounts to encouragement you are making the case and I am trying to explore the situation where there is something that is not clearly encouragement but complicity.

Professor Sands: I am not sure I would accept the distinction between the words “encouragement” and “complicity”. The term in the convention that we are stuck with, for better or worse, is “complicity”. There has been some case law on what on earth complicity means. Different writers, courts and bodies call it encouragement and aiding and abetting. I think that at the end of the day it is much of a muchness. Let me put it in a different sense: in the past week more legal memoranda have emerged following President Obama’s decision to release information. It has now become clear that as at July 2002 the Central Intelligence Agency and several months later the Department of Defense moved to a policy of interrogation techniques which in my view constituted torture. The crucial question for your purposes—it has been raised by Mr Murray—is: at what point did the British Government or those associated with it have direct or indirect knowledge of that change of policy? At the point that such knowledge arises the failure to engage with the United States and say, “We don’t do this sort of stuff; that’s not who we are”, could be seen as a policy of encouragement, bringing individuals into complicity through turning a blind eye. I addressed that issue a little in a lecture given to Justice a couple of years ago when the facts were less clear but when we could begin to speculate at what point turning a blind eye constituted complicity. When you cross that line and

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encourage another state's actors to engage in acts of torture you are at risk of being complicit in that torture and caught by article 4.

Q168 Dr Harris: I may need to reflect on this further, but I thought that if you encouraged something clearly that went further than ending up being a party to it through complicity which could be passive. In your memorandum you identified two different definitions of torture. One was a broader one which you linked to the UN Committee Against Torture. As you put it, it includes tacit consent and acquiescence and, as the Chairman intimated in his intervention, constructive as well as actual knowledge that torture is taking place. You then go on to identify a narrower definition which stems from the conclusion of the ICTY trial which has three components. All three elements must be established: knowledge and a contribution by way of assistance which in turn has a substantial effect on the perpetration of the crime of torture itself. Clearly, the first one is wider than the other and does not require active encouragement, just tacit consent and acquiescence. In the conclusion of your submission to us I think you say you would go with the latter narrower one. In paragraph 25 of your submission you say: "Having regard to the requirements of the law a proper investigation of any possible complicity in torture by persons associated with the British authorities would have to focus on key issues of fact relating to . . .", and then you refer to three elements. Your view is that it is the narrower definition that applies. If we accepted that view we would be adopting a narrower definition than tacit agreement and acquiescence.

Professor Sands: That is perhaps a drafting point. I do not think that was my intention. The Committee Against Torture established under the convention has very limited case law on the point. You have all of it here; that is all it has said on the subject. You read it very carefully and try to understand what the committee is saying. There is some jurisprudence, for example the Yugoslav war crimes tribunal. Essentially, it goes in the same direction. Looking at the examples given by the Committee Against Torture, if you are a doctor in the room and never touch the individual but you are there to ensure that the person can continue to be abused that is complicity. If you are a policeman who has been informed that an individual is at immediate risk and you do nothing that constitutes—here I paraphrase the committee—a form of contribution. Therefore, it is a negative or positive; it is the flip side of the same thing. I believe that essentially the three elements must be present on both standards that have been applied and I really do not make a point as to which is narrower or broader. What may be slightly unclear is what is meant by the term "contribution". "Contribution" can include a failure to act or turning a blind eye.

Q169 Dr Harris: I hesitate to give you more work, but my reading of it was as I have just said. I would still like to have your view on it.

Professor Sands: I shall submit a supplementary page to deal with it.

Q170 Chairman: I want to ask about the third element which says "substantial effect". Supposing the UK Government had raised this with the CIA and the CIA had said to the Uzbeks on behalf of the UK Government, "Please stop torturing", and meant it, the Uzbeks would just carry on anyway; realistically, it would make no difference whatsoever to what the Uzbeks did because that is their record. How would that affect the position? There would be no substantial effect one way or the other because they would not take a blind bit of notice of what we had to say, as was the case when it was raised with them.

Professor Sands: That may or may not be the case. I am not sufficiently close to the facts of that particular scenario, unlike the previous witness. But one can easily imagine a situation where a government becomes aware that certain practices are being followed and makes it clear it does not accept that such practices are tolerable and that if they continue it will take further steps in order to indicate displeasure with what is going on. The "do nothing" option in effect can be seen as encouragement and in that sense may constitute in an indirect way a contribution to what is happening. What I have just said is not that helpful in that everything turns on the specific facts of the scenario. I have not directed my mind to the Uzbek situation; over the past four years a great deal of my thoughts have been directed at the US situation where the facts are now clearer.

Q171 Dr Harris: There is an argument that what the British Government is doing is illegal; there is another argument, which I am happier with, that as a matter of policy the government should change its policy. Part of the argument in that regard is that the law really does not help. Let us say that in the case of America or Uzbekistan the facts are that Britain says, "Don't do this", and sends money to train people in how to do interrogation which does not involve torture but still accepts, citing the words of Lord Bingham—I do not want to call it the "Bingham doctrine"—the caveat and receives intelligence which it says it will not use in proceedings. It looks at it in case it provides evidence that there is a ticking bomb and it can make a decision. In those circumstances, are you saying that those facts are consistent with knowledge that torture is taking place? That is element is ticked. What about "contribution by way of assistance"? There is passive receipt plus, "Thank you for sending us intelligence." The third one is "has a substantial effect on the perpetration of the crime of torture itself". As the Chairman says, this is a state that does it; it is probably one with which we will seek to have a memorandum of understanding because we know they do it. It seems to me that it is difficult to make a legal case on that.

Professor Sands: I wish I could give you a yes or no answer but I cannot. There is a point on a factual continuum where passive receipt on a regular basis

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can be seen as active encouragement and therefore complicity. Where on the continuum that happens is very fact dependent and I do not think it is helpful to give a general yes or no answer. The point you raise about a legal case is, frankly, exactly the situation in which President Obama now finds himself. Last week he chose his words very carefully. I think he was right to say that interrogators who rely on wholly erroneous and outrageous legal advice in good faith should not be targeted by way of prosecution. I think that is the right approach.

Q172 Earl of Onslow: I do not know whether you heard the allegation made earlier about Mrs Thatcher's government, namely that it did not use it. Later on we do it. Does it not follow automatically that the moment somebody says that before it was not accepted but now it is that must be encouragement or complicity? To my mind, the moment you say, "Yes, we do", whereas before you said, "No, we don't", the government is complicit.

Professor Sands: Let us take a hypothetical fact scenario. Let us assume that the situation in country A for a period of 10 years is that it will not touch certain categories of intelligence or information because it understands them to have been obtained by illegal means, namely torture. Then a change of policy takes place internally within the government and it adopts the direction you have just suggested, that is, "We will receive it. We will not use it in court proceedings but we reserve our right to use it for other purposes." The crucial question then becomes whether that change of policy is in some way communicated to state B. If you communicate that change of policy plainly you are potentially crossing that line into encouragement.

Q173 Chairman: What I find hard to believe about the Mrs Thatcher analogy is that somehow the government at that time said to the CIA, "Please don't send us information obtained under torture from Argentina", or wherever it happened to be, and then suddenly after 9/11 MI6 and the government said to the CIA, "You can start sending us dodgy information now." I do not see that as a credible scenario. I suspect that the CIA sent all the material they had all the time anyway no matter what Mrs Thatcher may or may not have said.⁴

Professor Sands: I do not know, but if it is helpful the UK became a party to the Convention Against Torture in October 1998, so anything before that date would not have been covered by the rule in article 15. It would have come about very late in Mrs Thatcher's term. I doubt that there would have been a written policy one way or the other on this issue. The obligation in international law not to torture is a relatively recent one, at least in having a specific convention to deal with it, and I think we are moving

to a situation where probably even the drafters of that convention did not fully envisage the types of scenarios that we are now discussing. It would not have been at the forefront of their minds. I went through the whole negotiating history of the convention and this issue never came up. That indicates to me that we are in a new area looking in the cracks of the convention to see where this is dealt with.

Q174 Lord Bowness: Chairman, unless you think otherwise I do not believe we will get very much further with this particular question. This is a hypothetical situation and you are really saying that we have to judge it on the particular facts.

Professor Sands: I will try.

Q175 Lord Bowness: Forgive me if you think you are covering ground that you have already covered. The example, which is one of a number that we would probably want to put to you, is this: if the UK intelligence services get information which they know to have been obtained from what are described as "High Value Detainees" and they know they have been subjected to torture, or enhanced interrogation techniques to use that phraseology, would the receipt of that information constitute complicity?

Professor Sands: If it is preceded by a conversation between the Prime Minister of this country and the President of the United States that we will happily receive such information and "go ahead and do it" absolutely, yes. Again, it turns on the specific facts. It would be very surprising given the closeness of the relationship between Britain and the United States, for example, if the authorities in Britain were unaware of some change of practice in the US. It is probably no coincidence that these issues began to arise in June/July 2002. Frank Rich wrote an excellent op-ed piece in the *New York Times* last Sunday in which he drew the connections between all of this and the famous Downing Street memo. We have very close relations between British and American intelligence services. There was a big meeting between them in July 2002. It would be very surprising if there were not conversations around the kinds of issues you are addressing. If they did take place the content of those conversations could contribute to a situation in which the scenario you have just identified would amount to complicity.

Q176 Baroness Prashar: I have two hypothetical questions. First, if the UK intelligence services provide information and questions to foreign intelligence services in a country with a bad record who they know to be torturing detainees would the provision of such information constitute complicity? I have a second question.

Professor Sands: If I deal with them one at a time it may be a little easier. I need to be a little careful because that scenario is very close to another one which for me is a forbidden area as a result of Bar Council intervention. I do not want to indicate in any way that what I am saying addresses that matter at all. My own personal view based on the hypothetical situation that you give is that if the

⁴ Footnote from witness (Craig Murray): As I tried to say in answer to Q96, the Thatcher ruling did not come, to the best of my recollection, in response to CIA material. I was aware of no allegation at the time that CIA material was then coming from torture. I therefore at that time did not hear any discussion of the UK/US intelligence in this context. The incident took place around December 1990.

British intelligence services made questions available either themselves or in written form under the door in the knowledge that someone was being abused in violation of these international obligations it would be very strongly arguable that complicity would arise because I think it would constitute a contribution to a process in which one sought to obtain a confession or information which is one of the definitional elements for torture under article 1 of the convention. Therefore, that scenario in a hypothetical sense would raise the most serious issues.

Q177 Chairman: To take one step back from that, what about the situation where questions are supplied without knowing the specific conditions of the individual detainee in a country which generally has a bad record for torture, for example Uzbekistan?

Professor Sands: It comes back to the question of constructive knowledge. If the individual is being held in a country where for many years torture has not been practised, or it is under the control of a country where torture has not been practised, I do not think you can be expected to assume without further information that there has been a change of policy that would bring you into the “complicity” situation. On the other hand, you might be dealing with a situation where a country had a known track record of torture and abuse and you participated in that way. If you look at the Committee Against Torture the threshold of participation is pretty low, for example driving someone to a place where they will be abused. I think that the link between driving someone and providing questions or information on the whereabouts is a very clear connection, so in that scenario also there ought to be red lights flashing in relation to article 4.

Q178 Baroness Prashar: The second scenario is that if the UK intelligence services sent interrogators to question a detainee who was known to have been tortured by their interrogators, would that constitute complicity?

Professor Sands: Subject to the same caveat that I have just made, without wishing to express a view on any matter on which I am not allowed to express a view my personal opinion would be yes.

Q179 Mr Sharma: Leaving aside the case of Binyam Mohamed, what evidence is there in the public domain that any UK personnel were aware of the change in US policy and practice?

Professor Sands: There is material in the public domain. In a book I wrote before my most recent one I looked at this issue. I have not been involved in that case and so I am free to talk about it. I came across material that concerned the court martial of Col Mendonca. The Joint Committee might find it helpful to look at the transcripts of the cross-examinations. I address that case in a couple of pages in my latest book, to which I can draw the attention of your clerk, which caused me to receive a stonking email from a person not a million miles from the Ministry of Defence. The evidence was

pretty clear. We could trace what happened. We are talking now about September 2003. A visit is made to Baghdad and Abu Ghraib by US interrogators and lawyers on 30 August of that year. On 14 September of that year the commanding officer in Baghdad, General Sanchez, adopts a new regulation giving effect to these forbidden techniques: sleep deprivation, stress positions, hooding, nudity, dogs and so on, all Guantanamo techniques. They are used thereafter in Baghdad for a limited period of time. The facts surrounding the court martial of Col Mendonca occurred on precisely those days, 14, 15 and 16 September. What emerged in the course of the hearing but has never been teased out was that a British Army legal adviser appeared to receive information in relation to the legal advice and change of policy in the United States. That appears to have migrated down to Basra, so you can directly track the chain.

Q180 Chairman: Do you know the name of that legal adviser?

Professor Sands: I do but I do not recall it. I set it out in the book with all the footnotes, witness statements and transcripts that are publicly available.

Q181 Chairman: I assume you know that we have been looking at it from a different direction from the advice of the Attorney General at the time.

Professor Sands: Yes. We know that by September 2003 at least at the military level there was cross-fertilisation of knowledge of a change of practice, but I have also managed to track that the US position on the applicable standards changed much earlier: 7 February 2002. At that crucial moment of change the President of the United States adopted an executive decision which said that any detainee caught in the war on terror—anyone alleged to be al-Qaeda—had no rights under the Geneva conventions. We now know that that was done to open the door to what are called EITs—enhanced interrogation techniques—otherwise known in more modern parlance as torture. Although there was some public information as of 7 February 2002—we already knew by that date that there had been a change in US policy—the full details of President Bush’s decision were not made publicly available. I would be astonished if the British Government did not know the full details of that change of policy because they were already at that point involved in joint operations in Afghanistan. They must have known that a different standard was being applied in relation to the treatment of detainees.

Q182 Chairman: Can you say definitively what was the earliest date that this information was available to the UK? We can suspect it was the same day.

Professor Sands: I can only say definitively that it was by 14 September 2003. I can say as a matter of fact that someone in the UK authorities must have known, but I suspect that it was as early as 7 February 2002. I would be very surprised if no one in the UK authorities was aware that by 1 August 2002 there had been a significant change in US practice because that was when waterboarding began under

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those legal advices. But I cannot say to you as a matter of fact I am aware there was actual knowledge.

Q183 Chairman: Can you answer Mr Murray's question which he put to us in evidence: when did the UK first become aware of waterboarding being used by the US?

Professor Sands: I cannot answer that question. All I can say is that I would be very surprised on the basis of the close relationships at governmental and intelligence service levels if there was not knowledge by the autumn of 2002 at the latest. The reason I say that is that it is already in the public domain that at that point detainees with whom the United Kingdom had an involvement in relation to their identification or questioning were being subjected to interrogations by CIA operatives under the new legal framework decided as early as 7 February 2002. I think the crucial period for the Joint Committee to look at is from 7 February to, say, 1 October 2002.

Q184 Mr Timpson: Earlier you touched very briefly on the recent release of the four torture memos by President Obama in the US and the debate now taking place in the United States on what to do with that evidence in terms of criminal investigation or an inquiry and what form that inquiry would take. Should we in the UK be putting potential criminal prosecutions to one side? Should we be holding an independent inquiry into complicity and torture by UK personnel?

Professor Sands: President Obama has not yet decided whether there will be an independent inquiry. He has chosen his word very carefully. As I understand the position as of today, he has left open the possibility of a criminal investigation in relation to what he called the framers of the legal decision to move to abusive techniques of interrogation, which I suspect means the lawyers but may go higher up to some of the policymakers and politicians. He has expressed his own lack of support certainly for a congressional inquiry because he believes that that would be too partisan and political, but apparently he is not so opposed to the idea of a blue ribbon inquiry by the great and the good looking at all these issues as a possible way forward. I think that the pressure in the United States is enormous and it is inevitable that there will be some sort of inquiry. Before and during that inquiry materials will come out which will shed light not only on the UK but the many other states that co-operated in various ways with the United States in that period. That will inflame the situation in those other countries. It would be better for the United Kingdom to be seen to move ahead proactively under its own steam, not pushed by third countries, and say that this was, as President Obama puts it, a dark chapter in our history; let us shed some light on it and then move on. I think it is better for countries to do that themselves than to wait for others to push them into doing it. My answer is that I think there is enough out there that requires investigation.

Q185 Mr Timpson: You say that regardless of the US decision we in the UK should get on with an independent inquiry?

Professor Sands: In the long run that would be a more sensible way forward because we would then be masters of our own situation and would not be waiting for information to emerge from elsewhere in dribs and drabs.

Q186 Mr Timpson: Bearing that in mind, have you given any thought to what the model of that inquiry should be? For example, in Canada the Arar Commission is carrying out an independent inquiry and has made some important recommendations not only about the terms of reference of the inquiry but also about the role it has played, that it has not been a democratic country. Is that the sort of model we should look at or is there a better one that you think would fit in with the UK's position?

Professor Sands: The Canadians have behaved impeccably after their difficulties with Mr Arar and their contribution. They really cannot be faulted. They were also concerned about partisanship and so sent it out to an individual to carry out an independent inquiry. I think President Obama is right to be concerned about the danger of making it a partisan issue. In a sense it is a bigger issue than that; it is not a left or right issue. In my own written works over the past four years I met some truly amazing people who were deeply committed republicans and said, "This is not us; we don't do this stuff", and acted to stop it happening. I have also met democrats who have taken a different view and would be happy to proceed. It is not a party-political issue. I think the most sensible way to proceed with it is to try to depoliticise it which means putting it in the hands of individuals who in a sense would take an independent technical, policy and legalistic approach rather than decide the matter within a political framework. There is a very complex related question: can one have an inquiry of a non-legal character going hand in hand with criminal investigations? That is a very difficult issue that other countries have faced. Once you have criminal investigations for perfectly sensible reasons people clam up; they do not want to speak because they are themselves at risk of investigation, indictment, prosecution or whatever. My own sense is that at least in the initial stages you want as much information as possible. It may be that in due course there will have to be criminal investigations, independent prosecutors, DPP or whatever, but at the point we are now we ought to do what President Obama is doing which is to throw out all the information. In this way I would also support what former Vice President Cheney has said. He wants to see the memos that show all the benefits from this type of abusive behaviour. I do not think I need to go further than that. Let us put out the interrogation logs, videos and policy investigations and look at the consequences of the photographs taken at Guantanamo and Abu Ghraib in inflaming the situation in Islamic countries. Let us put all of it out there but in a non-political way, if that is possible, by

placing it in the hands of some sort of independent commission, whether it is a judicial body or the great and the good, in a de-politicised way.

Q187 Chairman: Earlier you said that President Obama was right to rule out the prosecution of CIA operatives as long as they were operating within the legal advice available to them, erroneous though it might have been.

Professor Sands: In good faith.

Q188 Chairman: Would you apply the same principle to UK personnel operating, for example, according to the Sir Michael Wood doctrine?

Professor Sands: In a situation of limited resources why would one expend effort, energy and resource on individuals who at the end of the day are not truly responsible for what has happened? The applicable principle must be to go up the decision-making process to the point at which the real decisions are taken, which is why in particular I have focused on the lawyers and policymakers rather than the people at the front line. What that necessarily requires as a matter of investigation—it is not clear to me who will do it—is a determination of what the interplay has been, without referring to any particular matter or case, among intelligence officers, government and others. That is a complex issue.

Q189 Chairman: Therefore, the Attorney General was not right to refer this to the police for investigation?

Professor Sands: I think the Attorney General was rather brave to do what she did. I suspect she came under intense political pressure to do otherwise, but she was presented with material—I do not want to go into the merits or demerits of the facts—and exercised independent critical scrutiny in her prosecutorial function as Attorney General. That was the exercise she performed. I do not think it was for her to decide whether or not to submit it to a general commission.

Q190 Chairman: To try to square the circle, how can you possibly have a proper and open public or semi-public inquiry, as far as it can be, when there are people at risk of prosecution, whether it be the individual humble CIA and MI5 operatives, the lawyers or ultimately, one supposes, ministers? How on earth will they co-operate with the inquiry when potentially they are at risk of prosecution?

Professor Sands: It is a very difficult issue that was faced in a very dramatic way by South Africa back in the mid-1990s; it was faced by Chile. What they decided to do in different ways was essentially to begin with a non-criminal process leaving open the possibility of criminal process to follow in due course. It was done essentially for that reason. The decision-making was premised on the right approach, namely that it is in the better interests of society as a whole to get more rather than less information out sooner rather than later.

Q191 Chairman: If I am right, the South African model is that there is immunity for everything to which you confess but you can still be prosecuted for anything you do not divulge.

Professor Sands: Essentially, if you participated fully and openly you were off the hook for the purposes of criminal investigation, but if you failed to do that you would be subject to criminal investigation. The same thing happened in Chile. You will be aware that the truth process in Chile was eventually followed by criminal investigations, prosecutions and convictions.

Q192 Chairman: Would you advocate immunity for things people owned up to?

Professor Sands: I have not thought about it in the context of this country. I have looked at it in the context of the United States where Senator Leahy is going through exactly this process of questioning. It is a really difficult question. Anyone who says that these issues are easy and it is black and white is not being straight. Senator Leahy has proposed that to get out all of the material there should be some sort of truth commission in which there will be limited immunity for a short period of time but then, depending on what comes out, the matter may go to a special prosecutor appointed by the Attorney General. That has not got off the ground yet though it has some support, but it recognises the reality of the situation you are addressing.

Q193 Chairman: If I were an American and found myself in that situation I would claim the fifth amendment. Why risk it?

Professor Sands: It depends on the precise rules of engagement.

Q194 Chairman: We have heard that phrase before.

Professor Sands: The US is smart at coming up with rules of engagement that encourage people to come forward. I think a lot of people want to come forward in the US. I heard the question put earlier to Mr Murray. I suspect that there are a lot of people in the United Kingdom who also would wish to come forward but are very uncomfortable about doing so for a range of different reasons.

Q195 Chairman: So, we need to change the rules of the game again?

Professor Sands: No comment.

Q196 Lord Lester of Herne Hill: I apologise for missing part of your evidence. The focus of your answer to the Joint Committee's questions has been largely on investigation and criminal prosecution, but I do not believe you have been asked about civil remedies in the United States. I should know the answer to the following question but I do not. Would someone who could show he had been the victim of serious ill treatment by perpetrators at a senior level have a civil remedy—I do not know whether it would fall under the Alien Tort Claims Act or otherwise—

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in the federal courts of the United States, quite apart from these difficult questions about criminal prosecutions?

Professor Sands: I can answer that question by reference to the example Mr Timpson gave because it has arisen in the case of Mr Arar, the Canadian national who was intercepted at John F Kennedy Airport and shipped off to Syria where it is fairly clear, as the Canadians found, he was horribly tortured. He went through the process in Canada. There have been payments in compensation, a full public apology and full accounting. He has brought a civil proceeding in the United States and it has got

nowhere because federal judges have said it is a national security matter over which they cannot exercise jurisdiction. Astonishingly, the Supreme Court of the United States has declined to allow that case to be challenged before that court. At this point the position appears to be that there is a national security bar to those cases of a civil character proceeding in US federal courts. That may change with the change of administration. This predates the change in administration.

Chairman: This brings us to the end of the public evidence session. Professor Sands, thank you very much.

Written evidence

**Letter from the Chair of the Committee to the Hon Jacqui Smith MP, Home Secretary,
dated 16 October 2008**

As you will be aware, the Joint Committee on Human Rights, which I chair, has a broad remit to scrutinise human rights issues relating to the United Kingdom. A significant focus of our work in recent years has concerned the UK's compliance with the UN Convention Against Torture (UNCAT). We published a major report on the UK's compliance with this treaty in May 2006 and have also scrutinised the issue in connection with our work on counter-terrorism policy and human rights and allegations of torture and inhuman treatment conducted by British troops in Iraq.

UNCAT prohibits the use of torture or inhuman and degrading treatment or punishment. It also specifies a series of positive obligations on states, to prevent acts of torture or inhuman or degrading treatment; to criminalise such acts and to prosecute or extradite where there is evidence that they have been committed; to investigate allegations of torture and to provide appropriate redress for victims of torture; and to train and educate officials in the light of the prohibition on torture and ill-treatment.

On 13 August we received a letter from Mr Alan Rusbridger, editor of the *Guardian* newspaper, enclosing a series of allegations about the involvement of members of the security services in the torture and mistreatment of British nationals detained in Pakistan. I am enclosing the *Guardian* allegations. They raise significant questions about whether the UK is fully meeting its requirements under UNCAT, including the positive obligations summarised above.

I would be grateful if you could respond to the allegations we have received.

In particular, my Committee would welcome answers to the following questions:

- when were you first made aware of the *Guardian* allegations?
- what steps you are taking to ensure that the *Guardian* allegations are fully investigated?
- can you provide us with details of the nature of the investigations into these allegations and their outcomes?

I am copying this letter to Mr Rusbridger, the Director General of the Security Service, the Foreign Secretary and the Chairman of the Intelligence and Security Committee.

16 October 2008

**Letter from Rt Hon Jacqui Smith MP, Home Secretary, to the Chair of the Committee,
dated 10 November 2008**

Thank you for your letter of 16 October 2008 in which you raise a number of concerns about the UK's compliance with the UN Convention Against Torture (UNCAT) particularly as regards the allegations made by the *Guardian* that members of the Security Service were "involved in the torture and mistreatment of British nationals detained in Pakistan".

First, the Government's position on torture and UNCAT is quite clear. We unreservedly condemn the use of torture as a matter of fundamental principle and work hard with our international partners to eradicate this abhorrent practice worldwide. The Security and Intelligence Agencies do not participate in, solicit, encourage or condone the use of torture or inhumane or degrading treatment. Their policy is not to carry out any action which they know would result in torture or inhuman or degrading treatment. And their rejection of the use of torture is well known by our liaison partners.

The UK continues to support wider ratification and implementation of the UNCAT. We do this through bilateral lobbying campaigns, EU demarches and our work in UN fora such as the Human Rights Council. We also use a combination of project work and diplomatic activity to encourage ratification and implementation of the Optional Protocol to the Convention Against Torture (OPCAT), including by the establishment of national preventative mechanisms.

The UK signed and ratified both UNCAT in 1988 and OPCAT in 2003, believing that universal implementation of these instruments will contribute significantly to global efforts to eradicate torture. In October 2008 we launched a fresh round of lobbying to encourage 150 countries to ratify either the UNCAT or OPCAT, including lobbying Pakistan and India to ratify the UNCAT. The UK regards its continuing relationship with the UN Committee against Torture as positive and productive. We always take seriously the recommendations made by any of the UN's treaty monitoring bodies.

As to the specific allegations made by *The Guardian* in the articles published on 29 April and 15 July 2008, the Government was first contacted about the *Guardian* allegations by Ian Cobain, Senior Reporter, on 4 April 2008, when he wrote to the Foreign Office to make initial enquiries on the issue.

It is our long-standing policy not to comment on any operational work of the intelligence services. So I will not comment on individual cases and some which you refer to are *sub judice*. But I can say that the Security Service have checked for any relevant information in light of the allegations and my understanding is that there is no basis to the allegations and that UK officials acted properly at all times.

If there were any question of anyone acting in an official capacity being engaged in an act of torture then this would be a matter for the police. Where allegations of mistreatment have been made to us by British nationals whilst in Pakistani custody or following their release, and where we have been asked to do so by the individual concerned, we have raised those allegations with the appropriate authorities. If individuals believe that their human rights have been infringed as a result of actions carried out by or on behalf of any of the intelligence agencies then they should take their case to the Investigatory Powers Tribunal. Where individuals are subject to court proceedings, they can raise such allegations there, and it would be for the judge to investigate as I understand Mr Amin has in fact done. Should anyone wish to raise any such allegations, these are the proper means by which they may do so.

A copy of this letter has been sent to David Miliband and to Jonathan Evans, Director General of the Security Service.

10 November 2008

**Letter from the Chair of the Committee to the Rt Hon Jacqui Smith MP, Home Secretary,
dated 9 December 2008**

I am writing in respect of the unconfirmed death of Rashid Rauf, who was suspected of being involved in a number of alleged terrorist plots and whom the Government had sought to extradite for trial. It would appear from press reports that Mr Rauf was killed in Pakistan in a US attack. This raises questions about whether Mr Rauf was specifically targeted by the US military and, if so, whether UK intelligence agencies collaborated in or assisted with the attack.

The Security Service is a public authority for the purposes of the Human Rights Act and must act compatibly with the Articles of the European Convention on Human Rights. Article 2 of the ECHR prohibits extra-judicial killings. Could you confirm that the Security Service is in no way involved with extra-judicial killings, including the provision of information to other countries to assist with such operations. I would also be grateful for your observations on the circumstances in which Mr Rauf was killed and the UK's role in monitoring his whereabouts.

I am copying this letter to the Foreign Secretary.

9 December 2008

**Letter from Rt Hon Jacqui Smith MP, Home Secretary to the Chair of the Committee,
dated 22 December 2008**

Thank you for your letter of 9 December about the alleged death of Rashid Rauf. We do not yet have confirmation that Mr Rauf died in the attack on 21 November. But following a request from his family, the Foreign and Commonwealth Office has asked the Government of Pakistan for official confirmation.

As to the various points raised in your letter, it is, as you know, the long standing policy of the Government not to comment on operational security and intelligence matters. But I can tell you that the intelligence and security agencies have written to the Intelligence and Security Committee whose remit covers such matters and is keeping them informed of the facts.

I'm copying this letter to David Miliband.

22 December 2008

**Letter from the Chair of the Committee to Rt Hon Baroness Scotland of Asthal QC, Attorney General,
dated 10 February 2009**

The Joint Committee on Human Rights, which I chair, has a long-standing interest in the UK's compliance with the UN Convention Against Torture (UNCAT). As you will know, the UK ratified UNCAT in 1988, and the Convention prohibits complicity in torture as well as torture itself.

The Joint Committee published a major report on UNCAT in 2006. Since then, we have continued to scrutinise UK policy in this area and on 3 February we heard oral evidence from Mr Ian Cobain, of the *Guardian*, and Human Rights Watch about the alleged complicity of UK agents in the abuse and mistreatment of UK detainees in Pakistan.

Since our hearing, we have also taken note of the latest judgement in the Binyam Mohamed case, including the release of the cross-examination of “Witness B”, a Security Service agent, and the Foreign Secretary’s oral statement to the House on the case. The Binyam Mohamed case also raises a number of issues about the alleged complicity of UK security service operatives in torture and mistreatment by overseas agencies.

We are inviting the Home Secretary and Foreign Secretary to give oral evidence to the Committee to address the allegations that intelligence and security service personnel have been complicit in the torture of UK nationals and residents by overseas agencies. We have also asked a number of questions about section 7 of the Intelligence Services Act, which provides for the Secretary of State to waive the liability of intelligence service personnel for illegal acts committed abroad in certain circumstances.

I note from the Foreign Secretary’s oral statement on 5 February that you have been asked by the Home Secretary to consider the question of possible criminal wrongdoing by intelligence and security service personnel in the Binyam Mohamed case. It would be very helpful if you could provide us with some details of this work, including the number of cases you are considering; the date by which you aim to conclude your consideration; and how you intend to announce your decisions to Parliament.

10 February 2009

Letter from Rt Hon Baroness Scotland QC, Attorney General, dated 12 February 2009

BINYAM MOHAMED

Thank you for your letter of 10 February 2009. You ask for some details of the work which is being done in relation to “the question of possible criminal wrongdoing by intelligence and security personnel in the Binyam Mohamed case”.

The Home Secretary referred this issue to me on 23 October 2008. I was provided with the open and closed judgments of the Divisional Court in the case; transcripts of all the evidence given by witness B; the other evidence and submissions made to the court; and the Foreign Secretary’s PII (public interest immunity) certificates, together with their sensitive schedules and associated documents.

I have also received material from third parties about the case.

After undertaking a preliminary review of this material I took the view that I should seek advice from the Director of Public Prosecutions. All the material provided to me has been made available to the DPP.

It has been said that I or the DPP are carrying out an “investigation” into these matters. That is not correct. Neither my office nor the CPS has the powers and capacity to conduct investigations. Rather, I am, with the advice of the DPP, considering the material in order to determine whether there is a basis for inviting the police to conduct a criminal investigation in relation to one or more individuals. Any decisions on prosecutions would be reached only after such an investigation.

At this stage no decision has been reached and it would be premature to speculate as to the outcome of this consideration.

In performing this function as Attorney General, I act wholly independently of government and in the public interest. Similarly the DPP acts as an independent prosecuting authority, subject to my statutory superintendence.

You ask for an indication of the date by which I aim to conclude my consideration. You will understand it is not possible to give a precise timescale. There is a substantial quantity of material to consider. Some of it is very highly classified and must be handled under the most secure conditions. It is being considered by specialist prosecutors within the CPS who are progressing this important work as quickly as possible.

I would intend to report to Parliament on my assessment. But you will understand that what can be said publicly at any given stage may depend on a variety of factors, including whether any police investigation is to follow (and the need to avoid prejudicing such an investigation and potential prosecution), and the need to protect national security.

In the meantime I do not believe it would be helpful to give a running commentary as to the progress of my consideration and I do not propose to do that.

10 February 2009

Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary, and Rt Hon David Miliband MP, Foreign Secretary dated 10 February 2009

I am writing to invite you to appear before the Joint Committee on Human Rights, at your earliest convenience, to discuss aspects of the UK's compliance with the UN Convention Against Torture (UNCAT).

The UK ratified UNCAT in 1988. It prohibits complicity in torture as well as torture itself.

The Joint Committee heard evidence on 3 February from Mr Ian Cobain, of the *Guardian*, and Human Rights Watch about the alleged complicity of UK agents in the abuse and mistreatment of UK detainees in Pakistan. I am enclosing the transcript of the proceedings.

The allegations, which I raised with you in a letter dated 16 October 2008, are that the intelligence and security services have been complicit in the torture of UK residents and nationals by the Pakistani authorities. If true, they cast considerable doubt on the UK's compliance with UNCAT and the intelligence and security services' compliance with the provisions of the Human Rights Act and call into question repeated assurances from the Government, including from you in your letter to me of 10 November, that the Government is fundamentally opposed to the use of torture.

Since our hearing, we have also taken note of the latest judgment in the Binyam Mohamed case, including the release of the cross-examination of "Witness B", a Security Service agent, and the Foreign Secretary's oral statement to the House on the case. The Binyam Mohamed case also raises a number of issues about the alleged complicity of UK security service operatives in torture and mistreatment by overseas agencies.

Given that you have ministerial oversight for the Security Service, I hope you will welcome the opportunity to appear before the Committee to answer our questions on these matters. I appreciate that the Foreign and Commonwealth Office also has an interest in this area, and that Lord Malloch-Brown appeared before the House of Commons Foreign Affairs Committee to answer questions about the Pakistan allegations, amongst other things, in May 2008. I am therefore writing in similar terms to the Foreign Secretary.

Finally, our questioning on 3 February touched on the purpose and implementation of section 7 of the Intelligence Services Act, which provides for the Secretary of State to waive the liability of intelligence service personnel for illegal acts committed abroad in certain circumstances. I would be very grateful if you could confirm whether this section applies to staff of the Security Service. If so, I would be grateful if you could set out:

- how many authorisations under section 7 of the Act are currently in force for Security Service personnel a) under subsection (5)(a) and b) under subsection (5)(b);
- how many of these authorisations relate to individual persons and how many to classes of person;
- how many of these authorisations relate to particular acts, to acts of a description specified in the authorisation or to acts undertaken in the course of a specified operation;
- how many of the authorisations currently in force have previously been renewed, and for how long in total any such authorisations have been in force, disregarding periodic renewals; and
- how many authorisations under section 7 of the Act have been issued since 2001 but are no longer in force, broken down in accordance with the bullet points listed above.

It would also be helpful to know whether authorisations under section 7 of the Act can relate to any criminal offence, including torture, homicide and serious personal injury: and how you ensure that you act in compliance with the provisions of the Human Rights Act in giving authorisations under the Act.

I would also be grateful if you could inform us of the number of occasions that Security Service personnel have invoked the defence of "lawful authority" provided by subsections (4) and (5) of section 134 of the Criminal Justice Act 1988 when faced with prosecution for torture under that section.

10 February 2009

Letter from Rt Hon Jacqui Smith MP, Home Secretary, and Rt Hon David Miliband MP, Foreign Secretary, to the Chair of the Committee, dated 26 February 2009

Thank you for your letters of 10 February in which you invited us to appear before the Joint Committee on Human Rights to discuss aspects of the UK's compliance with the UN Convention Against Torture (UNCAT). You referred, in particular, to allegations of UK complicity in the abuse and mistreatment of UK detainees in Pakistan, to the case of Binyam Mohamed and to the Intelligence Services Act. This letter addresses your questions in turn.

The Government's position on the use of torture is clear: we unreservedly condemn it. Our policy is not to participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose. We abide by our commitments under international law, including the UNCAT and

European Convention on Human Rights, and expect all other countries to comply with their international obligations. The Government, including the intelligence and security agencies, never uses torture for any purpose, including obtaining information. Nor would we instigate, encourage or condone others in so doing.

You refer to the allegation that UK intelligence agents have been complicit in the abuse and mistreatment of British detainees in Pakistan. The Government has already responded to this allegation in Parliament. The same points were made in a letter sent to you by the Home Secretary on 10 November 2008 in reply to yours of 16 October 2008.

The evidence session before your Committee on 3 February focussed particularly on the allegations already raised in *The Guardian* and by Human Rights Watch referring specifically to two individuals, Mr Raingzieb Ahmed and Mr Salahuddin Amin. These allegations were examined in detail as part of separate criminal proceedings against Mr Ahmed and Mr Amin, and in both cases the courts made clear that there was no evidence of UK complicity in any mistreatment.

In Mr Amin's case, these allegations were also made to the Court of Appeal, who rejected them and upheld his conviction. In Mr Ahmed's case, we understand that he is appealing to the Court of Appeal. I enclose the relevant transcripts of the judges' conclusions in the two cases.

In your letters you also referred to the case of Mr Binyam Mohamed. As you will be aware Mr Mohamed was released from Guantanamo Bay and returned to the UK on 23 February. This follows intensive negotiations with the US government over the past 18 months. We have kept Parliament informed, most recently via my Written Ministerial Statement on 24 February, both about the legal proceedings brought on Mr Mohamed's behalf and about our efforts with the US Government to secure his release from Guantanamo Bay and return to the UK.

You also refer to the recent decision of the High Court regarding Mr Mohamed, including the cross-examination of "Witness B". The Home Secretary has referred the question of possible criminal wrongdoing has been referred to the Attorney General. The High Court has made clear that this is the proper legal process. It would be improper to comment further on this.

As you are aware, the Intelligence and Security Committee (ISC), is responsible for Parliamentary oversight of the Intelligence and Security Services. The Agencies' operations are subject to scrutiny by the Intelligence Services Commissioner, as well as the Intercept of Communications Commissioner. The Commissioners have a statutory obligation to report to the Prime Minister on their findings. An unclassified version of this report is laid before Parliament and made public every year.

You also raised a number of questions related to the Intelligence Services Act. Section 7 of this Act applies in relation to the functions of the Secret Intelligence Service and GCHQ. In terms of the Secret Intelligence Service, oversight is exercised by the two Commissioners appointed under the Regulation of Investigatory Powers Act (RIPA) 2000. The Intelligence Services Commissioner has oversight of warrants and authorisations issued under the Intelligence Services Act 1994, and warrants and authorisations for surveillance and agents under RIPA. The Intercept of Communications Commissioner reviews the issue and operation of interception warrants as well as arrangements for handling this material. The Commissioners visit the Agencies regularly to discuss any case they wish to examine in more detail. They must, by law, be given access to whatever documents and information they need and at the end of each reporting year they submit reports to the Prime Minister. These reports are subsequently laid before Parliament and published, after the deletion of details whose publication would damage national security.

For security reasons we are unable to give you the information for which you ask about operations which have been authorised under section 7 of the Intelligence Services Act. However, as the Intelligence Services Commissioner himself has explained, any individuals who believe that their human rights have been infringed are able to take their cases to the Investigatory Powers Tribunal. This is an independent tribunal, assisted by the Commissioners, and established by law to consider all complaints and Human Rights Act claims that fall within its jurisdiction. The tribunal can consider, among other things, complaints by individuals about the Agencies' conduct towards them or about alleged interception of their communications. Anyone, regardless of nationality, can complain if they believe that their communications or human rights have been violated or abused by any of the Agencies. The Tribunal will consider and determine any complaint about the conduct of the Agencies. If the Tribunal upholds a complaint, it has the power to order such remedial action as it sees fit, including, if it deems appropriate, the award of damages to the complainant. We note the remarks of Lord Lester of Herne Hill about the independence and impartiality of the Tribunal during your evidence session (Q58).

In response to your question about subsections (4) and (5) of section 134 of the Criminal Justice Act 1988, we are not aware of any prosecutions of Security Service or Secret Intelligence Service personnel under this Act to date.

We are unable to add any further detail to that already provided and for this reason we believe that we cannot offer you further assistance by appearing before your Committee as requested.

26 February 2009

**Letter from the Chair to the Committee to Rt Hon David Miliband MP, Foreign Secretary and
Rt Hon Jacqui MP, Home Secretary, dated 17 March 2009**

I am grateful for your letter of 26 February, which has been discussed by my Committee.

We are disappointed at your refusal to appear before us to answer our questions about allegations that UK officials have been complicit in the torture of Binyam Mohamed and others. We do not share your assessment that you cannot offer us “further assistance” in our inquiry into the UK’s compliance with the UN Convention Against Torture. We have a number of issues to raise with you in oral evidence and consider it essential that you should be fully accountable to Parliament, and should be seen to be accountable to Parliament, on this matter.

We note that the Foreign Secretary has agreed to appear before the Commons Foreign Affairs Committee later in the year to discuss international human rights issues, including the Mohamed case. As you know, we have a different remit to the Foreign Affairs Committee, including monitoring UK compliance with the UN Convention Against Torture. We wish to focus on how the security and intelligence agencies comply with the UK’s human rights obligations under this Convention and under domestic law. The Foreign Secretary’s appearance before the Foreign Affairs Committee will not give us the opportunity to pursue the issues in which we are interested. Nor do written or oral statements to Parliament provide the opportunity for in-depth scrutiny.

Your letter cites the Home Secretary’s letter to us of 10 November 2008 concerning allegations of UK complicity in torture in Pakistan. As will be apparent from the transcript of our oral evidence session on 3 February, we have a number of detailed questions to raise about this letter and it is particularly disappointing that the Home Secretary should feel unwilling to be asked them.

I do not propose to rehearse the well known arguments about the lack of effective parliamentary accountability of the intelligence and security agencies in this letter, but we do not agree that the existence of the statutory Intelligence and Security Committee, which reports to the Prime Minister rather than Parliament, should be used as an excuse to preclude scrutiny by parliamentary committees.

We also note your comments about the judgments in the Ahmed and Amin cases. Both judgments concern whether any UK complicity in abuse and mistreatment constituted an abuse of process sufficient for the prosecutions of the two men to be stayed. This does not provide an answer to the issues we wish to raise concerning the activities of British agents in relation to both men, which should be scrutinised in Parliament. One of the judgments was heavily redacted and is subject to appeal. Moreover, our letter raised a number of cases, not just those two. The recent statements in the media by Binyam Mohamed also suggest there is evidence of complicity in torture in his case, supported by the documentary evidence, including the MI5 telegrams, which was disclosed for the hearings in his case and which has also now been widely reported in the media.

Amongst the other issues we wish to raise with you in oral evidence are:

- oversight of the intelligence and security agencies’ compliance with the UK’s human rights obligations. We note your comments about the Investigatory Powers Tribunal: however, our concerns include the fact that its remit relates to individual cases rather than systemic issues.
- we also fail to see how our questions about the overall use of section 7 of the Intelligence and Security Act 1994—which provides for the Secretary of State to waive the liability of intelligence service personnel for illegal acts committed abroad in certain circumstances—can raise security concerns. We have specifically not asked for details relating to individual authorisations and are concerned with statistical and systemic matters, not individual cases or operations.
- whether UK policy not to “participate in, solicit, encourage or condone” the use of torture has been carefully drawn up not to preclude complicity in the form alleged by Binyam Mohamed and others.
- the case for a public inquiry into the allegations by Mohamed and others.

The Committee has also taken note of the report in the *Guardian* on 16 March that Azhar Kham suffered “appalling mistreatment during a week of illegal detention” in Egypt, where he was interrogated on the basis of information which he says can only have come from the UK. We will be asking for more evidence about this case but it again raises questions about the possible complicity of the UK in torture overseas.

We urge you to reconsider your decision not to appear before my Committee to answer our questions. Torture is an abhorrent practice and where it is alleged to have occurred there needs to be full, transparent and independent scrutiny of the circumstances and of any relevant systemic issues. I asked the Prime Minister about this issue when he appeared before the Liaison Committee on 12 February and he said “I think you are right to raise these issues because of the public concern” (Q150). Given that the Prime Minister has agreed we should be asking questions about the allegations of complicity with torture, I hope you will both now agree to answer them.

17 March 2009

**Letter from Rt Hon Jacqui Smith MP, Home Secretary, and Rt Hon David Miliband MP,
Foreign Secretary, to the Chair of the Committee, dated 20 April 2009**

Thank you for your letter of 17 March which asks a number of questions about recent allegations of UK complicity in torture.

Parliamentary accountability is, of course, a crucial element of our democracy and is a responsibility we take very seriously indeed. As we outlined in our letter to you of 26 February, the Intelligence and Security Committee (ISC) is defined by Parliament—not by the executive—as the appropriate body to provide Parliamentary oversight of the Intelligence and Security Agencies. This is a legally mandated role established in the 1994 Intelligence Services Act. The ISC has cross-party membership of distinguished Parliamentarians who discharge their responsibilities with scrupulous care and impartiality. The Committee's reports show that it does not shy from criticising the Government, and the policies of the Agencies, when it believes that criticism is warranted.

Our oversight mechanisms, including the ISC, the Intelligence Services Commissioner, the Intercept of Communications Commissioner and the Investigatory Powers Tribunal, all established by statute, provide scrutiny of the policy and operations of the Agencies, and provide a remedy in individual cases, including where an individual's human rights may have been violated.

As you know, in light of recent concerns about the involvement of the security services and armed forces in detention activities, the Prime Minister announced a series of measures on 18 March. These include publishing our guidance to intelligence officers and service personnel concerning the standards applied in relation to the detention and interviewing of detainees overseas once this guidance has been consolidated and reviewed by the ISC. Sir Peter Gibson, the Intelligence Services Commissioner, has been asked to monitor compliance with the guidance and will report to the Prime Minister annually on this. The Prime Minister has also asked the ISC to consider any new developments and relevant information since their 2005 report on detention and their 2007 report on rendition. This is so that we can ensure that our systems are robust and be certain that any lessons have been understood.

We would also like to take this opportunity to clarify points you made with regard to the case of Binyam Mohamed. You point to recent media coverage of this case as evidence of possible complicity in torture, and mention that your Committee is interested in discussing the case for an inquiry into these allegations. As you are aware the question of possible criminal wrongdoing in this case was referred to the Attorney General. This is, as the Court acknowledged, the proper legal process. She has concluded that the appropriate course of action is to invite the Commissioner of the Metropolitan Police to commence an investigation into the allegations that have been made in relation to Mr Mohamed.

In addition Mr Mohamed, along with 11 other former Guantanamo detainees, has issued civil proceedings against the UK Government in relation to these matters. Mr Mohamed's allegations will therefore be fully considered and tested. It is everyone's right to seek redress through the legal system and you will appreciate that it would be inappropriate for us to comment further on the details of cases that will be heard before the courts.

You also raise the cases of individuals detained in Pakistan and Egypt where allegations have been made of UK involvement in their mistreatment. We discussed the cases of Mr Salahuddin Amin and Mr Raingzieb Ahmed, in the context of the criminal proceedings already brought against them, in our previous letter.

All UK intelligence officers and service personnel are given guidance, as noted above, about the standards that should apply during the detention and interviewing of detainees overseas, including how they should work with our intelligence liaison partners. In addition, guidance for Foreign Office consular staff on how to respond to allegations of mistreatment made by British nationals overseas was last set out in 2004. It is being reviewed, as is its promulgation. The FCO's Permanent Under Secretary is also issuing fresh guidance reminding all Foreign Office staff of their obligations should they become aware of any allegations of ill-treatment of any detainees, whatever their nationality.

The Government takes all allegations of mistreatment very seriously, and will investigate them as appropriate. We will refer any cases of potential criminal wrongdoing that may come to light to the Attorney General to consider whether there is a basis for inviting the police to conduct a criminal investigation. In addition, individuals who believe their human rights have been infringed as a result of actions carried out by or on behalf of any of the intelligence Agencies can of course take their cases to the Investigatory Powers Tribunal.

We are unable to provide further information on the use of Section 7 of the Intelligence and Security Act. The Intelligence Services Commissioner pointed out in his report covering 2007 that he did not support public release of "the numbers of warrants or authorisations issued to the security and intelligence agencies" because such disclosure "would assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, SIS and GCHQ in fulfilling their functions".

We do not therefore consider that we can provide more information by appearing before your Committee. We would also like to clarify that the Foreign Secretary's appearance before the Foreign Affairs Committee, which will cover some of the issues you raise, will be in the context of that Committee's annual consideration of the FCO's Human Rights Report.

20 April 2009

Letter from the Chair to the Committee to Rt Hon Gordon Brown MP, Prime Minister, 26 March 2009

When you appeared before the Liaison Committee last month I asked you about allegations that UK agents had been complicit in torture overseas. I was grateful for your reply that "I think you are right to raise these issues because of the public concern" (Q150). The Joint Committee on Human Rights published a report on the UK's compliance with the UN Convention Against Torture in 2006 which included recommendations on evidence obtained by torture and co-operation with foreign interrogators. We intend to carry on scrutinising the policy and activities of the Government in this area, particularly in the light of the serious allegations which have been made by Benyam Mohamed and others. We have written to the Foreign and Home Secretaries renewing our invitation for them to provide us with oral evidence on this issue.

I welcome your written ministerial statement of 18 March and the measures you have taken so far in response to the allegations. I also welcome your clear statement that "Britain condemns without reservation the use of torture for any purpose". We have a number of questions about your statement, however, for which we would be grateful for your reply.

In your statement you state that the UK "will not condone" torture. In their letter to us of 26 February, the Foreign and Home Secretaries said that "our policy is not to participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose". Can you also confirm that the UK does not collude in torture carried out by others?

We would also be grateful for your view on whether the intelligence and security agencies are under a positive obligation, under the UN Convention Against Torture and the Human Rights Act, to report instances of torture where they suspect it has occurred and to seek to prevent torture being carried out by other states.

We note that the Intelligence and Security Committee announced on 17 March that it had submitted a report to you on the allegations of complicity in torture, including the Mohamed case. Could you let us know when you aim to publish this report? Naturally, we would prefer early publication with as little material redacted as possible, to enable Parliament to hold the Government to account.

I welcome your announcement that guidance to intelligence officers and service personnel on detention and interrogation overseas is to be published, once it has been consolidated and reviewed by the Intelligence and Security Committee. Could you let us know your estimate of when the guidance will be published and to what extent material is likely to be redacted? My Committee looked at guidance to armed personnel in the context of its inquiry into the UN Convention Against Torture. Will we be able to see this guidance in draft?

We note the appointment of Sir Peter Gibson to monitor compliance with the guidance and report to you annually. Can you give a commitment to publish his reports? When will Sir Peter begin his work? Will he look at the cases, such as that of Mr Mohamed, which are currently causing concern?

We are also concerned that there appear to be insufficient mechanisms for examining systemic issues relating to compliance with the UK's human rights obligations, such as UNCAT, overseas. Our attention has been drawn by Ministers to the Investigatory Powers Tribunal, but it can only consider individual complaints. Will Sir Peter be able to look at systemic issues, such as the overall application of policy or procedures on detention and interrogation overseas, or will his remit relate solely to individual cases?

We share your view, expressed in your statement to Parliament, that the security and intelligence services and the armed forces must act "in a way that it is consistent with our unequivocal commitment to human rights". The allegations which have been made by Binyam Mohamed and others cast doubt on whether this ambition has been consistently achieved in recent years.

26 March 2009

Letter from the Chair of the Committee to Rt Hon David Miliband MP, Foreign Secretary and Rt Hon Jacqui Smith MP, Home Secretary, dated 12 May 2009

UN CONVENTION AGAINST TORTURE

Thank you for your letter of 20 April, regarding recent allegations of UK complicity in torture.

As you will know, since we received your letter we have heard oral evidence from Mr Craig Murray, the former UK ambassador to Uzbekistan, and Philippe Sands, Professor of International Law at University College, London. I enclose a copy of the transcript of the session.

We wish to give you the opportunity to comment on Mr Murray's evidence and to repudiate any of the points he made to us.

We also seek clarification of paragraph 15 of the Foreign Office's Annual Report on Human Rights 2008 which states:

... we need to be open in acknowledging challenges and difficult decisions in some areas. One example is the question of the use of intelligence provided to the UK by other countries. The provenance of such intelligence is often unclear—partners rarely share details of their sources. All intelligence received, whatever its source, is carefully evaluated, particularly where it is clear that it has been obtained from individuals in detention. The use of intelligence possibly derived through torture presents a very real dilemma, given our unreserved condemnation of torture and our efforts to eradicate it. Where there is intelligence that bears on threats to life, we cannot reject it out of hand. What is quite clear, however, is that information obtained as a result of torture would not be admissible in any criminal or civil proceedings in the UK. It does not matter whether the evidence was obtained here or abroad.

Does this paragraph mean that the UK does receive and make use of intelligence “possibly derived through torture” because it might “bear on threats to life”?

Referring to his work for the embargo surveillance centre, Mr Murray said that before 1990 “we received a clear direction from the then Prime Minister, Mrs Thatcher, now Baroness Thatcher, that we were not to use any intelligence that might have come from torture” (Q86). He suggested that the UK Government's policy changed after it discovered that the CIA was using waterboarding against detainees, around 2002 (Q114). We invite your comments on whether Government policy on the use of intelligence which might have been obtained by torture was changed in or around 2002.

Mr Murray also referred to human rights training for ambassadors (Qq137, 140). We would be grateful if you could send us the relevant extracts from the human rights training materials for ambassadors relating to compliance with the UN Convention Against Torture.

I am also enclosing the written memorandum we received from Professor Sands. In his evidence, Professor Sands discusses the interpretation of Article 4 of the UN Convention Against Torture. We would be grateful if you could comment on Professor Sands' oral and written evidence and provide us with your interpretation of the scope and meaning of Article 4 UNCAT.

You will be aware that in the United States the relevant legal opinions from the Department of Justice have been placed in the public domain in order to assist congressional and public scrutiny of the US Government's former policy in relation to interrogation of detainees. We invite you to do the same by publishing all relevant legal opinions provided to ministers concerning the use of information which may have been obtained by torture, and in particular any opinions concerning Article 4 UNCAT.

Some of these issues might be more usefully explored in oral evidence, where you would have the opportunity to put your case across more forcefully than is possible in writing. I note that you have both consistently refused to provide us with oral evidence on these matters but, given the nature of the issues raised by Mr Murray in particular, we again invite you to appear before the Committee before we publish our report.

Letter from Rt Hon Alan Johnson MP, Home Secretary and Rt Hon David Miliband MP, Foreign Secretary

Thank you for your letter of 12 May regarding the UN Convention Against Torture (UNCAT). In your letter you raise a number of questions which are dealt with in turn below.

THE USE OF INTELLIGENCE “POSSIBLY DERIVED THROUGH TORTURE

You asked about paragraph 15 of the FCO Annual Report on Human Rights 2008. The FCO has included reference to the very real dilemma Ministers face when making decisions on the use of intelligence in its 2007 and 2008 Reports. This follows the recommendation of the Foreign Affairs Committee, in its April 2007 Report on the FCO's Annual Report on Human Rights 2006, that the Government include a section exploring the ethical dilemmas on the use of evidence and information derived from torture in the subsequent Report on Human Rights.

You ask specifically whether the “UK does receive and make use of intelligence possibly derived through torture because it might bear on threats to life”. This misunderstands the way intelligence is received; it could even be taken to suggest that we commission intelligence received through torture. There is no truth to this.

As outlined in the Report on Human Rights to which you refer, we stand by the position that we would not reject information out of hand because it might possibly have derived from torture. This does not, however, mean that we encourage the receipt of information gained through torture or that we have a policy to do so—our allies and partners are well aware of our abhorrence of such treatment. Rather it reflects the reality that the provenance of intelligence is often unclear and that it would be irresponsible to ignore information that could save lives.

In his evidence to your Committee, Professor Sands referred to one of the judgments in the House of Lords in *A and Others vs the Secretary of State for the Home Department*; it is worth recalling some of the other speeches in that judgment at some length, because they reflect the situation we are discussing.

Lord Nicholls: [The intuitive response to these questions [of use of information tainted by torture] is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No-one suggests the police should act in this way.

Lord Brown: Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive *entitled* to make use of this information; to my mind it is *bound* to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those states whose interrogation practices are of most concern.

Lord Carswell: In so holding [ie that information extracted under torture should not be admissible in legal proceedings, even if considered reliable] I am very conscious of the vital importance in the present state of global terrorism of being able to muster all material information in order to prevent the perpetration of violent acts endangering the lives of our citizens. I agree with the frequently expressed view that this imperative is of extremely high importance. I should emphasise that my conclusion relates only to the process of proof before judicial tribunals such as SIAC and is not intended to affect the very necessary ability of the Secretary of State to use a wide spectrum of material in order to take action to prevent danger to life and property.

These seem to us to recognise the complexity of these issues.

CHANGES TO GOVERNMENT POLICY ON THE USE OF INTELLIGENCE WHICH MIGHT HAVE BEEN OBTAINED THROUGH TORTURE

You asked for our comments on whether Government policy on the use of intelligence which might have been obtained by torture was changed in or around 2002, in particular in response to the discovery that the CIA was using waterboarding.

As we engaged alongside the US in Afghanistan and elsewhere, we were unaware of the full scope and extent of the shift in US policy and practice in what they came to know as the Global War on Terror. We would draw your attention to the conclusions of the Intelligence and Security Committee who considered the question of the Agencies’ developing understanding of US practices in their 2007 Report on Rendition:

By mid-2003, following the case of Khalid Sheikh Mohammed and suspicions that the US authorities were operating “black sites”, the Agencies had appreciated the potential risk of renditions and possible mistreatment of detainees. From this point, the Agencies correctly sought Ministerial approval and assurances from foreign liaison services whenever there were real risks of rendition operations resulting from their actions. (Conclusion I)

After April 2004—following the revelations of mistreatment at the US military-operated prison at Abu Ghraib—the UK intelligence and security Agencies and the Government were fully aware of the risk of mistreatment associated with any operations that may result in US custody of detainees. Assurances on humane treatment were properly and routinely sought in operations that involved any risk of rendition and/or US custody. (Conclusion J)

In addition, on the specific question of waterboarding, the Government considers that the use of simulated drowning is torture and is absolutely unacceptable. Our allies are fully aware of our absolute rejection of such techniques.

HUMAN RIGHTS TRAINING MATERIALS FOR AMBASSADORS

You requested the relevant extracts from the human rights training material for ambassadors relating to compliance with the UN Convention Against Torture.

As we mentioned in our previous letter, the FCO does have Consular Guidance which instructs staff to ask detainees whether they have suffered abuse or mistreatment, and to look out for signs of mistreatment even where an individual does not raise it. There is also general guidance to all staff on the importance of responding appropriately to any allegations of torture or ill-treatment. These sets of Guidance are kept under constant review, and are currently being revised to ensure that they are as clear and as thorough as possible. They apply to staff of all levels and we will be happy to share copies of both documents with the Committee once the review process is complete.

More generally, the Office runs a range of human rights courses for its staff, with sessions led both by FCO human rights specialists and by external teachers. For example, our two-day course is partly led by a university professor, and our week-long human rights course is convened by a human rights barrister, who invites experts from various relevant fields (eg judges, NGOs and UN human rights officials) to address key issues of concern to the FCO. Similarly, our separate training courses on international law, counter-terrorism and various other subjects draw on expertise from across and outside government. The FCO also has a range of internal communication materials relating to human rights and other issues. We are confident that wherever the issue of torture arises in any of our training courses or other internal communications staff are left in no doubt as to the Government's absolute abhorrence of torture.

SCOPE AND MEANING OF ARTICLE 4 UNCAT

Article 4 UNCAT requires States Parties to 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. States Parties shall make these offences punishable by appropriate penalties which take into account their grave nature.

In 1988 the UK passed legislation to give full effect to the requirements of Article 4 and therefore to allow the Government to ratify UNCAT. Section 134 of the Criminal Justice Act 1988 makes it a criminal offence in UK law for any public official, person acting in an official capacity, or any other person acting at the instigation or with the consent or acquiescence of a public official, to intentionally inflict severe pain or suffering on another in the performance or purported performance of official duties whatever his nationality and wherever in the world the offence is committed. The maximum penalty for this offence is imprisonment for life.

Furthermore, under the Human Rights Act 1998 (HRA) it is unlawful for any public authority to act in a way that is incompatible with the European Convention on Human Rights, including the prohibition against torture and inhuman and degrading treatment or punishment in Article 3. Following the coming into force of the HRA in October 2000, there is therefore an additional cause of legal action and remedy if any UK public authority commits torture.

PUBLICATION OF LEGAL OPINIONS ON USE OF INTELLIGENCE WHICH MAY HAVE BEEN OBTAINED THROUGH TORTURE AND THOSE RELEVANT TO ARTICLE 4 UNCAT

It is not the Government's normal practice to publish internal legal advice, as Legal Professional Privilege attaches to such legal advice, as is recognised in Section 35 (1) (c) of the Freedom of Information Act. This is in order to ensure that full and frank legal advice can be given, in the interests of good governance.

29 June 2009

Memorandum submitted by Human Rights Watch

For many years Human Rights Watch has extensively investigated the human rights situation in Pakistan and, in particular, the treatment of individuals in detention.

Pakistan has a long and well-documented history of arbitrary arrests and detention, enforced disappearance, and torture and other mistreatment by government security forces. These practices are systematic and routine, whether in ordinary criminal matters or in more sensitive intelligence and counter-terrorism cases. Human Rights Watch has documented extensive accounts and evidence demonstrating a policy of torture employed by Pakistani intelligence agencies and law enforcement personnel.

Torture is routinely used in Pakistan, both to obtain confessions in criminal cases and against political and ideological opponents. Most acts of torture are aimed at producing a confession during the course of a criminal investigation. However, acts of torture by military and intelligence agencies often are intended for punishment. Torture often follows illegal abductions or "disappearances" by Pakistan's notorious Inter-Services Intelligence (ISI) agency or military. Torture is often used to frighten the detainee into compliance. If the detainee is released, it is usually on the understanding that if he fails to do what is demanded or

expected of him, a further abduction and torture will follow. In this manner, the victim of custodial abuse can be kept in a state of fear often for several years. Most often, the threat of torture is enough to ensure compliance to the demands of the intelligence agencies.

Neither high social standing nor public profile deters the ISI or other state agencies from perpetrating torture if they deem it in the interest of “national security”—the relative anonymity of a victim only simplifies matters for the torturers.

The impunity with which the Pakistan army and intelligence agencies operate in Pakistan is well known. Consequently even a phone call from an intelligence operative can achieve the required result of the intelligence services.

Pakistani and international nongovernmental organizations have documented severe mistreatment of detainees over the course of many years. Even President George W Bush’s State Department criticized the use of torture in its annual human rights reports (though, like the UK, it did not stop the US from working hand in hand with the ISI). For instance, the 2007 State Department human rights country report on Pakistan states that:

The law prohibits torture and other cruel, inhuman, or degrading treatment; however, there were persistent reports that security forces, including intelligence services, tortured and abused persons. Under provisions of the Anti-Terrorist Act, coerced confessions are admissible in Anti-Terrorism courts. Allegations that security personnel used abuse and torture of persons in custody throughout the country continued. Human rights organizations reported that methods included beating, burning with cigarettes, whipping soles of the feet, prolonged isolation, electric shock, denial of food or sleep, hanging upside down, and forced spreading of the legs with bar fetters. Security force personnel reportedly raped women during interrogations. The government rarely took action against those responsible, held prisoners incommunicado and refused to provide information on their whereabouts, particularly in terrorism and national security cases. Security force personnel continued to torture persons in custody throughout the country. Officials from the independent Human Rights Commission of Pakistan (HRCP) estimated 5,000 cases of police torture annually . . . Prison conditions were extremely poor, except those for wealthy or influential prisoners . . . Shackling of prisoners was routine. The shackles used were tight, heavy, and painful, and reportedly led to gangrene and amputation in several cases.

THE BRITISH ROLE

The most recent Foreign and Commonwealth Office (FCO) annual human rights report takes a shockingly different approach to the subject of counter-terrorism and torture. Human Rights Watch raised the following concerns with the Foreign Affairs Committee (FAC) about the 2007 report:

Given the seriousness of the human rights problems in Pakistan Human Rights Watch welcomes the inclusion of Pakistan in the list of countries of concern in this year’s report. However some serious shortcomings in the report’s coverage of Pakistan should be noted.

Pakistan is referred to as one of the UK’s “most important partners” in counter terrorism efforts which according to the report includes “operational co-operation”. The report argues that the UK’s training and wider counter terrorism assistance to Pakistan “promote human rights compliance, based on international human rights standards”. This is a misrepresentation of the UK’s counter terrorism cooperation with Pakistan. The report remains notably silent on the hundreds of disappearances of terrorism suspects in Pakistan. Human Rights Watch’s research indicates that the UK has itself been complicit in the illegal detention, forcible transfer to the UK and torture of some terrorism suspects. These have included Salahuddin Amin and Rangzeib Ahmed in recent years. By failing to criticise Pakistan’s well-documented human rights abuses in relation to the arrest and interrogation of terrorism suspects, this report actually fuels the allegations of UK tolerance of and complicity in such acts.

Tom Porteous, the London director of Human Rights Watch, gave evidence to the FAC on 30 April 2008 about the FCO’s 2007 annual human rights report. Here is the exchange, which sets out some of our key concerns:

Mr Hamilton: Pakistan obviously gives some cause for concern. I know that Human Rights Watch has been very worried, especially, I think, about the way in which the courts and the judges have been undermined by President Musharraf’s arrest and sacking of members of the judiciary in Pakistan. Your Human Rights Watch submission claims that the UK may have been complicit in a number of human rights abuses linked to counter-terrorism in Pakistan. How confident are you that these are accurate allegations? What sort of evidence do you have?

Tom Porteous: First, there is obviously a problem here. Let me give you a little bit of context. We are trying to pull together the evidence, and obviously it is very difficult to come by, because these are serious allegations. But it is pretty clear that the US and the UK are relying rather heavily on the well-known abusive Pakistani intelligence agency, the Inter-Services Intelligence, in their counter-terrorism operations. We have documented the abuses of the ISI for many years. It has well-known links with extremist elements in Afghanistan, with the Taliban, in Pakistan and in the Arab world.

In fact, it was behind the Taliban initially, as you will remember. It is one of the most brutal intelligence agencies in the world and yet the US and the UK have been relying rather heavily on it in their counter-terrorism efforts in that particular region and, as far as the UK is concerned, in its counter-terrorism efforts at home, because obviously there is a large British community of Pakistani origin.

We also know from this report, among other things, that the UK is grappling with the dilemma of what to do about evidence that is important for combating terrorism but is also suspect because there is a suspicion that it has been extracted under torture. It is pretty clear, reading between the lines of that section in the Foreign Office's report, that it is referring to Pakistan here. It is obviously having to deal with this problem. That is the sort of background.

When it comes to the detail, you probably read the front page report of *The Guardian* yesterday which identifies two men, British citizens, Salahuddin Amin and Zeeshan Saddiqui, who were arrested in Pakistan at the request of the British authorities. They were then allegedly—there is quite good evidence for this, not only their own statements but also medical evidence—quite brutally treated over long periods and tortured and interrogated. Now it seems that in these cases, and in a couple of other cases that we are also aware of, British Security Service officials were brought in to interrogate them during their period of detention by the Pakistani authorities.

In these two cases, their detention appears to have been illegal—they were not charged and there was no due process—and the treatment was allegedly very brutal. We were a corroborative source for the *Guardian* story in both those cases. We are aware of two other cases where the British appear to have been involved in interrogating suspects in Pakistan who, according to their lawyers, were allegedly tortured. One of them is Ramzeh Ahmed and the other Rashid Rauf, who was allegedly an important player in the Heathrow bombing of last year.

As one of the lawyers for these men, Tayab Ali, said in *The Guardian*, “at the very worst, the British Security Service instigates the illegal detention and torture of British citizens, and at the very best turns a blind eye to torture.” It is incredible that British agents would not be aware of the kind of treatment these men could expect at the hands of the Pakistani intelligence agency. Either way, the circumstances seem to amount to complicity and collusion in the mistreatment of these men.

To conclude, there might appear in the short term to be some advantage in relying so heavily on such abusive tactics in counter-terrorism but, in the longer term, we feel that it will be a disaster, because you are just piling up the grievances and the sense of injustice that fuels radicalisation and acts as a recruiting sergeant for terrorism. Condoning torture, therefore, even if it is only implicit, is a question of national security. The other point is that, if we are going to get to the bottom of what these suspects are supposed to have done, which is a crucial question, and if we are to give them proper trials, the fact that they were tortured will prejudice that process.

Mr Hamilton: These are very serious allegations. Have you had any response from the British Government or Government Ministers?

Tom Porteous: We have raised some of these concerns with the British Government over the past months and we have met with denials.

Mr Porteous made these statements after Human Rights Watch had investigated cases involving allegations of British complicity in torture and mistreatment of individuals in Pakistan. Several of these cases present a disturbing picture where both the allegation of torture and that of varying degrees of British intelligence awareness of that mistreatment and torture appear credible. In an appendix accompanying this submission, Human Rights Watch presents short summaries of three such cases.

We have read the reporting by the *Guardian* on these issues. We believe this is accurate and credible reporting. It is extremely difficult to gather information on this subject, but the *Guardian* and Human Rights Watch have been able to gather disturbing accounts of individual cases of torture of British citizens with the apparent complicity of UK officials.

It is important for us to emphasize that we are not only concerned about the treatment of British citizens. What has happened to British citizens is only a small window into what happens routinely to Pakistanis.

For more than six years the British government supported an abusive military government under General Pervez Musharraf, only jumping on the democracy and rule of law bandwagon in the dying days of Musharraf's regime. Officials told us that then-Prime Minister Tony Blair's affection for Musharraf sprang in large part from his close cooperation on counter-terrorism matters after the 7 July 2005 attacks in London. Because Blair believed that Musharraf was sharing valuable intelligence, he not only made no demands on Musharraf on human rights but ignored the real risk that UK collaboration with Pakistan on counter-terrorism would lead directly to serious abuses such as torture and illegal detentions.

What is most disturbing is that the British government knew full well the techniques that the ISI and Pakistani law enforcement use in interrogations, particularly in counter-terrorism investigations.

Asking the Pakistani security services to interrogate a detainee—without being present to ensure the person is not mistreated or demanding an end to these practices as the price of continued good relations—is essentially a request to use torture to obtain information. This has been the basis of counter-terror cooperation between the UK and Pakistan (and the US and Pakistan).

Not only did the British government effectively condone torture by putting questions to detainees in ISI custody and by visiting detainees who had obviously been tortured without halting cooperation in those cases, the conduct of the ISI has interfered with attempts to prosecute these individuals in British courts. For example, Rashid Rauf, the alleged mastermind of plans for a second 9/11 involving planes taking off from Heathrow—and the reason we all now have to throw away our water bottles before passing through airport security—was arrested in Pakistan. But he was tortured so badly that British officials quickly realized he could not be prosecuted in a British court. His guilt or innocence has never been established—and never will, since he was reportedly killed in a US missile strike in Pakistan last November.

Instead of investigating the alleged complicity of the British intelligence services, the Foreign and Home Offices have simply denied any role or obfuscated the issue. Consider this disappointing answer offered by Lord Malloch-Brown when he appeared in front of the FAC and was asked about torture in Pakistan. According to the committee:

We asked him for his assessment on whether the ISI practices torture. His reply was oblique: “Let me put it this way, we think that the return of civilian government and hopefully the strengthening of civilian control over the ISI, which we hope will give a lot more transparency to its methods, is an extremely good development in Pakistan.”

Following further questioning, he said he did not know whether he was “prepared” to go further by stating that the ISI was guilty of practicing torture. He said: “we are extremely concerned. We have certainly not run frontly into evidence of torture, but we think that the ISI’s methods could do with a lot of opening up and a lot of transparency.” Referring to the allegations that have been made, he stated: “we absolutely deny the charge that we have in any way outsourced torture to Inter-Services Intelligence as a way of extracting information, either for court use or for use in counter-terrorism.”

The ISI practices torture. No one in Pakistan has any doubts about this. It is a subject commonly discussed, not least by government officials, diplomats and the media in Pakistan. Why is the British government so nervous about admitting it? One possibility is because it knows that such practices continue and discussion of them may complicate its efforts at collaboration with the ISI and other Pakistani agencies. The only way the British government could not have “run frontly” into evidence of torture is because it appears to have been running away from it.

British law may actually encourage—or at the least fail to discourage—complicity in torture by its officials and agents. The Criminal Justice Act of 1988 banned torture in domestic law. The government has a legal obligation to prosecute officials who carry it out. Ministers insist that this ban is “absolute” and that Britain never uses or condones torture. But the Criminal Justice Act has a major loophole:

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 [emphasis added].

This provides effective immunity for a person who can show he or she was acting under “lawful authority” to participate in torture.

The Intelligence Services Act 1994 goes further. This Act says that:

If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section . . . “liable in the United Kingdom” means liable under the criminal or civil law of any part of the United Kingdom.

This statute sends a mixed signal to the intelligence community by suggesting that state agents who engage in overseas conduct that would be illegal under British law, such as those who may have been complicit in torture in Pakistan, are unlikely to suffer any consequences. This law should be amended to rule out acts of or complicity in grave crimes such as murder, torture, and enforced disappearance.

QUESTIONS THE COMMITTEE COULD ADDRESS

There are many important questions about British government policy and the actions of government officials and agents that require additional inquiry.

A good place to start is for answers to be given to questions put forward on 2 September 2008, in the Raingzieb Ahmed case in Manchester, by his defense counsel, Michael Topolski, QC. Topolski submitted 10 questions to the court that are relevant not only to the Raingzieb case, but to all UK counter-terror activities in Pakistan:

- 1: was Raingzieb Ahmed unlawfully detained at any time between 20 August 2006 and 7 September 2007?
- 2: to what extent, if any, did the United Kingdom authorities have prior knowledge of his arrest and detention and what part, if any, did they play in it?
- 3: was Raingzieb Ahmed ill treated whilst in detention?
- 4: was he tortured whilst in detention?
- 5: did the United Kingdom authorities have any reasonable grounds to suspect that Raingzieb Ahmed would or might be ill treated or tortured?
- 6: what was the United Kingdom authorities' state of knowledge and/or reasonable belief regarding the position of similar detainees in Pakistan regarding ill-treatment and/or torture?
- 7: why did the United Kingdom authorities regard it as necessary and appropriate to request of the Pakistan authorities that any conduct of theirs be lawful?
- 8: was it appropriate for the United Kingdom authority's representatives to have access to Raingzieb Ahmed before he had received any consular visit and without the benefit of legal advice and representation?
- 9: what questions were asked of Raingzieb Ahmed [by agents of the United Kingdom] whilst detained and what answers did he give?
- 10: what part, if any, did the United Kingdom authorities play in the removal of Raingzieb Ahmed by way of deportation as opposed to extradition in September of 2007?

Human Rights Watch believes that these are key questions. Some other outstanding questions include:

1. What steps as a matter of policy does the UK government (throughout this memo we mean this term to include all intelligence and security agencies) take to ensure that torture or cruel, inhuman or degrading treatment or punishment is not used in any cases in which it has asked the Pakistani authorities for assistance or cooperation?
2. What does the UK government do when it learns that such treatment has occurred in a particular case?
3. What conditions has the UK government put on continuing cooperation and assistance with Pakistan in counter-terror and law enforcement activities?
4. Has the UK government ever conditioned continuing cooperation or assistance with Pakistan on an end to torture or cruel, inhuman or degrading treatment?
5. Has the UK government ever withdrawn cooperation in a particular case or cases because of torture or cruel, inhuman or degrading treatment?

Michael Topolski raised some other important claims in the Raingzeib trial. It is worth considering his submission, made on 2 September 2008:

My Lord, it is our submission that this prosecution amounts to an abuse of the process of the court arising from two things. First of all, the alleged complicity of the United Kingdom authorities in unlawful detention, ill-treatment, and/or torture between 20 August 2006 and 7 September 2007, and arising from any established involvement of the United Kingdom authorities in the unlawful deportation or return of Raingzieb Ahmed to the United Kingdom.

The question is whether it appears that the authorities have acted illegally or have procured, connived at or facilitated unlawful procedures, or have violated international law or have violated domestic law of a foreign state, or have otherwise abused their powers.

It will be noted and needs to be underlined that it is not our case that United Kingdom agents themselves ill treated or tortured this man. It is not our case that agents of the United States of America, who also interrogated him in this time, ill treated or tortured this man. It is our case, clear and unequivocal, that it was agents of the state of Pakistan, specifically [ISI] and perhaps others, who ill treated and/or tortured him.

We make it clear that the abuse of executive power alleged here arises out of his ill-treatment, abuse and torture in Pakistan by Pakistan, amounting to significant and serious breaches of his article 3 rights at the very least, and it is the relationship that existed and exists between United Kingdom State authorities and the authorities of Pakistan, and how they interplayed in this case that forms the backdrop to the grave allegations which we make but from which we do not shrink. That submission is based on the assertion that we make that United Kingdom authorities knew or believed, or at least seriously suspected that the conduct of Pakistan authorities *vis-à-vis* Raingzieb Ahmed was or was likely to be incompatible with his . . . rights under article 3 and article 5 [of the European Convention on Human Rights].

In that regard it is our case that United Kingdom agencies, as public authorities, acted in breach of section 6 of the Human Rights Act of 1998. We say this about torture because it is, in our submission, important that the court recognises how significant this is in this application.

Torture and the prohibition against it enjoys the highest normative force recognised by international law. States are required not merely to refrain from authorising or conniving torture, but also to suppress and discourage it and not to condone it. And here we come to the heart of the matter.

Aware of or at least suspecting the situation in Pakistan to be what it was, State agents, the security services and also the police condoned and connived in his torture by providing his torturers with questions after being refused access to him.

This is indeed a case, we submit, with no enthusiasm, of outsourcing torture. The court will need to examine whether in reality the prosecution are indeed relying, in the loosest sense of that term, on what happened to Raingzieb Ahmed in Pakistan. Torture is not discouraged and is not suppressed, but is condoned in circumstances such as these, and it is our submission that the United Kingdom authorities have acted in clear breach of its obligations, both under the Convention and its wider international obligations.

RECOMMENDATIONS

Human Rights Watch recommends:

1. A public inquiry should be held into all cases in which there are allegations of British government complicity, participation, or knowledge of torture or cruel, inhuman or degrading treatment of detainees to establish whether British intelligence, security or law enforcement services have been complicit in torture, cruel, inhuman or degrading treatment, illegal detentions, or enforced disappearances, and to establish a code of conduct that is consistent with British and international law and human rights standards.

2. The government should condition its counter-terror cooperation or assistance in Pakistan and elsewhere on the end of the use of torture, disappearances, arbitrary arrests, and other illegality in such cooperation. This will not only ensure compliance with Britain's domestic and international legal obligations, it will help countless Pakistanis who suffer from torture on a daily basis.

3. The government should make the end of torture among its highest priorities in its relations with Pakistan. It should press in public and private for an end to torture. It should include a candid and unvarnished description of the problem in its annual human rights report.

4. Parliament should repeal or amend any legal provisions, such as those in the Criminal Justice Act 1988 or Intelligence Act 1994, that appear to provide legal immunity for serious human rights abuses carried out by British security or intelligence personnel. At the very least, the Intelligence Act should be amended to rule out acts of or complicity in grave crimes such as murder, torture, and disappearances.

5. Parliament should reconsider legislation that allows the use of "in camera" hearings where allegations of UK complicity in torture cannot be discussed in open court. Such hearings make it almost impossible to get to the truth on cases like these and hold anyone who has transgressed the law accountable.

Thank you for your consideration.

APPENDIX

Some cases investigated by Human Rights Watch are outlined below. Human Rights Watch adopts no opinion on the guilt or innocence of these individuals concerning the offenses they are either charged with, suspected, or convicted for. However, it is our view that the allegations of torture and of British complicity in or awareness of the torture are credible.

Salahuddin Amin

Salahuddin Amin, a British citizen, was convicted in April 2007 in the "Crevice" trial for plotting attacks against several potential targets, including London's Ministry of Sound nightclub. Amin gave himself up voluntarily to Pakistani authorities after learning that British law enforcement officials were seeking his arrest. Assurances were given to his family by Pakistani authorities that he would not be mistreated, yet he was then repeatedly tortured by Pakistan's notorious Inter-Services Intelligence agency (ISI) and forced into a laundry list of false confessions.

While detained illegally by Pakistani authorities, Amin alleges that he was met by British intelligence officials on almost a dozen occasions. He says he would be tortured, then forced to go back to his cell and do "homework," wherein he would provide a written confession at ISI instruction, then meet British interrogators the next day, who would ask questions on the same subject. If the ISI felt his answers to the British agents were unsatisfactory, he would be told that he had embarrassed them "in front of our friends" and be punished with further torture. He says his main torturer was in the room when British officials were present, making it impossible to tell the British agents that he had been tortured. He says that because of their frequent presence, he assumed the British had approved his mistreatment, even if they were not present

during it. Amin was released by Pakistani authorities after 10 months, during which he was never produced in court as required by Pakistani law, and then arrested at Heathrow upon his expulsion from Pakistan to the UK in 2005.

Zeeshan Siddiqui

Zeeshan Siddiqui, another British citizen, was detained in Pakistan in 2005 and tortured by the ISI while they interrogated him for his alleged membership of al Qaeda. Siddiqui was released without any charge by the Pakistanis and returned to the UK in January 2006, where he was sectioned under the Mental Health Act and the government placed a control order on him. During his detention in Pakistan, Siddiqui reported being repeatedly beaten, chained, injected with drugs and threatened with further torture and sexual abuse. During this detention and in an allegedly semi-coherent and visibly traumatized state, Siddiqui alleges he was interviewed by British intelligence officials, who must have known that he had been mistreated. Though this interrogation took place in early July 2006, Siddiqui only gained consular access in mid August—well over a month after British authorities were “aware” of his plight and an eternity for someone facing repeated torture.

Rangzieb Ahmed

Rangzieb Ahmed, a British citizen from Rochdale, Manchester, was arrested on 25 August 2006, en route to Islamabad from Pakistan’s North West Frontier Province. He was handed over to the ISI. On 31 August 2007, Ahmed’s release was ordered by Pakistan’s Supreme Court on the grounds that he had been arrested and held without charge for over a year. Upon “release,” Ahmed was speedily repatriated to the UK and arrested. On 17 December 2008, he was convicted at Manchester Crown Court of being a member of al-Qaeda and directing terrorism by instructing a terror cell in the UK.

While in ISI custody, Ahmed says he was beaten with sticks, whipped with electric cables and sleep-deprived. He also alleges that his fingernails were pulled out over a three day period as ISI officials interrogated him. The *Guardian* has published photos of his injured fingernails. Ahmed told Human Rights Watch that he was interviewed in Pakistani custody by a British official in December 2006. At trial, the government did not deny the defense claim in open court that MI5 and Greater Manchester police sent the ISI questions to be put to Ahmed during interrogation and that MI5 officers questioned Ahmed while he was in ISI custody. British consular officials did not visit Ahmed until the day he was flown back to Britain. However, Ahmed succeeded in making contact with Human Rights Watch while still in Pakistani custody and, through an intermediary, provided an account consistent with his subsequent statements at his trial.

February 2009

Memorandum submitted by Ian Cobain, *The Guardian*

INTRODUCTION

1. Over the past two years *The Guardian* has been reporting upon allegations that a number of British terrorists and terrorism suspects have been detained in Pakistan and suffered severe mistreatment amounting to torture. These individuals say that they have been questioned by British intelligence officials after, in some cases in between, periods of mistreatment. They and their families, and in some cases their legal advisors, say they have been forced to conclude that British officials may have been responsible for their detention and have colluded in their mistreatment.

2. The *Guardian* has investigated these allegations as best it can. Given that acts of torture are generally surrounded by secrecy and denial, and that those who are victims of torture can be expected to be terrified of speaking openly, this was never going to be an easy matter. With so much evidence relating to these matters being heard in camera, and kept in ‘closed’ court judgements, and with the Prison Service attempting to prevent us from visiting some of those making the allegations, the task has been particularly difficult.

3. In a leading article published on 15 July, the *Guardian* described the questions raised by its news reports on these allegations as being “at the heart of the difficulties which terrorism poses for democracies”. It also said that an investigation into such allegations by those bodies responsible for the oversight of the country’s intelligence agencies is “the least a democracy expects”.

4. The aim of this memorandum is to introduce members of the Joint Committee on Human Rights to these allegations, to some of the facts that may tend to support them, and to some other related matters.

5. Some of the matters complained of by those making the allegations are not contested; others are. I believe that if the allegations are examined together, rather than in isolation, a pattern emerges that may indicate where the truth lies.

BACKGROUND

6. The Committee will be aware that law enforcement and intelligence agencies in Pakistan have been responsible for serious abuses of human rights, and that these abuses have been well documented for a number of years. Among the organisations that have reported on these matters are the United Nations, the United States State Department, Human Rights Watch, Amnesty International and the Pakistani Parliamentarians' Commission for Human Rights.

7. The torture of detainees is no great secret in Pakistan. In conversations with other media, particularly the Agence France-Press news agency, government officials have been more-or-less open about it. Victims of torture are regularly photographed as they arrive at court, showing clear signs of their mistreatment. In July 2006, Pakistan's most widely-read English language newspaper, Dawn, took the principal Pakistani intelligence agency, Inter-Services Intelligence Directorate (ISI), to task in an editorial in which it said the agency had "over-stepped all limits", and that "running torture chambers" was not part of its remit.

8. In October 1996, Nigel Rodley, the United Nations special rapporteur on torture, reported on the "endemic, widespread and systematic" use of torture in the country. The methods used, he reported, included "rape, beatings with sticks, hose-pipes, leather belts and rifle butts, kicking with heavy boots, being hung upside down, electric shocks to the genitalia and knees, cheera (forced stretching apart of the victim's legs, sometimes in combination with kicks to the genitalia), sleep deprivation, prolonged blindfolding and boring of holes with an electric drill into parts of the victim's body".

9. Four years after Rodley's report, the London-based Medical Foundation for the Care of Victims of Torture reported on 51 clients whose torture in Pakistan had been medically documented: almost all had been beaten or whipped, more than a third while suspended, usually upside down.

10. In February 2004, Amnesty International wrote an open letter to Pervez Musharraf raising concerns about the treatment of non-Pakistanis suspected of al-Qaida membership. Later that month, the US State Department was reporting that Pakistani "security force personnel continued to torture persons in custody throughout the country".

11. Rodley, or Sir Nigel as he now is, believes the methods of torture that he detailed to be still in use in Pakistan. He has told the *Guardian* that he believes that any British officials operating in Pakistan who claimed not to be aware of the manner in which detainees are likely to be treated while being questioned during counter-terrorism investigations would be displaying "wilful ignorance".¹

12. After the attacks on London's transport network on July 7 2005, Pakistani authorities announced that they had detained around 800 people for questioning.

DETAINEES

13. The British nationals whom we know to have made allegations of British collusion in mistreatment, or whose relatives or lawyers have made such allegations, were held in Pakistan over a four-year period between late 2003 and late 2007.

14. Some have given accounts of their alleged mistreatment in court or in media interviews. Other accounts have been relayed to us second-hand, or even third-hand, and are sketchy.

15. There are some similarities between their accounts, between the locations at which they have been detained, for example, or between their descriptions of the rooms in which they say they were tortured, or between the form of words that they say British intelligence officers have used to introduce themselves for the first time.

MSS

16. This man is a doctor currently working at a hospital on the south coast of England. He appears to the *Guardian* to remain traumatised by his experiences, and he and his family appear to be frightened both of the British Security Service and Pakistani intelligence agencies. He and his family have asked that I do not disclose his name.

17. MSS was born in London in 1981. His family's Member of Parliament, John McDonnell, is a friend of his father; Mr McDonnell says he has known MSS almost since birth.

18. MSS studied medicine in London. At the end of his fourth year of studies, he and his fellow students were encouraged to spend some weeks working at another hospital, preferably overseas. Both of MSS's parents are of Pakistani origin, and he arranged to work at the Ziauddin Memorial Hospital in Karachi.

19. MSS travelled to Pakistan shortly after the 7 July 2005 suicide attacks. On the evening of 20 August while eating with colleagues at a Kentucky Fried Chicken restaurant in the city, he was approached by three armed men wearing civilian clothes who bundled him into a waiting car and drove off.

20. MSS's family in the UK were told that he had been abducted. They informed Mr McDonnell, who contacted the Foreign Office and the Metropolitan Police. Neither were able to tell him who was holding MSS.

¹ *Guardian*, 29 April 2008, page 8.

21. MSS's father travelled to Karachi, where he spent almost two months looking for his son. He says that he made frequent contact with the office of the UK's Deputy High Commission in Karachi, but says he formed the impression that they were not particularly interested in his son's plight, and not helpful. He says that he eventually learned, through contacts in the city, that his son was being held by one of Pakistan's intelligence agencies, the Intelligence Bureau (IB). He says that he made contact with the IB, and was eventually told that his son would be released to him. He says that he waited at a designated location in the city, where a van pulled up. Inside were one uniformed police officer and several men in plain clothes. Once inside, he says, there was a brief discussion as to whether a hood should be placed over his head, and it was decided that he could remain unhooded as long as he lowered his head and did not look out of the window. He says he was driven into a compound and taken into a room, where four intelligence officers apologised to him. He says he was then introduced to a man identified as the director of the IB, who also apologised to him.

22. He says his son was then brought into the room. MSS and his father say they were then put back into the van and driven to a relative's home, before flying to London the next day. MSS's father says that as he was driven from the building where his son had been held, he looked out of the window and saw that the British Deputy High Commission's offices were on the opposite side of the road.

23. MSS says that he was detained at just one location though-out his detention; that he was beaten, whipped, deprived of sleep and forced to witness the torture of other detainees. He says that he was questioned only about the attacks on London of the previous month. He says that towards the end of his detention and torture he was questioned by two British intelligence officers.

24. The *Guardian* decided that it needed to visit Karachi, to establish whether an IB facility might located opposite the British Deputy High Commission.

25. A freelance journalist, Waqar Kiani, travelled there from Islamabad on 5 July last year. Waqar quickly established that one of the buildings opposite the Deputy High Commission is well-known to be the local headquarters of the IB. Unfortunately he aroused the suspicion of those inside. Men emerged from the building on motorcycles and chased him through Karachi until he sought refuge in a police station. On his return to Islamabad the following day, Waqar found that his apartment had been broken into and searched. He then received two threatening calls on his mobile telephone from a man who accused him of being a "British agent" and told him that he must "face the consequences" for his actions. There were consequences for Waqar, which I have outlined in my second memorandum.

Rangzieb Ahmed

26. Ahmed was born in Rochdale in 1975. He has spent much of his life in Pakistan. He was in prison in India between April 1994 and July 2001, after being detained in Kashmir. He is a self-professed member of Harkat-ul-Mujahideen, a terrorist organisation proscribed in the UK, and in December last year, after a trial at Manchester Crown Court, was convicted of membership of al-Qaida, directing a terrorist organisation, and possession of an article for the purposes of terrorism. He was jailed for life with the judge ruling that he should serve a minimum of 10 years and should be considered for parole only when he was no longer considered a danger to the public and had forsaken his radical views.

27. Much of the evidence against Ahmed was gathered when he was under surveillance in Dubai and Manchester, before he returned to Pakistan where he was detained in August 2006. Four of his associates were detained in Greater Manchester around the same time. When he was deported to the UK in September 2007, three of his fingernails were missing from his left hand.

28. Before the trial, during an abuse of process hearing, Ahmed gave an account of his mistreatment at the hands of the ISI. He said he was beaten with sticks, whipped with electric cables, sexually humiliated and deprived of sleep for several days. He says his fingernails were removed one at a time over a period of three days, and he would be given a pain-killing injection and allowed to sleep after each session.

29. On the day after his third fingernail was removed, he alleged, he was shackled and hooded and driven for about 15 minutes to a building where he was questioned by two British officials. He says the two men explained that they were from the British government, and specified that they were not consular officials. He says he told these men that he was being tortured, and never saw them again. He was subsequently interrogated by American officials, he says, and was denied access to a lawyer or his family throughout his detention.

30. Ahmed's counsel, Michael Topolski QC, argued during the abuse of process hearing that because of his mistreatment in Pakistan, it would be an abuse of the court's process for his trial to go ahead. He said that the conduct of the state authorities had failed to uphold the administration of justice, and that to proceed would put Britain under a clear breach of its obligations, under international law, to suppress and discourage torture.

31. Mr Topolski also said: "Aware of, or at least suspecting the situation in Pakistan to be what it was, state agents, the security services and also the police condoned and connived in his torture by providing his torturers with questions after being refused access to him."

32. The assertion that police and the security services passed questions to the ISI was not contested by the Crown in open court. The Guardian believes this to be because this information was disclosed to the defence by the Crown. A ruling by the judge towards the end of proceedings makes clear that there were three matters heard in camera that may have a bearing on the issues addressed in this memorandum, and which, it might be argued, should be brought into open in the public interest.

33. During the abuse of process hearing, the Crown introduced evidence that it said showed that Ahmed's fingernails had been removed while he was a prisoner in India. The defence introduced evidence that it said showed that this could not be the case, and that they could only have been removed in Pakistan. The Crown's own pathologist concluded that the fingernails had parted from his fingers as a result of some sort of injury, and that one of those injuries had been just a few months prior to his release from Pakistani detention in September 2007.

34. The British Security Service's response to Ahmed's allegations of collusion in torture was heard in camera.

35. The judge, Mr Justice Saunders, rejected the application for a stay. He issued two judgements on the matter, one open, the other closed. In his open judgement he concludes that Ahmed was kept in inhumane conditions during the early part of his detention and may have been deprived of sleep, but said he was not satisfied that he suffered physical injury during the first 14 days of his detention (ie before being seen by British officials).

36. The judge does not address the matter of questions being passed to Ahmed's interrogators in his open judgement.

37. Ahmed's lawyers say they are planning to appeal against both his conviction and the judge's ruling on the abuse application, and are planning to bring civil proceedings in which the British state will be accused of failing in its duty of care towards Ahmed while he was in Pakistani custody.

Zeeshan Siddiqui

38. Zeeshan Siddiqui was born in London in 1980. He has some history of mental illness but is not known to be delusional. He was a friend of Asif Hanif, who killed three people and injured 55 in a suicide bomb attack in Tel Aviv in April 2003, and was associated with several men since convicted of serious terrorist offences.

39. Siddiqui was detained in the Peshawar area on 15 May 2005 and held until March 2006, when he was repatriated to the UK. On his return he gave a statement to a London solicitor and an interview to the BBC in which he alleged that he suffered 11 days of severe mistreatment at the hands of Pakistani officials before being interviewed several times by British intelligence officers.

40. He says he was shackled, beaten, drugged, had chemicals injected up his nose, was forcibly catheterised, sexually humiliated, threatened, and told that he would be sent to Guantanamo.

41. Siddiqui told the BBC in an interview broadcast in March 2006 that he was questioned several times by British intelligence officials. Asked how he could be sure that they were intelligence officials, he replied: "The first time they came to see me they told me that there's people in the embassy who are available to help people like you, who have been imprisoned and detained, but we want you to know that we are not those people, we are in fact people from British intelligence."

42. In a statement to his lawyer, Siddiqui said he was seen by intelligence officers on six occasions and also seen by a consular official.

43. Siddiqui was subjected to a control order but absconded in October 2006 and his current whereabouts are unknown.

Salahuddin Amin

44. Salahuddin Amin was born in Edgware in 1975. He is serving a life sentence after being convicted in April 2007 of conspiracy to cause explosions likely to endanger life. The court heard that he and several other men were planning attacks on targets such as the Ministry of Sound nightclub or the Bluewater shopping centre in Kent. His appeal was dismissed.

45. Amin had been detained in April 2004 after surrendering himself to ISI officers who knew his uncle. His uncle says that the ISI told him that British officials were requesting Amin's detention. Shortly before his uncle was approached some 18 people, including associates of Amin, had been detained in raids across the south east of England.

46. Amin was held for ten months. For the first four months, he says, he suffered severe mistreatment including sleep deprivation, beatings, whippings, being threatened with an electric drill and being suspended from the ceiling of a cell. He says he was interviewed several times by two officers from the British Security Service in between being tortured. He says he did not tell the officers that he was being tortured as he assumed they had requested that he be treated this way.

47. Amin's counsel, Patrick O'Connor QC, told the jury at the Old Bailey trial that Security Service officers would need to have been "naive in the extreme" not to know what would be happening to him. He said: "The ISI are so notorious that the idea that they didn't know, in general terms, the practices of the ISI, and what was likely to be happening to Mr Amin, will be regarded by you as risible." He added: "You could well conclude that there was a tacit understanding of some considerable amorality. The ISI can get away with what they can get away with. They are an organisation above the law, operating in a country with no effective democratic control. The British authorities, of course, are not going to dirty their hands with such abuses." The amorality, he added, is that British authorities are perfectly happy to gain what they regard as the benefit by way of intelligence, and information, and access to him.

48. Before the trial began, the judge ruled that Amin's treatment before he was brought to the UK was oppressive, but said he did not believe his allegations of torture.

Tariq Mahmood

49. During a telephone conversation from prison, Amin told the *Guardian* that an Uzbek detainee, held for a while in the cell next to him at the ISI prison in Rawalpindi, had informed him that another British citizen had been held there a short time before. Amin says that the Uzbek told him the British man had said his name was Tariq and had said he came from Birmingham.

50. We believe this man to have been Tariq Mahmood, who was born in Birmingham in 1973. His relatives say he travelled to Pakistan to settle a family dispute and disappeared in October 2003. His family's solicitor in Birmingham says she wrote to Jack Straw, the then Foreign Secretary, and to the British High Commission in Islamabad, seeking information on his whereabouts.

51. Pakistani officials confirmed on 17 November that he had been detained and was being questioned about alleged terrorism offences.

52. Mahmood surfaced around four months later when he was arrested by police in Rawalpindi. According to a police report compiled at that time, and seen by the *Guardian*, Mahmood had been been in ISI custody. He was then released at the side of a road, and police were called to say that a foreigner could be found at that location without any form of identification—a criminal offence under Pakistani law.

53. Mahmood's brother, Asif Mahmood, told the *Guardian* that Tariq had been mistreated while in ISI custody. He said: "Everyone mistreated him in a bad way. It was the British, it was MI5, and it was the FBI." He has declined to expand on that statement. He added that his brother remained in Pakistan and wished to put the matter behind him. In the Jhelum district of the Punjab, friends and relatives of Mahmood contacted by the *Guardian* claimed that he was now resident in Dubai. We formed the impression that relatives in both countries were very concerned for his safety. The *Guardian* has not been able to make contact with Mahmood.

Tahir Shah

54. Shah was born in the UK in 1967. He was detained in Peshawar in July 2005, shortly after the London bombings. He was held for 16 days. He says he was interrogated about the bombings in what he describes as "a fully-equipped torture chamber", with mangles, whips and electrical equipment.

55. Shah says he was hooded and shackled for long periods and deprived of sleep. He says he did not receive any consular assistance. He says he was effectively deported without any legal process, being put aboard a scheduled flight. He says that at Heathrow his British passport was returned to him by an official who did not identify himself. Shah says he assumed the official to have been from the Security Service.

Rashid Rauf

56. Rauf was born in Pakistan in 1981 and moved to Birmingham as a child. He was a dual national. He returned to Pakistan in 2002 after the murder of an uncle in Birmingham. West Midlands police say they would have wanted to interview Rauf in connection with that offence had they been able to do so.

57. Rauf was detained in Pakistan in August 2006 on suspicion of involvement in a terrorist plot. Some 21 people were arrested in the UK shortly afterwards. Rauf was brought before a court in December 2006, and cleared of terrorist offences. He was held on other charges and arrangements were made for his extradition to the UK.

58. Rauf's family in Birmingham say that he told relatives who spoke to him at court that he had been tortured. They also that he was once able to telephone them from the court. His brother Tayib Rauf, who was interviewed a number of times by the *Guardian*, said: "He described being dragged off a bus and having the living daylight beaten out of him. His solicitor who only saw him after he had been held for six months has said he had marks on his back, his front and his side. At first he was held in what he called a "grave cell". It was like a coffin: there was so little room that when he was lying down if he brought up his knees they touched the roof. He had no idea where he was. Whenever he was moved from cell to cell or interview room to interview room he would have a hood placed over his head. He could not see anything because he still

had the hood on. He told me that one time, when he was being beaten, he could hear English and American accents in the room with him. He had a hood over his head but he knows what an English accent sounds like.”

59. Rauf’s lawyer in Pakistan, Hashmat Ali Habib, told the *Guardian* that Rauf told him that he had been mistreated, and that he had been questioned Westerners, but that he did not specify their nationality.

OFFICIAL RESPONSES

60. We believe that official responses to the specific allegations made in court by Ahmed and Amin were heard in camera.

61. General responses made in public are given in more detail in the annex. Asked about the allegations, the Home Office issued a statement on behalf of the Security Service which did not address the specifics but said that the Service’s policy was to not be involved in torture in any way.

62. The FCO denied that the Government had “outsourced” torture and said that the Foreign Secretary had been assured by the Security Service that there was nothing to suggest that it had supported torture.

63. The FCO and Margaret Beckett, former chair of the ISC, said individuals who with a complaint against the Security Service should take their case to the Investigatory Powers Tribunal.

64. The IPT has indicated that it does not generally examine third party complaints. I understand that John McDonnell has lodged a complaint on behalf of his constituent, MSS, but I am uncertain whether this man’s allegations have yet been examined.

65. Finally, it should be pointed out that few of the people who have alleged mistreatment, and alleged British collusion in mistreatment, or on whose behalf such allegations have been made, are able and willing to make complaints to the IPT. Many of the people to whom I have spoken are, frankly, terrified of reprisals against themselves or against family members in Pakistan.

January 2009

Supplementary memorandum submitted by Ian Cobain, the *Guardian*

1. This is my third memorandum for the Joint Committee on Human Rights, addressing an allegation of collusion in torture in Egypt that was reported in the *Guardian* on 16 and 17 March 2009.

2. I became aware in late July 2008, through an associate of a relative of man from Berkshire called Azhar Khan, that he was alleging that he had been tortured during a week in detention in Egypt earlier that month, and that he was saying that he had been questioned only about friends, associates and events in the United Kingdom.

3. Mr Khan was an associate of seven men who stood trial at the Central Criminal Court between March 2006 and April 2007 in a case widely known as the Crevice Trial. Five of these men were subsequently convicted of conspiring to cause explosions. Among these five was a man called Omar Khyam, who had married Mr Khan’s sister shortly before his arrest in March 2004.

4. Mr Khan had been arrested at the same time as these men, and released without charge.

5. I was told that following his return to the UK, Mr Khan had become withdrawn and distrustful and would be unlikely to wish to talk to me. A lawyer who had heard his account confirmed to me, in broad terms, that he was alleging that he had been questioned, under torture, on the basis of information that must have been supplied by the UK authorities. By February of this year, this lawyer said that Mr Khan was no longer talking to her.

6. At this point I made contact with a friend of Mr Khan, who told me what Mr Khan had told him about his time in Egyptian custody. I have formed the view that this friend is an honest and trustworthy individual. He agreed to meet Mr Khan on my behalf, and ask him a number of questions about his experience. The answers to these questions were relayed back to me and helped with my report.

7. Much of what Mr Khan alleges about his experiences in Egypt is impossible to corroborate. Some matters can be confirmed, however.

8. Among the matters alleged by Mr Khan, via this intermediary, were that he had contacted the Foreign Office in advance of his trip, explaining that he had some concerns because of his relationship with the defendants in the Crevice trial, and that he had been assured that he would be safe to travel. He also alleged that he had informed two Security Service officers, who approached him on occasion, of his plan to travel to Egypt.

9. Mr Khan says that he was detained on arrival in the country, by uniformed officials, and that his travelling companion was not; that he spent 24 hours in detention at the airport before being hooded, by uniformed officials, and driven some distance; that his hood was removed briefly while he was being stripped naked in a place that appeared to be a prison; and that he was then hooded again, handcuffed and his feet shackled.

10. He says he was led along a corridor, where he could see, beneath his hood, the feet of others, both bare and in shoes, and taken into a large room where a number of other people were detained, and tortured from time to time.

11. He says that he was forced to stand on one spot for prolonged periods, beaten and subjected to occasional electric shocks.

12. He says that one of the other people being mistreated in the same room spoke English with a British accent, and that this man's prayers, during and after being mistreated, made it clear that he was a Moslem.

13. Mr Khan alleges that he was questioned only about associates in the UK, including the Crevice defendants, and others whose names have not entered the public domain. He also alleges that he was questioned about discrepancies between a statement that he had given police at the time of his arrest and comments that he had subsequently made when visiting friends in prison or when receiving telephone calls from them.

14. After around five days of this treatment, he says, he was dressed and driven some distance, while still hooded, but no longer handcuffed or shackled. He says he was ejected from the vehicle with his hood still in place. On removing it, he says, he found himself standing next to a uniformed police officer who took him to a police station and took a statement.

15. He says that he subsequently told British consular officials that he had been tortured.

16. He says that he returned to the UK the next day, flying into Heathrow, where two police officers took a statement from him.

17. I understand that Mr Khan has been receiving a range of professional treatments since his return.

18. In October last year, Andrew Tyrie MP tabled this Parliamentary Question:

“To ask the Secretary of State for Foreign and Commonwealth Affairs how many British nationals have been detained in (a) Bangladesh, (b) Syria and (c) Egypt on suspicion of terrorist offences since 2000.”

19. Bill Rammell, Minister of State, replied:

“In your Parliamentary Question, answered on 12 November, you asked how many British Nationals have been detained in Bangladesh, Syria and Egypt since 2000 on suspicion of terrorist offences. I agreed to write to you with further details following a review of FCO records.

“We have drawn on information held in Consular records to identify such cases. I should highlight the fact that our staff will only be aware of the specifics of an individual's detention if the individuals or local authorities concerned inform us of their detention and the reasons for this. Additionally, in the case of dual British Nationals, we will not as a matter of routine, be notified of their detention. Furthermore, the information we hold on the reasons for detention is based on local laws regarding terrorist offences and may not necessarily be defined in the same terms under UK terrorism legislation. For these reasons it is not possible to provide a definitive figure in answer to your question.

“However, FCO records indicate that since 2000, two British Nationals, one of whom holds dual nationality, have been detained in Bangladesh and two British nationals, again one of whom holds dual nationality, have been detained in Syria on suspicion of terrorist offences. We have no records of any British Nationals being detained in Egypt on suspicion of terrorist offences over this period.”

20. In a subsequent question, Mr Tyrie asked in how many of the four cases (a) the British nationals complained of mistreatment, (b) consular access was requested, (c) consular access was granted and (d) the detainees were visited by other British officials.

21. The FCO replied:

“Two of the four British nationals alleged that they were ill-treated at the time of their release. However, we have no record of them pursuing the matter with the Foreign and Commonwealth Office.

“Consular access was requested in all four cases. Consular access was granted to the two individuals detained in Bangladesh. Consular access was only granted to the two individuals detained in Syria at the end of their periods of detention, immediately prior to their deportation.

“We can neither confirm nor deny whether other UK officials met any of these individuals to discuss non-consular matters.”

22. Last month I asked the FCO a number of questions about Azhar Khan and about the individuals detained in Bangladesh and Syria.

23. The FCO reply, which I asked be put in writing, was:

“Were our PQ Figures Right? Yes. The figures included all those cases of which we were aware which fell within the parameters of Mr Tyrie’s question.

“What about Azhar Khan? Azhar Khan was detained in Egypt from 9 July 2008 to 16 July. We provided consular assistance.

“Why was he not included in our answer to Mr Tyrie? The reasons for his detention did not fall within the parameters of Mr Tyrie’s original question, he was therefore not included in the figures.

“Why was he detained by Egyptian authorities? Cannot go into the grounds for his arrest due to reasons of consular confidentiality.

“Were the detainees who alleged ill-treatment held in Syria, or Bangladesh, or did the complaints come from one individual held in each location? Our response to Mr Tyrie referred to a very small number of cases. If we were to provide further details about these cases publicly this would allow identification of the individuals concerned and we would be in breach of the Data Protection Act.

“Can you also tell me what, if any, representations the FCO made to the authorities in the country or countries concerned? Representations were made to seek consular access in both cases.

“We consider raising allegations of ill-treatment with the relevant authorities on a case-by-case basis and when asked to by the individual concerned. We have no record of these individuals pursuing the matter with the FCO.”

24. The FCO declined to answer a number of subsequent questions on the grounds that to do so would breach Mr Khan’s data protection rights. The FCO refused even to confirm that its earlier answer, giving 9 July as the date of Mr Khan’s detention, was accurate, maintaining that to do so would be a breach of the Data Protection Act.

25. On 10 March I asked the Metropolitan Police what action it had taken when Mr Khan had alleged, in a statement given on his return to the UK, that he had been tortured in Egypt.

26. Four days later, late on a Friday afternoon, the Metropolitan Police said, in a statement sent by e-mail: “Can confirm a 25-year-old man was detained under Schedule 7 Port and Border Controls contained within the Terrorism Act 2000 at Heathrow Airport on 17 July 2008. The man was not arrested. Information provided to police on 17 July 2008 was passed to FCO officials shortly afterwards.”

27. A very short time later the FCO contacted the Guardian with the following statement:

“First of all, we previously stated that we received no complaints of mistreatment from British Nationals detained in Egypt in July 2008. However, a further search of our records indicates that we were informed by others that one individual had made allegations of mistreatment following his return to the UK. This individual did not ask for his allegations to be taken further and has not been in contact with the FCO since his return to the UK.

“We are aware that a British citizen was detained in Egypt on 9 July 2008 on suspicion of links with extremist activities.

“We sought consular access as soon as we were informed of the detention, contacting the local authorities on at least nine occasions over the following days, including through representations made by our Ambassador.

“Consular access was granted only upon the release of the individual on 16 July. Our Consular staff spoke to the individual concerned. When they asked about his treatment in custody, the individual did not share with them any specific allegations of mistreatment. Nor was it requested that the UK make any formal representations to the Egyptian authorities.

“The individual was given contact details of consular staff in Cairo and London in case they wished to follow up any issues.

“Our Embassy subsequently received from the Met Police information regarding the same individual after their arrival back in the UK.

“At no time since the release of the individual from Egyptian custody has the UK been asked to take up with the Egyptian authorities any allegations of mistreatment.

“We would normally make such representations on behalf of an individual only with their consent.

“We have an ongoing dialogue with Egypt in respect of a number of human rights issues, including in relation to the treatment of detainees.”

28. On 16 March the *Guardian* reported: “The Foreign Office went through a series of twists and turns when asked about the allegations made by Azhar Khan, having already told parliament that no British nationals had been held in Egypt on suspicion of terrorist offences.”

29. On the same date we also reported: “The *Guardian* has learned from a reliable source that MI5 had an interest in another person who was in detention in Egypt at the same time as Khan, and that the security service knew that there was every possibility that this individual would be tortured.”

30. On the basis of the evidence we possess, we believe it unlikely that this latter fact will be disputed.

March 2009

E mail from Mr Michael Davies

I warmly welcome the Committee’s interest in examining the extent of the British role in torture and our compliance with the letter and intent of the Convention Against Torture—as publicised by the Chairman on the radio this morning.

Whilst the effort to get at the truth in relation to torture is important and worthwhile, I believe there may be a serious system weakness within the government and that this would also be worthwhile for the Committee to pursue. The weakness relates to the function of the Ministry of Justice in regard to human rights, democracy, justice and the values that Britain wishes to project overseas. It simply has not provided an adequate defence to the pressures from FCO, Home Office and intelligence services to push back human rights—including some absolutes, such as those related to torture.

Most contentious issues in government require trade-offs and delicate balancing of competing interests and irreconcilable objectives. Government is usually arranged to create advocates for contending views, with the Cabinet or a Cabinet Committee reconciling and making the trade-offs where necessary. In relation to torture and to other supposed trade-offs between liberties and security, the Home Office habitually takes a strong, almost authoritarian, line in favour of security. The FCO tends to look at relations with particular countries, especially the US, and does not usually place human rights dialogue or pressure uppermost in the relationships it is trying to maintain. I do not know, but I suspect both FCO and Home Office are strongly influenced by the security and intelligence services, which are in turn still quite unaccountable and fond of secrecy.

To me there appears to be a missing counter-weight in favour of human rights, justice and democratic values—the MoJ could play this role, but doesn’t do it, or does it ineffectively. For that reason, I believe the human rights agenda has slipped within the government more than the security concerns justify. The effect has been for the judges, media, parliament and pressure groups to apply the external counter-weight—often with embarrassing results. It would be better if these conflicts were faced within the government to arrive at a more credible position before they face scrutiny externally.

There are several recent controversies in which the MoJ should have a role, but appears to have done nothing:

- The loophole in the 1988 Criminal Justice Act (s134) that appears to allow UK officials to be involved in torture overseas—MoJ has done nothing to ensure we are strictly compliant with the CAT and ministers stated position of complete opposition to torture. The UN has been critical of this approach for some years.
- The recent banning of a Dutch MP who wished to show his film about Islamic fascism in the UK (there was obvious concern about offending Muslim opinion, but the film is not bigoted and no credible case was made for free speech—but MoJ would be the obvious voice within government).
- The extradition of a teenage hacker to face severe penalties in the US in what seems to be a strongly extra-territorial move by the US authorities (MoJ has not to my knowledge challenged the extra-territoriality of the American legislation or asymmetric extradition treaty with the US).
- Use of secret “closed evidence” in deportation cases (evidence that cannot be challenged has no proper role in a judicial process).
- Use of control orders to establish near permanent house arrest (violates natural justice).
- Return of asylum seekers to places where they risk torture and weakness of the “memorandum of understanding” idea (probably breaks several conventions).
- It appears no case was made within government about Britain’s reputation on corruption as a counterweight to the security (and economic) arguments for dropping the corruption case against BAE (though this predates the formation of the MoJ).

No doubt the experts would be able to offer many more. What is clear to me is that the voice of human rights and civil liberties within government is too weak, and that voice should be coming from the Ministry of Justice.

I suspect it will be difficult to prise out many facts surrounding recent conduct in relation to torture, rendition and other human rights abuses from the murky centre of government. But a useful forward-looking outcome that the Committee could press for would be a strengthening of MoJ’s voice as a proper champion for human rights, free speech, justice and democracy within government.

I notice from this morning's Guardian that the Committee wishes to question the Home Secretary and Foreign Secretary. My suggestion is that the Committee asks to see the Justice Secretary as well. It may be revealing to find out what he believes his role in "justice" to be? It is also worth recalling that he was Foreign Secretary from 2001–06 and Home Secretary before that, and may well have first-hand knowledge and some responsibility for aspects of UK policy on human rights over this period.

11 March 2009

Memorandum submitted by Craig Murray

My name is Craig Murray. I was British Ambassador in Uzbekistan from August 2002 to October 2004.

I had joined the Diplomatic Service in 1984 and became a member of the Foreign and Commonwealth Office's Senior Management Structure in 1998. I had held a variety of posts including Deputy High Commissioner, Accra (1998–2001) and First Secretary Political and Economic, Warsaw (1994–97).

I had also been head of the FCO section of the Embargo Surveillance Sector leading up to and during the first Gulf War, monitoring and interdicting Iraqi attempts at weapons procurement. In consequence I had obtained security clearances even higher than those routinely given to all executive members of the Diplomatic Service. I had extensive experience throughout my career of dealing with intelligence material and the intelligence services.

It was made plain to me in briefing in London before initial departure for Tashkent that Uzbekistan was a key ally in the War on Terror and to be treated as such. It was particularly important to the USA who valued its security cooperation and its provision of a major US airbase at Karshi-Khanabad.

As Ambassador in Uzbekistan I regularly received intelligence material released by MI6. This material was given to MI6 by the CIA, mostly originating from their Tashkent station. It was normally issued to me telegraphically by MI6 at the same time it was issued to UK ministers and officials in London.

From the start of my time as Ambassador, I was also receiving a continual stream of information about widespread torture of suspected political or religious dissidents in Tashkent. This was taking place on a phenomenal scale. In early 2003 a report by the UN Special Rapporteur on Torture, in the preparation of which my Embassy much assisted, described torture in Uzbekistan as "routine and systemic".

The horror and staggering extent of torture in Uzbekistan is well documented and I have been informed by the Chair is not in the purview of the Joint Committee on Human Rights. But what follows goes directly to the question of UK non-compliance with the UN Convention Against Torture.

In gathering evidence from victims of torture, we built a consistent picture of the narrative which the torturers were seeking to validate from confessions under torture. They sought confessions which linked domestic opposition to President Karimov with Al-Qaida and Osama Bin Laden; they sought to exaggerate the strength of the terrorist threat in Central Asia. People arrested on all sorts of pretexts—I recall one involved in a dispute over ownership of a garage plot) suddenly found themselves tortured into confessing to membership of both the Islamic Movement of Uzbekistan (IMU) and Al-Qaida. They were also made to confess to attending Al-Qaida training camps in Tajikistan and Afghanistan. In an echo of Stalin's security services from which the Uzbek SNB had an unbroken institutional descent, they were given long lists of names of people they had to confess were also in IMU and Al-Qaida.

It became obvious to me after just a few weeks that the CIA material from Uzbekistan was giving precisely the same narrative being extracted by the Uzbek torturers—and that the CIA "intelligence" was giving information far from the truth.

I was immediately concerned that British ministers and officials were being unknowingly exposed to material derived from torture, and therefore were acting illegally.

I asked my Deputy, Karen Moran, to call on a senior member of the US Embassy and tell him I was concerned that the CIA intelligence was probably derived from torture by the Uzbek security services. Karen Moran reported back to me that the US Embassy had replied that it probably did come from torture, but in the War on Terror they did not view that as a problem.

In October or November of 2002 I sent the FCO a telegram classified Top Secret and addressed specifically for the attention of the Secretary of State. I argued that to receive this material from torture was:

- Illegal—Plainly it was a breach of UNCAT;
- Immoral—To support such despicable practices undermined our claims to civilisation; and
- Impractical—The material was designed to paint a false picture.

I received no reply, so in January or February of 2003 I sent a further telegram repeating the same points.

I was summoned back to a meeting which was held in the FCO on 7 or 8 March 2003. Present were Linda Duffield, Director Wider Europe; Matthew Kydd, Head Permanent Under Secretary's Department; Sir Michael Wood, Legal Adviser.

At the start of the meeting Linda Duffield told me that Sir Michael Jay, Permanent Under Secretary, wished me to know that my telegrams were unwise and that these sensitive questions were best not discussed on paper.

In the meeting, Sir Michael Wood told me that it was not illegal for us to obtain intelligence from torture, provided someone else did the torture. He added "I make no comment on the moral aspect" and appeared to me to be signalling disapproval.

Matthew Kydd told me that the Security Services considered the material from the CIA in Tashkent useful. He also argued that, as the final intelligence report issued by the security services excludes the name of the detainee interrogated, it is not possible to prove that torture was involved in any particular piece of intelligence.

Linda Duffield told me that Jack Straw had discussed this question with Sir Richard Dearlove and the policy was that, in the War on Terror, we should not question such intelligence. The UK/US intelligence sharing agreement stipulated that all intelligence must be shared. Influential figures in the US believed this was an unfair agreement as we received much more from the US than they did from us. It was not in our interest to abandon the universality principle and refuse categories of CIA material.

It was agreed that Sir Michael Wood's view that it was not illegal to receive intelligence from torture would be put in writing. I attach a copy of his letter of 13 March 2003.

This meeting was minuted. I have seen the minute, which is classified Top Secret. On the top copy is a manuscript note giving Jack Straw's views. It is entirely plain from this note that this torture policy was under his personal direction.

I returned to Tashkent. In May 2003, during a visit to Tashkent by my line manager, Simon Butt, he told me I was viewed in London as "unpatriotic". This hurt me enormously as I had served my country with great enthusiasm for 19 years. Every traceable generation of my family had served in the British military. I felt it was my country which had abandoned the principles I had believed I was working for.

In August 2003 the FCO attempted to frame me on 18 false charges of gross misconduct and demanded my resignation. I refused and after a sickening fight was acquitted and returned to Tashkent in January 2004.

While in London in approximately May 2004 for a medical check-up I was informed by Jon Benjamin, Head of Human Rights Policy Department FCO, that there had just been a senior level interdepartmental FCO meeting on receiving intelligence from torture and he had been surprised I was not invited. The policy that we would accept this intelligence had been re-affirmed.

On return to Tashkent I sent on 22 July 2004 yet a further telegram arguing we should not obtain intelligence from torture. I kept an electronic copy and this is attached.

I specifically argued (paras 16 to 18) that we were in breach of Article 4 of UNCAT which concerns complicity with torture. I also referred to the US transport of detainees to Uzbekistan (para 18). I referred to the London interdepartmental meeting (paras 8 to 9).

I received a brief and extraordinary reply to the effect that there had been no such meeting in the last two weeks. I knew it had been before then and had not referred to a date in my telegram.

This telegram, which was sparked by my anger at the lies in our public position on torture after Abu Ghraib became public, resulted in my dismissal as ambassador when it was leaked to the *Financial Times* (not by me).

CONCLUSIONS

1. All CIA intelligence is received by the UK. MI6 has seen the fruits of every CIA waterboarding session and rendition torture. Very many will have been passed on to ministers and senior officials.

2. Ministers decided the principle of the universality of the UK/US intelligence sharing agreement was more important than any aversion to torture. We could not refuse this material from the CIA without compromising the basic agreement.

3. Ministers did know they were receiving intelligence from torture. There was a definite, internally promulgated and legally cleared policy to receive intelligence from torture, directed in person by Jack Straw.

4. The format of intelligence reports contains a deliberate double blind; by excluding the name of the detainee from the final report, Ministers can state they have never knowingly seen intelligence from torture.

5. The government's public lines that we do not condone, endorse, encourage or instigate torture, even that we condemn it and work against it, do not answer the key question:

Are we prepared on a regular basis to receive intelligence from torture?

That question is capable of a one word answer. The true answer is yes. The government refuses to give a straight answer.

13 March 2009

Annex A

Letter from Sir Michael Wood, Legal Adviser, Foreign and Commonwealth Office, to Linda Duffield, Director, Wider Europe, Foreign and Commonwealth Office, dated 13 March 2003

UZBEKISTAN: INTELLIGENCE POSSIBLY OBTAINED UNDER TORTURE

1. Your record of our meeting with HMA Tashkent recorded that Craig had said that his understanding was that it was also an offence under UN Convention on Torture or receive or possess information under torture. I said that I did not believe that this was the case, but undertook to re-read the Convention.

2. I have done so. There is nothing in the Convention to this effect. The nearest thing is article 15 which provides:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

3. This does not create any offence. I would suspect that under UK law any statement established to have been made as a result of torture would not be admissible as evidence.

Annex B

Telegram from Craig Murray, HM Ambassador, Tashkent, to Foreign and Commonwealth Office, London, dated July 2004

SUBJECT: RECEIPT OF INTELLIGENCE OBTAINED UNDER TORTURE

SUMMARY

1. We receive intelligence obtained under torture from the Uzbek intelligence services, via the US. We should stop. It is bad information anyway. Tortured dupes are forced to sign up to confessions showing what the Uzbek government wants the US and UK to believe, that they and we are fighting the same war against terror.

2. *I gather a recent London interdepartmental meeting considered the question and decided to continue to receive the material. This is morally, legally and practically wrong. It exposes as hypocritical our post Abu Ghraib pronouncements and fatally undermines our moral standing. It obviates my efforts to get the Uzbek government to stop torture they are fully aware our intelligence community laps up the results.*

3. We should cease all co-operation with the Uzbek Security Services they are beyond the pale. We indeed need to establish an SIS presence here, but not as in a friendly state.

DETAIL

4. In the period December 2002 to March 2003 I raised several times the issue of intelligence material from the Uzbek security services which was obtained under torture and passed to us via the CIA. I queried the legality, efficacy and morality of the practice.

5. I was summoned to the UK for a meeting on 8 March 2003. Michael Wood gave his legal opinion that it was not illegal to obtain and to use intelligence acquired by torture. He said the only legal limitation on its use was that it could not be used in legal proceedings, under Article 15 of the UN Convention on Torture.

6. On behalf of the intelligence services, Matthew Kydd said that they found some of the material very useful indeed with a direct bearing on the war on terror. Linda Duffield said that she had been asked to assure me that my qualms of conscience were respected and understood.

7. Sir Michael Jay's circular of 26 May stated that there was a reporting obligation on us to report torture by allies (and I have been instructed to refer to Uzbekistan as such in the context of the war on terror). You, Sir, have made a number of striking, and I believe heartfelt, condemnations of torture in the last few weeks. I had in the light of this decided to return to this question and to highlight an apparent contradiction in our policy. I had intimated as much to the Head of Eastern Department.

8. I was therefore somewhat surprised to hear that without informing me of the meeting, or since informing me of the result of the meeting, a meeting was convened in the FCO at the level of Heads of Department and above, precisely to consider the question of the receipt of Uzbek intelligence material obtained under torture. As the office knew, I was in London at the time and perfectly able to attend the meeting. I still have only gleaned that it happened.

9. I understand that the meeting decided to continue to obtain the Uzbek torture material. I understand that the principal argument deployed was that the intelligence material disguises the precise source, ie it does not ordinarily reveal the name of the individual who is tortured. Indeed this is true—the material is marked with a euphemism such as “From detainee debriefing.” The argument runs that if the individual is not named, we cannot prove that he was tortured.

10. I will not attempt to hide my utter contempt for such casuistry, nor my shame that I work in an organisation where colleagues would resort to it to justify torture. I have dealt with hundreds of individual cases of political or religious prisoners in Uzbekistan, and I have met with very few where torture, as defined

in the UN convention, was not employed. When my then DHM raised the question with the CIA head of station 15 months ago, he readily acknowledged torture was deployed in obtaining intelligence. I do not think there is any doubt as to the fact.

11. The torture record of the Uzbek security services could hardly be more widely known. Plainly there are, at the very least, reasonable grounds for believing the material is obtained under torture. There is helpful guidance at Article 3 of the UN Convention;

“The competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” While this article forbids extradition or deportation to Uzbekistan, it is the right test for the present question also.

12. On the usefulness of the material obtained, this is irrelevant. Article 2 of the Convention, to which we are a party, could not be plainer:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

13. Nonetheless, I repeat that this material is useless—we are selling our souls for dross. It is in fact positively harmful. It is designed to give the message the Uzbeks want the West to hear. It exaggerates the role, size, organisation and activity of the IMU and its links with Al Qaida. The aim is to convince the West that the Uzbeks are a vital cog against a common foe, that they should keep the assistance, especially military assistance, coming, and that they should mute the international criticism on human rights and economic reform.

14. I was taken aback when Matthew Kydd said this stuff was valuable. 16 months ago it was difficult to argue with SIS in the area of intelligence assessment. But post Butler we know, not only that they can get it wrong on even the most vital and high profile issues, but that they have a particular yen for highly coloured material which exaggerates the threat. That is precisely what the Uzbeks give them. Furthermore MI6 have no operative within a thousand miles of me and certainly no expertise that can come close to my own in making this assessment.

15. At the Khuderbegainov trial I met an old man from Andizhan. Two of his children had been tortured in front of him until he signed a confession on the family’s links with Bin Laden. Tears were streaming down his face. I have no doubt they had as much connection with Bin Laden as I do. This is the standard of the Uzbek intelligence services.

16. I have been considering Michael Wood’s legal view, which he kindly gave in writing. I cannot understand why Michael concentrated only on Article 15 of the Convention. This certainly bans the use of material obtained under torture as evidence in proceedings, but it does not state that this is the sole exclusion of the use of such material.

17. The relevant article seems to me Article 4, which talks of complicity in torture. Knowingly to receive its results appears to be at least arguable as complicity. It does not appear that being in a different country to the actual torture would preclude complicity. I talked this over in a hypothetical sense with my old friend Prof Francois Hampson, I believe an acknowledged World authority on the Convention, who said that the complicity argument and the spirit of the Convention would be likely to be winning points. I should be grateful to hear Michael’s views on this.

18. It seems to me that there are degrees of complicity and guilt, but being at one or two removes does not make us blameless. There are other factors. Plainly it was a breach of Article 3 of the Convention for the coalition to deport detainees back here from Baghram, but it has been done. That seems plainly complicit.

19. This is a difficult and dangerous part of the World. Dire and increasing poverty and harsh repression are undoubtedly turning young people here towards radical Islam. The Uzbek government are thus creating this threat, and perceived US support for Karimov strengthens anti-Western feeling. SIS ought to establish a presence here, but not as partners of the Uzbek Security Services, whose sheer brutality puts them beyond the pale.

Supplementary memorandum submitted by Craig Murray following oral evidence heard on 28 April 2009

I am grateful to you and to the committee for the kind attention and consideration which you gave to my evidence, as witnessed by the obvious thoughtfulness of the questioning.

I have a few comments and clarifications to offer on the transcript, to be sure that everything is quite plain and accurate.

[Mr Murray's comments on Q88, Q96, Q104 and Q136 have been included in the oral evidence as footnotes]
 Q102

I talk of "Creating a market for torture". It did not occur to me as I sat before the Committee, but on reflection I believe that the proper analogy is with child pornography. If someone views or collects child pornography, the law has specifically rejected any defence of not being part of the actual making of the pornography. The law takes the view that using child abuse pornography, is to be responsible for its creation. I believe that is a correct view. I would argue that child abuse is a form of torture, and that using intelligence from torture is a direct moral parallel with using images from child abuse.

Q149

My answer here is not full, and my mind was subsequently jogged by Professor Sands important answers at Q165 and Q166. Apart from the MI6 contact to which I refer, the Uzbek government was certainly receiving a number of very strong signals of thanks and support from other FCO officials and from FCO Ministers, particularly to the Uzbek Ambassador in London.

I was present at a meeting where Mr Simon Butt, Head of Eastern Department, thanked the Uzbek Foreign Minister for security cooperation. There was at least one phone call from an FCO minister to an Uzbek minister in this period giving a similar message, and contacts to the Uzbek Embassy in London.

The Uzbeks received definite help from the US and UK in support at international institutions, including the IMF and OSCE, as a payoff for their "War on Terror" cooperation including intelligence cooperation. This is recounted in enormous detail in my published memoir, *Murder in Samarkand*, of which it is a primary theme.

Finally the Uzbek Security Services received direct funding of over US\$80 million from the US government.

Q154

There is of course a great deal of documentary corroboration of my testimony. It is open to the FCO to provide this to the committee. The committee already has a copy of Michael Wood's letter, which is essential corroboration, and my telegram of 22 July 2004. The government has confirmed authenticity of this as I received a letter from Treasury Solicitors claiming Crown Copyright over it. The Committee may also wish to ask the FCO for copies of the minutes of my meeting with Linda Duffield, Michael Wood and Matthew Kydd in March 2003, and of my two telegrams on the legality of torture intelligence which led to it. My telegram of 22 July 2004 also refers at para 8 to a inter-departmental meeting on this subject which must also have been minuted.

18 May 2009

Letter from Philippe Sands QC to the Chair of the Committee, dated 8 February 2009

I have been following with interest your Committee's inquiry into issues of torture and other abuse of detainees, which I very much welcome.

I have been deeply involved in these issues for several years, as counsel in numerous cases and also in an academic capacity. In 2006 I gave the Justice International Ruyle of Law Lecture (*Extraordinary Rendition: Complicity and its Consequences*), which raised many of the central legal issues well before much of the evidence had emerged. I have also written several articles and books, including most recently *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Penguin, 2008) (I attach a copy of a related article that appeared in *Vanity Fair* last year, entitled *The Green Light*, that summarises my argument, available at: <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>).

This book charts the manner in which the Bush Administration came to embrace cruelty, after September 11th, and was the catalyst for hearings before the United States House of Representatives Judiciary Committee.

Developments in the United Kingdom are closely connected with those of the United States. But for the actions of the Bush Administration, your Committee would not be faced with its current inquiry.

I think it may be useful for your Committee to understand the circumstances in which the Bush Administration took its decisions. In short, it adopted the following steps:

- (i) in late 2001, the decision was taken to move to "harsh interrogations";
- (ii) on 7 February 2002, President Bush decided that none of the detainees at Guantanamo would have any rights under the Geneva Conventions, including Common Article 3, in order to remove international constraints on abuse;
- (iii) in the summer of 2002, the US DoD and the CIA "reverse engineered" the techniques of interrogation used on US military, for use on its detainees;

- (iv) thereafter, decisions were taken that all “designated unlawful combatants” (DUCs), including in Iraq, would have no rights or protections under the Geneva Conventions;
- (v) on 1 August 2002 the US Department of Justice provided opinions that redefined torture and signed off on individual techniques of interrogation, including waterboarding).

The abuses followed, on a wide scale, often amounting to torture (as confirmed on 14 January 2009, by Susan Crawford, the convening authority of the US military commissions at Guantanamo).

As described in my book, there is already some evidence as to the manner in which these new interrogation techniques migrated from US interrogators to British interrogators.

What is now pertinent is to understand the full extent—including timing—of the knowledge of the British authorities on these matters. Specifically, amongst other issues:

- when did the British authorities learn that the US had abandoned Geneva and other international constraints on interrogation;
- what steps did the British authorities take to bring the US into line with its international legal obligations;
- how did the new US approach to interrogations migrate to British intelligence and military officials;
- what was the role of 10 Downing Street in relation to these issues, and what communications took place between the offices of the British Prime Minister and the US President, and their most senior associates, on these and related issues.

I hope you will accept my apologies for the rather hasty nature of this note. I gather you are meeting on Tuesday, and I am currently travelling in the Gulf. I am troubling to write to you because I do not believe it is possible to fully inquire into UK developments without having a clear understanding of the US situation, and the paths of communication between the two countries. In this regard, it is also of importance to recognize the significance of the obligations under the 1984 Convention against Torture, including the obligation of Article 4, which criminalises complicity in torture (which, on some interpretations, would include silence or turning a blind eye).

I would be pleased to assist your Committee in whatever way might be helpful, including by appearing before you. Equally, I recognize that this comes late in the day and would fully understand if you felt that at this late stage my input was not required.

Finally, I wish to point out that I have appeared as counsel for Mr Binyam Mohammed, in legal proceedings in the English courts. The views I wish to express are personal and offered in my academic capacity, and I would not be in a position to share any information on any material I may have come across in my professional capacity, and could not comment on any aspect of any proceedings that are pending in which I am or have been involved.

8 February 2009

Memorandum submitted by Professor Philippe Sands QC

1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the 1984 Convention”) was adopted on 10 December 1984 and entered into force on 26 June 1987. The United Kingdom became a party on 8 December 1988, and the Convention now has 146 parties, including Morocco and the United States (Pakistan signed the Convention on 17 April 2008 but is not a party).

2. The object of the 1984 Convention, as reflected in the Preamble, is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”. To that end, Article 4 of the 1984 Convention provides that:

“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.”²

3. The Joint Committee on Human Rights has invited me to provide a note on the meaning and effect of the second sentence of Article 4(1) of the 1984 Convention. In accordance with my professional obligations under the Code of Conduct of the Bar of England and Wales I will not make any reference to facts or issues

² Article 1(1) of the Convention defines torture as follows: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

arising in current legal proceedings in which I am briefed.³ I have previously addressed related issues in a lecture I was invited to give in 2006 by the then Chairman of Justice, Lord Steyn, entitled *International Rule of Law: Extraordinary Rendition, Complicity and its Consequences*.⁴

4. As set out in more detail below, three elements have to be established in order for complicity to have occurred within the meaning of Article 4(1) of the 1984 Convention. They are:

- (i) knowledge that torture is taking place, and
- (ii) a contribution by way of assistance, that
- (iii) has a substantial effect on the perpetration of the crime.

1. BACKGROUND

5. I prepare this Note against the background of extensive research that I have carried out since 2003 on the move by the United States to use coercive techniques of interrogation in violation of the standards reflected in Common Article 3 of the Geneva Conventions and the obligations imposed by the 1984 Convention. The product of this research is reflected in *Torture Team: Cruelty, Deception and the Compromise of Law* (Penguin, 2008), which examines the circumstances in which the Administration of President Bush embraced a policy of cruelty and moved to authorize “coercive interrogations” often amounting to torture. The book focused in particular on a memorandum signed by Donald Rumsfeld on 2 December 2002, authorizing new techniques of interrogation, and their subsequent use on Guantanamo’s Detainee 063 (Mohammed Al Qahtani, alleged to be the twentieth 9/11 hijacker). The heart of the book’s argument was the subject of my article *The Green Light*, published in May 2008 in *Vanity Fair* magazine, a copy of which is attached at Annex I.⁵

6. Torture Team was based on an extensive series of interviews I conducted during 2006 and 2007 with senior US policy-makers and lawyers, including the General Counsel to the US Department of Defense (William J Haynes), the Undersecretary of Defense at the US Department of Defense (Doug Feith) and the former Chairman of the Joint Chiefs of Staff (General Richard Myers). My general conclusion was that the Administration had spun a false narrative in June 2004, concerning the manner in which it had moved to approve the use of harsh techniques of interrogation. Specifically:

- (i) the Administration did not move with care and deliberation and crafted rules to follow a policy that had already been fixed: the decision to move to harsh techniques of interrogation was taken as early as December 2001 and set in stone with the President’s decision of 7 February 2002 that none of the alleged Taleban or Al Qaeda detainees at Guantanamo (or elsewhere in the “war on terror”) had any rights under the Geneva Conventions, including its Common Article 3 (which prohibits torture);
- (ii) the initiative came not come from the ground (from Guantánamo) but from very top of the Administration, involving decisions taken by President Bush, Vice President Cheney and Secretary of Defense Donald Rumsfeld;
- (iii) the legal justifications for the use of new techniques of interrogation, and the new policy, was the result of legal positions taken by US Department of Justice lawyers, reflected in particular in two memoranda of 1 August 2002;
- (iv) the new techniques, and the policies—approved in 2002 then migrated to other parts of the world, including Iraq, where they contributed to the abuses at Abu Ghraib;

7. In December 2008, the US Senate Armed Services Committee published the summary of a bi-partisan, unanimous report on detainee treatment, which largely confirmed my findings.⁶ In January 2009, Susan Crawford, the top Bush administration official charged with deciding whether to bring Guantanamo detainees to trial, confirmed that Mohammed al-Qahtani had been tortured and, as a result, decided that charges against him had to be dropped.⁷

³ Since May 2008 I have served as counsel to Binyam Mohammed in certain proceedings before the English courts. I wish to make clear that this note expresses only my personal views and is not intended to express any views on the merits or demerits of any decision or judgment adopted in the course of those proceedings. The purpose of the note is solely to assist the Joint Committee on Human Rights. By way of information, the Bar Code of Conduct provides:

“709.1 A barrister must not in relation to any anticipated or current proceedings or mediation in which he is briefed or expects to appear or has appeared as an advocate express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings.

709.2 Paragraph 709.1 shall not prevent the expression of such an opinion on an issue in an educational or academic context.”

⁴ The lecture is published in [2006] EHRLR p 409.

⁵ In April 2009 the article was awarded the 2008 Sigma Delta Chi Awards for Public Service in Magazine Journalism by the American Society of Professional Journalists.

⁶ Senate Armed Services Committee, Inquiry Into the Treatment of Detainees in US Custody, Executive Summary, 11 December 2008, <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>

⁷ Bob Woodward, “Detainee Tortured, Says US Official”, *Washington Post*, 14 January 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372_pf.html

8. These developments in the United States are relevant to the current inquiry being carried out by the Joint Committee on Human Rights. They indicate that as early as February 2002, the highest levels of the Bush Administration had authorized the use of techniques of interrogation that amounted to torture. This applied to interrogations carried out by US personnel and interrogations to be carried out by third States.

9. A key question of fact for the Joint Committee's inquiry is: who in the British authorities became aware of the change in US policy and practise, and when did they become aware of it. The fact of knowledge is likely to be highly relevant to the question of whether anyone acting on behalf of the British authorities, or taking decisions, may be caught by the complicity rule in Article 4(1) of the Convention.

10. In 2005 the British Government sought to persuade the English courts that certain evidence that may have been obtained by torture should be allowed in certain proceedings, despite the fact that Article 15 of the 1984 Convention was unambiguous in stating that:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

The Law Lords rejected the Government's efforts in the landmark judgment of *A & Others v Home Secretary*.⁸

11. The Government's arguments before the House of Lords appeared to be in contradiction to advice that had previously been given by the FCO legal adviser, Michael Wood, in a letter dated 13 March 2003 (reproduced at Annex II). The letter apparently responds to a claim made by Britain's then Ambassador to Uzbekistan, Craig Murray, to the effect that it is an offence under the 1984 Convention “to receive or possess information under torture”. Mr Wood responds by expressing the view that “There is nothing in the Convention to this effect”, and makes reference to Article 15 of the 1984 Convention (see above). In a formal and limited sense, Mr Wood's response is correct, but it seems not to address the issue in the round. As discussed further below, there may be circumstances in which the receipt or possession of information that has been obtained by torture may amount to complicity in torture, within the meaning of Article 4(1). This may occur, for example, where the recipient or holder knows—or would have known if he had not wilfully turned a blind eye—that the information had been obtained by torture, so that his actions may amount to direct or indirect encouragement of torture, or failing to take steps to prevent torture. This point was made—correctly in my view—by the Joint Committee on Human Rights in its 19th Report, when it stated that:

“Care must also be taken to ensure that the use of information in this way, and in particular any repeated or regular use of such information, especially from the same source or sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks.”⁹

It may well be that the legal adviser or other lawyers in the FCO or elsewhere in Government, addressed the issues arising under Article 4 of the Convention (or complicity more generally) on another occasion. Taken on its own, however, the letter of 13 March 2003 does not address in a complete manner the various obligations which may arise under the 1984 Convention in relation to information that may have been obtained where torture has occurred.

12. Against the background of developments in the US after 9/11, the combined effect of the FCO legal adviser's letter of March 2003 and the Government's arguments in *A & Others* in 2005 might be seen by some as suggesting that during this period the British authorities were motivated by considerations that reflected a less than total opposition to torture and the use of its fruits, in circumstances that could (depending on the precise facts) give rise to actions that cross a line into complicity.

2. THE MEANING OF “COMPLICITY” IN ARTICLE 4 UNCAT

13. Against this background, I turn to the meaning of “complicity” in Article 4(1) of the 1984 Convention.

14. Article 4(1) requires parties to the 1984 Convention to criminalize “an act by any person which constitutes complicity . . . in torture”. The interpretation of a treaty is governed by the rules set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which reflect general international law. In accordance with Article 31(1), the term “complicity” is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Account may also be taken of “subsequent practise” (Article 31(2)) and, if the meaning remains “ambiguous or obscure” then recourse may be had to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion” (Article 32).

⁸ *A and others v Secretary of State for the Home Department* (No 2), House of Lords, [2005] UKHL 71.

⁹ Joint Committee on Human Rights, Nineteenth Report, (Printed 18 May 2006), para 55 available at: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm>

15. The term “complicity” is not defined by the Convention. The *Dictionnaire de Droit International Public* (Bruylant, 2001) defines the term (in relation to the law of state responsibility, rather than in relation to the criminal law applicable to individuals) as:

“Aide ou assistance donnée par un Etat a la réalisation d’un fait internationalement illicite perpétré par un autre Etat.” [Informal translation provided by the author: “Aid or assistance given by a State to the commission of an internationally illegal act by another State”].¹⁰

This indicates that “complicity” is closely linked to the notion of “aiding and abetting” the commission of an illegal act, a conclusion that derives some support from the negotiating history.

(a) *Negotiating history of Article 4(1)*

16. The original draft of the text that would become Article 4(1) was provided by Sweden on 18 January 1978. It provided:

“(1) Each State Party shall ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.”

Sweden provided a revised draft on 19 February 1979, in the following terms:

“(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.”

17. The language does not appear to have been problematic and did not give rise to much debate, perhaps reflecting the fact that the language was similar to that used in other treaties, such as the 1948 Genocide Convention. The words “complicity or participation in torture” in the revised draft gave rise to some States expressing doubts about whether, in the legislation of all countries, these terms would cover those persons who were accessories to the crime of torture after it had occurred or who had in some way concealed acts of torture.¹¹ The Working Group that drafted the Convention agreed that “complicity or participation” includes acts relating to cover-up or concealment of incidents of torture, and this version was adopted by consensus by the Working Group. Subsequently one delegate reserved his position on Article 4 because of his concern that the word “complicity” was not broad enough to cover the notion of “accessory after the fact” under his country’s domestic law.¹² The USSR unsuccessfully introduced amendments to the draft resolution regarding Article 4(1) that suggested that the words “irrespective of the reason, purposes and motives for which they were committed” be added after “all acts of torture”.¹³ The Working Group wished to ensure, by adding a footnote to its draft of Article 4(1), that the term “complicity” also includes the concept of “concealment” after torture has been committed.¹⁴ It is also clear that Article 4(1) is closely related to the definition of torture in Article 1(1) that includes instigation, consent and acquiescence. On this approach, it appears that “complicity or participation” is to be interpreted broadly, to include incitement, instigation, superior orders or instructions, consent, acquiescence and concealment.¹⁵

(b) *Judicial decisions and the Committee against Torture*

18. I am not aware of any decision by the English courts on the meaning and effect of Article 4(1) of the 1984 Convention.

19. Support for a broad interpretation of Article 4(1) may also be found in the practise of the Committee against Torture, the treaty body that is charged with overseeing the implementation of the Convention. The Committee has interpreted “complicity or participation” to include incitement, instigation, superior orders or instructions, consent, acquiescence and concealment.¹⁶

20. In this sense, the Committee has made it clear, for example, that any involvement of doctors, even if only for the purpose of ensuring that the victim does not die or suffer physical injuries during interrogation, is to be treated as a form of participation.¹⁷ In this sense “complicity or participation” may be seen as acts that in some way, whether directly or indirectly, have the effect of allowing torture to occur, or even

¹⁰ At p 218.

¹¹ Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (2008), p 232 [Nowak and McArthur].

¹² Nowak and McArthur, p 232.

¹³ Nowak and McArthur, p 233.

¹⁴ See Rodley and Pollard, *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2006) 2 EHRLR 115–141 (on concealment and on the criminal consequences of wilfully turning a blind eye).

¹⁵ See also Burgers and Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), 130.

¹⁶ Nowak and McArthur, pp 247–8.

¹⁷ CAT/C/SR.77, para 28; CAT/C/SR.105, para 5.

encouraging it implicitly. The Committee has also confirmed that superior officials will be guilty of complicity (or acquiescence) in torture (or cruel inhuman or degrading treatment) if they knew or should have known that torture was being practised by personnel under their command. In its 2003 Conclusions and recommendations relating to Azerbaijan, for example, the Committee expressed concern that the domestic criminalisation of torture in Azerbaijan did not fully comply with Article 1 of the Convention because it failed to “provide for criminal liability of officials who have given tacit consent to torture”.¹⁸

21. The case of *Dzemajl v Yugoslavia* seems particularly pertinent. The Committee held that acquiescence, the lowest form of participation required to engage state liability under Article 16 of the Convention (which concerns cruel, inhuman or degrading treatment, and not torture), had been demonstrated where the police “although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants.”¹⁹ This indicates that acquiescence may occur where there is a failure to act to prevent harm in the face of information that acts incompatible with the Convention are occurring. The same principle surely applies in relation to Article 4.²⁰

22. Support for a broad definition of “complicity” may also be found in international case-law. International criminal law has not provided a definition of the term “complicity”, but judicial practice indicates that the term is treated as closely connected to “aiding and abetting”. The leading international authority is the judgment of 10 December 1998 of the Appeals Chamber (Judge Florence Mumba, Presiding; Judge Antonio Cassese; Judge Richard May) in the case of *Prosecutor v Anto Furundzija*, before the International Criminal Tribunal for the former Yugoslavia, which was concerned with the definition of “aiding and abetting” as used in Article 7(1) of the ICTY Statute, where the defendant was charged *inter alia* with torture.²¹ The Appeals Chamber carried out an extensive review of international practice, treating “complicity” as being closely connected to the concept of “aiding and abetting”,²² and also referred to the work of the International Law Commission on the Code of Crimes against the Peace and Security of Mankind, Article 2(3)(d) of which would impose criminal responsibility upon an individual who “knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission”. The ICTY Trial Chamber concluded from this that:

“In the absence of specification, it appears that assistance can be either physical or in the form of moral support. Encouragement given to the perpetrators may be punishable, even if the abettor did not take any tangible action, provided it ‘directly and substantially’ assists in the commission of a crime. This proposition is also supported by a passage from the International Law Commission’s Commentary concerning *ex post facto* assistance:

‘The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.’²³

On the basis of this review, the Trial Chamber concluded that:

“234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”

23. The Trial Chamber then addressed the question of “How to Distinguish Perpetration of Torture from Aiding and Abetting Torture”. This part of the Judgment may be especially pertinent to the current inquiry, and it is worth reproducing the relevant extracts in full:

“250. [. . .] [T]he Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

¹⁸ CAT/C/CR/30/1, para 5(b).

¹⁹ *Hajrizi Dzemajl et al v Yugoslavia*, CAT/C/29/D/161/2000, .

²⁰ See also 2007–08 Annual Report, the Committee, A/63/44, Annex VI General Comment No 2 at p 188; 18 (Where State authorities or others acting in an official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. The failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or *de facto* permission.)

²¹ Judgment, paras 190–235, available at: <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>

²² *Ibid*, at paras 195, 196, 198, 207, 212, 221, 222 and 224.

²³ *Ibid*, para 229.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also partakes of the purpose behind torture (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to “compartmentalise” and “dilute” the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, inter alia, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law *maxim quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described supra, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.”²⁴

²⁴ *Ibid*, paras 250–7.

24. In summary, the conclusions of the Trial Chamber of the ICTY in the Furundzija case appear to reflect a reasonable approach to the interpretation and application of Article 4(1) of the Convention, having regard to its plain meaning, its object and purpose, the intentions of the drafters, and the practise of the Committee against Torture. The Trial Chamber summarized the situation as follows:

“(i) to be guilty of torture as a perpetrator (or co- perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.”²⁵

In this way the three elements that must be established for complicity to have occurred within the meaning of Article 4(1) of the Convention are:

- (i) knowledge that torture is taking place, and
- (ii) a contribution by way of assistance, that
- (iii) has a substantial effect on the perpetration of the crime.

3. CONCLUSIONS

25. Having regard to the requirements of the law, however, and the information referred to above—including the early decision taken by President Bush on the deprivation of certain rights for detainees in the “war on terror”, Britain’s close relationship with the United States, the Prime Minister’s active support for President Bush, and the tenor of the legal advice given by the FCO legal adviser—a proper investigation of any possible complicity in torture by persons associated with the British authorities would have to focus on key issues of fact relating to (1) the extent to which such persons had knowledge that torture was or might be taking place, (2) the extent to which such person’s actions may have contributed by way of assistance, and (3) whether those actions had a substantial effect on the perpetration of the torture.

26. Subject to my professional obligations, I would be pleased to provide such further assistance to the Joint Committee as may be helpful.

20 April 2009

Annex I

PHILIPPE SANDS, *The Green Light, Vanity Fair*, MAY 2008

As the first anniversary of 9/11 approached, and a prized Guantánamo detainee wouldn’t talk, the Bush administration’s highest-ranking lawyers argued for extreme interrogation techniques, circumventing international law, the Geneva Conventions, and the army’s own Field Manual. The attorneys would even fly to Guantánamo to ratchet up the pressure—then blame abuses on the military. Philippe Sands follows the torture trail, and holds out the possibility of war crimes charges.

The abuse, rising to the level of torture, of those captured and detained in the war on terror is a defining feature of the presidency of George W Bush. Its military beginnings, however, lie not in Abu Ghraib, as is commonly thought, or in the “rendition” of prisoners to other countries for questioning, but in the treatment of the very first prisoners at Guantánamo. Starting in late 2002 a detainee bearing the number 063 was tortured over a period of more than seven weeks. In his story lies the answer to a crucial question: How was the decision made to let the US military start using coercive interrogations at Guantánamo?

The Bush administration has always taken refuge behind a “trickle up” explanation: that is, the decision was generated by military commanders and interrogators on the ground. This explanation is false. The origins lie in actions taken at the very highest levels of the administration—by some of the most senior personal advisers to the president, the vice president, and the secretary of defense. At the heart of the matter stand several political appointees—lawyers—who, it can be argued, broke their ethical codes of conduct and took themselves into a zone of international criminality, where formal investigation is now a very real option. This is the story of how the torture at Guantánamo began, and how it spread.

“Crying. Angry. Yelled for Allah.”

One day last summer I sat in a garden in London with Dr Abigail Seltzer, a psychiatrist who specializes in trauma victims. She divides her time between Great Britain’s National Health Service, where she works extensively with asylum seekers and other refugees, and the Medical Foundation for the Care of Victims of Torture. It was uncharacteristically warm, and we took refuge in the shade of some birches. On a table before us were three documents. The first was a November 2002 “action memo” written by William J (Jim) Haynes II, the general counsel of the US Department of Defense, to his boss, Donald Rumsfeld; the document is sometimes referred to as the Haynes Memo. Haynes recommended that Rumsfeld give “blanket approval”

²⁵ *Ibid*, para 257.

to 15 out of 18 proposed techniques of aggressive interrogation. Rumsfeld duly did so, on 2 December 2002, signing his name firmly next to the word “Approved.” Under his signature he also scrawled a few words that refer to the length of time a detainee can be forced to stand during interrogation: “I stand for eight to 10 hours a day. Why is standing limited to four hours?”

The second document on the table listed the 18 proposed techniques of interrogation, all of which went against long-standing US military practice as presented in the Army Field Manual. The 15 approved techniques included certain forms of physical contact and also techniques intended to humiliate and to impose sensory deprivation. They permitted the use of stress positions, isolation, hooding, 20-hour interrogations, and nudity. Haynes and Rumsfeld explicitly did not rule out the future use of three other techniques, one of which was waterboarding, the application of a wet towel and water to induce the perception of drowning.

The third document was an internal log that detailed the interrogation at Guant—namo of a man identified only as Detainee 063, whom we now know to be Mohammed al-Qahtani, allegedly a member of the 9/11 conspiracy and the so-called 20th hijacker. According to this log, the interrogation commenced on 23 November 2002, and continued until well into January. The techniques described by the log as having been used in the interrogation of Detainee 063 include all 15 approved by Rumsfeld.

“Was the detainee abused? Was he tortured?,” I asked Seltzer. Cruelty, humiliation, and the use of torture on detainees have long been prohibited by international law, including the Geneva Conventions and their Common Article 3. This total ban was reinforced in 1984 with the adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which criminalizes torture and complicity in torture.

A careful and fastidious practitioner, Seltzer declined to give a straight yes or no answer. In her view the definition of torture is essentially a legal matter, which will turn on a particular set of facts. She explained that there is no such thing as a medical definition of torture, and that a doctor must look for pathology, the abnormal functioning of the body or the mind. We reviewed the definition of torture, as set out in the 1984 Convention, which is binding on 145 countries, including the United States. Torture includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”

Seltzer had gone through the interrogation log, making notations. She used four different colors to highlight moments that struck her as noteworthy, and the grim document now looked bizarrely festive. Yellow indicated episodes of abusive treatment. Pink showed where the detainee’s rights were respected—where he was fed or given a break, or allowed to sleep. Green indicated the many instances of medical involvement, where al-Qahtani was given an enema or was hospitalized suffering from hypothermia. Finally, blue identified what Seltzer termed “expressions of distress.”

We talked about the methods of interrogation. “In terms of their effects,” she said, “I suspect that the individual techniques are less important than the fact that they were used over an extended period of time, and that several appear to be used together: in other words, the cumulative effect.” Detainee 063 was subjected to systematic sleep deprivation. He was shackled and cuffed; at times, head restraints were used. He was compelled to listen to threats to his family. The interrogation leveraged his sensitivities as a Muslim: he was shown pictures of scantily clad models, was touched by a female interrogator, was made to stand naked, and was forcibly shaved. He was denied the right to pray. A psychiatrist who witnessed the interrogation of Detainee 063 reported the use of dogs, intended to intimidate “by getting the dogs close to him and then having the dogs bark or act aggressively on command.” The temperature was changed, and 063 was subjected to extreme cold. Intravenous tubes were forced into his body, to provide nourishment when he would not eat or drink.

We went through the marked-up document slowly, pausing at each blue mark. Detainee 063’s reactions were recorded with regularity. I’ll string some of them together to convey the impression:

Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable. Moaning. Began crying hard spontaneously. Crying and praying. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Dizzy. Forgetting things. Angry. Upset. Yelled for Allah.

The blue highlights went on and on.

Urinated on himself. Began to cry. Asked God for forgiveness. Cried. Cried. Became violent. Began to cry. Broke down and cried. Began to pray and openly cried. Cried out to Allah several times. Trembled uncontrollably.

Was Detainee 063 subjected to severe mental pain or suffering? Torture is not a medical concept, Seltzer reminded me. “That said,” she went on, “over the period of 54 days there is enough evidence of distress to indicate that it would be very surprising indeed if it had not reached the threshold of severe mental pain.” She thought about the matter a little more and then presented it a different way: “If you put 12 clinicians in a room and asked them about this interrogation log, you might get different views about the effect and long-term consequences of these interrogation techniques. But I doubt that any one of them would claim that this individual had not suffered severe mental distress at the time of his interrogation, and possibly also severe physical distress.”

The Authorized Version

The story of the Bush administration's descent down this path began to emerge on 22 June 2004. The administration was struggling to respond to the Abu Ghraib scandal, which had broken a couple of months earlier with the broadcast of photographs that revealed sickening abuse at the prison outside Baghdad. The big legal guns were wheeled out. Alberto Gonzales and Jim Haynes stepped into a conference room at the Eisenhower Executive Office Building, next to the White House. Gonzales was President Bush's White House counsel and would eventually become attorney general. Haynes, as Rumsfeld's general counsel, was the most senior lawyer in the Pentagon, a position he would retain until a month ago, when he resigned—"returning to private life," as a press release stated. Gonzales and Haynes were joined by a third lawyer, Daniel Dell'Orto, a career official at the Pentagon. Their task was to steady the beat and make it clear that the events at Abu Ghraib were the actions of a few bad eggs and had nothing to do with the broader policies of the administration.

Haynes Memo

The famous Haynes Memo, recommending enhanced "counter-resistance" techniques, as signed and annotated with a jocular comment by Rumsfeld. Enlarge this.

Gonzales and Haynes spoke from a carefully prepared script. They released a thick folder of documents, segmented by lawyerly tabs. These documents were being made public for the first time, a clear indication of the gravity of the political crisis. Among the documents were the Haynes Memo and the list of 18 techniques that Seltzer and I would later review. The log detailing the interrogation of Detainee 063 was not released; it would be leaked to the press two years later.

For two hours Gonzales and Haynes laid out the administration's narrative. Al-Qaeda was a different kind of enemy, deadly and shadowy. It targeted civilians and didn't follow the Geneva Conventions or any other international rules. Nevertheless, the officials explained, the administration had acted judiciously, even as it moved away from a purely law-enforcement strategy to one that marshaled "all elements of national power." The authorized version had four basic parts.

First, the administration had moved reasonably—with care and deliberation, and always within the limits of the law. In February 2002 the president had determined, in accordance with established legal principles, that none of the detainees at Guantánamo could rely on any of the protections granted by Geneva, even Common Article 3. This presidential order was the lead document, at Tab A. The administration's point was this: agree with it or not, the decision on Geneva concealed no hidden agenda; rather, it simply reflected a clear-eyed reading of the actual provisions. The administration, in other words, was doing nothing more than trying to proceed by the book. The law was the law.

Relating to this was a second document, one that had been the subject of media speculation for some weeks. The authors of this document, a legal opinion dated 1 August 2002, were two lawyers in the Justice Department's Office of Legal Counsel: Jay Bybee, who is now a federal judge, and John Yoo, who now teaches law at Berkeley. Later it would become known that they were assisted in the drafting by David Addington, then the vice president's lawyer and now his chief of staff. The Yoo-Bybee Memo declared that physical torture occurred only when the pain was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and that mental torture required "suffering not just at the moment of infliction but . . . lasting psychological harm." Interrogations that did not reach these thresholds—far less stringent than those set by international law—were allowed. Although findings that issue from the Office of Legal Counsel at Justice typically carry great weight, at the press conference Gonzales went out of his way to decouple the Yoo-Bybee Memo from anything that might have taken place at Guantánamo. The two lawyers had been asked, in effect, to stargaze, he said. Their memo simply explored "the limits of the legal landscape." It included "irrelevant and unnecessary" discussion and never made it into the hands of the president or of soldiers in the field. The memo did not, said Gonzales, "reflect the policies that the administration ultimately adopted."

The second element of the administration's narrative dealt with the specific source of the new interrogation techniques. Where had the initiative come from? The administration pointed to the military commander at Guantánamo, Major General Michael E Dunlavey. Haynes would later describe him to the Senate Judiciary Committee, during his failed confirmation hearings for a judgeship in 2006, as "an aggressive major general." The techniques were not imposed or encouraged by Washington, which had merely reacted to a request from below. They came as a result of the identification locally of "key people" at Guantánamo, including "a guy named al-Qahtani." This man, Detainee 063, had proved able to resist the traditional non-coercive techniques of interrogation spelled out in the Army Field Manual, and as the first anniversary of 9/11 approached, an intelligence spike pointed to the possibility of new attacks. "And so it is concluded at Guantánamo," Dell'Orto emphasized, reconstructing the event, "that it may be time to inquire as to whether there may be more flexibility in the type of techniques we use on him." A request was sent from Guantánamo on 11 October 2002, to the head of the US Southern Command (SouthCom), General James T Hill. Hill in turn forwarded Dunlavey's request to General Richard Myers, the chairman of the Joint Chiefs of Staff. Ultimately, Rumsfeld approved "all but three of the requested techniques." The official version was clear: Haynes and Rumsfeld were just processing a request coming up the chain from Guantánamo.

The third element of the administration's account concerned the legal justification for the new interrogation techniques. This, too, the administration said, had originated in Guantánamo. It was not the result of legal positions taken by politically appointed lawyers in the upper echelons of the administration, and certainly not the Justice Department. The relevant document, also dated 11 October, was in the bundle released by Gonzales, a legal memo prepared by Lieutenant Colonel Diane Beaver, the staff judge advocate at Guantánamo. That document—described pointedly by Dell'Orto as a “multi-page, single-spaced legal review”—sought to provide legal authority for all the interrogation techniques. No other legal memo was cited as bearing on aggressive interrogations. The finger of responsibility was intended to point at Diane Beaver.

The fourth and final element of the administration's official narrative was to make clear that decisions relating to Guantánamo had no bearing on events at Abu Ghraib and elsewhere. Gonzales wanted to “set the record straight” about this. The administration's actions were inconsistent with torture. The abuses at Abu Ghraib were unauthorized and unconnected to the administration's policies.

Gonzales and Haynes laid out their case with considerable care. The only flaw was that every element of the argument contained untruths.

The real story, pieced together from many hours of interviews with most of the people involved in the decisions about interrogation, goes something like this: The Geneva decision was not a case of following the logic of the law but rather was designed to give effect to a prior decision to take the gloves off and allow coercive interrogation; it deliberately created a legal black hole into which the detainees were meant to fall. The new interrogation techniques did not arise spontaneously from the field but came about as a direct result of intense pressure and input from Rumsfeld's office. The Yoo-Bybee Memo was not simply some theoretical document, an academic exercise in blue-sky hypothesizing, but rather played a crucial role in giving those at the top the confidence to put pressure on those at the bottom. And the practices employed at Guant—namo led to abuses at Abu Ghraib.

The fingerprints of the most senior lawyers in the administration were all over the design and implementation of the abusive interrogation policies. Addington, Bybee, Gonzales, Haynes, and Yoo became, in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse.

Killing Geneva

In the early days of 2002, as the number of al-Qaeda and Taliban fighters captured in Afghanistan began to swell, the No 3 official at the Pentagon was Douglas J Feith. As undersecretary of defense for policy, he stood directly below Paul Wolfowitz and Donald Rumsfeld. Feith's job was to provide advice across a wide range of issues, and the issues came to include advice on the Geneva Conventions and the conduct of military interrogations.

I sat down with Feith not long after he left the government. He was teaching at the school of foreign service at Georgetown University, occupying a small, eighth-floor office lined with books on international law. He greeted me with a smile, his impish face supporting a mop of graying hair that seemed somehow at odds with his 54 years. Over the course of his career Feith has elicited a range of reactions. General Tommy Franks, who led the invasion of Iraq, once called Feith “the fucking stupidest guy on the face of the earth.” Rumsfeld, in contrast, saw him as an “intellectual engine.” In manner he is the Energizer Bunny, making it hard to get a word in edgewise. After many false starts Feith provided an account of the president's decision on Geneva, including his own contribution as one of its principal architects.

“This was something I played a major role in,” he began, in a tone of evident pride. With the war in Afghanistan under way, lawyers in Washington understood that they needed a uniform view on the constraints, if any, imposed by Geneva. Addington, Haynes, and Gonzales all objected to Geneva. Indeed, Haynes in December 2001 told the CentCom admiral in charge of detainees in Afghanistan “to ‘take the gloves off’ and ask whatever he wanted” in the questioning of John Walker Lindh. (Lindh, a young American who had become a Muslim and had recently been captured in northern Afghanistan, bore the designation Detainee 001.)

A month later, the administration was struggling to adopt a position. On 9 January, John Yoo and Robert Delahunty, at the Justice Department, prepared an opinion for Haynes. They concluded that the president wasn't bound by traditional international-law prohibitions. This encountered strong opposition from Colin Powell and his counsel, William H. Taft IV, at the State Department, as well as from the Tjags—the military lawyers in the office of the judge advocate general—who wanted to maintain a strong US commitment to Geneva and the rules that were part of customary law. On 25 January, Alberto Gonzales put his name to a memo to the president supporting Haynes and Rumsfeld over Powell and Taft. This memo, which is believed to have been written by Addington, presented a “new paradigm” and described Geneva's “strict limitations on questioning of enemy prisoners” as “obsolete.” Addington was particularly distrustful of the military lawyers. “Don't bring the Tjags into the process—they aren't reliable,” he was once overheard to say.

Feith took up the story. He had gone to see Rumsfeld about the issue, accompanied by Myers. As they reached Rumsfeld's office, Myers turned to Feith and said, "We have to support the Geneva Conventions. If Rumsfeld doesn't go along with this, I'm going to contradict them in front of the president." Feith was surprised by this uncharacteristically robust statement, and by the way Myers referred to the secretary bluntly as "Rumsfeld."

Douglas Feith had a long-standing intellectual interest in Geneva, and for many years had opposed legal protections for terrorists under international law. He referred me to an article he had written in 1985, in *The National Interest*, setting out his basic view. Geneva provided incentives to play by the rules; those who chose not to follow the rules, he argued, shouldn't be allowed to rely on them, or else the whole Geneva structure would collapse. The only way to protect Geneva, in other words, was sometimes to limit its scope. To uphold Geneva's protections, you might have to cast them aside.

But that way of thinking didn't square with the Geneva system itself, which was based on two principles: combatants who behaved according to its standards received POW status and special protections, and everyone else received the more limited but still significant protections of Common Article 3. Feith described how, as he and Myers spoke with Rumsfeld, he jumped protectively in front of the general. He reprised his "little speech" for me. "There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States," he told Rumsfeld, according to his own account, "and there is no institution in the US government that has a stronger interest than the Pentagon." So Geneva had to be followed? "Obeying the Geneva Conventions is not optional," Feith replied. "The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute." Myers jumped in. "I agree completely with what Doug said and furthermore it is our military culture. It's not even a matter of whether it is reciprocated—it's a matter of who we are."

Feith was animated as he relived this moment. I remained puzzled. How had the administration gone from a commitment to Geneva, as suggested by the meeting with Rumsfeld, to the president's declaration that none of the detainees had any rights under Geneva? It all turns on what you mean by "promoting respect" for Geneva, Feith explained. Geneva didn't apply at all to al-Qaeda fighters, because they weren't part of a state and therefore couldn't claim rights under a treaty that was binding only on states. Geneva did apply to the Taliban, but by Geneva's own terms Taliban fighters weren't entitled to POW status, because they hadn't worn uniforms or insignia. That would still leave the safety net provided by the rules reflected in Common Article 3—but detainees could not rely on this either, on the theory that its provisions applied only to "armed conflict not of an international character," which the administration interpreted to mean civil war. This was new. In reaching this conclusion, the Bush administration simply abandoned all legal and customary precedent that regards Common Article 3 as a minimal bill of rights for everyone.

In the administration's account there was no connection between the decision on Geneva and the new interrogation rules later approved by Rumsfeld for Detainee 063; its position on Geneva was dictated purely by the law itself. I asked Feith, just to be clear: Didn't the administration's approach mean that Geneva's constraints on interrogation couldn't be invoked by anyone at Guantánamo? "Oh yes, sure," he shot back. Was that the intended result?, I asked. "Absolutely," he replied. I asked again: Under the Geneva Conventions, no one at Guantánamo was entitled to any protection? "That's the point," Feith reiterated. As he saw it, either you were a detainee to whom Geneva didn't apply or you were a detainee to whom Geneva applied but whose rights you couldn't invoke. What was the difference for the purpose of interrogation?, I asked. Feith answered with a certain satisfaction, "It turns out, none. But that's the point."

That indeed was the point. The principled legal arguments were a fig leaf. The real reason for the Geneva decision, as Feith now made explicit, was the desire to interrogate these detainees with as few constraints as possible. Feith thought he'd found a clever way to do this, which on the one hand upheld Geneva as a matter of law—the speech he made to Myers and Rumsfeld—and on the other pulled the rug out from under it as a matter of reality. Feith's argument was so clever that Myers continued to believe Geneva's protections remained in force—he was "well and truly hoodwinked," one seasoned observer of military affairs later told me.

Feith's argument prevailed. On 7 February 2002, President Bush signed a memorandum that turned Guantánamo into a Geneva-free zone. As a matter of policy, the detainees would be handled humanely, but only to the extent appropriate and consistent with military necessity. "The president said 'humane treatment,'" Feith told me, inflecting the term sourly, "and I thought that was OK. Perfectly fine phrase that needs to be fleshed out, but it's a fine phrase—'humane treatment.'" The Common Article 3 restrictions on torture or "outrages upon personal dignity" were gone.

"This year I was really a player," Feith said, thinking back on 2002 and relishing the memory. I asked him whether, in the end, he was at all concerned that the Geneva decision might have diminished America's moral authority. He was not. "The problem with moral authority," he said, was "people who should know better, like yourself, siding with the assholes, to put it crudely."

"I Was on a Timeline"

As the traditional constraints on aggressive interrogation were removed, Rumsfeld wanted the right man to take charge of Joint Task Force 170, which oversaw military interrogations at Guantánamo. Two weeks after the decision on Geneva he found that man in Michael Dunlavey. Dunlavey was a judge in the Court of Common Pleas in Erie, Pennsylvania, a Vietnam veteran, and a major general in the reserves with a strong background in intelligence.

Dunlavey met one-on-one with Rumsfeld at the end of February. They both liked what they saw. When I met Dunlavey, now back at his office in Erie, he described that initial meeting: "He evaluated me. He wanted to know who I was. He was very focused on the need to get intelligence. He wanted to make sure that the moment was not lost." Dunlavey was a strong and abrasive personality ("a tyrant," one former jag told me), but he was also a cautious man, alert to the nuances of instruction from above. Succinctly, Dunlavey described the mission Rumsfeld had given him. "He wanted me to 'maximize the intelligence production.' No one ever said to me, 'The gloves are off.' But I didn't need to talk about the Geneva Conventions. It was clear that they didn't apply." Rumsfeld told Dunlavey to report directly to him. To the suggestion that Dunlavey report to SouthCom, Dunlavey heard Rumsfeld say, "I don't care who he is under. He works for me."

He arrived at Guantánamo at the beginning of March. Planeloads of detainees were being delivered on a daily basis, though Dunlavey soon concluded that half of them had no intelligence value. He reported this to Rumsfeld, who referred the matter to Feith. Feith, Dunlavey said, resisted the idea of repatriating any detainees whatsoever. (Feith says he made a series of interagency proposals to repatriate detainees.)

Dunlavey described Feith to me as one of his main points of contact. Feith, for his part, had told me that he knew nothing about any specific interrogation issues until the Haynes Memo suddenly landed on his desk. But that couldn't be right—in the memo itself Haynes had written, "I have discussed this with the Deputy, Doug Feith and General Myers." I read the sentence aloud. Feith looked at me. His only response was to tell me that I had mispronounced his name. "It's Fythe," he said. "Not Faith."

In June, the focus settled on Detainee 063, Mohammed al-Qahtani, a Saudi national who had been refused entry to the United States just before 9/11 and was captured a few months later in Afghanistan. Dunlavey described to me the enormous pressure he came under—from Washington, from the top—to find out what al-Qahtani knew. The message, he said, was: "Are you doing everything humanly possible to get this information?" He received a famous Rumsfeld "snowflake," a memo designed to prod the recipient into action. "I've got a short fuse on this to get it up the chain," Dunlavey told me, "I was on a timeline." Dunlavey held eye contact for more than a comfortable moment. He said, "This guy may have been the key to the survival of the US."

The interrogation of al-Qahtani relied at first on long-established FBI and military techniques, procedures sanctioned by the Field Manual and based largely on building rapport. This yielded nothing. On 8 August, al-Qahtani was placed in an isolation facility to separate him from the general detainee population. Pressure from Washington continued to mount. How high up did it go?, I asked Dunlavey. "It must have been all the way to the White House," he replied.

Meanwhile, unbeknownst to Dunlavey and the others at Guantánamo, interrogation issues had arisen in other quarters. In March 2002 a man named Abu Zubaydah, a high-ranking al-Qaeda official, was captured in Pakistan. CIA director George Tenet wanted to interrogate him aggressively but worried about the risk of criminal prosecution. He had to await the completion of legal opinions by the Justice Department, a task that had been entrusted by Alberto Gonzales to Jay Bybee and John Yoo. "It took until August to get clear guidance on what Agency officers could legally do," Tenet later wrote. The "clear guidance" came on 1 August 2002, in memos written by Bybee and Yoo, with input from Addington. The first memo was addressed to Gonzales, redefining torture and abandoning the definition set by the 1984 torture convention. This was the Yoo-Bybee Memo made public by Gonzales nearly two years later, in the wake of Abu Ghraib. Nothing in the memo suggested that its use was limited to the CIA; it referred broadly to "the conduct of interrogations outside of the United States." Gonzales would later contend that this policy memo did "not reflect the policies the administration ultimately adopted," but in fact it gave carte blanche to all the interrogation techniques later recommended by Haynes and approved by Rumsfeld. The second memo, requested by John Rizzo, a senior lawyer at the CIA, has never been made public. It spells out the specific techniques in detail. Dunlavey and his subordinates at Guantánamo never saw these memos and were not aware of their contents.

The lawyers in Washington were playing a double game. They wanted maximum pressure applied during interrogations, but didn't want to be seen as the ones applying it—they wanted distance and deniability. They also wanted legal cover for themselves. A key question is whether Haynes and Rumsfeld had knowledge of the content of these memos before they approved the new interrogation techniques for al-Qahtani. If they did, then the administration's official narrative—that the pressure for new techniques, and the legal support for them, originated on the ground at Guantánamo, from the "aggressive major general" and his staff lawyer—becomes difficult to sustain. More crucially, that knowledge is a link in the causal chain that connects the keyboards of Feith and Yoo to the interrogations of Guantánamo.

When did Haynes learn that the Justice Department had signed off on aggressive interrogation? All indications are that well before Haynes wrote his memo he knew what the Justice Department had advised the CIA on interrogations and believed that he had legal cover to do what he wanted. Everyone in the upper echelons of the chain of decision-making that I spoke with, including Feith, General Myers, and General Tom Hill (the commander of SouthCom), confirmed to me that they believed at the time that Haynes had consulted Justice Department lawyers. Moreover, Haynes was a close friend of Bybee's. "Jim was tied at the hip with Jay Bybee," Thomas Romig, the army's former judge advocate general, told me. "He would quote him the whole time." Later, when asked during Senate hearings about his knowledge of the Yoo-Bybee Memo, Haynes would variously testify that he had not sought the memo, had not shaped its content, and did not possess a copy of it—but he carefully refrained from saying that he was unaware of its contents. Haynes, with whom I met on two occasions, will not speak on the record about this subject.

The Glassy-Eyed Men

As the first anniversary of 9/11 approached, Joint Task Force 170 was on notice to deliver results. But the task force was not the only actor at Guantánamo. The CIA had people there looking for recruits among the detainees. The Defense Intelligence Agency (DIA) was interrogating detainees through its humint (human intelligence) Augmentation Teams. The FBI was carrying out its own traditional non-aggressive interrogations.

The source of the various new techniques has been the stuff of speculation. In the administration's official account, as noted, everything trickled up from the ground at Guantánamo. When I suggested to Mike Dunlavey that the administration's trickle-up line was counter-intuitive, he didn't disabuse me. "It's possible," he said, in a tone at once mischievous and unforthcoming, "that someone was sent to my task force and came up with these great ideas." One FBI special agent remembers an occasion, before any new techniques had been officially sanctioned, when military interrogators set out to question al-Qahtani for 24 hours straight—employing a variation on a method that would later appear in the Haynes Memo. When the agent objected, he said he was told that the plan had been approved by "the secretary," meaning Rumsfeld.

Diane Beaver, Dunlavey's staff judge advocate, was the lawyer who would later be asked to sign off on the new interrogation techniques. When the administration made public the list, it was Beaver's legal advice the administration invoked. Diane Beaver gave me the fullest account of the process by which the new interrogation techniques emerged. In our lengthy conversations, which began in the autumn of 2006, she seemed coiled up—mistreated, hung out to dry. Before becoming a military lawyer Beaver had been a military police officer; once, while stationed in Germany, she had visited the courtroom where the Nuremberg trials took place. She was working as a lawyer for the Pentagon when the hijacked airplane hit on 9/11, and decided to remain in the army to help as she could. That decision landed her in Guantánamo.

It was clear to me that Beaver believed Washington was directly involved in the interrogations. Her account confirmed what Dunlavey had intimated, and what others have told me—that Washington's views were being fed into the process by people physically present at Guantánamo. DIA personnel were among them. Later allegations would suggest a role for three CIA psychologists.

During September a series of brainstorming meetings were held at Guantánamo to discuss new techniques. Some of the meetings were led by Beaver. "I kept minutes. I got everyone together. I invited. I facilitated," she told me. The sessions included representatives of the DIA and the CIA. Ideas came from all over. Some derived from personal training experiences, including a military program known as sere (Survival, Evasion, Resistance, and Escape), designed to help soldiers persevere in the event of capture. Had sere been, in effect, reverse-engineered to provide some of the 18 techniques? Both Dunlavey and Beaver told me that sere provided inspiration, contradicting the administration's denials that it had. Indeed, several Guantánamo personnel, including a psychologist and a psychiatrist, traveled to Fort Bragg, sere's home, for a briefing.

Ideas arose from other sources. The first year of Fox TV's dramatic series 24 came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."

The brainstorming meetings inspired animated discussion. "Who has the glassy eyes?," Beaver asked herself as she surveyed the men around the room, 30 or more of them. She was invariably the only woman present—as she saw it, keeping control of the boys. The younger men would get particularly agitated, excited even. "You could almost see their dicks getting hard as they got new ideas," Beaver recalled, a wan smile flickering on her face. "And I said to myself, You know what? I don't have a dick to get hard—I can stay detached."

Not everyone at Guantánamo was enthusiastic. The FBI and the Naval Criminal Investigative Service refused to be associated with aggressive interrogation. They opposed the techniques. One of the NCIS psychologists, Mike Gelles, knew about the brainstorming sessions but stayed away. He was dismissive of the administration's contention that the techniques trickled up on their own from Guantánamo. "That's not accurate," he said flatly. "This was not done by a bunch of people down in Gitmoáno way."

That view is buttressed by a key event that has received virtually no attention. On 25 September as the process of elaborating new interrogation techniques reached a critical point, a delegation of the administration's most senior lawyers arrived at Guantánamo. The group included the president's lawyer, Alberto Gonzales, who had by then received the Yoo-Bybee Memo; Vice President Cheney's lawyer, David Addington, who had contributed to the writing of that memo; the CIA's John Rizzo, who had asked for a Justice Department sign-off on individual techniques, including waterboarding, and received the second (and still secret) Yoo-Bybee Memo; and Jim Haynes, Rumsfeld's counsel. They were all well aware of al-Qahtani. "They wanted to know what we were doing to get to this guy," Dunlavey told me, "and Addington was interested in how we were managing it." I asked what they had to say. "They brought ideas with them which had been given from sources in DC," Dunlavey said. "They came down to observe and talk." Throughout this whole period, Dunlavey went on, Rumsfeld was "directly and regularly involved."

Beaver confirmed the account of the visit. Addington talked a great deal, and it was obvious to her that he was a "very powerful man" and "definitely the guy in charge," with a booming voice and confident style. Gonzales was quiet. Haynes, a friend and protégé of Addington's, seemed especially interested in the military commissions, which were to decide the fate of individual detainees. They met with the intelligence people and talked about new interrogation methods. They also witnessed some interrogations. Beaver spent time with the group. Talking about the episode even long afterward made her visibly anxious. Her hand tapped and she moved restlessly in her chair. She recalled the message they had received from the visitors: Do "whatever needed to be done." That was a green light from the very top—the lawyers for Bush, Cheney, Rumsfeld, and the CIA. The administration's version of events—that it became involved in the Guantánamo interrogations only in November, after receiving a list of techniques out of the blue from the "aggressive major general"—was demonstrably false.

"A Dunk in the Water"

Two weeks after this unpublicized visit the process of compiling the list of new techniques was completed. The list was set out in a three-page memorandum from Lieutenant Colonel Jerald Phifer, dated 11 October and addressed to Dunlavey.

The Phifer Memo identified the problem: "current guidelines" prohibited the use of "physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." The prohibition dated back to 1863 and a general order issued by Abraham Lincoln.

The list of new interrogation techniques turned its back on this tradition. The 18 techniques were divided into three categories and came with only rudimentary guidance. No limits were placed on how many methods could be used at once, or for how many days in succession. The detainee was to be provided with a chair. The environment should be generally comfortable. If the detainee was uncooperative, you went to Category I. This comprised two techniques, yelling and deception.

If Category I produced no results, then the military interrogator could move to Category II. Category II included 12 techniques aimed at humiliation and sensory deprivation: for instance, the use of stress positions, such as standing; isolation for up to 30 days; deprivation of light and sound; 20-hour interrogations; removal of religious items; removal of clothing; forcible grooming, such as the shaving of facial hair; and the use of individual phobias, such as the fear of dogs, to induce stress. detainees in a holding area at Guantanamo's Camp X-Ray.

Finally came Category III, for the most exceptionally resistant. Category III included four techniques: the use of "mild, non-injurious physical contact," such as grabbing, poking, and light pushing; the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; and waterboarding. This last technique, which powerfully mimics the experience of drowning, was later described by Vice President Cheney as a "dunk in the water."

By the time the memo was completed al-Qahtani had already been separated from all other detainees for 64 days, in a cell that was "always flooded with light." An FBI agent described his condition the following month, just as the new interrogation techniques were first being directed against him: the detainee, a 2004 memo stated, "was talking to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end."

Ends and Means

Diane Beaver was insistent that the decision to implement new interrogation techniques had to be properly written up and that it needed a paper trail leading to authorization from the top, not from "the dirt on the ground," as she self-deprecatingly described herself. "I just wasn't comfortable giving oral advice," she explained, as she had been requested to do. "I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days." She says she believed that senior lawyers in Washington would review her written advice and override it if necessary. It never occurred to her that on so important an issue she would be the one to provide the legal assessment on which the entire matter would appear to rest—that her word would be the last word. As far as she was concerned, getting the proposal "up the command" was victory enough. She didn't know that people much higher up had already made their

decisions, had the security of secret legal cover from the Justice Department, and, although confident of their own legal protection, had no intention of soiling their hands by weighing in on the unpleasant details of interrogation.

Marooned in Guantánamo, Beaver had limited access to books and other documents, although there was Internet access to certain legal materials. She tried getting help from more experienced lawyers—at SouthCom, the Joint Chiefs, the DIA, the Jag School—but to no avail.

In the end she worked on her own, completing the task just before the Columbus Day weekend. Her memo was entitled “Legal Review of Aggressive Interrogation Techniques.” The key fact was that none of the detainees were protected by Geneva, owing to Douglas Feith’s handiwork and the president’s decision in February. She also concluded that the torture convention and other international laws did not apply, conclusions that a person more fully schooled in the relevant law might well have questioned: “It was not my job to second-guess the president,” she told me. Beaver ignored customary international law altogether. All that was left was American law, which is what she turned to.

Given the circumstances in which she found herself, the memo has a certain desperate, heroic quality. She proceeded methodically through the 18 techniques, testing each against the standards set by US law, including the Eighth Amendment to the Constitution (which prohibits “cruel and unusual punishment”), the federal torture statute, and the Uniform Code of Military Justice. The common theme was that the techniques were fine “so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate government objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm.” That is to say, the techniques are legal if the motivation is pure. National security justifies anything.

Beaver did enter some important caveats. The interrogators had to be properly trained. Since the law required “examination of all facts under a totality of circumstances test,” all proposed interrogations involving Category II and III methods had to “undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.” This suggested concerns about these new techniques, including whether they would be effective. But in the end she concluded, I “agree that the proposed strategies do not violate applicable federal law.” The word “agree” stands out—she seems to be confirming a policy decision that she knows has already been made.

Time and distance do not improve the quality of the advice. I thought it was awful when I first read it, and awful when I reread it. Nevertheless, I was now aware of the circumstances in which Beaver had been asked to provide her advice. Refusal would have caused difficulty. It was also reasonable to expect a more senior review of her draft. Beaver struck me as honest, loyal, and decent. Personally, she was prepared to take a hard line on many detainees. She once described them to me as “psychopaths. Skinny, runty, dangerous, lying psychopaths.” But there was a basic integrity to her approach. She could not have anticipated that there would be no other piece of written legal advice bearing on the Guantánamo interrogations. She could not have anticipated that she would be made the scapegoat.

Once, after returning to a job at the Pentagon, Beaver passed David Addington in a hallway—the first time she had seen him since his visit to Guantánamo. He recognized her immediately, smiled, and said, “Great minds think alike.”

The “voco”

On 11 October Dunlavey sent his request for approval of new techniques, together with Diane Beaver’s legal memo, to General Tom Hill, the commander of SouthCom. Two weeks later, on 25 October, Hill forwarded everything to General Myers, the chairman of the Joint Chiefs, in Washington. Hill’s cover letter contains a sentence—“Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ”—which again makes it clear that the list of techniques was no surprise to Rumsfeld’s office, whatever its later claims. Hill also expressed serious reservations. He wanted Pentagon lawyers to weigh in, and he explicitly requested that “Department of Justice lawyers review the third category of techniques.”

At the level of the Joint Chiefs the memo should have been subject to a detailed review, including close legal scrutiny by Myers’s own counsel, Jane Dalton, but that never happened. It seems that Jim Haynes short-circuited the approval process. Alberto Mora, the general counsel of the navy, says he remembers Dalton telling him, “Jim pulled this away. We never had a chance to complete the assessment.”

When we spoke, Myers confessed to being troubled that normal procedures had been circumvented. He held the Haynes Memo in his hands, looking carefully at the sheet of paper as if seeing it clearly for the first time. He pointed: “You don’t see my initials on this.” Normally he would have initialed a memo to indicate

approval, but there was no confirmation that Myers had seen the memo or formally signed off on it before it went to Rumsfeld. “You just see I’ve ‘discussed’ it,” he said, noting a sentence to that effect in the memo itself. “This was not the way this should have come about.” Thinking back, he recalled the “intrigue” that was going on, intrigue “that I wasn’t aware of, and Jane wasn’t aware of, that was probably occurring between Jim Haynes, White House general counsel, and Justice.”

Further confirmation that the Haynes Memo got special handling comes from a former Pentagon official, who told me that Lieutenant General Bantz Craddock, Rumsfeld’s senior military assistant, noticed that it was missing a buck slip, an essential component that shows a document’s circulation path, and which everyone was supposed to initial. The Haynes Memo had no “legal chop,” or signature, from the general counsel’s office. It went back to Haynes, who later signed off with a note that said simply, “Good to go.”

Events moved fast as the process was cut short. On November 4, Dunlavey was replaced as commander at Guant—namo by Major General Geoffrey Miller. On November 12 a detailed interrogation plan was approved for al-Qahtani, based on the new interrogation techniques. The plan was sent to Rumsfeld for his personal approval, General Hill told me.

Ten days later an alternative plan, prepared by Mike Gelles and others at the NCIS and elsewhere, using traditional non-aggressive techniques, was rejected. By then the FBI had communicated its concerns to Haynes’s office about developments at Guantánamo. On 23 November, well before Rumsfeld gave formal written approval to the Haynes Memo, General Miller received a “voco”—a vocal command—authorizing an immediate start to the aggressive interrogation of al-Qahtani. No one I spoke with, including Beaver, Hill, and Myers, could recall who had initiated the voco, but an army investigation would state that it was likely Rumsfeld, and he would not have acted without Haynes’s endorsement.

Al-Qahtani’s interrogation log for Saturday, 23 November, registers the immediate consequence of the decision to move ahead. “The detainee arrives at the interrogation booth His hood is removed and he is bolted to the floor.”

Reversal

Four days after the voco, Haynes formally signed off on his memo. He recommended, as a matter of policy, approval of 15 of the 18 techniques. Of the four techniques listed in Category III, however, Haynes proposed blanket approval of just one: mild non-injurious physical contact. He would later tell the Senate that he had “recommended against the proposed use of a wet towel”—that is, against waterboarding—but to the contrary, in his memo he stated that “all Category III techniques may be legally available.” Rumsfeld placed his name next to the word “Approved” and wrote the jocular comment that may well expose him to difficulties in the witness stand at some future time.

As the memo was being approved, the FBI communicated serious concerns directly to Haynes’s office. Then, on 17 December, Dave Brant, of the NCIS, paid a surprise visit to Alberto Mora, the general counsel of the navy. Brant told him that NCIS agents had information that abusive actions at Guantánamo had been authorized at a “high level” in Washington. The following day Mora met again with Brant. Mike Gelles joined them and told Mora that the interrogators were under extraordinary pressure to achieve results. Gelles described the phenomenon of “force drift,” where interrogators using coercion come to believe that if some force is good, then more must be better. As recounted in his official “Memorandum for Inspector General, Department of the Navy,” Mora visited Steve Morello, the army’s general counsel, and Tom Taylor, his deputy, who showed him a copy of the Haynes Memo with its attachments. The memorandum describes them as demonstrating “great concern.” In the course of a long interview Mora recalled Morello “with a furtive air” saying, “Look at this. Don’t tell anyone where you got it.” Mora was horrified by what he read. “I was astounded that the secretary of defense would get within 100 miles of this issue,” he said. (Notwithstanding the report to the inspector general, Morello denies showing Mora a copy of the Haynes Memo.)

On 20 December, Mora met with Haynes, who listened attentively and said he would consider Mora’s concerns. Mora went away on vacation, expecting everything to be sorted out. It wasn’t: Brant soon called to say the detainee mistreatment hadn’t stopped. On 9 January 2003, Mora met Haynes for a second time, expressing surprise that the techniques hadn’t been stopped. Haynes said little in response, and Mora felt he had made no headway. The following day, however, Haynes called to say that he had briefed Rumsfeld and that changes were in the offing. But over the next several days no news came.

On the morning of Wednesday, 15 January, Mora awoke determined to act. He would put his concerns in writing in a draft memorandum for Haynes and Dalton. He made three simple points. One: the majority of the Category II and III techniques violated domestic and international law and constituted, at a minimum, cruel and unusual treatment and, at worst, torture. Two: the legal analysis by Diane Beaver had

to be rejected. Three: he “strongly non-concurred” with these interrogation techniques. He delivered the draft memo to Haynes’s office. Two hours later, at about five pm on 15 January, Haynes called Mora. “I’m pleased to tell you the secretary has rescinded the authorization,” he said.

The abusive interrogation of al-Qahtani lasted a total of 54 days. It ended not on 12 January, as the press was told in June 2004, but three days later, on 15 January. In those final three days, knowing that the anything-goes legal regime might disappear at any moment, the interrogators made one last desperate push to get something useful out of al-Qahtani. They never did. By the end of the interrogation al-Qahtani, according to an army investigator, had “black coals for eyes.”

The Great Migration

Mike Gelles, of the NCIS, had shared with me his fear that the al-Qahtani techniques would not simply fade into history—that they would turn out to have been horribly contagious. This “migration” theory was controversial, because it potentially extended the responsibility of those who authorized the Guantánamo techniques to abusive practices elsewhere. John Yoo has described the migration theory as “an exercise in hyperbole and partisan smear.”

But is it? In August 2003, Major General Miller traveled from Guantánamo to Baghdad, accompanied by Diane Beaver. They visited Abu Ghraib and found shocking conditions of near lawlessness. Miller made recommendations to Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq. On September 14, General Sanchez authorized an array of new interrogation techniques. These were vetted by his staff judge advocate, who later told the Senate Armed Services Committee that operating procedures and policies “in use in Guant—namo Bay” had been taken into account. Despite the fact that Geneva applied in Iraq, General Sanchez authorized several techniques that were not sanctioned by the Field Manual—but were listed in the Haynes Memo. The abuses for which Abu Ghraib became infamous began one month later.

Three different official investigations in the space of three years have confirmed the migration theory. The August 2006 report of the Pentagon’s inspector general concluded unequivocally that techniques from Guant—namo had indeed found their way to Iraq. An investigation overseen by former secretary of defense James R Schlesinger determined that “augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.”

Jim Haynes and Donald Rumsfeld may have reversed themselves about al-Qahtani in January 2003, but the death blow to the administration’s outlook did not occur for three more years. It came on June 29, 2006, with the US Supreme Court’s ruling in *Hamdan v Rumsfeld*, holding that Guantánamo detainees were entitled to the protections provided under Geneva’s Common Article 3. The Court invoked the legal precedents that had been sidestepped by Douglas Feith and John Yoo, and laid bare the blatant illegality of al-Qahtani’s interrogation. A colleague having lunch with Haynes that day described him as looking “shocked” when the news arrived, adding, “He just went pale.” Justice Anthony Kennedy, joining the majority, pointedly observed that “violations of Common Article 3 are considered ‘war crimes.’”

Jim Haynes appears to remain a die-hard supporter of aggressive interrogation. Shortly after the Supreme Court decision, when he appeared before the Senate Judiciary Committee, Senator Patrick Leahy reminded him that in 2003 Haynes had said there was “no way” that Geneva could apply to the Afghan conflict and the war on terror. “Do you now accept that you were mistaken in your legal and policy determinations?,” Leahy asked. Haynes would say only that he was bound by the Supreme Court’s decision.

As the consequences of Hamdan sank in, the instinct for self-preservation asserted itself. The lawyers got busy. Within four months President Bush signed into law the Military Commissions Act. This created a new legal defense against lawsuits for misconduct arising from the “detention and interrogation of aliens” between 11 September 2001, and 30 December 2005. That covered the interrogation of al-Qahtani, and no doubt much else. Signing the bill on 17 October 2006, President Bush explained that it provided “legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs.”

In a word, the interrogators and their superiors were granted immunity from prosecution. Some of the lawyers who contributed to this legislation were immunizing themselves. The hitch, and it is a big one, is that the immunity is good only within the borders of the United States.

A Tap on the Shoulder

The table in the conference room held five stacks of files and papers, neatly arranged and yellow and crisp with age. Behind them sat an elderly gentleman named Ludwig Altsttter, rosy-cheeked and cherubic. Ludwig is the son of Josef Altsttter, the lead defendant in the 1947 case *United States of America v Josef Altstoetter et al*, which was tried in Germany before a US military tribunal. The case is famous because it appears to be the only one in which lawyers have ever been charged and convicted for committing international crimes through the performance of their legal functions. It served as the inspiration for the Oscar-winning 1961

movie *Judgment at Nuremberg*, whose themes are alluded to in Marcel Ophuls's classic 1976 film on wartime atrocities, *The Memory of Justice*, which should be required viewing but has been lost to a broader audience. Nuremberg was, in fact, where Ludwig and I were meeting.

The Altsttter case had been prosecuted by the Allies to establish the principle that lawyers and judges in the Nazi regime bore a particular responsibility for the regime's crimes. Sixteen lawyers appeared as defendants. The scale of the Nazi atrocities makes any factual comparison with Guantánamo absurd, a point made to me by Douglas Feith, and with which I agree. But I wasn't interested in drawing a facile comparison between historical episodes. I wanted to know more about the underlying principle.

Josef Altsttter had the misfortune, because of his name, to be the first defendant listed among the 16. He was not the most important or the worst, although he was one of the 10 who were in fact convicted (four were acquitted, one committed suicide, and there was one mistrial). He was a well-regarded member of society and a high-ranking lawyer. In 1943 he joined the Reich Ministry of Justice in Berlin, where he served as a Ministerialdirektor, the chief of the civil-law-and-procedure division. He became a member of the SS in 1937. The US Military Tribunal found him guilty of membership in that criminal organization—with knowledge of its criminal acts—and sentenced him to five years in prison, which he served in full. He returned to legal practice in Nuremberg and died in 1979. Ludwig Altsttter had all the relevant documents, and he generously invited me to go over them with him in Nuremberg.

I took Ludwig to the most striking passage in the tribunal's judgment. "He gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organisation from the eyes of the German people." The tribunal convicted Altsttter largely on the basis of two letters. Ludwig went to the piles on the table and pulled out fading copies of the originals. The first, dated 3 May 1944, was from the chief of the SS intelligence service to Ludwig's father, asking him to intervene with the regional court of Vienna and stop it from ordering the transfer of Jews from the concentration camp at Theresienstadt back to Vienna to appear as witnesses in court hearings. The second letter was Altsttter's response, a month later, to the president of the court in Vienna. "For security reasons," he wrote, "these requests cannot be granted." The US Military Tribunal proceeded on the basis that Altsttter would have known what the concentration camps were for.

The words "security reasons" reminded me of remarks by Jim Haynes at the press conference with Gonzales: "Military necessity can sometimes allow . . . warfare to be conducted in ways that might infringe on the otherwise applicable articles of the Convention." Haynes provided no legal authority for that proposition, and none exists. The minimum rights of detainees guaranteed by Geneva and the torture convention can never be overridden by claims of security or other military necessity. That is their whole purpose.

Mohammed al-Qahtani is among the first six detainees scheduled to go on trial for complicity in the 9/11 attacks; the Bush administration has announced that it will seek the death penalty. Last month, President Bush vetoed a bill that would have outlawed the use by the CIA of the techniques set out in the Haynes Memo and used on al-Qahtani. Whatever he may have done, Mohammed al-Qahtani was entitled to the protections afforded by international law, including Geneva and the torture convention. His interrogation violated those conventions. There can be no doubt that he was treated cruelly and degraded, that the standards of Common Article 3 were violated, and that his treatment amounts to a war crime. If he suffered the degree of severe mental distress prohibited by the torture convention, then his treatment crosses the line into outright torture. These acts resulted from a policy decision made right at the top, not simply from ground-level requests in Guantánamo, and they were supported by legal advice from the president's own circle.

Those responsible for the interrogation of Detainee 063 face a real risk of investigation if they set foot outside the United States. Article 4 of the torture convention criminalizes "complicity" or "participation" in torture, and the same principle governs violations of Common Article 3.

It would be wrong to consider the prospect of legal jeopardy unlikely. I remember sitting in the House of Lords during the landmark Pinochet case, back in 1999—in which a prosecutor was seeking the extradition to Spain of the former Chilean head of state for torture and other international crimes—and being told by one of his key advisers that they had never expected the torture convention to lead to the former president of Chile's loss of legal immunity. In my efforts to get to the heart of this story, and its possible consequences, I visited a judge and a prosecutor in a major European city, and guided them through all the materials pertaining to the Guantánamo case. The judge and prosecutor were particularly struck by the immunity from prosecution provided by the Military Commissions Act. "That is very stupid," said the prosecutor, explaining that it would make it much easier for investigators outside the United States to argue that possible war crimes would never be addressed by the justice system in the home country—one of the trip wires

enabling foreign courts to intervene. For some of those involved in the Guantánamo decisions, prudence may well dictate a more cautious approach to international travel. And for some the future may hold a tap on the shoulder.

“It’s a matter of time,” the judge observed. “These things take time.” As I gathered my papers, he looked up and said, “And then something unexpected happens, when one of these lawyers travels to the wrong place.”

20 April 2009

**Supplementary memorandum submitted by Professor Philippe Sands QC²⁶ following oral evidence
on 28 April 2009**

1. During the course of my evidence on 28 April 2009 a point was put to me by Dr Evan Harris MP, as regards the scope of the definition of complicity (uncorrected transcript, questions 168–9). His intervention was as follows:

Dr Harris: *I may need to reflect on this further, but I thought that if you encouraged something clearly that went further than ending up being a party to it through complicity which could be passive. In your memorandum you identified two different definitions of torture. One was a broader one which you linked to the UN Committee Against Torture. As you put it, it includes tacit consent and acquiescence and, as the Chairman intimated in his intervention, constructive as well as actual knowledge that torture is taking place. You then go on to identify a narrower definition which stems from the conclusion of the ICTY trial which has three components. All three elements must be established: knowledge and a contribution by way of assistance which in turn has a substantial effect on the perpetration of the crime of torture itself. Clearly, the first one is wider than the other and does not require active encouragement, just tacit consent and acquiescence. In the conclusion of your submission to us I think you say you would go with the latter narrower one. In paragraph 25 of your submission you say: “Having regard to the requirements of the law a proper investigation of any possible complicity in torture by persons associated with the British authorities would have to focus on key issues of fact relating to . . .”, and then you refer to three elements. Your view is that it is the narrower definition that applies. If we accepted that view we would be adopting a narrower definition than tacit agreement and acquiescence.*

My response was as follows:

Professor Sands: *That is perhaps a drafting point. I do not think that was my intention. The Committee Against Torture established under the convention has very limited case law on the point. You have all of it here; that is all it has said on the subject. You read it very carefully and try to understand what the committee is saying. There is some jurisprudence, for example the Yugoslav war crimes tribunal. Essentially, it goes in the same direction. Looking at the examples given by the Committee Against Torture, if you are a doctor in the room and never touch the individual but you are there to ensure that the person can continue to be abused that is complicity. If you are a policeman who has been informed that an individual is at immediate risk and you do nothing that constitutes—here I paraphrase the committee—a form of contribution. Therefore, it is a negative or positive; it is the flip side of the same thing. I believe that essentially the three elements must be present on both standards that have been applied and I really do not make a point as to which is narrower or broader. What may be slightly unclear is what is meant by the term “contribution”. “Contribution” can include a failure to act or turning a blind eye.*

2. I am grateful to the point raised by Dr Harris, as it allows me to clarify my original written evidence as to the views of the Committee against Torture (described by Dr Harris as the “wider” view) and that of the ICTY (described by him as the “narrower” view). I do not believe that there is a material difference or incompatibility between the approaches of these two bodies. Each is charged with interpreting and applying different instruments and texts: the decisions of the Committee against Torture to which I refer interpret and apply the 1984 Convention (including its Article 4 and the meaning of “complicity or participation”), whereas the ICTY Appeals Chamber in *Prosecutor v Anto Furundzija* interprets and applies the ICTY Statute (including its Article 7(1) and the meaning of “aided and abetted”)

3. It is apparent that “complicity and participation” in Article 4 of the Torture Convention are not identical in meaning and effect to the words “aided and abetted” in Article 7(1) of the ICTY Statute. In my view, the words “complicity and participation” have a broader meaning, including but not limited to “aiding and abetting”. In particular, and having regard to the decisions of the Committee against Torture, the word “complicity” would encompass tacit consent that falls short of the contribution by way of assistance that the ICTY indicated as an element of “aiding and abetting”, as well as a failure to take steps to prevent abuse in circumstances in which it is known to be occurring (see Note on Complicity, paras 20 and 21).

²⁶ Professor of Law, University College London; Barrister, Matrix Chambers.

4. Accordingly, and for the purposes of clarity, I would revise paragraphs 24 and 25 of my original Note and replace them with the following text:

“24. In summary, the conclusions of the Trial Chamber of the ICTY in the Furundzija case appear to reflect a reasonable approach to the interpretation and application of Article 4(1) of the Convention, having regard to its plain meaning, its object and purpose, the intentions of the drafters, and the practise of the Committee against Torture. The Trial Chamber summarized the situation as follows:

“(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.”²⁷

In this way the three elements that must be established for complicity to have occurred within the meaning of Article 4(1) of the Convention, and recognising that complicity has a broader meaning than “aiding and abetting” are:

- (1) knowledge that torture is taking place, and**
- (2) a contribution by way of assistance or a failure to prevent torture from occurring, that**
- (3) has a substantial effect on the perpetration of the crime, including by a failure to prevent it from occurring or continuing.**

(3) Conclusions

25. Having regard to the requirements of the law, however, and the information referred to above—including the early decision taken by President Bush on the deprivation of certain rights for detainees in the “war on terror”, Britain’s close relationship with the United States, the Prime Minister’s active support for President Bush, and the tenor of the legal advice given by the FCO legal adviser—a proper investigation of any possible complicity in torture by persons associated with the British authorities would have to focus on key issues of fact relating to (1) the extent to which such persons had knowledge that torture was or might be taking place, (2) the extent to which such person’s actions may have contributed either by way of assistance or by failing to prevent torture, and (3) whether those actions had a substantial effect on the perpetration of the torture, including by a failure to prevent torture from occurring or continuing.”

5. I hope this assists in providing clarification. Please do not hesitate to be in touch if I can provide further assistance to the Joint Committee.

Professor Philippe Sands QC

3 July 2009

Letter from Andrew Tyrie MP, Chairman of the All-Party Group on Extraordinary Rendition, to the Chair of the Committee, dated 28 January 2009

RE: BRITISH NATIONALS DETAINED IN PAKISTAN

I am writing to you about UK nationals detained in Pakistan on suspicion of terrorist offences, in advance of your evidence session with Ian Cobain of The *Guardian* and Human Rights Watch on Tuesday 3 February 2009. I hope that the attached information is of use to your Committee in this evidence session.

I response to a Written Question the Government stated that two British so-called “mono” nationals detained in Pakistan had been visited by British non-consular officials. Dr Howell’s letter however, which revised the total number of British nationals detained from six to eight, refused to set out how many of these detainees had been visited by British non-consular officials. He has still not done so, despite a recommendation by the Foreign Affairs Committee that he should.²⁸

I have asked a number a number of other Parliamentary Questions which could be of interest, and attach them.²⁹ I have also attached letters to the Intelligence and Security Committee [Annex A], and from the Foreign Office Minister Dr Kim Howells [Annex B], correcting the answers provided to me by his Department. I am placing this letter in the public domain.

²⁷ *Ibid.*, para 257.

²⁸ Foreign Affairs Committee, *Human Rights Annual Report 2007*, 20 July 2008, para 63.

²⁹ See: HC Deb 1105W, 8 May 2008; HC Deb 1815W, 16 May 2008; HC Deb 1005W, 4 June 2008; HC Deb 1006W, 4 June 2008; and HC Deb 1129W, 3 July 2008.

ANNEX A

Letter from Andrew Tyrie MP, Chairman of the All-Party Parliamentary Group on Extraordinary Rendition, to Rt Hon Margaret Beckett MP, Chairman of the Intelligence and Security Committee, dated 17 July 2008

Re: Extraordinary Rendition

I am writing to ask your Committee to investigate allegations that UK Intelligence officers have been involved in the torture of British nationals in Pakistan. Having examined this issue I think it would be in the public interest if your Committee were to investigate it.

Clearly, your Committee cannot and should not seek to investigate every allegation of British involvement in torture. However, this is a particularly sensitive issue on account of the close counter-terrorism relationship between the UK and Pakistan.³⁰ Allegations of torture perpetrated by Pakistani intelligence and security services are widespread.³¹ I fht specific allegations are groundless then your Committee can give the public reassurance. It would also be of value to have reassurance that British officials have not been complicit in torture by Pakistani authorities.

I have attached the Parliamentary Questions I have asked on this issue. Please let me know if I can be of further assistance.

I am putting this letter in the public domain.

ANNEX B

Letter from Kim Howells MP, Minister of State, Foreign and Commonwealth Office, to Andrew Tyrie MP, Chairman of the All-Party Parliamentary Group on Extraordinary Rendition, dated 11 August 2008

I am writing concerning a written Parliamentary Question (203571) you tabled on 29 April 2008 about the detention of British or dual/ British/Pakistani nationals in Pakistan and my answer of 8 May 2008.

I replied that we were aware of six cases of British or dual British/Pakistani nationals having been detained on suspicion of terrorist offences in Pakistan since 2000.

You will be aware that since my reply, the Foreign Affairs Committee raised further points regarding these individuals in their response to the FCO's Annual Human Rights Report.

While working on the response to the FAC report, officials became aware that the six names held on lists by different FCO departments and which formed the basis of my answer to you did not fully correspond and that in fact there were eight individual cases. However, I should make clear that it will always be difficult to give precise numbers as it is often the case that we will not be given consular notification of the detention of dual British nationals in the country of their second nationality.

I am sorry that this administrative confusion caused me to give an inaccurate reply to your question. Procedures are being put in place to prevent this mistake occurring again. In the future, I have sent a letter of correction to the Editor of Hansard in order to amend the record.

I know that you tabled a number of further Parliamentary Questions requesting additional detail about the original six cases. I take this opportunity to provide the same information in relation to the further two cases now identified (see Annex A).

I hope that that his provides you with a comprehensive picture of the further two cases recently identified.

I am copying this letter to Mike Gapes MP, in his capacity as Chair of the Foreign Affairs Committee, and Margaret Beckett MP, in her capacity as Chair of the Intelligence and Security Committee, for information. Further details about our policy and handling of such cases will be provided in our response to the FAC report on the FCO's Annual Human Rights Report.

Annex A

PQ 206054—in how many of the cases British consular access was (a) requested and (b) granted.

Consular access was sought in one of the two cases, but not granted before the individual was released by the Pakistani authorities. We believe that both individuals were dual nationals. However there is often uncertainty about nationality in such cases due to the fact that we rely on information from the Pakistani authorities to confirm this.

³⁰ This was highlighted in the FCO Human Rights Annual Report 2007, page 166.

³¹ See, for example, the US State Department's 2007 Country Report on Human Rights Practices, <http://www.state.gov.g.drl/rls/hrrpt/2007/100619.htm>

PQ 206055—in how many of the cases the detainee complained of mistreatment.

Of these two cases, one detainee complained of mistreatment while in detention and consular access was sought. Press reports alleged that the other was abused whilst in detention. We contacted the individual following these reports but he has not asked us to take this forward with the Pakistani authorities.

PQ 207358—whether any of the detainees are still in Pakistani detention.

I can confirm that both these individuals were released from Pakistani custody.

PQ 207259—whether any of the detainees were visited by other British officials.

I can neither confirm nor deny whether UK officials met any of these individuals to discuss non-consular matters. It is the Government's long standing policy not to comment on intelligence-related issues.

PQ 207361—for what reasons consular access was not sought in all cases

In line with the Consular Guide, in which we set out the help we can offer to British nationals abroad, we would not normally offer consular assistance to dual nationals in their country of other nationality. We may make an exception to this rule if, having looked at the circumstances of the case, we consider that there is a special humanitarian reason to do so. If we become aware of an allegation of torture against a dual UK national held in the country of their other nationality, it is likely we would seek consular access and we would carefully consider raising the allegation with the local authorities. We would look at each situation on a case-by-case basis. However, if we were not aware of such allegations then we would not normally seek consular access.

PQ 214990—what steps the Government took in the cases of those who alleged mistreatment

In the case of the individual who alleged mistreatment whilst in detention we raised these allegations officially with the Pakistan authorities. We have yet to receive any official response from them. In the other case, the individual asked us not to raise any allegations with the Pakistani authorities.

PQ 214991—how the government learned of the detention in Pakistan of the dual British/Pakistani nationals

As I stated regarding the original four dual British/Pakistani cases, the Pakistani authorities were under no obligation to inform us of the detention of dual nationals in their second country of nationality. In all cases we were informed of their detention either by family members or foreign officials.
