



## **Dangerous Ambivalence: UK Policy on Torture since 9/11**

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*Torture is one of the worst human rights abuses. As torture is outlawed under general international law as well as specific human rights treaties, when governments condone it, they risk losing their legitimacy and provoking terrorism.*

UK Foreign and Commonwealth Office Human Rights Report 2005

*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*

Article 2, UN Convention against Torture

*Let no-one be in any doubt, the rules of the game are changing...*

Prime Minister Tony Blair, speaking to journalists at Downing Street (August 2005)

*I sometimes feel that so many people who should be foremost in recognizing the serious nature of the threat just don't get it.*

Home Secretary John Reid, explaining his opposition to a key European Court judgment that prohibits returning people at risk of torture (August 2006)

## **Summary**

In past years, the United Kingdom has played an important role in confronting torture worldwide. Sadly, there are now two sides to Britain's role. One involves ongoing support to anti-torture efforts, through training and treaties. The other is directed at bending and weakening the torture ban in the context of countering terrorism. This second strand of policy undermines decades of effort by the UK and others to make the global torture ban stick.

The threat from terrorism is serious, as the attacks in London in July 2005, in which more than 50 people were killed, and the dramatic alleged airplane bomb plot exposed in August 2006 made clear. Governments have a duty to take positive measures to protect the public from terrorism.

On no account, however, should such measures include softening the ban on torture. That approach would be morally bankrupt, illegal under international law and ultimately counter-productive. And yet, this is the direction that the British government seems determined to follow.

With a series of interconnected policies aimed at countering terrorism, in the past two years the British government has:

- proclaimed for itself the right to use torture evidence in legal proceedings;
- devised agreements to make it possible to send people back to the risk of torture;
- attempted to overturn European human rights law banning such returns;
- refused to condemn (and thus condoned) the U.S. policy of “extraordinary rendition”—state kidnap, delivering people to be tortured in third countries;
- shared information with other governments that led to the apprehension of UK residents who were then subjected to “extraordinary rendition” by the U.S.; and
- whitewashed (and thus condoned) U.S. policies on torture.

There is a contradiction at the heart of the British government’s approach. On the one hand, it emphasizes the importance of human rights around the world, and encourages other states to improve protections against torture. On the other hand, it argues that security in an age of terror requires loosening the rules on human rights, including the ban on torture. Ministers suggest that those who continue to cling to the old rules fail to understand the way that the world has changed. In particular, those who insist on the absolute prohibition of torture in the face of new threats are portrayed as naïve or worse.

Not only is the government’s attitude flawed, it also ignores the damaging consequences of loosening the torture ban for the fight against terrorism. Accepting torture undermines the moral legitimacy of the British government around the world. And it damages the government’s standing at home, especially with British Muslims, whose cooperation with the police and security services is so vital if the terrorist threat is to be addressed.

Britain faces a stark choice. There is still time to turn back to the right path—the rule of law and the unequivocal repudiation of torture wherever and by whomever it is carried out. If Britain continues down the present road, however, this will do lasting damage to its place in the world, to the global ban on torture, and to the values that help keep us safe.

## **Lessons from History**

Arguments that torture is sometimes necessary to confront a greater evil are not new. The French jurist Jean Bodin wrote in 1580 of the need to torture suspected witches. Making an argument about the need for extreme measures in extreme circumstances that may in part sound familiar in the 21st century, he wrote, “Proof of such evil is so obscure and difficult that not one out of a million witches would be accused or punished if regular legal procedures were followed.”

But by the mid-20th century, the shamefulness of torture seemed self-evident, a message that was reinforced by the horrors of Nazi practices in the Second World War. The international ban on torture was enshrined in the 1948 UN Universal Declaration of Human Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>1</sup> Britain played a key role in shaping the Universal Declaration, as it also did in shaping the European Convention on Human Rights that followed two years later.

Yet in the second half of the twentieth century, governments—including the UK’s—repeatedly sought once more to justify torture, claiming that the ban was already somehow outmoded.

In the 1950s, France’s war against the rebels in Algeria was distinguished by extraordinary savagery. Torture and disappearances were widespread. Gen. Jacques Massu, a French commander in Algiers, said that torture was a “cruel necessity.” Yet France was subsequently forced out of Algeria, not least because its brutal tactics turned ordinary Algerians against its rule.

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<sup>1</sup> Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A(III), UN Doc. A/810, Article 5.

Only much later did Massu change his mind. In 2000, he told *Le Monde*, “Torture is not indispensable in time of war, we could have got along without it very well.” He said that France should officially admit its policies of torture and condemn them: “I think that would be a good thing. Morally torture is something ugly.”<sup>2</sup>

(Interestingly, even some in the Pentagon have acknowledged the failure of the torture policy, with reference to abuses by French forces in Algeria. In 2003, shortly after U.S. forces arrived in Baghdad, the Pentagon organized a screening of Gillo Pontecorvo’s *The Battle of Algiers*, with a flier which put Pontecorvo’s famous movie in perspective. The Defense Department flier summed up the message: “How to win a battle against terrorism and lose the war of ideas.”)<sup>3</sup>

France’s disastrous experience in Algeria did not end the idea that breaking the rules is necessary to defeat terrorist violence. In the early 1970s, the UK government argued that highly coercive interrogation was necessary to confront the new terror threat in Northern Ireland, after the beginning of violent unrest—commonly known as “the Troubles”—in 1969.

The European Court of Human Rights condemned the so-called “five techniques” used by UK military and security forces during that period.<sup>4</sup> It ruled that the techniques—hooding, wall-standing, noise, deprivation of food and drink, and sleep deprivation—were cruel, inhuman or degrading treatment, banned under the European Convention on Human Rights. The British government gave “a solemn undertaking” to the court that the techniques would never again be used on British soil.

In the 1970s, military governments in Latin America were eager to argue that the torture ban was outmoded. In 1976 the Argentinean military proclaimed a *guerra sucia*, a “dirty war” against subversives. In the new, changed circumstances, they said that an old-style “clean war” was no longer appropriate. The regime found

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<sup>2</sup> Florence Beauge, “La torture faisait partie d’une certaine ambiance. On aurait pu faire les choses différemment!” (interview with Jacques Massu), *Le Monde*, June 22, 2000.

<sup>3</sup> David Ignatius, “Think Strategy, Not Numbers,” *Washington Post*, August 26, 2003, <http://www.washingtonpost.com/wp-dyn/articles/A45136-2003Aug25.html> (accessed June 16, 2006).

<sup>4</sup> Ireland v. United Kingdom, (Series A, No. 25), Judgment of January 18, 1978, (1979-80) 2 EHRR 25.

powerful backers for that argument. Argentinean bishops offered God’s dispensation for torture, suggesting that, in a war against subversives, it was “necessary to use such methods.”<sup>5</sup> In the name of protecting Argentina from terrorism, thousands were kidnapped and disappeared by security forces, thrown out of helicopters into the ocean, or tortured to death.

Argentina was not alone with its policies. In Chile, too, torture and forced disappearances were common. Manuel Contreras, director of Gen. Augusto Pinochet’s National Intelligence Directorate (Dina), later declared, “There are no ‘disappeared detainees’ in a war against subversion.... Those who still think that war is a slightly affair with pretty gentlemanly uniforms and white gloves, with a declaration of war from the last century, are out of date.”<sup>6</sup>

The argument that the anti-torture rules were “out of date,” designed for an era of “gentlemanly behaviour and white gloves,” was specious. In reality, the four core Geneva Conventions—each of which bans “cruel treatment and torture”—were agreed in 1949 with the exceptional brutality of the Second World War, in Eastern Europe and the Far East especially, very much in mind. The Geneva Conventions, like the Universal Declaration of Human Rights and the European Convention on Human Rights, negotiated and agreed at approximately the same time, were intended to ensure that such nightmares would not be repeated.

The preamble to the Universal Declaration makes this context clear: “...disregard and contempt for human rights have resulted in barbarous acts which outraged the conscience of mankind... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the rule of law...”<sup>7</sup>

The 1984 UN Convention against Torture sought to close for all time any loopholes that might imply that extreme times justify extreme measures, and anticipated the

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<sup>5</sup> “Argentine ex-dictator admits to 8,000 disappeared in ‘dirty war’ – report,” Agence France Presse, September 1, 2003; “Argentina says Church gave green light to torture,” EFE News Service, September 1, 2003.

<sup>6</sup> Television Nacional de Chile (TVN), March 27, 1991.

<sup>7</sup> UDHR, Preamble.

danger that governments would be eager to use national security as a “get-out clause” in order to soften the prohibition. Article 2 states,

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.<sup>8</sup>

Britain supported the convention. By the time of its adoption, torture had become a universal taboo. While the practice had by no means been eradicated, it was so shameful that its perpetrators carried it out in secret, denied its existence, and went to great lengths to conceal its effects. In the wake of September 11, however, governments have begun openly to question that taboo, and have done incalculable damage to the eradication of torture.

### **A New Ambivalence toward Torture**

In the 2006 annual human rights report, the Foreign Office boasts: “The UK is one of the most active countries in the world on torture, speaking out clearly on torture prevention, advocating strong international machinery and developing practical tools to combat torture in all its forms.”<sup>9</sup> Britain has indeed devoted large sums of money and considerable efforts to confronting torture worldwide. The government has funded international anti-torture projects, and paid for publications like *The Torture Reporting Handbook*—a practical guide to identifying, documenting and reporting incidents of torture for doctors, lawyers and human rights activists.<sup>10</sup> The UK government paid for the *Handbook* to be translated into seven languages, including Russian, Arabic and Chinese.

The UK was also one of the first states to ratify the Optional Protocol to the Convention against Torture in December 2003. The protocol, which entered into force

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<sup>8</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, entered into force June 26, 1987, Article 2(2).

<sup>9</sup> United Kingdom Foreign and Commonwealth Office, Human Rights Annual Report 2006, p.186. [http://www.fco.gov.uk/Files/kfile/hr\\_report2006.pdf](http://www.fco.gov.uk/Files/kfile/hr_report2006.pdf) (accessed October 20 2006).

<sup>10</sup> Another recent example is the handbook *Medical Investigation and Documentation of Torture*, M. Peel, N. Lubell, and J. Beynon. (2<sup>nd</sup> edition), June 2006, Human Rights Centre, University of Essex in conjunction with the Foreign and Commonwealth Office.



on June 22, 2006, creates an international system to monitor places of detention worldwide, and a parallel domestic monitoring system in each country that ratifies it. Its purpose is to reduce incidents of torture and ill-treatment in detention. The British government has been active in lobbying other governments to ratify the protocol.

All this deserves praise. The British government continues to declare—as does the Bush administration—that torture is one of the worst human rights abuses. At the same time, however, the British government has severely undermined its own work by chipping away at the international torture ban. It has even begun a direct assault on existing jurisprudence. Both in rhetoric and through their actions, government ministers—despite their increasingly implausible insistence that they remain opposed to torture—show that they believe the international ban on torture to be outdated. The danger of terrorism, it is suggested, trumps everything else—including the rules against torture.

## **Torture as Response to Terrorism**

### *Human rights and security: the false dichotomy*

There is a growing sense that the British government considers that the framework of human rights law in general, and the absolute nature of the torture ban in particular, are no longer up to the task. The government insists that, in the words of Prime Minister Tony Blair, “the rules of the game are changing.”<sup>11</sup> For him and other government ministers, it seems that the international torture ban—which includes a prohibition on sending people back to the risk of torture—is just one more variable in the mix.

In September 2005, Charles Clarke, then home secretary, chose a speech to the European Parliament in Strasbourg to argue that the torture ban, and the European Convention on Human Rights, were incapable of meeting the challenge from terrorism, because circumstances today are “very different” from when the treaty was drafted.<sup>12</sup>

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<sup>11</sup> Prime Minister’s press conference at 10 Downing Street, August 5, 2005, <http://www.number-10.gov.uk/output/Page8041.asp> (accessed September 20, 2006).

<sup>12</sup> Speech by Charles Clarke, UK home secretary, to the European Parliament (Strasbourg), September 7, 2005, <http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107293561746&a=KArticle&aid=1125559979691> (accessed June 16, 2006).

Terry Davis, secretary-general of the Council of Europe and a former Labour member of the British parliament, pointed out that the alleged contrast was misleading:

The European Convention on Human Rights dates from a time when threats to our freedom and security were different, but the threats were real. It is an asset and not an obstacle in the fight against terrorism. Any suggestion to change the Convention on this point endangers not only our rights, but also our security.<sup>13</sup>

Davis is right: the choice between fundamental human rights and national security is a false dichotomy. Under UN Security Council Resolution 1456, which Britain voted for in 2003,

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law.<sup>14</sup>

Human rights law is sufficiently flexible as to allow governments to respond to security threats without tearing up the rules. The European Convention and UN Covenant on Civil and Political Rights both allow certain rights, including freedom of expression, to be subject to some limitation on the grounds of national security and public order. And some human rights can be partially suspended in time of war and national emergency “threatening the life of the nation.” But torture is prohibited absolutely at all times and under all circumstances.

The words and actions of Prime Minister Tony Blair and his current home secretary, John Reid, suggest that they wish to abandon the clear and binding commitments that Britain has signed up for. The prime minister insists that, because of the terror threat, “traditional civil liberty arguments are not so much wrong, as just made for

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<sup>13</sup> “Terry Davis: ‘There are no excuses for torture,’” Council of Europe press release, October 11, 2005, <http://www.coe.int/NewsSearch/Default.asp?p=nwz&id=7194&lmLangue=1> (accessed June 16, 2006).

<sup>14</sup> United Nations Security Council Resolution 1456 (2003) S/RES/1456 (2003), para. 6. [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/S.RES.1456+\(2003\).En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.RES.1456+(2003).En?Opendocument) (accessed June 16, 2006),

another age.”<sup>15</sup> In a key speech on security in August 2006, Reid quoted that assessment by the prime minister, and referred contemptuously to a key European Court of Human Rights judgment, *Chahal v. UK*, which reinforces the absolute nature of the international torture ban, including the ban on return to the risk of torture (see below):

When I see the nature of the Chahal judgement by European judges, that we ought to be prohibited from weighing the security of our millions of people in this country, of our own people, if a suspected terrorist remains here when we are trying to deport him.... then I sometimes feel that so many people who should be foremost in recognising the threat that exists and the serious nature of that threat, I can't help feeling that they don't get it. They just don't get it.”<sup>16</sup>

Reid sees an explicit trade-off between the torture ban, on the one hand, and keeping Britain safe, on the other.

Beyond the ignorance of the historical circumstances in which human rights law was developed, and of the inherent balance built into that system, the government’s argument is also based on a fundamentally false premise—that long-established values have to be set aside because no alternative exists. This could not be further from the truth.

### *Policing and prosecution as a means of confronting terror*

Those who plot or carry out mass murder are guilty of some of the most serious crimes imaginable. They should be prosecuted to the fullest extent of the law, in accordance with international fair trial standards.

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<sup>15</sup> Prime Minister Tony Blair, Speech to News Corporation, Pebble Beach, California, July 30, 2006, <http://www.number-10.gov.uk/output/Page9937.asp> (accessed September 20, 2006).

<sup>16</sup> “Security, freedom and the protection of our values,” speech by the home secretary to DEMOS, August 9, 2006, <http://press.homeoffice.gov.uk/Speeches/sp-hs-DEMOS-090806?version=1> (accessed September 20, 2006).

The advantage of relying on policing and prosecution—rather than weakening the rules on torture—as a means of countering terrorism, is that they uphold and reaffirm the rule of law and fundamental human rights, rather than weakening them.

The government argues that because the authorities sometimes have to act preemptively to prevent terrorism, there may be insufficient evidence to secure a conviction. But prosecutors have a range of options open to them, even where no act of terrorism has yet been carried out, including pressing charges of conspiracy, aiding and abetting, criminal attempt, and (following the 2006 Terrorism Act) acts preparatory to terrorism.

The government has also argued that the rules of evidence and concerns about disclosing the sources and methods of intelligence gathering preclude it from relying on evidence that could otherwise found prosecutions. There is no shortage of ideas about ways in which such evidence can be managed without compromising fair trial standards. A number of parliamentary committees have produced extensive recommendations, based on evaluations of the practices of other countries and consultations with expert witnesses.<sup>17</sup> But the government has done little to address the obstacles that are said to exist.

The ban on using intercept evidence in court provides a useful illustration. The United Kingdom and Ireland are the only two western countries with total bans on such evidence, gathered through judicially authorized phonetaps and other forms of intercept. There is a broad consensus—including Britain’s most senior police officer and within Parliament—that the ban is a disproportionate response to a genuine concern over disclosure of intelligence sources or methods, and that removal of the ban would facilitate prosecution of terrorism suspects.<sup>18</sup> Yet the British government

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<sup>17</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, August 1, 2006, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/24002.htm> (accessed October 20, 2006); U.K. Parliament, Privy Counsellor Review Committee, “Anti-terrorism, Crime and Security Act 2001 Review: Report,” December 18, 2003, [www.statewatch.org/news/2003/dec/atcsReport.pdf](http://www.statewatch.org/news/2003/dec/atcsReport.pdf) (accessed October 20, 2006).

<sup>18</sup> Rachel Sylvester, “Lift phone tap ban in terror trials, says new Met chief,” *The Daily Telegraph*, February 5, 2005, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/02/05/nmet05.xml&sSheet=/news/2005/02/05/ixnewstop.html> (accessed October 20, 2006).

has done nothing to make such evidence admissible in court, despite repeated recommendations dating back to 1996.<sup>19</sup>

Where the authorities suspect persons of involvement in terrorism but there is insufficient evidence of any criminal conduct, the appropriate response is monitoring and surveillance, subject to appropriate judicial safeguards.

Successfully policing and prosecuting terrorism requires public cooperation, and in particular, tip-offs—such as a neighbor reporting unusual activity or a young man or woman reporting an approach by a terrorist recruiter or an overheard conversation. Often, it is the information that comes through such tips, rather the interrogation of suspects, that proves the decisive factor in cracking a case.

As one former U.S. intelligence officer explains:

Every intelligence case officer... knows that more good information comes from walk-in than from any other source. A witness you didn't know about decides to come forward, someone who participated in a crime makes up his mind to confess, a foreign national with secrets to sell makes a contract, or an agent decides for one reason or another that he wants to defect.<sup>20</sup>

The same is true of traditional law enforcement. According to David Bayley, a leading criminologist:

Studies have found that the critical ingredient in solving crimes is whether the public—victims and witnesses—provide information to the police that helps identify the suspect.... Studies show that unless the

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<sup>19</sup> Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996; Privy Counsellor Review Committee, "Anti-terrorism, Crime and Security Act 2001 Review: Report," December 18, 2003; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, August 1, 2006.

<sup>20</sup> Orin DeForest and David Chanoff, *Slow Burn: The Rise and Bitter Fall of American Intelligence in Vietnam* (New York: Simon and Schuster, 1990), p. 122.

public can specifically identify suspects to the police, the chances that a crime will be solved fall to about 10%.<sup>21</sup>

Policing and prosecution as effective means of countering terrorism while upholding the rule of law depend on community cooperation and a willingness to pursue prosecutions, even where other means—such as deporting terror suspects to places where they are at risk of torture—may appear easier and superficially more attractive.

### *The cost of abandoning the rules*

The abandonment by powerful governments of international rules—as we have repeatedly seen in the past few years—gives succor to those who believe that they, too, need not be bound by the universal rules of humanity.

United Nations Secretary-General Kofi Annan argues that “greater respect for human rights, along with democracy and social justice, will, in the long term, be the most effective prophylactic against terror.”<sup>22</sup> The UK all-party parliamentary joint human rights committee points out that derogation from international obligations has a “corrosive effect.”<sup>23</sup>

The “Preventing Extremism Together” working groups established by the British government following the July 7 attacks reached a similar conclusion. The working groups, which included many prominent British Muslim leaders, issued their joint report in November 2005. The working group on community security expressed

[c]oncerns around the UK’s standing vis-à-vis international principles and standards of fundamental human rights. The UK was for a time in derogation of Art[icle] 5 of the ECHR. Further discussions, generated by the PM [Prime Minister], around revoking/changing international (and now universally accepted) principles and standards of human rights

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<sup>21</sup> David Bayley, *Police for the Future* (Oxford: Oxford University Press, 1994), pp. 7-8 (citations omitted). Bayley is Distinguished Professor in the School of Criminal Justice, State University of New York at Albany

<sup>22</sup> “Secretary-General calls for ‘Unity of purpose around a common security agenda,’” United Nations press release, SG/2085, September 8, 2003, <http://www.un.org/news/Press/docs/2003/sg2085.doc.htm> (accessed June 16, 2006).

<sup>23</sup> House of Lords, House of Commons, Joint Committee on Human Rights - Review of Counterterrorism Powers, Eighteenth Report of Session 2003-04, HL Paper 153 HC 713. <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/158.pdf> (accessed August 4, 2006).

developed by the international community in the aftermath of the unprecedented horrors of WWII are very worrying... Our moral high ground rests on championing these standards.<sup>24</sup>

The report recommends: “The U.K. must lead on and not unilaterally derogate from international principles and standards of human rights.”

Respecting international law, including the absolute prohibition on torture and sending people back to the risk of torture, does not provide an instant panacea for terrorism. But, as Kofi Annan and others quoted above point out, the trampling of international law makes the world more dangerous.

Blair acknowledges that values matter to the struggle against terrorism. In July 2006, he said, “[W]e cannot win this struggle by military means or security measures alone, or even principally by them.”<sup>25</sup> As quoted at the beginning of this report, the British government appears to be alive to the danger that torture poses for those values: “Torture is one of the worst human rights abuses. As torture is outlawed under general international law as well as specific human rights treaties, when governments condone it, they risk losing their legitimacy and provoking terrorism.”

Yet the British government seems determined to ignore the unambiguous message that undermining international law and fundamental values will ultimately make Britain less safe. Quite apart from the loss of moral legitimacy, such actions may help to act as a recruiting sergeant for the terrorists’ cause.

Counterterrorism measures that violate human rights—including a softening of the ban on torture—also undermine the willingness of communities to cooperate with the police and security services. Experience around the world—from 1970s Northern Ireland to post-Saddam Iraq—shows that if the authorities are themselves perceived

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<sup>24</sup> Home Office, “‘Preventing Extremism Together’ Working Groups, August – October 2005,” November 10, 2005, [http://raceandfaith.communities.gov.uk/raceandfaith/reports\\_pubs/publications/race\\_faith/PET-working-groups-aug-oct05](http://raceandfaith.communities.gov.uk/raceandfaith/reports_pubs/publications/race_faith/PET-working-groups-aug-oct05) (accessed July 5, 2006).

<sup>25</sup> Prime Minister Tony Blair, Speech to News Corporation, Pebble Beach, California, July 30, 2006, <http://www.number-10.gov.uk/output/Page9937.asp> (accessed September 20, 2006).

to be breaking the rules, such cooperation becomes less likely. That threatens the very source of tip-offs that are central to successful counterterrorism efforts.

## **Undermining the Torture Ban**

The British government has sought to undermine and continues to undermine the global ban on torture in a variety of ways. Taken together, these various policies pose a significant danger.

### **Torture Evidence in Legal Proceedings:**

*Let me make it clear, we unreservedly condemn the use of torture and have worked hard with our international partners to eradicate this practice. However, it would be irresponsible not to take appropriate account of any information which could help protect national security and public safety.*

David Blunkett, then home secretary, commenting in 2004 on a court ruling favorable to the Government<sup>26</sup>

*I am startled, even a little dismayed, at the suggestion - and the acceptance by the Court of Appeal majority - that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all.*

Lord Bingham of Cornhill, Britain's most senior law lord, in a unanimous law lords judgement that overturned the 2004 ruling<sup>27</sup>

One might hope that the British government should need no arm-twisting in order categorically to rule out evidence gained under torture. Sadly, that has not been the case. The intervention of the country's highest court was required to close the door on torture evidence.

The issue arose in connection with hearings of the Special Immigration Appeals Commission (SIAC), the body tasked with hearing deportation appeals for those

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<sup>26</sup> "Court Of Appeal Judgment - Statement From The Home Secretary," UK Home Office press release, August 11, 2004, [http://press.homeoffice.gov.uk/press-releases/Court\\_Of\\_Appeal\\_Judgment\\_-\\_State?version=1](http://press.homeoffice.gov.uk/press-releases/Court_Of_Appeal_Judgment_-_State?version=1) (accessed June 16, 2006).

<sup>27</sup> The panel unanimously overturned the Appeal Court ruling, see "U.K.: Highest Court Rules Out Use of Torture Evidence," Human Rights Watch news release, December 8, 2005, <http://hrw.org/english/docs/2005/12/08/uk12171.htm>



alleged to be a threat to national security. In a ruling criticised by Human Rights Watch and other human rights groups at the time, the UK Court of Appeal ruled by a 2-1 majority in August 2004 that the British government was entitled to rely in the SIAC on evidence obtained under torture.<sup>28</sup> The court acknowledged that this could put the UK in conflict with international law. But the majority judgment considered that the government was not precluded from relying on evidence “which had or might have been obtained through torture by agencies of other states.” The only requirement was that the government had “neither procured nor connived at” the torture.

Crucially, the majority in the Court of Appeal held that a “recognition of [the government’s] responsibility for national security was required.” That conclusion, the court said, “was not altered by article 15 of the United Nations Convention against Torture,” which prohibits evidence obtained under torture from use in any proceedings.<sup>29</sup> In other words, the court allowed international law to be balanced against—in effect, trumped by—the needs of security.

The appeal court ruling of 2004 was not allowed to stand. Britain’s highest court, the House of Lords judicial committee (commonly known as the law lords), unanimously overturned the judgment in December 2005. Seven of Britain’s most senior judges dismissed the argument that torture evidence should not as a matter of principle be excluded from British legal proceedings. Lord Bingham noted,

The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention,

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<sup>28</sup> *A and others v. Secretary of State for the Home Department* [2004] EWCA Civ 1123.

<sup>29</sup> Article 15 of the Convention against Torture states: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked in any proceedings, except against a person accused of torture as evidence that the statement was made.”

which itself takes account of the all but universal consensus embodied in the Torture Convention.<sup>30</sup>

As quoted above, Lord Bingham said he was “dismayed” at the British government’s apparent readiness to override “this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken.” Other judges on the law lords panel were equally clear-cut in their judgments.

After this humiliating rebuff, the UK government claimed it had merely sought “reassurance” on a technicality. Charles Clarke, then home secretary, declared, “I welcome the decision, which gives clarity about an extremely important and very difficult issue.”<sup>31</sup> *The Guardian* described Clarke’s claim as *chutzpah*. It is difficult to disagree with that analysis, suggesting certain brazenness on the government’s part. If the government welcomed the ruling, one must ask why it fought so hard against the ban on torture evidence being recognized.

Despite the home secretary’s attempt to put a brave face on the defeat, the government’s submission to the court had been unambiguous in its claim that torture evidence should not be excluded. The government had argued, “There is no rule of law which renders inadmissible... statements of a third party obtained by means of torture or inhuman or degrading treatment inflicted by the agents of a foreign state.”<sup>32</sup> The law lords decision slammed shut the door in the face of that argument, and Britain’s attempts to consume “the fruits of the poisoned tree.” Despite the law lords’ historic judgment, however, the government appears determined to bend the rules on torture.

## **Sending People back to the Risk of Torture**

*[T]he circumstances of our national security have now self-evidently changed and we believe we can get the necessary assurances from the countries to which we will*

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<sup>30</sup> A and others v. Secretary of State for the Home Department [2005] UKHL 71, para. 52  
<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jdo51208/aand.pdf> (accessed June 16, 2006).

<sup>31</sup> Charles Clarke, “I welcome the ban on evidence gained through torture,” *The Guardian*, December 13, 2005.

<sup>32</sup> A and others, Case for the Secretary of State for the Home Department (undated). On file with Human Rights Watch.

*return the deportees, against their being subject to torture or ill-treatment contrary to Article 3.*

Tony Blair, August 2005<sup>33</sup>

*I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment...*

Louise Arbour, UN high commissioner for human rights<sup>34</sup>

The international ban on sending people back to the risk of torture is clear-cut. In the words of Article 3 of the UN Convention against Torture:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>35</sup>

Article 3 of the European Convention on Human Rights is similarly unequivocal: “No person shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court of Human Rights has repeatedly affirmed that under the Convention, the implicit prohibition on being returned to the risk of torture—an explicit ban under the UN Convention—derives from the general and absolute ban on torture in the ECHR.<sup>36</sup> The prohibition against torture would be

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<sup>33</sup> Prime Minister’s press conference at 10 Downing Street, August 5, 2005, <http://www.number-10.gov.uk/output/Page8041.asp> (accessed September 20, 2006).

<sup>34</sup> Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe’s Group of Experts on Human Rights and the Fight Against Terrorism, March 29-31, 2006.

<sup>35</sup> Convention against Torture, Article 3.

<sup>36</sup> See also the judgments of the European Court of Human Rights in: *Soering v. United Kingdom*, Judgment of July 7, 1989, (1989) 11 EHRR 439; *Cruz Varas v. Sweden*, Judgment of March 20, 1991, (1992) 14 EHRR 1; *Vilvarajah v. United Kingdom*, Judgment of October 30, 1991, (1993) 14 EHRR 248; *Ahmed v. Austria*, Judgment of December 17, 1996, (1997) 24 EHRR 278; *D v. United Kingdom*, Judgment of May 2, 1997, (1997) 24 EHRR 423; and *HLR v. France*, Judgment of April 29, 1997, (1998) 26 EHRR 29.

meaningless if governments could get around it simply by sending a suspect to be tortured elsewhere.

The British government has long sought to devise ways of getting around these international prohibitions—most notably, through “diplomatic assurances.” Diplomatic assurances in this context refer to promises from governments with poor track records on torture that a particular person will not suffer such treatment upon return. Unsurprisingly, these promises have proved unreliable, as cases described below illustrate. The British government, however, appears more determined than ever to force them through, no matter what the consequences to the individual at risk or to the global ban on torture. Whether the assurances will be sufficient to persuade British courts, to which every person subject to deportation can appeal on human rights grounds, remains to be seen.

In 1999, the UK government wished to deport an Egyptian, Hani Youssef, back to Egypt. Home Office and Foreign Office lawyers told the prime minister that this would be in breach of international law, including Article 3 of the European Convention on Human Rights quoted above. The Home Office pointed out that assurances would in practical terms be useless:

There are a number of factors which suggest that assurances [from Cairo] would do little or nothing to diminish the Article 3 risk. The main problem is that the Egyptian authorities’ record in the treatment of political opponents is, by any standards not good... In particular as you will see, abuse and torture are widespread despite the prohibition by the constitution of infliction of physical harm upon those arrested or detained. My first question therefore is whether in the face of this evidence, the Home Secretary might reasonably conclude that assurances from the Egyptians could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option.<sup>37</sup>

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<sup>37</sup> *Youssef v. Home Office* [2004] EWHC 1884 (QB).

Tony Blair was not impressed. The prime minister's private secretary wrote: "[The prime minister] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts." Blair himself was even blunter. On one of the letters, he scribbled a curt note: "Get them back."<sup>38</sup>

The track record of diplomatic assurances is dire, as two notable examples make clear.

Ahmed Agiza and Mohammed al-Zari were sent back from Sweden to Egypt in 2001. Maher Arar was sent from the United States to Syria in 2002. In both cases "assurances" were received, and in both cases the men were tortured.

In December 2001 Ahmed Agiza, an asylum seeker in Sweden, was bundled onto a CIA-leased plane, without access to a lawyer, and flown from Stockholm to Cairo, together with another man, Mohammed al-Zari. It is now generally accepted that both men were tortured in custody upon their return, including with electric shocks.<sup>39</sup> The Swedish government insisted it had obeyed its obligations under the UN Convention against Torture, because it had received assurances that the two men would not be tortured, and "there were no substantial grounds for believing that they would be subjected to torture."<sup>40</sup>

No hindsight is needed to realize that there were, on the contrary, "substantial grounds." The same information available to the UK for its deliberations in the Youssef case was widely and publicly available to the Swedish authorities in 2001. In May 2005, the UN Committee against Torture confirmed that commonsense conclusion, and decided that Sweden had violated the prohibition on transferring people to risk of torture by expelling Agiza.<sup>41</sup> The committee noted that the

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<sup>38</sup> *Ibid.*, para. 37.

<sup>39</sup> See, for example, UN Committee against Torture, Decision: Agiza v. Sweden, CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed July 5, 2006); and Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states," June 12, 2006 <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>(accessed June 27, 2006).

<sup>40</sup> Human Rights Watch, *Still at Risk; Diplomatic Assurances No Safeguard Against Torture*, vol. 17, no. 3(D), April 2005, <http://hrw.org/reports/2005/eca0405/eca0405.pdf>

<sup>41</sup> UN Committee against Torture, Decision: Agiza v. Sweden, May 20, 2005.

assurances secured from Egyptian officials “did not suffice to protect against this manifest risk.” This, the committee said, should have been a “natural conclusion” despite the bilateral agreement between the two states and a post-return monitoring scheme allegedly aimed at guaranteeing that Agiza would not be ill-treated on return. At the time of writing, Mohammad al-Zari’s case was under consideration by the UN Human Rights Committee.

Maher Arar, a Canadian-Syrian dual national, was arrested in transit at JFK airport in New York, en route home to Canada, in 2002. From there, he was delivered via Jordan to Syria, where he was severely tortured. Syria’s record of torture is described in the most recent U.S. State Department human rights report:

Former prisoners, detainees, and reputable local human rights groups, reported that torture methods included electrical shocks; pulling out fingernails; burning genitalia; forcing objects into the rectum; beating, sometimes while the victim was suspended from the ceiling; alternately dousing victims with freezing water and beating them in extremely cold rooms; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a backward-bending chair to asphyxiate the victim or fracture the victim’s spine.<sup>42</sup>

As Vincent Cannistraro, former chief of operations for the CIA's Counterterrorism Center remarked: “You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary.”<sup>43</sup> Nonetheless, the U.S. administration claimed to believe Syrian promises that Arar would not be tortured. John Ashcroft, the U.S. attorney-general, said “appropriate assurances” were received before Arar was handed over.<sup>44</sup>

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<sup>42</sup> U.S. State Department, Bureau of Democracy, Human Rights and Labor, “Country Reports on Human Rights Practices - 2005: Syria,” March 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61699.htm> (accessed July 5, 2006).

<sup>43</sup> Shannon McCaffrey, “Canadian Sent to Syrian Prison Disputes U.S. Claims against Torture,” Knight-Ridder, August 1, 2004.

<sup>44</sup> Letter from Terry A. Breese, director, Office of Canadian Affairs, U.S. Department of State, to Stephen Rickard, Human Rights Executive Directors Working Group, in response to human rights groups’ concerns about the reliability of assurances from the Syrian government, November 26, 2003. Copy on file with Human Rights Watch.

Despite strong evidence that the assurances were not respected, the U.S. government “officially welcomed statements by the Syrian government that Mr. Arar was not tortured.”<sup>45</sup> The independent fact-finder appointed by the Arar Commission in Canada found, by contrast, that Arar’s account of his torture was entirely credible. Stephen Toope wrote,

The interrogation techniques used on Mr. Arar, especially in the first three days but also sporadically in the first two weeks of his detention amounted to torture. The use of the black cable in particular, and the generalized beatings he endured, could only have been ‘intentional’. They were meant to inflict severe pain and suffering. The pain was clearly physical. But in addition, the techniques of humiliation and the creation of intense fear were forms of psychological torture. This is particularly true of the strategy of blindfolding Mr. Arar and making him wait for the next interrogation session in a corridor or room where he could hear the screams of other victims.<sup>46</sup>

### *The British way*

In this dubious climate—worthless promises, followed by predictable torture—Britain has forged ahead with its determination to find ways of (to quote the prime minister) “getting them back,” come what may.

The UK government agreed diplomatic assurances contained in “memoranda of understanding” with Jordan, Libya and Lebanon—all countries with a known pattern of torture—in August, October and December 2005 respectively. Britain is eager to agree assurances with Algeria, and remains in discussion with Egypt and other countries. In the hope of persuading British courts that terrorism suspects returned under the agreements will be protected against torture, the memos purport to improve on the previous government promises by creating a formal mechanism for post-return monitoring and a blanket agreement covering all returns.

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<sup>45</sup> Congressional Record, Case of Maher Arar, pp. S781-S785, February 10, 2004. [http://www.fas.org/irp/congress/2004\\_cr/s021004.html](http://www.fas.org/irp/congress/2004_cr/s021004.html) (accessed May 13, 2006).

<sup>46</sup> Commission of Inquiry into the Acts of Canadian Officials in relation to Maher Arar, Report of Professor Stephen J. Toope, Fact Finder, October 14, 2005, [http://www.ararcommission.ca/eng/ToopeReport\\_final.pdf](http://www.ararcommission.ca/eng/ToopeReport_final.pdf) (accessed May 13, 2006).

In May 2006, the Special Immigration Appeals Commission heard the first case on returns under the agreements, involving Omar Othman, also known as Abu Qatada, a terrorism suspect whom the UK government wishes to deport to Jordan. At this writing, the SIAC had yet to issue its decision on the case.

Despite the new name for the “memoranda of understanding,” the efforts to systematize promises of humane treatment, and the incorporation of monitoring mechanisms, the agreements suffer from the well-established flaws that affect diplomatic assurances.

Those who have looked most closely and dispassionately at the way these assurances would work have been skeptical about the government’s plans. The UK parliamentary Joint Committee on Human Rights published an assessment of the UK government’s compliance with the Convention against Torture in May 2006. After considering oral and written evidence from a wide range of actors, including Human Rights Watch, the Committee concluded:

... the Government’s policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the U.K. in breach of its obligations under Article 3 UNCAT [UN Convention against Torture], as well as Article 3 ECHR [European Convention on Human Rights].<sup>47</sup>

Louise Arbour, United Nations high commissioner for human rights, has condemned what she calls the “dubious practice” of seeking diplomatic assurances. In her words:

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<sup>47</sup> House of Lords, House of Commons, Joint Committee on Human Rights - The UN Convention against Torture (UNCAT), Nineteenth Report of Session 2005-06, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18511.htm#a31> (accessed June 16, 2006), para. 131.



[D]iplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement... [I]t is understood that diplomatic assurances would be sought only after an assessment has been made that there is a risk of torture in the receiving State. If there is no risk of torture in a particular case, they are unnecessary and redundant. It should be clear that diplomatic assurances cannot replace a State's obligation of non-refoulement in these circumstances, either in fact or in law. While some have suggested the establishment of post-return monitoring mechanisms as a means of removing the risk of torture and ill-treatment, we know through the experience of international monitoring bodies and experts that this is unlikely to be an effective means for prevention.<sup>48</sup>

Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, is unequivocal in his opposition to the practice of seeking assurances against torture:

“Diplomatic assurances”, whereby receiving states promise not to torture specific individuals if returned are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. Such pledges are not credible and have also turned out to be ineffective in well-documented cases... In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kind.<sup>49</sup>

Manfred Nowak, UN special rapporteur on torture, has also condemned the purported value of diplomatic assurances, and expressed a fear “that the plan of the United Kingdom to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent the

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<sup>48</sup> Statement by UN High Commissioner for Human Rights Louise Arbour, to the Council of Europe's Group of Experts on Human Rights and the Fight Against Terrorism, March 2006.

<sup>49</sup> Council of Europe Commissioner on Human Rights, “Viewpoint: ‘Torture can never, ever be accepted,’” June 27, 2006, [http://www.coe.int/T/Commissioner/Viewpoints/Default\\_en.asp](http://www.coe.int/T/Commissioner/Viewpoints/Default_en.asp) (accessed July 5, 2006).

international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture.”<sup>50</sup>

The response of the then UK home secretary to the UN’s most senior expert on torture was telling. Charles Clarke declared, in response to Nowak’s criticisms, “The human rights of those people who were blown up on the Tube in London on July 7 are, to be quite frank, more important than the human rights of the people who committed those acts.... I wish the UN would look at human rights in the round rather than simply focusing all the time on the terrorist.”<sup>51</sup>

In reality, Nowak and others who criticize the diplomatic assurances have been eager to see human rights in the round. They acknowledge the obligation of states to protect their inhabitants against terrorism. They recognize that a number of human rights—such as freedom of expression and assembly—permit government restriction to protect the public.<sup>52</sup> But they emphasize that some human rights obligations—like the prohibition of torture—are so fundamental that they can never be set to one side.

The UK government, by contrast, has addressed the problem from a narrow perspective, where human rights are forced into second place. Clarke’s comments ignore the government’s own stated philosophy about the dangers inherent in condoning torture. The government seems determined not to learn the lessons that it claims to preach.

### *No safeguard against torture*

“Assurances” are sometimes used in the context of, for example, sending detainees to a country with the death penalty, with a condition attached that the death penalty shall on this occasion not be used. Such assurances are both transparent and legally binding; breach of the commitment can easily be verified.

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<sup>50</sup> “United Kingdom must not deport people to countries with risk of torture – UN rights expert,” UN News Centre, August 23, 2005, <http://www.un.org/apps/news/story.asp?NewsID=15513&Cr=UK&Cr1=> (accessed August 4, 2006).

<sup>51</sup> Ewen MacAskill, Julian Glover and Vikram Dodd, “Expulsions illegal, UN tells Clarke,” *The Guardian*, August 25, 2005, <http://politics.guardian.co.uk/terrorism/story/0,,1555931,00.html> (accessed August 4, 2006).

<sup>52</sup> For example, the secretary-general of the Council of Europe has noted, “The [European] Convention balances the rights and freedoms of individuals against the interest of the larger community. It allows for a robust, effective and fair response to all threats to society, including terrorism.” Statement by Terry Davis, secretary-general of the Council of Europe, on the occasion of the Assembly debate on alleged secret detentions in Council of Europe member states, June 27, 2006.

In the case of diplomatic assurances on torture, none of these conditions applies. The countries with which the UK is discussing or has agreed diplomatic assurances have already signed up to the Convention against Torture—which they flout. In effect, they are being asked to say: “On this occasion, with this detainee, we will refrain from committing crimes which we secretly commit, despite legally binding commitments, on a regular basis.” The UK insists that verification will be at the heart of these assurances, through the creation of a “post-return monitoring mechanism” in the form of an independent organization that will ensure that detainees are treated humanely. Comparisons are sometimes made with inspections by the International Committee of the Red Cross (ICRC). The comparison is misleading.

The ICRC meets many detainees during its prison visits. This means that complaints of mistreatment cannot easily be traced to individual prisoners, who might then suffer retaliation. By contrast, the UK proposals create a cruel dilemma for detainees who have been tortured—to speak out, or not to speak out, in the knowledge that if they complain about their mistreatment they may be punished still more. The UK, at the same time, has little interest in discovering that a given country is in breach of the assurances. Rather, the contrary: Any such finding would be embarrassing to the UK, and amount to an admission that the UK had violated its obligations under international law.

As Louise Arbour has pointed out:

Short of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance of the deportee, there is little oversight that could guarantee that the risk of torture will be obliterated in any particular case. While detainees as a group may denounce their torturers if interviewed privately and anonymously, a single individual is unlikely to reveal his ill treatment if he is to remain under the control of his tormentors after the departure of the ‘monitors.’<sup>53</sup>

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<sup>53</sup> Statement by UN High Commissioner for Human Rights Louise Arbour on Human Rights Day, New York, December 7, 2005.

The government seems reluctant to engage with its critics on the substance. Instead, ministers try to portray those who express concerns about the worthlessness of the diplomatic assurances as being at the heart of the problem. Singling out human rights NGOs such as Human Rights Watch and Amnesty International, Foreign Office minister Kim Howells complained that those who express scepticism about the value of diplomatic assurances from countries with a track record of torture are “condescending” and display “a real leftover from a colonial attitude.”<sup>54</sup>

Human Rights Watch will be delighted if the pattern of abuse can be shown to have changed. Nothing is immutable, and—as many countries around the world have demonstrated in recent decades—the possibilities of improvement are enormous. Such belief in the possibilities of positive change lies at the heart of the work of Human Rights Watch. There is no reason to believe, however, that any country that continues to lie to the world about its international legal commitment not to torture will suddenly choose to tell the truth in connection with a non-binding bilateral agreement.

Then Foreign Secretary Jack Straw acknowledged in December 2005 the difficulty in persuading governments to admit torture:

Those who commit the torture deny it to themselves as much as they deny it to other people, so to track it is very difficult, but we are alive to those countries where we think malpractice of all kinds is used and we seek to deal with it.<sup>55</sup>

Despite the mounting criticism, the UK government insists that diplomatic assurances will allow it safely to deport terrorism suspects to places where they face the risk of torture. But in the event that the courts rightly reject those arguments, the government has developed a complementary strategy that seeks to alter the very nature of the torture ban itself.

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<sup>54</sup> Anne Penketh, “Howells in row over ‘no-torture’ memos,” *The Independent*, February 6, 2006.

<sup>55</sup> House of Commons, Corrected Transcript of Oral Evidence before the Foreign Affairs Committee, Q27-28, December 13, 2005, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaaff/c768-i/c768o2.htm> (accessed March 23, 2006).

## Trying to Rewrite the Rules on Deportation to Torture

*The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.... The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.*

European Court of Human Rights judgment, 1996 (*Chahal v. UK*)<sup>56</sup>

*That jurisprudence says you can't deport people where there is a serious risk of particular things happening to them - death, torture for example ... We're going to ask the European Court of Human Rights to look at that again.*

Attorney-General Lord Goldsmith, 2006<sup>57</sup>

The case of *Ramzy v. Netherlands*, now before the European Court of Human Rights, illustrates the determination of the British government to loosen the ban on torture, thus reversing decades of progress.

In a landmark 1996 judgment, the European Court of Human Rights reaffirmed the absolute prohibition on sending people back to the risk of torture, in a case known as *Chahal v. UK*. The court ruled that the return to India of Karamjit Singh Chahal, a Sikh activist suspected of involvement in terrorism, would violate the UK's obligations under the European Convention on Human Rights, despite assurances that Chahal would not suffer mistreatment. The court ruled, "The violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem... Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety."<sup>58</sup>

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<sup>56</sup> *Chahal v. The United Kingdom*, Application No 22414/93, November 15, 1996, (1997) 23 EHRR 399, para. 79.

<sup>57</sup> "UK seeks human rights law review," *BBC News Online*, May 20, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/5000238.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/5000238.stm) (accessed June 16, 2006).

<sup>58</sup> *Chahal v. The United Kingdom*, para. 105.

The court made clear in its judgment that “[t]he prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.... In these circumstances, the activities of the individual in question, *however undesirable or dangerous*, cannot be a material consideration [emphasis added].”<sup>59</sup> Similarly, the UN Committee against Torture has emphasized that “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the [Torture] Convention.”<sup>60</sup>

The *Chahal* decision reflects the absolute prohibition under the UN Convention against Torture. The ban on sending people back to the risk of torture is absolute. There is, after all, no practical difference between permitting torture, on the one hand, and allowing people to be sent back to be tortured, on the other.

But the UK government is no longer prepared to accept the judgment of the court or Britain’s obligations under the torture convention. Its view is that the risk of torture to an individual should be “balanced” against the alleged threat that the person poses to national security. The former home secretary, Charles Clarke, made clear that the risk of torture was just one factor to be considered, when considering whether somebody could be deported to the risk of torture:

Our strengthening of human rights needs to acknowledge a truth which we should all accept, that the right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism.<sup>61</sup>

The current home secretary, John Reid, went further, describing the *Chahal* decision as “outrageously imbalanced.”<sup>62</sup> Reid argued that the judges in the European Court of Human Rights who decided the case “just don’t get it.”

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<sup>59</sup> *Ibid.*, para. 80.

<sup>60</sup> UN Committee against Torture, Communication No.39/1996, UN Doc.A/52/44 (1997) para. 94.

<sup>61</sup> Home Office Press Office, “The Home Secretary Speech to the European Parliament,” <http://press.homeoffice.gov.uk/Speeches/10-05-sp-euro-parliament> (accessed June 16, 2006).

<sup>62</sup> “Human Rights Act reform ruled out,” Press Association, July 20, 2006,

The UK government believes that the terrorist threat requires the *Chahal* judgment to be overturned. It is seeking to do so through the case of *Ramzy v. Netherlands*. Mohammed Ramzy, an Algerian suspected of involvement in terrorism, is challenging deportation from the Netherlands on the grounds that he would be at risk of torture if returned to Algeria. The case is a relatively straightforward dispute about risk upon return.

But the UK has seized upon the case as an opportunity to overrule *Chahal*, and rewrite European human rights law to introduce a balancing test between torture and national security. So keen is the UK government on overturning *Chahal* that it persuaded four other governments to join its intervention in the *Ramzy* case.<sup>63</sup> It placed the matter on the agenda of a European Union meeting of justice and home affairs ministers when it held the Presidency of the EU.<sup>64</sup>

The letter that the UK government sent to the court requesting permission to intervene describes the prohibition on returns to torture expressed in *Chahal* as creating “real difficulty” that prevents states from “expelling... foreign nationals on their territories who are judged to be a threat to national security.” It goes on to state, “The Government of the United Kingdom... would wish to suggest a number of alternative legal routes by which this difficulty could more appropriately be dealt with. This will involve examining where and how the balance between the rights of citizens... and the rights of suspected terrorists should fairly be struck.”<sup>65</sup> In this context, the key right which the government is content to set aside is the right not to be tortured.

This new “yes, but” attitude to the torture ban may be seen as part of what UN High Commissioner for Human Rights Louise Arbour has called “the new normal.”<sup>66</sup> The

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<sup>63</sup> Lithuania, Slovakia, Portugal, and Italy. Italy subsequently withdrew from the intervention.

<sup>64</sup> European Union, Justice and Home Affairs Council, Meeting on October 12, 2005. Main results of Council: “Article 3 of the European Convention on Human Rights. The Presidency briefed the Council about the UK and the Netherlands positions regarding the possibility for the European Court of Human Rights of revisiting an earlier Court decision in the 1996 *Chahal* case,” (undated), [http://www.fco.gov.uk/Files/kfile/JHA\\_12Oct\\_Results.o.pdf](http://www.fco.gov.uk/Files/kfile/JHA_12Oct_Results.o.pdf) (accessed July 5, 2006), p. 19.

<sup>65</sup> Letter from the UK Foreign and Commonwealth Office to the European Court of Human Rights, regarding *Ramzy v. the Netherlands*, September 22, 2005.

<sup>66</sup> Address by UN High Commissioner for Human Rights Louise Arbour at the Royal Institute of International Affairs, London, February 15, 2006.

new British policy appears to argue that torture remains unacceptable and evil—but less unacceptable and evil than it was, because of the terrorist threat.

In effect, the British government is arguing that the ban on torture is an expression of our most important values—except where the implications are inconvenient. The insidiousness of that argument needs to be confronted. It is for this reason that a number of human rights organizations, including Human Rights Watch, have also intervened in *Ramzy*, to highlight the fundamental importance of the ban on returns to risk of torture to the torture prohibition as a whole.<sup>67</sup>

At the time of writing, the European Court has yet to set a date to hear the case. But as the Joint Committee on Human Rights has pointed out, even if the UK government were to succeed in its intervention, the ban on returns to torture would remain absolute under international law, including the UN Convention against Torture, and returns to risk of torture by the UK would violate international law.<sup>68</sup>

### **Complicity in U.S. Abduction and Torture: British Refusal to Ask Questions**

*As the questions multiply, there is such a thing as willful ignorance and it seems we are close to that point... It is not enough to protest, as government spokesmen have, that we do not support torture. We must demonstrate that we do not by actions as well as words.*

Former Foreign Office minister Chris Mullin<sup>69</sup>

*It's a question of what degree of complicity it might involve by the territorial government, if it allows or ignores indications to the effect that there are other countries using its airports for the transfer of persons against their will.*

Martin Scheinin, UN rapporteur on human rights and counterterrorism<sup>70</sup>

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<sup>67</sup> Human Rights Watch has intervened in the case jointly with Interights, Amnesty International, the Association for the Prevention of Torture, the International Commission of Jurists, Open Society Justice Initiative, and REDRESS.

<sup>68</sup> Joint Committee on Human Rights, Nineteenth Report of Session 2005-06, para. 27.

<sup>69</sup> Chris Mullin, "America must tell us the truth about its gulag," *The Independent*, December 4, 2005, <http://comment.independent.co.uk/commentators/article331006.ece> (accessed June 16, 2006).

<sup>70</sup> "Today Programme," BBC Radio 4, January 6, 2006.



*I have no reason to believe that suspected terrorists have been rendered through UK territory or airspace during the Bush Administration. None of the information published recently has demonstrated otherwise...*

Jack Straw, then foreign secretary, writing to the Joint Human Rights Committee<sup>71</sup>

The U.S. government policy of “extraordinary rendition”—in effect, state-sponsored abduction and delivering people to be interrogated and tortured in third countries—has become controversial worldwide in the past two years. Two examples illustrate the well-documented pattern.

An Italian judge has issued warrants for the arrest of twenty-five presumed CIA agents wanted in connection with the abduction of Hassan Osama Nasr (also known as Abu Omar), a radical Egyptian cleric, in Milan in 2003. An arrest warrant has also been issued against a U.S. commander at Aviano Air Base in northern Italy for his role in assisting the transfer of Abu Omar first to Ramstein Air Base in Germany and then on to Egypt. Abu Omar was under investigation by Italian police, with a view to possible prosecution, at the time of his abduction.

Khaled el Masri, a German citizen of Lebanese origin, was picked up in Macedonia in 2004. After a brief period of detention he was taken to Afghanistan and held in a secret U.S. detention facility in that country. He was later released without charge. El Masri is suing the CIA for wrongful imprisonment.

Planes leased by the CIA have been used to transport such detainees around the world, with itineraries that include Guantanamo, Afghanistan, Jordan, Morocco and Uzbekistan; many of the itineraries include stop-offs in the UK. On some occasions, the United States acknowledged taking the disappeared persons into custody.

Until September 2006—when President George W. Bush finally admitted the existence of secret CIA detention facilities used to detain so-called high-value terrorism suspects, and indicated that 14 such suspects would be transferred to

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<sup>71</sup> Joint Committee on Human Rights Session 2005-06 - Written Evidence - Letter from Rt. Hon. Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs, December 21, 2005.

military custody and subsequently prosecuted—the U.S. had repeatedly refused to release information about where detainees were being held, in violation of the ban on incommunicado detention. Nor—in defiance of the ban on prolonged arbitrary detention—had it sought to bring charges against those in custody.<sup>72</sup>

A number of other “ghost detainees” remained unaccounted for, and it remains unclear whether the 14 suspects transferred will be prosecuted in accordance with international fair trial standards.

The victims of these abductions were rendered to countries with a track record of torture. Robert Scheuer, formerly of the CIA, explains how the system evolved: “When the CIA came back and said to the policymaker, where do you want to take them, the answer was – that’s your job.”<sup>73</sup>

President Bush was asked why people were transferred out of U.S. custody to countries where torture is common. The President’s response was less than convincing:

[In] the post-9-11 world, the United States must make sure we protect our people and our friends from attack.... One way to do so is to arrest people and send them back to their country of origin with the promise that they won’t be tortured. That’s the promise we receive. This country does not believe in torture.<sup>74</sup>

The President was then asked specifically about returns to Uzbekistan, a country with a notorious record on torture: “As commander in chief, what is it that Uzbekistan can do in interrogating an individual that the United States can’t?” His response was: “We seek assurances that nobody will be tortured.”

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<sup>72</sup> See Human Rights Watch, *The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees,”* October 2004, <http://www.hrw.org/backgrounders/usa/us1004/us1004.pdf> Reed Brody (Human Rights Watch), “Ghost detainees of the U.S.: Prisoners who disappear,” commentary, *International Herald Tribune*, October 12, 2004, [http://www.iht.com/articles/2004/10/12/edbroyd\\_ed3\\_.php](http://www.iht.com/articles/2004/10/12/edbroyd_ed3_.php) (accessed August 4, 2006); “U.S. Operated Secret ‘Dark Prison’ in Kabul,” Human Rights Watch news release, December 19, 2005, <http://hrw.org/english/docs/2005/12/19/afghan12319.htm>.

<sup>73</sup> Stephen Grey, “Trade in torture,” *The New Nation*, October 11, 2005.

<sup>74</sup> President’s Press Conference. James S. Brady Briefing Room, March 16, 2005, <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html> (accessed June 16, 2006).

Others spelled things out more clearly. One U.S. diplomat was quoted as saying: “It allows us to get information from terrorists in a way we can’t do on U.S. soil.”<sup>75</sup> A former CIA agent, Robert Baer, explained, “The ultimate destinations of these flights are places that, you know, are involved in torture.”<sup>76</sup> In Baer’s words, “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear - never to see them again - you send them to Egypt.”<sup>77</sup>

Such returns are in flagrant breach of international law, including the UN Convention against Torture. In addition, there have been credible allegations that U.S. officials themselves have carried out abuses in secret interrogation centres that have become known as “black sites.”<sup>78</sup>

Jack Straw, then foreign secretary, put his name to an EU letter written in December 2005, while the UK held the Presidency of the European Union, asking Washington to answer questions about the handling of detainees in U.S. custody. But the British government has shown little eagerness to press the issue.

As Chris Mullin, a former Foreign Office minister, has pointed out: “If the [UK] government’s policy is against rendition, then we must make that clear. The franchising out of torture is wholly unacceptable.”<sup>79</sup> UN officials have been equally clear about the extent of the problem. Martin Scheinin, UN rapporteur on human rights and counterterrorism, warned of the danger that the UK government would be complicit “[i]f it allows or ignores indications to the effect that there are other countries using its airports for the transfer of persons against their will.”<sup>80</sup> The British government, meanwhile, has seemed determined to content itself with reassurance from Washington that everything that the United States government does is legal,

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<sup>75</sup> Duncan Campbell, “U.S. sends suspects to face torture,” *The Guardian*, March 12, 2002.

<sup>76</sup> “File on Four,” BBC Radio 4, February 8, 2005. Transcript available at [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15\\_02\\_05\\_renditions.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf) (accessed July 26, 2006).

<sup>77</sup> Stephen Grey, “America’s gulag,” *New Statesman*, May 17, 2004.

<sup>78</sup> Human Rights Watch, *The United States’ “Disappeared”*; “U.S. Operated Secret ‘Dark Prison’ in Kabul,” Human Rights Watch news release.

<sup>79</sup> Ian Cobain, Stephen Grey and Richard Norton-Taylor, “MPs from all parties prepare campaign to halt CIA terror flights from Britain,” *The Guardian*, September 13, 2005.

<sup>80</sup> “Today Programme,” BBC Radio 4, January 6, 2006.

despite a body of evidence to the contrary. British ministers have provided formulaic replies. The all-party Foreign Affairs Committee noted that government ministers failed to answer the committee's questions "with the transparency and accountability required on so serious an issue."<sup>81</sup>

Jack Straw told the Joint Human Rights Committee that he had "no reason" to believe that suspected terrorists may have been rendered through UK territory, and that "none of the information published recently has demonstrated otherwise." But the committee noted the British government's conspicuous reluctance to press home this point: "In regard to extraordinary renditions, as elsewhere, compliance with the Convention against Torture and other human rights standards requires more than passive non-cooperation in torture; it requires active investigative and law enforcement action to prevent torture or inhuman and degrading treatment."<sup>82</sup>

This determination not to speak out, nor publicly to press Washington with difficult questions, made it easier for the U.S. to continue this abusive practice. International pressure, together with decisions by the U.S. Supreme Court, helped prompt the White House's September 2006 admission. But Britain has repeatedly avoided opportunities to exert such pressure, and even moved to prevent criticism by others of U.S. secret detention facilities, where torture is known to have been carried out. Geoff Hoon, the Europe minister, intervened at a meeting of European Union foreign ministers in September 2006 to ensure that the EU ministerial conclusions did not include criticism of the United States in connection with the secret detention facilities.<sup>83</sup>

## Complicity in Illegal Transfers

*My interrogator asked me "Why are you so angry at America? It is your Government, Britain, the MI5, who called the CIA and told them that you and Bisher were in The Gambia and to come and get you. Britain gave everything to us. Britain sold you out to the CIA."*

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<sup>81</sup> House of Commons Foreign Affairs Committee, "Sixth Report: Foreign Policy Aspects of the War against Terrorism," Para 98.

<sup>82</sup> Joint Committee on Human Rights, Nineteenth Report Session 2005-06, para. 156.

<sup>83</sup> Suzanne Goldenberg and Nick Watt, "Bush digs in after terror law rebellion," *The Guardian*, <http://www.guardian.co.uk/international/story/0,,1873734,00.html> (accessed September 20, 2006).

Statement of Jamil el-Banna to his lawyer during an interview at Guantanamo<sup>84</sup>

*I never thought the British Government would allow me to be slashed with a razor blade for a full year. I never thought they would let me be hauled to the Dark Prison in Kabul for further abuse before my trip to Guantánamo.*

Binyam Mohammed al-Habashi<sup>85</sup>

The British government is not only complicit by its reluctance to speak out about renditions, in some cases it is implicated in them.

In November 2002 Bisher al-Rawi and Jamil el-Banna, both British permanent residents, were arrested in Gambia and interrogated incommunicado by Gambian security agents and then by U.S. operatives. After being questioned by U.S. agents about their alleged ties to al-Qaeda, the men were secretly transferred sometime in January 2003, first to Afghanistan and then to Guantanamo, where they remain in detention. The men were not allowed to consult a lawyer prior to transfer. Nor did they have an opportunity to challenge any evidence against them.

In the course of legal proceedings in the High Court of England and Wales in 2006, challenging the government's refusal to seek release of the men from Guantanamo, it was revealed that the UK security services had kept the two men under close surveillance in Britain during the run-up to their departure for Gambia, including a visit to el-Banna's home about ten days before his travels when they told him they knew about his trip. The UK authorities passed information—including flight and arrival details and the men's associations in the UK—to the Gambian authorities and to those of another (undisclosed) country. According to the judgment of the High Court:

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<sup>84</sup> Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states," para. 171.

<sup>85</sup> Amnesty International, "Who are the Guantanamo Detainees?" Case Sheet 12: Binyam Mohammed al-Habashi, AI Index: 51/152/2005, September 21, 2005, <http://www.amnesty.org.ru/library/Index/ENGAMR511522005?open&of=ENG-MAR>(accessed August 4, 2006).

The fact of the matter... is that information was undoubtedly given to Gambians about the proposed movements of the claimants; and the surrounding circumstances suggest that either directly or indirectly this information came into the hands of the United States authorities.<sup>86</sup>

The UK government denies any complicity on the part of the Foreign Office or the Home Office in the detention of al-Rawi and el-Banna. The government does not mention possible complicity by UK security and intelligence agencies. According to a Council of Europe report on secret detentions and unlawful transfers involving European governments issued in June 2006, however:

This case... is an example of (ill-conceived) cooperation between the services of a European country (the British MI5) and the CIA in abducting persons against whom there is no evidence enabling them to be kept in prison lawfully...<sup>87</sup>

The case of Binyam Mohamed al-Habashi, an asylum seeker who lived in the UK since 1994, also raises the disturbing question of the UK's role in providing information that may have assisted in a rendition. Binyam Mohamed al-Habashi apparently left the UK in 2001 in an attempt to control a drug addiction. He was arrested in Pakistan in April 2002 and then forcibly transferred from country to country, in his case three times, without any access to a court. He alleges that he was severely tortured and ill-treated in each country, Pakistan, Morocco, and in a "dark prison" in Afghanistan, and then flown to Guantanamo, where he is detained as of this writing. Information sharing between the UK and the various governments involved, including the U.S., has been a feature of the case. In the words of the Council of Europe report:

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<sup>86</sup> R. on the application of Bisher Al Rawi and others v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department, [2006] EWHC 972 (Admin), May 4, 2006, <http://www.bailii.org/ew/cases/EWHC/Admin/2006/972.html> (accessed July 5, 2006). See also discussion in Amnesty International, "Partners in Crime," p. 44.

<sup>87</sup> Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states," para. 163.

Binyam’s case is an example for the very numerous detainees – most of whose names and whereabouts we do not know – who have become trapped in the United States’ spider’s web during the course of the “war on terror.” Binyam has been subjected to two CIA renditions, a U.S. military transfer to Guantanamo Bay and several other clandestine transfers by plane and helicopter. He has been held in at least two secret detention facilities, in addition to military prisons. During his illegal interrogations, he has been confronted with allegations that could only have arisen from intelligence provided by the United Kingdom.<sup>88</sup>

## **Whitewashing U.S. Government Abuses**

*The U.S. has since conducted three substantial enquiries into allegations of abuse in Iraq and has investigated and punished those responsible.*

Foreign and Commonwealth Office Human Rights Report 2005

*We still haven’t had an independent investigation or inquiry into Abu Ghraib, or what led to Abu Ghraib, or where was it occurring before Abu Ghraib.*

Janis Karpinski, former military police commander at Abu Ghraib, May 2006<sup>89</sup>

Attempts by the United States to undermine the international prohibition against torture are well documented in recent years. In 2002, memos from the U.S. Justice Department explicitly sought to define torture so narrowly as to define it almost out of existence.<sup>90</sup> In 2005, Senator John McCain fought hard, against the opposition of the White House, to close a loophole that would have left the CIA exempt from the torture ban.

The UN Committee against Torture issued a highly critical report in May 2006, calling on the United States to close all secret prisons, hold accountable senior military and civilian officials who authorized, acquiesced or consented to acts of torture

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<sup>88</sup> Ibid., para. 198.

<sup>89</sup> “Today Programme,” BBC Radio 4, May 31, 2006.

<sup>90</sup> See for example Reed Brody, “The Road to Abu Ghraib: Torture and Impunity in U.S. Detention,” in Kenneth Roth and Minky Worden, eds., *Torture: does it make us safer? Is it ever OK? A human rights perspective* (London: The New Press, 2005)

committed by their subordinates, and end the practice of transferring detainees to countries with known torture records.<sup>91</sup> The committee rejected U.S. claims that the Convention against Torture did not apply to U.S. personnel acting outside of the United States or during wartime.

Senior military lawyers in the United States understand the dangerous implications of the new U.S. permissiveness on torture. Thus, Alberto Mora, former general counsel of the U.S. Navy, commented, “Getting information became the overriding objective. But there was a failure to look more broadly at the ramifications... When you put together the pieces, it’s all so sad. To preserve flexibility, they were willing to throw away our values.”<sup>92</sup>

More recently, in pushing a military commissions law through Congress, the Administration sought to redefine common article 3 of the Geneva Conventions, which prohibits torture and cruel treatment. The administration's goal was to permit the use of “alternative” interrogation methods that violate international law -- methods that the CIA had been using against detainees in secret prisons. As President Bush’s former Secretary of State, Colin Powell, argued, in opposing the administration's effort: “The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts.”<sup>93</sup>

The views of the UK carry real weight in Washington. British Prime Minister Tony Blair perhaps has more influence in the White House than any other world leader. If criticisms from Blair were publicly expressed, that would have impact on U.S. public opinion, and thus help put pressure on the White House to change its policies.

But until very recently it was virtually impossible to find serious criticism in public from the British government of U.S. counterterrorism policies and practice. In the law lords ruling of December 2005, which rejected the use of torture evidence, Lord Hope noted,

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<sup>91</sup> Conclusions and Recommendations of the UN Committee against Torture, United States of America, CAT/C/USA/CO/2, <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf> (accessed June 16, 2006).

<sup>92</sup> Jane Mayer, “The Memo,” *New Yorker*, February 27, 2006.

<sup>93</sup> Letter to Senator John McCain, September 13, 2006. <http://graphics8.nytimes.com/packages/pdf/politics/PowellLetter.pdf> (accessed October 20, 2006).



Torture is one of most evil practices known to man. Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use... Views as to where the line is to be drawn may differ sharply from state to state. This can be seen from the list of practices authorised for use in Guantánamo Bay by the U.S. authorities, some of which would shock the conscience if they were ever to be authorised for use in our own country.<sup>94</sup>

Such strong but carefully chosen words were never heard from British ministers for a full three years. Instead, Tony Blair repeatedly used euphemisms like “anomaly” to describe Guantanamo. Only in spring 2006, by which time even the U.S. had begun to suggest that Guantanamo might be closed, did Britain suddenly find Guantanamo abhorrent. In June 2006 Lord Falconer, the lord chancellor, argued, “I think that Guantanamo Bay is a recruiting agent for those who would attack all our values.” He told the BBC television program *Question Time*,

We live by the rule of law. What Guantanamo Bay is doing is placing people beyond the rule of law, which I think is intolerable and wrong. It should never have been opened and it should be closed.<sup>95</sup>

The British government has never explained why it took more than three years to acknowledge this self-evident truth. To this day, the prime minister has never used such unequivocal language, which might be heard clearly in Washington.

In other contexts, too, the British government has been determined to play down abuses by the U.S. government. In criticizing the “shameful” abuses at Abu Ghraib, the 2005 Foreign Office Human Rights Report claims, “The U.S. has since conducted three substantial enquiries into allegations of abuse in Iraq and has investigated and punished those responsible.” In reality, the inquiries into the events at Abu Ghraib

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<sup>94</sup> A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004), A (FC) and others (Appellants) (FC) v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2005] UKHL 71, para. 101, <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jdo51208/aand.pdf> (accessed June 16, 2006).

<sup>95</sup> “Question Time,” BBC 1, June 14, 2006.

were constructed in such a way as to ensure that high-level officials would not be implicated. None of the various commissions constituted under the Department of Defense had either the institutional independence or the authority to investigate responsibility for policies devised at the highest levels of government.

On the broader question of U.S. torture policy, we see the same story of British determination not to criticize. A confidential memo from the Foreign Office to Downing Street, published by the *New Statesman*, lays bare the official determination not to criticise Washington's dangerous stance:

We should try to avoid getting drawn on detail... and try to move the debate on, in as front foot a way as we can, underlining all the time the strong counter-terrorist rationale for close cooperation with the US, within our legal obligations. Armed with [Secretary of State Condoleezza] Rice's statement and the Foreign Secretary's response, we should try to situate the debate not on whether the US practices torture (and whether the UK is complicit in it): they have made clear they do not – but on to the strong US statements in Rice's text on their commitment to domestic and international instruments. A debate on whether the US test for torture/CID [cruel, inhuman and degrading treatment] derives from their commitments under the US Constitution rather than international law is better ground than the principle of whether they practice torture.<sup>96</sup>

Rather than advising a trusted ally that its policies on torture and inhumane treatment are wrong, the British government prefers to rely on legal abstraction to divert attention from the true issues. The memo itself thus reinforces the complicity.

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<sup>96</sup> Martin Bright, "Rendition: the cover up," *New Statesman*, January 23, 2006, <http://www.newstatesman.com/pdf/rendition/rendition.pdf> (accessed August 4, 2006).

## Conclusion: A Stark Choice

As a result of the combination of policies outlined above, the UK is in a weaker position than ever before to work on combating torture. It still claims strongly to support the ban on torture. And yet, at the same time, it acts in a way that clearly undermines that ban. The British government can no longer have it both ways.

The UK is losing the credibility that it once enjoyed. The government's determination to bend the rules on its own account, and its refusal to confront abuses committed by its closest ally, is a moral and political abdication, in defiance of international law.

The UK government, under Tony Blair and his as yet unnamed successor, now faces a stark choice: It can further develop policies—like memoranda of understanding, and its challenge in the *Ramzy* case—that deliberately and dangerously undermine the international ban on torture. Alternatively, the government can acknowledge that bending and seeking to trample the rules is not the way forward, in a time of real insecurity. Britain can once again play a role at the vanguard of combating torture, as it did in previous years. But to do so requires a fundamental change of direction and an end to recent policies that undermine torture. Failure to change direction will damage us all.

Specifically, the UK government should undertake the following measures as a matter of urgent priority:

- Refrain from returning any person to a place where he or she faces the risk of torture, whether or not diplomatic assurances against torture have been obtained from the country of return.
- Cease the practice of seeking diplomatic assurances against torture, whether contained in memoranda of understanding or otherwise, as a means of removing terrorism suspects at risk of torture from the United Kingdom.
- Withdraw from the intervention in *Ramzy v. Netherlands*, and reaffirm the absolute nature of the prohibition on returns to risk of torture and prohibited ill-treatment under international law.

- Investigate allegations of complicity by the British security services in the abduction or extraordinary rendition of terrorism suspects by the United States for the purposes of interrogation and torture.
- Speak out clearly and unequivocally against torture and ill-treatment across the globe, including where such abuse is carried out by agents of the U.S. government.
- Where credible evidence exists of criminal activity that threatens national security, prosecute those responsible to the fullest extent of the law, and in accordance with international fair trial standards.

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