The Rt. Hon. Sir Peter Gibson
c/o Ripley Building
26 Whitehall
London
SW1A 2WH
United Kingdom

08 September 2010

Re: Inquiry into alleged UK involvement in the mistreatment of detainees held abroad

Dear Sir Peter

Following the announcement by Prime Minister David Cameron on 6 July of an inquiry into allegations of UK involvement in the mistreatment of detainees held abroad, the AIRE Centre, Amnesty International, British Irish RIGHTS WATCH, Cageprisoners, Justice, Liberty, Redress, Reprieve, and the Medical Foundation for the Care of Victims of Torture, write to offer a number of constructive comments to ensure the success of the inquiry.

A sufficiently empowered and transparent inquiry could discharge the United Kingdom's duty to effectively investigate damaging allegations of knowledge and/or involvement by state actors or agents in the torture, ill-treatment or rendition of individuals that have arisen in the last decade. Such an inquiry could also play an important role in clarifying how involvement in torture, ill-treatment or rendition might be prevented in the future.

It is incumbent on governments to promptly and effectively investigate all allegations of torture and other related human rights abuses. In order to comply with basic human rights standards, it is essential that the inquiry be:

(1) **Prompt.** The earliest events that this inquiry must consider occurred at least a decade ago. Delay has increased the damage caused by allegations of involvement in torture and ill-treatment and has already reduced the potential for the inquiry to uncover the truth.

(2) **Independent.** The persons responsible for and carrying out the inquiry must be fully independent of any institution, agency or person who may be the subject of, or are otherwise involved in, the inquiry. Where allegations of involvement in torture and ill-treatment have been made, an independent response is particularly important in order to preserve confidence in the administration of justice.

(3) **Thorough.** The inquiry must be sufficiently empowered, staffed, and resourced to be thorough, wide-ranging and rigorous. It must be able to pronounce on state responsibility for knowledge and involvement in the serious human rights violations that have been alleged and to identify any individuals responsible for such abuses, including establishing the responsibility of superior officers for crimes committed by subordinates under their effective control. The inquiry must be capable of determining whether any conduct was unlawful and thus must be empowered to: secure all relevant evidence and testimony; interview victims and their families; question any eye witnesses; take statements of any officials alleged to have been involved in violations; secure appropriate medical reports; and consider any evidence which implicates any public officials or agents of the state.

(4) **Subject to public scrutiny, with the participation of victims.** The inquiry must be open to adequate public scrutiny. Survivors or victims must be involved in the process to ensure their right to effective investigation and redress, and special measures must be adopted to ensure this participation is supportive, safe and effective; non-governmental organizations have an important role to play in this regard. The participation of survivors, victims and civil society ensures the adherence of the inquiry to the rule of law, prevents any appearance of collusion in or tolerance of illegal acts, and helps safeguard victims' rights to an effective remedy and reparations.

It is fundamental to the legality, credibility and utility of the inquiry that it complies with the United Kingdom's international human rights obligations, including standards arising from the Convention against Torture, the European Convention on Human Rights, and the common law.

Terms of reference

The terms of reference of the inquiry must permit the consideration of the full range of alleged abuses. To that end, we propose the following terms:

> "The inquiry shall be empowered to inquire into knowledge of and involvement in the unlawful rendition of individuals, and torture and other cruel, inhuman or degrading treatment of detainees held abroad, by any UK state actors and agents, including corporate bodies, in the lead up to the 11 September 2001 attacks in the USA and subsequent to them. The inquiry shall examine both policy and practice, and make recommendations."

The development of satisfactory terms of reference - in consultation with the survivors and victims of abuses, their representatives, and interested non-governmental organizations - is essential to ensure that the inquiry provides effective redress for all victims of the alleged abusive practices, identifies the policies that gave rise to them, and suggests appropriate reforms.

Conduct of the inquiry

The UK government has noted a variety of reasons for establishing a forensic inquiry - the reputational damage to the country and the security services caused by the allegations; the desire on the part of the security services to establish their integrity; the resource burden on the security services in lengthy court cases; exploitation of the allegations by extremists for propaganda purposes; and the need to systematically get to the truth and ensure that such abuses will not happen again. Our organizations would add to this list the requirement of effective redress for any victims of these alleged abuses and the need to hold accountable those responsible for serious human rights violations.

In order for the inquiry to fulfil its purposes, we recommend the following:

(1) The inquiry must appoint a strong legal team with sufficient expertise to deal with the range of human rights, intelligence, and secrecy issues that it is likely to face;

(2) The presumption must be that each stage of the inquiry will be public, with as much evidence as possible to be heard and considered in public;

(3) The inquiry must ensure that survivors and victims have standing as parties to the inquiry and have a right to legal representation funded by the inquiry. Survivors, victims and their representatives must be kept informed of all information relevant to the investigation and have access to hearings and the ability to make submissions;

(4) Other interested parties, including the intelligence services, must also have standing and the right to legal representation funded by the inquiry. They and their representatives must be kept informed of all information relevant to the investigation; and have access to hearings and the ability to make submissions;

(5) The inquiry must require that all relevant documents be disclosed to the inquiry by the government; the head of the inquiry must have the power to decide whether or not to make such documents public;

(6) The inquiry must aim to achieve maximum possible disclosure. Any determination that certain information should be kept confidential, including on the grounds of national security, should be made applying limited and precisely defined grounds that are specified in advance; an independent mechanism should be developed to ensure that any decision by the inquiry panel to withhold such information is in the public interest;

(7) The inquiry must ensure that any invocation of secrecy or confidentiality on the part of the government, its agents, or the inquiry does not: prevent an independent, impartial, and thorough investigation of alleged human rights violations; prevent the government and individual perpetrators from being held accountable; prevent a victim from receiving an effective remedy, including reparation; or prevent full and public disclosure of the truth;

(8) The inquiry must be empowered to require the production of evidence, subject to ordinary rules of admissibility, and must also be able to require a person to attend the inquiry to give evidence or to provide a written statement. It must be an offence for a person to fail to do anything that is required of him or her regarding the production of evidence. It must be an offence to do anything to distort or alter evidence provided to the inquiry;

(9) The inquiry panel must request the cooperation of agents and officials of foreign states who can provide relevant evidence, and that the government should support such requests;

(10) The inquiry panel should be empowered to enforce cooperation from corporations doing business in the UK who are alleged to have had knowledge of or been involved in any abuses that are the subject of the inquiry;

(11) It is imperative that the inquiry report be published, and that any redactions for national security reasons be agreed by the inquiry panel and be subject to review by a court. The inquiry must be empowered to not only establish particular facts, practices and policies, but should also consider the adequacy of measures in place to prevent the occurrence of any wrongdoing in the future. The final report must be made public and should at a minimum include the conclusions and recommendations based on findings of fact and applicable law, in sufficient detail to satisfy the requirement of full and public disclosure of the truth about UK responsibility for the human rights violations in question.

Involvement of Non-Governmental Organizations

The direct participation of civil society is imperative for the proper conduct of this inquiry.

First, the allegations of UK involvement in illegal conduct are wide ranging in time and nature. Various NGOs have been at the forefront of establishing such patterns of conduct, and are in a position to assist the inquiry in designing its scope and in pursuing certain lines of inquiry.

Second, the participation of survivors and victims, which is a requisite component of an effective, human rights-compliant investigation, is complicated in many instances. For example, some who might have substantial evidence of great relevance to the terms of the inquiry remain in illegal detention in Guantanamo Bay and elsewhere. It is important that their voices should be heard.

Third, the credibility of this inquiry rests on the extent to which it properly engages with public concerns about these most serious allegations. Allowing for close NGO scrutiny will ensure that the inquiry is seen to be robust and fair.

NGOs should have the opportunity to be present throughout the inquiry, including representation by counsel, and have the opportunity to make submissions regarding any aspect of the inquiry.

We believe that a human rights compliant inquiry that provides full victim and NGO participation by implementing the above modest suggestions has every prospect of success, and encourage the inquiry's engagement with the victims, their representatives, and the broader NGO sector.

Yours sincerely

The AIRE Centre

Amnesty International

British Irish Rights Watch

Cageprisoners

Justice

Liberty

The Medical Foundation for the Care of Victims of Torture

Redress

Reprieve

cc:

The Rt. Hon. Dame Janet Paraskeva
The Rt. Hon. Peter Riddell
The Rt. Hon. David Cameron, Prime Minister
The Rt. Hon. Nick Clegg, Deputy Prime Minister
The Rt. Hon. Baroness Neville-Jones
Sir Gus O'Donnell
Sir Peter Ricketts

The Rt. Hon. Sir Peter Gibson
The Detainee Inquiry
35 Great Smith Street
London
SW1P 3BQ
United Kingdom

08 February 2011

Re: Submission to the Detainee Inquiry

Dear Sir Peter

Thank you for the opportunity to raise and discuss a number of issues with respect to the conduct of the Detainee Inquiry at the non-governmental organization (NGO) stakeholder meeting on 20 January 2011; the openness of the discussion was much appreciated. Following your suggestion, we have put in writing our views on a number of the issues raised.

This submission seeks to address an issue of fundamental importance to the Detainee Inquiry Panel: what constitutes a human rights-compliant inquiry under the United Kingdom's international legal obligations, in particular the general requirements deriving from Article 3 (prohibition against torture) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and other relevant international standards.

More specifically, the latter section of this submission addresses two issues with respect to the disclosure of evidence, including recommendations for how the Inquiry should handle material which the government claims cannot be made public due to considerations of national security and the need for powers to compel the production of documents and attendance of witnesses.

General requirement of an Article 3 inquiry

At the 20 January meeting, we discussed the need for the Detainee Inquiry to comply in letter and spirit with the international obligation to investigate allegations of torture and other ill-treatment. The protocols for other inquiries were mentioned, such as the Chilcot and Saville Inquiries, but it is important to recognise that the Detainee Inquiry was established specifically to examine allegations of torture and other ill-treatment, which give rise to particular requirements under Article 3 ECHR.

The European Court of Human Rights case law requires that any investigation or inquiry into allegations of torture adhere to the following principles: in general, it must be independent, impartial, subject to public scrutiny, and include effective access for victims to the process. Persons conducting the inquiry must act with exemplary diligence and promptness, and the investigation must be capable of establishing the facts and identifying those who were responsible for the violations.[1] The state's obligation to investigate is not relieved by its inability to obtain cooperation from other states that have access to some of the relevant information.[2] Every effort must be made to seek and secure information regarding torture violations, including from other states and despite their unwillingness to cooperate (see section below on what constitutes a "thorough" inquiry).

The duty to investigate allegations of torture obtains even when the state in question is not alleged to have directly perpetrated the violations in question, but is alleged to have had knowledge of, been complicit or involved in, or provided help or assistance to another state which has had a substantial impact with respect to the perpetration of the violation.[3] In situations where there appears to be a pattern of serious human rights violations, the investigation should be expansive enough to examine broader questions of the systemic nature of the violations, the chain of command and management within the system, and the institutional culture of the agencies and other governmental apparatus alleged to have perpetrated or been complicit in the violations.[4]

The Detainee Inquiry must be carried out in a manner capable of producing tangible results.[5] It is an obligation of means, not of result.[6] As a consequence, "[a]ny deficiency in the investigation which undermines its ability to establish the circumstances of the case, or the person responsible, is liable to fall foul of the required measure of effectiveness."[7] Thus, a failure to conduct the Inquiry properly would constitute a violation by the UK of its obligations under Article 3 that is *additional* to and independent of any violation of Article 3 arising from the torture itself.[8]

Constituent elements of an Article 3 inquiry

An Article 3 compliant inquiry into allegations of torture and other ill-treatment must be 1) prompt; 2) independent; 3) thorough; 4) capable of leading to the identification and prosecution of persons responsible; and 5) provide for public scrutiny and victim participation. While our letter of 8 September 2010 referred to these elements, this submission provides more detail regarding the legal basis for the requirement of each element and some policy considerations for ensuring adherence to them.

Prompt: European Court of Human Rights jurisprudence has interpreted an implicit requirement for promptness and reasonable expedition into the obligation to conduct an effective investigation capable of leading to the identification and punishment of those responsible for human rights violations.[9] Some of the events that the Detainee Inquiry will examine occurred at least a decade ago, which may present challenges to establishing some facts with regard to the allegations. It is thus vital that the Inquiry is provided immediately with all the necessary resources, both human and material, to enable it to investigate these allegations in as expedient a manner as possible.[10] It is important, however, that the inquiry not be limited to one year if a longer period is required to effectively investigate the allegations.

- The Detainee Inquiry Panel should publicly announce now that, should it become evident that an extension of the one-year time period provided by the Prime Minister is necessary for the Panel to complete an effective investigation, it will make such a request to the Prime Minister and would expect such an extension to be granted.
- The Detainee Inquiry Panel should request adequate resources to ensure that the inquiry commences at a pace that complies with the legal requirement that it be concluded in as prompt and expeditious a manner as possible, without sacrificing efficacy.

Independent: An effective investigation requires that the persons responsible for and carrying out the investigation are independent from those implicated in the events.[11] An independent investigation "means not only a lack of hierarchical or institutional connection but also a practical independence" of

the investigating authority.[12] The need for independence is particularly important where agents of the state are suspected of having been involved in the violation of Article 3,[13] because, in the European Court of Human Rights' view, a prompt and independent response subject to public scrutiny is essential to preserve confidence in the administration of justice.[14]

- The Detainee Inquiry Panel should disclose any conflict of interest that might jeopardize the independence of the investigation;
- The Detainee Inquiry Panel should consider policies and practices that ensure its practical independence from the government, such as the publication on a public website of as many transcripts and as much evidence as possible, the holding in public of as many hearings as possible, and public acknowledgment of any limitations that have been imposed on the Inquiry by the government or by any state agency.

Thorough: In order to comply with the requirements of Article 3 ECHR the Detainee Inquiry must be thorough, wide-ranging and rigorous, and capable of leading to the identification and punishment of those responsible for human rights violations. It thus must be able to:

- Establish the facts of the alleged violations and publicly disclose the truth of the allegations to the fullest extent possible;
- Pronounce on state responsibility for knowledge of and involvement in the serious human rights violations that have been alleged;
- Investigate the policies and practices that led to involvement in violations of human rights;
- Identify where government practices or policies deliberately, or inevitably (if not through lack of due diligence), gave rise to human rights violations;
- Identify any individuals responsible for such abuses, including establishing the responsibility of superior officers for crimes committed by subordinates under their effective control; [15]
- Refer information regarding criminal conduct and human rights violations to the relevant authorities;
- Identify measures to prevent reoccurrence of involvement in human rights violations, including recommendations for effective independent oversight of the intelligence services, aimed at ensuring their full accountability.

It is critical to note that the procedural obligation of thoroughness is stricter where the state, as opposed to private individuals or other non-state actors, is implicated in an offence, and requires a wider examination than simply investigating individuals who may have been involved in the violations. For example, wider examination is required if the investigation fails to address the full scope of the state's involvement in the violations.[16] The European Court of Human Rights has also found that there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial, such as where government policy or practices deliberately or inevitably gave rise to unlawful conduct, including by their concealment. In such instances, a wider inquiry may be warranted, as the European Court of Human Rights had found in several of the UK cases related to the killings of alleged IRA members.[17]

A review of European Court of Human Rights case law suggests that the following measures are required of those persons responsible for conducting an inquiry or investigation into allegations of torture and other ill-treatment:

(1) take all reasonable steps to secure evidence concerning the incidents under investigation, including forensic evidence and testimony of eyewitnesses and other key witnesses;[18]

(2) attempt to interview the victims/survivors of the alleged violations;[19]

(3) attempt to question eyewitnesses in the immediate aftermath of an incident when memories are fresh;[20]

(4) identify all officials involved in the violations;[21]

(5) take careful and prompt statements of officials involved in the violations;[22]

(6) resolve uncertainties and ambiguities in accounts of key witnesses and physical evidence;[23]

(7) secure an independent medical report in cases of alleged torture and other ill-treatment where one is reasonably required;[24]

(8) secure the evidence of a forensic specialist where one is reasonably required;[25]

(9) make efforts to locate and secure key evidence, (including not simply accepting allegations of facts by state authorities, but rather investigating whether there is actually any evidence in support of them);[26]

(10) take account of evident or visible evidence;[27]

(11) take account of evidence which supports allegations of involvement of state agents;

(12) not give undue weight to unsupported conclusions[28] or inferences and conclusions that lack sufficient evidentiary support;[29] and

(13) not reach factual conclusions that require assumptions contrary to the principles under Article 3.[30]

We thus recommend that:

- The Detainee Inquiry ensure that it has relevant and adequate expertise in terms of staffing to ensure that the skill set required to thoroughly and effectively investigate the allegations of torture and other ill-treatment is secured on the Inquiry team;
- The Detainee Inquiry ensure that it has powers to compel the disclosure of evidence and the testimony of relevant witnesses (see section below on disclosure issues);
- The Detainee Inquiry identify and establish the responsibility of individuals for human rights violations, and refer that information to relevant authorities.

Public Scrutiny and Victim Participation: In order to maintain public confidence in the UK's adherence to the rule of law and to prevent any appearance of its ongoing collusion in or tolerance of unlawful acts, "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[31] This is particularly so where there are serious issues of public interest at stake, in which case the findings must be given the widest possible exposure.[32]
Aside from determinations regarding public access to information, victims must be afforded effective access to the investigatory procedure[33] and must be involved in the procedure to the extent necessary to safeguard their legitimate interests.[34] (See section below on disclosure).

European Court of Human Rights case law also requires the particularly vulnerable situation of victims of torture to be taken into account during investigations.[35] We were heartened at the 20 January meeting by indications that legal representation will be afforded to the victims (or 'survivors' as many prefer to be called) at the Inquiry's expense. The panel also appeared receptive to NGO representations on the importance of both properly assessing the needs of victims who will be involved in the inquiry and developing appropriate processes that facilitate disclosure by victims whilst minimising the risk of re-traumatisation and other forms of harm.

We propose that:

- The Detainee Inquiry work with clinical and other specialists from NGOs to develop a written protocol to guide the Inquiry's approach to involving victims and the special measures that will be adopted to support their participation.

The right to effective remedy and redress for victims

The UK's obligation to carry out an effective investigation into allegations of torture and other ill-treatment also derives from the right of victims of human rights violations to effective remedy and redress, as firmly rooted in Article 13 ECHR (right to an effective remedy) and other international legal standards.[36]

An effective remedy includes, among other things, the right of victims, their families and society as a whole to know the truth regarding the violations suffered, including the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred.[37] The right to an effective remedy and redress also includes guarantees of non-repetition which should include measures to ensure that such violations are not repeated in the future. Allegations of UK involvement in serious human rights violations of individuals detained abroad in the context of counter-terrorism operations reaches beyond cases connected to the CIA-led programme of rendition and secret detention. Accordingly the need to learn lessons in order to prevent future violations from occurring is paramount to securing public confidence that such violations will not be repeated.

The need for an independent mechanism for disclosure

The issue of whether material considered by the Inquiry should be kept confidential is one of the most important issues the Panel will have to deal with. In some cases, this may involve a difficult balancing exercise. On the one hand, there may be, in limited circumstances, a public interest in ensuring that, for instance, the identity of a confidential informant whose life may be at risk is not made available to members of the public. On the other hand, there is the clear and constant public interest in the fair administration of justice. In the context of this Inquiry, we take this to mean the public interest in identifying any wrongdoing by those public bodies charged with its protection, based on evidence which is open to the public itself to assess. An inquiry which reaches its conclusions based entirely or substantially on closed material cannot be expected to command the confidence of the general public, let alone the confidence of the individual victims of the human rights violations it will investigate.

As Collins J noted concerning the 2007 inquest into the death of a British soldier in Basra, it is fundamental that any official inquiry does not simply accept at face value the claims of secrecy made by the government:

> [A]ny claim that material should not be disclosed on national security grounds must be considered by the coroner. His is an inquisitorial, not an adversarial, process. He must have all the information, but he must bear in mind *the requirements of the procedural obligation which include enabling the family to play a proper and effective part in the process.* (*Smith v Assistant Deputy Coroner for Oxfordshire* [2008] EWHC 694 (Admin) at para 36, emphasis added).

At the very least, then, compliance with the investigative obligation under Article 3 requires that as much material as possible is made public.

In addition to the well-established purposes applicable to every Article 3 inquiry, it is clear from the Prime Minister's statement to the House of Commons on 6 July 2010 that there were further pragmatic reasons for commissioning this particular Inquiry. He spoke of a need to "resolve issues of the past" where allegations have been made about the UK's involvement in the mistreatment of detainees held by other countries, in order to restore the reputation of the security services. He warned: "Our reputation as a country that believes in human rights, justice, fairness and the rule of law…risks being tarnished."

This additional purpose can only be achieved if the victims and the public can have confidence in the Inquiry's conclusions. This will depend in large part on how much of its work takes place in public. Lord Neuberger recognised the dangers of closed proceedings in this regard in *Al Rawi and others v the Security Service and others* [2010] EWCA Civ 482 (para 56):

> "While considering practical considerations, it is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session, attended by the defendants, but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants, but not the claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater."

We respectfully suggest that the same considerations apply with even greater force to the work of the Inquiry. The Prime Minister's letter to you of 6 July 2010 also implicitly acknowledged that, notwithstanding the sensitive subject-matter of the Inquiry, as much of the Inquiry's work as possible should be done in public (emphasis added):

> "The Inquiry will have access to all Government papers it requires as relevant to its examination. There are obvious limitations to what can be considered in public. Almost all of the operational intelligence details will need to be reviewed in closed session.
>
> *I invite you to consider what can take place in public*. It is open to the Inquiry to invite evidence from those who allege mistreatment and other interested parties from outside Government, including in open session. *I would look to you to agree with Government a protocol on the treatment of information and the balance of public and private evidence*. This protocol will be published.
>
> … I intend to publish the report and any supporting documents *you recommend*, with redactions only where necessary in order to avoid damage to the public interest."

In light of the above, we believe that the protocol for the Detainee Inquiry must:

(a) expressly recognise the need for as much material as possible to be made public;

(b) set out the grounds on which information may be kept confidential, limited to those which are strictly necessary;

(c) establish an independent mechanism for determining whether material should be withheld from the public, which includes the ability of the Inquiry Counsel or other independent counsel to test, including through cross-examination, the government's claims; and

(d) ensure that any such determination properly balances the public interest in disclosure against the public interest in withholding the material in question.

Powers to compel evidence

Notwithstanding the Prime Minister's assurance that the Cabinet Secretary and heads of the intelligence services will "require staff in their departments and agencies to cooperate fully with the Inquiry", we have serious concerns about the lack of any current powers to compel the production of documents or the attendance of witnesses.

We believe that both the effectiveness and the credibility of the Inquiry risk being seriously damaged by the absence of such powers and we would ask the Panel to convey to the government an urgent need to remedy this. Even assuming all existing members of staff cooperate with the Inquiry, it is quite possible that those who have left office will – unless compelled – refuse to do so. As for private companies whose activities may be relevant to the Inquiry (such as those who are alleged to have facilitated the use of UK airports and airspace for extraordinary rendition flights), it is almost inevitable that those implicated will refuse to cooperate.

An expression of disapproval or disappointment by the Inquiry is simply an inadequate deterrent to anyone who is reluctant to comply with a request to attend or produce documents.

Further submissions on relevant issues

This submission provides legal analysis to support the proposition that the Detainee Inquiry must include specific elements in order to comply with the UK's obligation to conduct a human rights compliant inquiry. The Inquiry can expect to receive additional submissions from the NGO community regarding specific topics of interest (e.g. the liability of corporations for their role in the operations that led to the human rights violations under scrutiny) and we hope that further engagement will be invited in relation to the operational aspects of some of the key issues of concern (e.g. participation and protection of victims and witnesses), among others.

Yours sincerely

The AIRE Centre

Amnesty International

British Irish Rights Watch

Cageprisoners

Justice

Liberty

The Medical Foundation for the Care of Victims of Torture

Redress

Reprieve

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[1][1] *Aksoy v Turkey*, no. 21987/93, § 98 (1996) 23 E.H.R.R. 553; *Aydin v. Turkey*, § 103, (1999) 28 E.H.R.R. 25; *Kurt v. Turkey*, no. 24276/94, § 140, (1999) 27 E.H.R.R. 373; *Ergi v. Turkey*, no. 23818/94, § 98, (2001) 32 E.H.R.R. 18, 28 July 1998; *Akkoç v. Turkey*, nos 22947/93 and 22948/93, § 118, 10 October 2000; *Mikheyev v. Russia*, no. 77617/01, §§ 107-110; *Jordan v. United Kingdom*, § 109.

[2] *Varnava v Turkey*, nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 123-133, (2010) 50 E.H.R.R. 21.

[3] *Yasa v. Turkey*, no. 22495/93, (1998); *Kaya v. Turkey*, no. 22535/93, (2000); *Cakici v. Turkey*, no. 23657/94, § 87, (1999). See also International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, Article 16 [UN General Assembly Resolution A/RES/56/83, 12 December 2001]. Article 16 reflects a rule of customary international law, binding on all States: International Court of Justice, *Bosnia and Herzegovina and Herzegovina v Serbia (Genocide Convention)*, 26 February 2007, para. 420.
Already recognized examples include facilitating the abduction of a person on foreign soil, knowingly providing an "essential facility" and "placing its own territory at the disposal of another state": see ILC Commentaries, UN Doc. A/56/10, 2001, pp. 66-67, paras. 1 and 8; and European Commission for Democracy through Law (Venice Commission), *Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of Prisoners*, Opinion no. 363/2005, CDL-AD(2006)009, 17 March 2006, para. 45. See also House of Lords/House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture Twenty–third*

Report of Session 2008–09, HL Paper 152, HC 230 (4 August 2009), paras. 17-35.
[4] [Note, this is a requirement more clearly spelt out in domestic jurisprudence eg R (on the application of Amin) v Secretary of State for the Home Department [2003] UKHL 51; R (on the application of AM and others) v Secretary of State for the Home Department [2009] EWCA Civ 219.
[5] *McKerr v United Kingdom*, no. 28883/95, § 111, (2001)..
[6] *Jordan v United Kingdom*, no. 24746/94, § 107, (2003).
[7] *Juozaitiene v Lithuania*, no. 70659/01, (2008) (citing *Nachova v Bulgaria*, no. 43577/98, § 113, (2004)).
[8] *Cakici v. Turkey,* no. 23657/94, § 87, (1999).
[9] *Yaman v Turkey*, no. 32446/96, § 54, (2005); *Çakici v Turkey* [GC], no. 23657/94, §§ 80, 87, 105-106, (2001); *Kaya v. Turkey*, no. 22729/93, §§ 106-107, (1999)*; Aksoy v Turkey*, no. 21987/93, § 98, (1996) (holding that the requirement for a prompt investigation provided in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is implicit in the notion of an "effective remedy" in Article 13); *Tas v. Turkey*, §§ 51, 71; see *mutatis mutandis* Article 2 cases *Imakayeva v Russia*, no. 7615/02, § 148, (2008) ; *McKerr v United Kingdom*, no. 28883/95, § 157, (2002); *Jordan v United Kingdom*, no. 24746/94, § 142, (2003); *Finucane v United Kingdom*, no. 29178/95, §§ 79-80, (2003); *McShane v United Kingdom*, no. 43290/98, § 97, (2002); *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106–107.
[10] European Committee on the Prevention of Torture, 14th General Report para 31, Istanbul Protocol para 80.
[11] *Ogur v. Turkey*, no. 21594/93, (2001).. This rule was originally elaborated in Article 2 cases, but has been applied in the same manner in Article 3 cases. *See Ahmet Mete v Turkey*; no. 30465/02, § 38, (2009); *Yuksel v Turkey*, no. 40154/98, § 37, (2005); *McKerr v United Kingdom*, no. 28883/95, § 112, (2002).
[12] *Isayeva v Russia*, no. 57947/00, § 210, (2005); and the Northern Irish cases, e.g. *McKerr v United Kingdom*, no. 28883/95, § 128 (2002); *Kelly v United Kingdom*, no.30054/96, § 114, (2001).
[13] *Aksoy v Turkey*, no. 21987/93, § 98, (1996); *Bati v Turkey*, no. 33097/96, § 135, (2006).
[14] *Bati v Turkey*, no. 33097/96, § 136, (2006).
[15] *Blanco Abad v Spain*, CAT Communication No. 59/1996, 14 May 1998
[16] *Avsar v Turkey*, no. 25657/94, §404, (2003); *McKerr v United Kingdom*, no. 28883/95, §§ 135-136, (2002).
[17] *See, e.g., McKerr v United Kingdom*, no. 28883/95, § 137, (2002), and cases cited therein.
[18] *Gul v Turkey*, no. 22676/93, § 89, (2002); *Tanrikulu v Turkey,* no. 23763/94, § 109, (2000); *Poltoratskiy v Ukraine,* no. 38812/97, (2003) .
[19] *Yavuz v Turkey*, no. 67137/01, §§ 50-52 (2007).
[20] *Assenov v Bulgaria*, no. 24760/94, § 104, (1999).
[21] *Makaratzis v Greece*, no. 50385/99, § 76, (2005).
[22] *Gul v Turkey*, no. 22676/93, § 90, (2002).
[23] *Rantsev v Cyprus*, no. 25965/04, §§ 235-236, (2010); *Assenov v Bulgaria*, no. 24760/94, § 103 (1999); *Gul v Turkey*, no. 22676/93, § 91, (2002).
[24] *Colibaba v Moldova*, no. 29089/06, § 54, (2009).
[25] *Tanrikulu v Turkey*, no. 23763/94, §§ 106, 104-111 (2000).
[26] *Gul v Turkey*, no. 22676/93, § 89, (2002).
[27] *See, e.g., Aksoy v Turkey*, no. 21987/93, §§ 56, 103, (1996).
[28] *Assenov v Bulgaria*, no. 24760/94, §§ 103-104, (1999).
[29] *Tanrikulu v Turkey*, no. 23763/94, § 108, (2000); *Kaya v. Turkey,* no. 22729/93, § 88, (1999).
[30] *Assenov v Bulgaria*, no. 24760/94, § 104, (1999).
[31] *See, e.g.*, *Edwards v United Kingdom*, no. 46477/99, § 73, (2002) (Article 2 case); *Bati v Turkey*, no. 33097/96, § 137, (2006) (Article 3 case).
[32] *Ibid*
[33] *Aksoy v Turkey,* no. 21987/93, §§ 56, 103, (1996); *Ilhan v Turkey*, no. 22277/93, (2000),
[34] European Committee on the Prevention of Torture, 14th General Report para 36. Also CPT standards para 88.
[35] *Bati v Turkey*, no. 33097/96, (2006) and *Aksoy v Turkey,* no. 21987/93, (1996).
[36] Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005.
[37] UN Basic Principles on Right to Remedy articles 22 and 24; Human Rights Council resolutions 9/11 (24/09/2008) and 12/12 (1/10/2009) on the right to the truth. See also *Aksoy v Turkey* no. 21987/93, § 98, (1996).

Alun Evans
Secretary to the Inquiry
The Detainee Inquiry
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17 February 2011

Dear Mr Evans

Thank you for your letter of 16 February 2011 responding to our submission of 8 February to the Detainee Inquiry, regarding the human rights standards by which the Inquiry should be conducted.

You have asserted that "the purpose for which the Inquiry was established" was not, as our letter had stated "to examine allegations of torture and other ill-treatment, which give rise to particular requirements under Article 3 ECHR" (European Convention on Human Rights). In particular, you point to the fact that the allegations against UK actors involve complicity in torture, not direct participation in torture.

However, as we made clear in our letter of 8 February, the duty to investigate allegations of torture is not restricted to cases in which UK personnel are themselves alleged to have committed the acts in question. Under both UK and international law, it also extends to cases in which UK officials are alleged to have been complicit or involved in, or knowingly provided help or assistance to those committing acts of torture.

We note your suggestion that any questions about the Inquiry's remit should be addressed to the Government, and we will be raising these issues with them as a matter of priority. However, the Detainee Inquiry must also recognise the seriousness of the allegations they are tasked with examining and the legal obligations that arise under domestic and international law with respect to them. Given the context in which the Inquiry has been established in relation to these allegations, we believe it is essential that the Inquiry itself make representations to the executive aimed at ensuring that the Inquiry can be carried out in a manner which satisfies the UK's obligations under both domestic and international law.

First, under UK law, it is well understood that criminal responsibility for torture is not limited to those who commit acts of torture. It also extends to any person who aids, assists, counsels or procures another to commit torture (see section 8 of the Accessories and Abetters Act 1861, together with the more recent offences under Part 2 of the Serious Crimes Act, and the corresponding common law provisions under Scots law). UK law, then, only reinforces that such acts -- which are without question forms of complicity -- clearly fall within the scope of Article 3 of the ECHR. We therefore find it impossible to see how allegations of possible complicity in torture by UK officials could fail to trigger the UK's investigative obligations under Article 3 of the ECHR.

Secondly, under the UN Convention Against Torture, obligations to investigate arise in relation not only to acts of torture in which the state's agents directly inflicted the pain and suffering, but also wherever the pain and suffering was inflicted "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" on behalf of the state. Indeed, the UN Convention against Torture also expressly covers any "act by any person which constitutes complicity or participation in torture." In this context, we note credible, well-documented evidence that suggests UK complicity in torture or other ill-treatment, unlawful detentions and renditions, including:

- UK personnel being present during and participating in interrogations of detainees held unlawfully overseas in circumstances in which the UK knew or ought to have known that the detainees concerned had been or were at risk of being tortured and/or whose detention was unlawful;

- UK personnel providing information (e.g. telegrams sent by UK intelligence personnel to intelligence services of other countries) that led the USA and other countries to apprehend and detain individuals when the UK knew or ought to have known that these people would be at risk of torture and/or unlawful detention;

- The UK being involved in the US-led programme of renditions and secret detentions through, for example, the use of UK territory (e.g. Diego Garcia) and/or airspace;

- UK personnel forwarding questions to be put to individuals detained by other countries in circumstances in which the UK knew or ought to have known that the detainees concerned had been or were at risk of being tortured and/or whose detention was unlawful;

- UK actors soliciting, receiving and using information extracted from people detained overseas in circumstances in which it knew or ought to have known that the detainees concerned were being, had been or would be tortured and/or whose detention was unlawful.

These allegations pertain not just to individuals held by the US in Guantanamo Bay, but individuals held overseas in a number of different countries in the context of counter-terrorism operations, including, but not limited to, Pakistan, Bangladesh, Egypt, Kenya, Somalia, United Arab Emirates and Yemen.

The seriousness of these allegations, and the credible evidence that is already in the public domain supporting them, gives rise to an obligation under international law on the part of the UK to ensure that the allegations are effectively investigated. In order for the UK to discharge this obligation the investigation must be in conformity with human rights standards; that is, the investigation must be independent, impartial, thorough, subject to public scrutiny and include effective access for victims to the process.

Accordingly, the fact that the allegations against the UK relate to complicity and/or participation in torture, rather than UK actors and/or agents directly inflicting the pain and suffering in question, does not provide a legitimate reason to assert that the Detainee Inquiry should not be conducted in a manner capable of satisfying the UK's obligations under Article 3 of the ECHR and under the UNCAT.

We would like to make clear that although the Prime Minister has not expressly stated that the purpose of the Detainee Inquiry is to discharge the UK's obligations under international law, this does not mean

that these legal obligations can be disregarded. More generally, any failure to comply with the UK's international obligations in this area would raise serious doubts as to the purpose of establishing the Inquiry in the first place.

Yours sincerely

The AIRE Centre

Amnesty International

British Irish Rights Watch

Cageprisoners

Justice

Liberty

The Medical Foundation for the Care of Victims of Torture

Redress

Reprieve

CC

The Rt. Hon. David Cameron MP, Prime Minister
The Rt. Hon. Nick Clegg MP, Deputy Prime Minister
The Rt. Hon. William Hague MP, Foreign Secretary
The Rt. Hon. Theresa May MP, Home Secretary
The Rt. Hon. Dominic Grieve QC MP, Attorney General
Dr Hywel Francis MP, Chair of the Joint Committee on Human Rights
Juan E. Méndez, UN Special Rapporteur on Torture
Martin Scheinin, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
Thomas Hammarberg, Commissioner for Human Rights , Council of Europe