



House of Lords

House of Commons

Joint Committee on Human
Rights

Allegations of UK Complicity in Torture

**Twenty-third Report of Session 2008-
09**

Not to be published in full, or in part, in any form,
before 00.01 Hrs on Tuesday 4 August 2009



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**Twenty-third Report of Session
2008–09**

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

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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.

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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.

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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, cW551.

- 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/C/SR.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

Not to be published in full, or in part, in any form, before 00.01 Hrs on Tuesday 4 August 2009

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.

Not to be published in full, or in part, in any form,
before 00.01 Hrs on Tuesday 4 August 2009

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; HL Paper 142/ HC 918
Government response to the Committee's
Thirteenth Report of Session 2008-09

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 HL Paper 5/HC 72
Eighteenth Report of Session 2006-07: The Human
Rights of Older People in Healthcare

Second Report Counter-Terrorism Policy and Human Rights: 42 HL Paper 23/HC 156
days

Third Report Legislative Scrutiny: 1) Child Maintenance and HL Paper 28/ HC 198
Other Payments Bill; 2) Other Bills

Fourth Report Government Response to the Committee's Twenty- HL Paper 31/ HC 220
First Report of Session 2006-07: Human Trafficking:
Update

Fifth Report Legislative Scrutiny: Criminal Justice and HL Paper 37/HC 269
Immigration Bill

Sixth Report The Work of the Committee in 2007 and the State HL Paper 38/HC 270
of Human Rights in the UK

Seventh Report A Life Like Any Other? Human Rights of Adults HL Paper 40-I/HC 73-I
with Learning Disabilities: Volume I Report and
Formal Minutes

Seventh Report A Life Like Any Other? Human Rights of Adults HL Paper 40-II/HC 73-II
with Learning Disabilities: Volume II Oral and
Written Evidence

Eighth Report Legislative Scrutiny: Health and Social Care Bill HL Paper 46/HC 303

Ninth Report Counter-Terrorism Policy and Human Rights HL Paper 50/HC 199
(Eighth Report): Counter-Terrorism Bill

Tenth Report Counter-Terrorism Policy and Human Rights (Ninth HL Paper 57/HC 356
report): Annual Renewal of Control Orders
Legislation 2008

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 HL Paper 66/HC 379
2) Child Maintenance and Other Payments Bill:
Government Response

Thirteenth Report Government Response to the Committee's First HL Paper 67/HC 380
Report of Session 2006-07: The Council of Europe
Convention on the Prevention of Terrorism

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 HL Paper 95/HC 501
and Regeneration Bill; 3) Other Bills

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