Amnesty International UK

Response to the Justice and Security Green Paper

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Human Rights Action Centre

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Amnesty International UK

Amnesty International UK is a national section of a global movement of over three million supporters, members and activists. We represent over 230,000 supporters in the United Kingdom. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

I. Introduction

The Green Paper begins by asserting that "the first duty" of government is to safeguard national security. While protecting the right to life of its general population is indeed a fundamental duty of any state, the state's concurrent obligation to ensure that any measures in this regard fully respect a range of other human rights is no less fundamental.

Amnesty International has particular concern that the proposals put forward in the Green Paper would, if enacted, fail to ensure respect for the right of anyone whose human rights have been violated to receive an effective remedy. This includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated and, if established, an effective remedy granted. These rights are entrenched in a range of human rights treaties to which the United Kingdom is subject, including:

- The European Convention on Human Rights article 13, as well as the procedural aspects of articles 2 and 3 as elaborated by the jurisprudence of the European Court of Human Rights.[1]
- The International Covenant on Civil and Political Rights article 2(3).
- The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14.

The UN General Assembly has also adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on the Right to a Remedy and Reparation), which further elaborates on the some of the rights described above.[2] These principles affirm unequivocally that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization".[3]

The consistency of the proposals in the Green Paper with the right more generally of all persons to a "fair and public hearing" in any "determination" of a person's "civil rights and obligations" (as provided for by article 14 of the ICCPR and article 6 of the European Convention on Human Rights), is also of concern. Principles of open and natural justice forming a fundamental part of the UK's common law have traditionally helped ensure that UK civil proceedings meet or exceed international fair trial standards, but it is precisely those elements of UK law that the Green Paper proposes radically to weaken.

In light of the wide-ranging and serious implications that some of these proposals would have, Amnesty International considers that the government has not demonstrated that the measures would be compatible with its international human rights obligations.

II. Context of the Green Paper

The stated aim of the Green Paper is "to respond to the challenges of how sensitive information is treated in a full range of civil proceedings". It identifies two main motivations behind the proposals, first: the risk that material the government considers sensitive may be

[1] See, e.g., *Giuliani and Gaggio v Italy* [Grand Chamber], (App No 23458/02), 24 March 2011; *Kaya v Turkey,* (App No 22729/93), 19 February 1998; *Ilhan v Turkey* [Grand Chamber], (App No 22277/93), 27 June 2000; *Assenov and Others v. Bulgaria*, (App No 24760/94), 28 October 1998.
[2] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.
[3] Basic Principles on the Right to a Remedy and Reparation, 60/147 para 24.

publically disclosed, including information gathered by the Security and Intelligence Agencies (as well as their sources and methodology), and the fear that material emanating from foreign intelligence services, notably the USA, is at risk of disclosure (the so-called "control principle"). The government argues that such disclosure - and indeed even the possibility of court-ordered disclosure in the future – has a disproportionate impact on the UK's international diplomatic and intelligence relationships.[4] The second challenge concerns those cases in which the government has been called upon to defend its actions. The Green Paper argues that the current system for dealing with sensitive material in civil proceedings: Public Interest Immunity ("PII") does not allow the government to properly defend itself, resulting either in the payment of costly financial settlements or the possibility that the case is struck out. The proposals in the Green Paper are therefore asserted to be a necessary and justified response to these difficult challenges.

In scrutinizing proposals in the Green Paper the context in which they have been brought forward must not be forgotten. The cases identified as demonstrating the need for change, ones in which "sensitive information is at their heart", are those which concern allegations that the UK has been involved in serious human rights violations, including torture and other ill-treatment, rendition and unlawful detention. Amnesty International recognizes that there may be circumstances in which the government could in some proceedings lawfully restrict disclosure of certain information, for example in some cases where disclosure would put the lives or safety of identifiable individuals at risk. However, the need for sensitive material to be handled appropriately does not negate the right of victims of human rights violations to disclosure of the truth. It is of great concern, therefore, that the proposals in the Green Paper are directed at those very cases where principles of transparency, openness and fairness should be of the utmost importance – where there is credible evidence of involvement in human rights violations by the state.

The invocation of secrecy on grounds of national security, or the public interest, has repeatedly been one of the central obstacles in preventing victims of human rights violations from securing their right to remedy and reparation and obstructing efforts in achieving genuine accountability for those violations.[5] Indeed in the 2009 report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Special Rapporteur on counter-terrorism and human rights), the United Kingdom is referenced as one of the states in which the "increasing use of State secrecy provisions and public interest immunities…to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and - most importantly – liability" gave rise to concern.[6] International law does not provide states with unfettered discretion as to what can be kept secret in the name of national security. Numerous international and regional experts and bodies have emphasized that "information and evidence concerning civil, criminal or political liability of the state's representatives for serious human rights violations are not and must not be considered worthy of protection as state secrets."[7] The Special Rapporteur on counter-terrorism and human rights has stated that if exceptional circumstances exist where

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[4] *Justice and Security Green Paper*, October 2011, paras 1.43-1.46.

[5] For further information see the following Amnesty International reports: *Open Secret: Mounting evidence of Europe's complicity in rendition and secret detention,* (Index: EUR 01/023/2010); *State of Denial: Europe's Role in Rendition and Secret Detention*, (Index: EUR 01/003/2008); *USA: Guantanamo: A decade of damage to human rights and 10 anti-human rights messages Guantanamo still sends*, (Index: AMR 51/103/2011); *USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror',* (Index: AMR 51/151/2008); *Germany: Briefing to the UN Committee against Torture,* (Index: EUR 23/002/2011); *Lithuania: Unlock the truth in Lithuania: Investigate secret prisons now*, (Index: EUR 53/002/2011).

[6] Report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), paragraph 59

[7] See Parliamentary Assembly of the Council of Europe, Resolution 1562 (2007) and Recommendation 1801 (2007). See also report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), paras 58-63, 75; also the 'Johannesburg Principles' on national security, freedom of expression and access to information - developed in 1995 by a group of experts in international law, national security and human rights which states that "a restriction sought to be justified on the ground of national security is not legitimate if it genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest" (principle 2).

information concerning human rights violations is truly impossible to extrapolate from material genuinely harmful to national security, human rights standards require that an "appropriate mechanism" be found.[8] The proposals contained in the Green Paper, however, would allow information to be kept secret in a far wider range of circumstances, and would not constitute an "appropriate" mechanism from a human rights perspective.

Amnesty International considers that those proposals in the Green Paper which would depart from normal standards of fairness and open justice on a very wide range of grounds, and would allow the government to avoid proper scrutiny of its human rights record, cannot be considered as an appropriate or proportionate means by which to respond to any legitimate security concerns that the government may have with respect to threats to the life or safety of the general population or particular individuals.

III. Closed Material Procedures

a. Consultation question: *How can we best ensure that closed material procedures support and enhance fairness for all parties?*

Amnesty International is concerned - in light of the above question - that this consultation is premised on a pre-existing decision that closed material procedures (CMPs) will be introduced by legislation for use in an extended range of civil proceedings. We believe that a truly open consultation would start at a stage prior to the current document by asking the question of whether the proposed CMPs are strictly necessary, proportionate and compatible with respect for human rights, particularly the right of alleged victims of human rights violations to have access to an effective remedy. Amnesty International does not believe the government has made this case.

The right to an effective remedy and reparation for victims of human rights violations is enshrined in all major human rights treaties. International law requires that remedies are available not only in law but are accessible and effective in practice[9] and includes the right to the following: 1) equal and effective access to justice and fair and impartial proceedings, 2) adequate, effective and prompt reparation for harm suffered and 3) access to relevant information concerning those violations.[10] Inherent to this is the right of victims and society as a whole to know the truth about the violations that they have suffered.[11]

Allowing the government to rely on secret evidence in cases where the claimant's only effective means of seeking a remedy for human rights violations is through civil litigation, as the Green Paper proposes, would be inconsistent with a range of aspects of this right. Notably the introduction of CMP into civil claims for damages undermines the right to effective access to justice by potentially denying victims of human rights violations access to a meaningful procedure in which their claim can be *fairly* adjudicated and if established reparation granted. It will also restrict the ability of victims of human rights violations to access information about the circumstances of the violations they have suffered, as they are entitled to under international law.[12]

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[8] Report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), paragraph 75.

[9] See UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) which says that states "must ensure that individuals also have accessible and effective remedies to vindicate" the rights protected by the ICCPR (paras 14 and 15). The Committee has noted even when the legal systems of States parties are *formally* endowed with powers to grant an appropriate remedy, this will be insufficient if the remedy procedures fail to function effectively *in practice* (para 20). See also UN Human Rights Committee, General Comment no 20, concerning prohibition of torture and cruel treatment or punishment (10 March 1992), paragraphs 14 and 15. See similarly European Court of Human Rights *Aydin v Turkey* [Grand Chamber]*, (*App No 57/1996/676/866), 25 September 1997, para 103 and similar jurisprudence.

[10] Basic Principles on the Right to a Remedy and Reparation, 60/147; UN Human Rights Committee General Comment no 31, para 16.

[11] The United Nations has also formally recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", see UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005; Basic Principles on the Right to a Remedy and Reparation, 60/147, article 22(b).

[12] Basic Principles on the Right to a Remedy and Reparation, 60/147, articles 11(c) and 24. Restrictions on the rights of alleged victims of human rights violations to receive information pertinent to their claim may also raise issues

When considering the necessity of such drastic changes to the justice system, attention should be drawn once again to the fact that the cases which are the focus of the proposals are ones in which the UK is credibly alleged to have been involved in serious human rights violations, including torture or other cruel, inhuman or degrading treatment and enforced disappearance. Clearly the primary response of the UK government should be to ensure that the actions of UK authorities always comply with the highest human rights standards. This includes by ensuring effective, impartial, thorough and independent investigations into all credible allegations of UK involvement in serious human rights violation that provide the alleged victims with key findings and access to facts about their claims, and other forms of redress and guarantees of non-repetition. The repeated failure to ensure such investigations and results must be seen as contributing to occurrence of the civil litigation cases with which the Green Paper is concerned, and yet the Green Paper focuses only on establishing new latitude for the government to keep information secret without recognizing the failures of investigation and remedy as an underlying cause that must itself be addressed.[13]

Further, as emphasized earlier in the submission, respect for the right of access to an effective remedy for violations of international human rights standards requires that evidence concerning the civil, criminal or political liability of the state's representatives for serious human rights violations is not subject to secrecy provisions. Amnesty International believes that there is no legitimate reason why a civil case for damages where the UK is alleged to have been involved in or committed human rights violations cannot proceed fairly and have its merits properly adjudicated under the current system.[14] As such the government's argument that CMPs must be introduced in the interests of justice because otherwise these types of cases will either be settled or struck-out is misleading. Indeed it should be noted that to strike out a civil case for damages where the state is alleged to have been involved in serious human rights violations would itself be manifestly incompatible with the right to an effective remedy and reparation. Leaving aside whether such a scenario would actually be likely to occur,[15] the government cannot rely on invoking the spectre of an alternative that would contravene international human rights law, as a justification for the introduction of measures that would themselves infringe the same rights.

Access to evidence concerning human rights violations: In relation to the proposals to legislate for the possibility of CMPs in all civil proceedings, it is Amnesty International's view that evidence that would tend to prove allegations of human rights violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial executions or other unlawful killings, should never be capable of being kept secret from a person who alleges he or she was a victim of the human rights violations (or family members claiming on behalf of an alleged victim) or his or her legal counsel of choice, in civil

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in relation to their rights of access to information of a personal nature as protected for instance under article 8 of the European Convention on Human Rights (*Roche v. the United Kingdom* (App no 32555/96), 19 October 2005, paras 155 -169) and article 19 of the ICCPR.

[13] The Detainee Inquiry, established by the UK government to "examine whether, and if so to what extent, the UK Government and its security and intelligence agencies in the aftermath of 9/11: i. were involved in improper treatment, or rendition, of detainees held by other countries in counter terrorism operations overseas; and/or ii. were aware of improper treatment, or rendition, of detainees held by other countries in counter terrorism operations in which the UK was involved" falls short of the human rights standards requiring an effective, impartial, independent and thorough investigation into such allegations. For further information see, *United Kingdom: Detainee Inquiry terms of reference and protocol fall far short of human rights standards*, (Index EUR 45/011/2011).

[14] It is disappointing that there is little examination in the Green Paper of other mechanisms which could be employed alongside PII to ensure that legitimately sensitive evidence is protected from unnecessary disclosure, whilst still allowing for as fair and transparent a procedure as possible, such as the use of confidentiality rings, targeted disclosure, redactions, in camera hearings and so forth.

[15]The case referred to by the government in this regard is *Carnduff v Rock* [2001] EWCA Civ 680, which was a contractual claim brought by a police informant. A number of submissions to the Justice and Security Green Paper consultation have questioned the use of *Carnduff* as a precedent to justify the proposals. See for example, *JUSTICE, Justice and Security Green Paper Consultation Response*, p.20 and *Bingham Centre for the Rule of Law, Response to the Justice and Security Green Paper*, para.22. See also Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.50 who states "cases such as *Carnduff* are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned".

proceedings in which a remedy for the violation is sought.[16] Proceedings might in some circumstances be taken before a court ex parte in order to allow the government to argue whether particular evidence not only is relevant to national security, but is also *not* relevant to the claim of human rights violations. However, once a court has found evidence to be probative of the claimed human rights violation then there should be no circumstances in which the claimant or his or her counsel can be totally deprived of meaningful access to that evidence (at least so long as the government contests the claim and fails to provide a full remedy). This would not necessarily preclude more precise measures short of keeping the evidence entirely secret from the claimant and/or his or her counsel, such as concealing the identity of a witness where there was clear evidence that to reveal his or her identity would put his or her life directly at risk. Claimants and their counsel must also always have an effective means of challenging government evidence that is intended to deny allegations that the government has been responsible for human rights violations.

Though it is the case that under the current PII system it is possible that evidence concerning human rights violations may also be withheld from the alleged victim and his or her lawyer,[17] a CMP will in practice lead to considerably less disclosure than exists under the current system. There are two central reasons for this, firstly, the extremely broad definition of "sensitive material" which is used and, second, that the proposals appear to bring an end to the Wiley balancing test currently employed in the PII process.[18]

The definition used in the Green Paper for "sensitive material" is as follows:

> *Any material/information which if publically disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily 'sensitive', but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.*[19]

Amnesty International fears that the use of such a broad definition of the kinds of information which if disclosed would be deemed to constitute harm to the public interest will in practice result in large amounts of material being placed into closed and so never disclosed to the individuals or their lawyer, which in turn will increase the degree of secrecy surrounding these claims. Of particular concern, is the provision of what appears to be a de-facto claim to secrecy for the Security and Intelligence Services by allowing all material originated or handled by them to be automatically defined as "sensitive" and so presumably placed into a closed session. Blanket claims to secrecy represent a very real impediment to securing genuine accountability for human rights violations given that it is often the actions of these very agents under scrutiny in these cases.

The "Wiley balance" for testing disclosure in the current PII system allows the court to "*hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice.*"[20] This test recognizes that sometimes maintaining secrecy sensitive information would on balance not be in the public interest. That recognition is crucial in cases where the state is alleged to have been involved in human rights violations, as the interest of the actual public in seeing violations such as torture or other cruel, inhuman or degrading treatment,

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[16] The exception to this is perhaps in cases where the government is willing to acknowledge the facts of the violation to the degree of specificity required by the right of a victim of human rights violation to the truth about the violation.
[17] It should be noted that Amnesty International considers the scope for such withholding under the current PII process itself raise issues in relation to the right to effective remedy of those alleging to be victims of human rights violations.
[18] Several senior lawyers and judges have also emphasized that the current PII process essentially incentivizes the government to disclose as much as is possible. As Lord Kerr notes in *Al Rawi v Security Service* [2011] UKSC 34, "At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make", para 96.
19 *Justice and Security Green Paper*, October 2011, p.71.
[20] *R(Wiley) v Chief Constable, West Midlands* [1995] 1 AC 274.

enforced disappearance, or extrajudicial execution brought to light, and in ensuring victims have access to a fair procedure for obtaining a remedy, should be no less compelling than the possible interest of a government keeping such information confidential.[21] In a CMP, as proposed in the Green Paper, there is no balance of competing public interests.[22] Instead material falling within the very broad definition of "sensitive material" set out above (whether because it is "secret intelligence" or "secret information" or because it is any other kind of information and the Secretary of State has identified a likely harm to the public interest) could potentially be indefinitely withheld from the claimant, however, slight the putative harm that might be caused by its disclosure and even if it were clearly evidence of the human rights violations alleged in the proceedings.[23] The government has argued that Special Advocates will be able to play a role in ensuring as much material is disclosed as possible; however, it is important to note that Special Advocates themselves have stated publicly that because of the nature of a CMP, their ability to secure substantive disclosure by challenging the government's argument on national security grounds in these types of proceedings remains severely limited – leading one Special Advocate to state that they are simply "not in a position to do it".[24]

As a consequence there is a real concern that the introduction of CMPs into civil cases for damages where the state is alleged to be involved in serious human rights violations will lead to greater secrecy and less transparency – allowing the government to more easily avoid proper scrutiny of its human rights record. Accordingly the introduction of such measures cannot be described as a valid response to the national security challenges the government may face.

Fair procedure: The right to an effective remedy includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated.[25] More broadly, everyone has the right to a fair trial in the determination of any of his or her civil rights and obligations.[26] The government claims throughout the Green Paper that CMPs have been proven to work effectively and are capable of delivering procedural fairness.[27] Amnesty International believes this claim is inaccurate and misleading. CMPs have been the subject of substantial litigation which remains on-going. Concern about CMPs has been raised by human rights organizations[28], international human rights bodies[29], parliamentary committees[30], media organizations[31] and senior

[21] The value of this balancing exercise in cases where the state is accused of involvement in human rights violations is perhaps exemplified in the Divisional Court's fourth decision in the Binyam Mohammed case which states "the issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place. . . It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability." *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 18.

[22] See Lord Kerr in *Al Rawi v Security Service* [2011] UKSC 34 (para 92) "[t]his seemingly innocuous scheme proposed by the appellant would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellant would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said … has been established for more than three centuries."

[23] It should be noted in control order hearings, following the House of Lords decision in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, Special Advocates can secure further disclosure in order to satisfy article 6 requirements even if that material is considered as sensitive – that is if disclosure is likely to result in harm to the public interest. For further information regarding the ongoing challenges in securing disclosure in such a way see *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation* 2010, HL 64/HC 395 and *Justice and Security Green Paper: Response to consultation from Special Advocates*.

[24] *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010* Qu.46 (Helen Mountfield).

[25] See the Basic Principles on the Right to a Remedy and Reparation which recognizes the right of victims of serious human rights violations to have "equal access to an effective judicial remedy" and that the "the right to access justice and fair and impartial proceedings" is to be reflected in domestic laws.

[26] See for instance article 14 ICCPR and article 6 ECHR.

[27] See for example paragraph 2.2 of the *Justice and Security Green Paper.*

[28] For example, Liberty, Justice, Reprieve and Human Rights Watch have all criticized the use of CMP.

[29] See the concluding observations of the Human Rights Committee UN Doc CCPR/C/GBR/CO/6, 30 July 2008, calling on the UK to "ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made".

[30] For example, the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111; *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation* 2010, HL 64/HC 395; and the Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use*

lawyers.[32] They have been described variously in the UK courts as "inherently imperfect" and as containing "inherent frailties".[33] Special Advocates themselves have also publicly criticized CMPs stating that "they do not work effectively" and "do not deliver real procedural fairness".[34]

In allowing the government not only to withhold information from the claimant (as might be the case in some contexts under the existing PII framework[35]), but also then rely on it as secret evidence during the proceedings, a CMP can undermine the right to a fair and public hearing, especially with regard to the respect for an adversarial process and equality of arms.[36] The UN Human Rights Committee explains that "the right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant" and further that "the principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."[37]

In the UK, in addition to the application of the European Convention on Human rights via the Human Rights Act, these features of fair trial are also secured by longstanding rules under common law as recognized in the UK's domestic jurisprudence.[38] A CMP, where one party to the case cannot see all the evidence being relied upon by the court and cannot directly cross-examine the witnesses in a case, represents a radical departure from the normal principles of fairness that currently apply in civil trials. The use of Special Advocates has not been demonstrated to sufficiently mitigate this unfairness, leading the Joint Committee on Human Rights to conclude that Special Advocates are simply "not capable of ensuring the substantial measures of procedural justice that is required".[39]

It should also be noted that the argument that CMPs will necessarily lead to a fairer outcome because the judge is able to consider more material is by no means clear. As Lord Kerr states in the case of *Al-Rawi,* "The central fallacy of the argument lies in the unspoken assumption because the judge sees everything he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding

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of Special Advocates, 3 April 2005, HC 323-II.

[31] For example, see the intervention of the BBC, Guardian News and Media Limited and the Times Newspapers in the case of *Al Rawi v Security Service* [2011] UKSC 34.

[32] For example, Dinah Rose QC, delivering the Atkin Lecture on 10 November 2011 said: "A common law trial is designed to enable facts to be found on the balance of probabilities through an open adversarial process.. ,If you bolt a closed procedure on to that, what you have is a process that is not adversarial, and not judicial. It may look and sound like a trial, but in fact it is nothing of the sort". See also the evidence given by Gareth Peirce to the Joint Committee on Human Rights *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010* and Lord Bingham, formerly the Senior Lord of Appeal in the Ordinary, who said, with regard to disclosure in control order proceedings: "[T]he right to a fair trial is 'fundamental and absolute'; where a conflict arises between the use of material not disclosed to a party and the right of that party to a fair hearing his right to a fair hearing must prevail." Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, p. 108.

[33] See *Al Rawi v Security Service* [2011] UKSC 34 and *Tariq v Home Office* [2010] EWCA Civ 462. See also Lord Woolf in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 (at [59] and [67]), that the involvement of a special advocate "[must] not be used to justify a reduction in the protection available to the person affected by the non disclosure....the appointment of [such an advocate] should not be used as a justification for reducing the rights that [an individual] may otherwise have but only as a way of mitigating the disadvantage he would otherwise suffer if his rights were to be reduced with or without [such an advocate]."

[34] *Justice and Security Green Paper: Response to consultation from Special Advocates,* para.15.

[35] As noted earlier, the existing PII framework itself is not free from human rights concerns.

[36] It should also be noted, in this regard, that the right to a fair trial is broader than the sum of the individual guarantees within article 14, and depends on the entire conduct of the trial. (See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/40) annex X, sect. E: Communication No. 207/1986, *Yves Morael v. France,* para. 9.3).

[37] See UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32, 23 August 2007, para 13. See also Communication No. 1347/2005, *Dudko v. Australia*, Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*.

[38] For further discussions regarding common law see *JUSTICE, Justice and Security Green Paper Consultation Response*, January 2012; *Bingham Centre for the Rule of Law, Response to the Justice and Security Green Paper.*

[39] The Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111 paragraph 90.

challenge. I go further. Evidence which has been insulated from challenge may positively mislead."[40]

Finally, one of the central pillars of a fair hearing is the open administration of justice.[41] The principle of open justice acts as an essential safeguard of the fairness and independence of the judicial process, ensuring that the administration of justice is open to public scrutiny, which in turn provides a means of protecting and maintaining public confidence in the justice system.[42] By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[43] Though international human rights law allows for the exclusion of the press and public in certain circumstances for reasons of national security, this is permissible only to the extent strictly necessary.[44] The relevant articles make no similar explicit provision for the exclusion of *litigants or their counsel* for any reason or any period of time.[45]

The right to a fair and public hearing also requires that "the judgment, including the essential findings, evidence and legal reasoning must be made public".[46] The use of a CMP, however, invariably leads to the issuing of a closed judgment alongside an open judgment, which elaborates on the reasoning for the decision of the court and which relies on the secret evidence. The issuing of closed judgments has the potential to undermine public confidence in fair administration of justice in cases where the state is involved in or has committed human rights violations and that those responsible for violations will be held to account. The implications of this were well recognized by the Court of Appeal in *Al-Rawi* which emphasized that:

> *"[i]f 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*

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40 *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.93.

41 See *Malhous v Czeck Republic*, (App No 33071/96) 12 July 2001; *Bakova v Slovakia*, (App No 47227/99), 12 November 2002; *Pretto and Others v Italy*, (App No 7984/77), 8 December 1983; *Barberà, Messegué and Jabardo v Spain*, (App No 10590/83) 6 December 1988; *Yakovlev v Russia*, (App No 72701/01) 15 March 2005; *B and P v United Kingdom,* (App No 36337/97; 35974/97) 24 April 2001.

42 See in this regard Special Rapporteur on counter-terrorism and human rights report of 6 August 2008, UN Doc A/63/223 and UN Human Rights Committee, General Comment No. 32, para. 67.

43 *Pretto and others v Italy,* (App. No 7984/77), 8 December 1983. This principle was also reflected by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, para.63"If the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust".

44 See UN Human Rights Committee, General Comment no 32, para 29 [only exception is in cases involving children or matrimonial disputes]. See also the judgment in the case of *Romanova v Russia*, (App No 23215/02), 11 October 2011, where the European Court of Human Rights considered a case where an entire criminal trial had been held in camera, with only part of the trial and appeal judgments having been delivered in public (it appears the defendant and her lawyers were not excluded from any part of the trial). In finding the exclusion of the public in the circumstances to have violated article 6 of the Convention, the Court observed: "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity." Such considerations must apply with even more force when the issue is whether evidence of a government's involvement in serious violations of human rights can be withheld from the public, or even indeed from the very persons who are claiming to be the victims of the violations in question.

45 Nowhere in its discussion in General Comment no 32 of the possibility of excluding the public on grounds of national security does the Human Rights Committee discuss any possibility that litigants or their counsel could be validly excluded. The government has cited the decision in *Kennedy v the United Kingdom.* The particular facts of that case, however, are markedly different from and far narrower than the wide range of courts and tribunal proceedings to which the Green Paper would apply, and the measures the Green Paper proposes. The court also emphasized as relevant its understanding that where the IPT found there had been wrongful interference it could in fact disclose the otherwise sensitive documents and information to the complainant, even over objections of the government that they should remain secret. Amnesty International does not necessarily agree with the reasoning or conclusions of the Court in the *Kennedy* case.

46 See UN Human Rights Committee, General Comment No 32, para 29 (noting an exception only in cases involving children or matrimonial disputes).

process, but the damage to the reputation of the court would in all probability be even greater".[47]

Amnesty International reminds the government that the onus is always on the state to demonstrate that any restrictions it wishes to impose on human rights, including restricting the right to a fair trial (in the limited range circumstances for which such limitations permitted), are necessary and proportionate to the pursuance of legitimate aims. Even where restrictions are allowed they may not "be applied or invoked in a manner that would impair the essence of a Covenant right."[48] While the European Court of Human Rights has held that national security can be a legitimate aim that could justify certain restrictions on the ordinary rules for disclosure of evidence to a litigant, any such restrictions must still satisfy all of the other requirements in the circumstances of the case, namely proportionality, not impairing the essence of the right to fair trial and sufficient counterbalancing of any restrictions within the judicial process.

Amnesty International believes that the introduction of a CMP in a civil claim for damages where the state is alleged to have been involved in serious human rights violations risks substantively impairing both the right to an effective remedy and reparation and the right to a fair trial in such cases and as such cannot be considered a valid measure to address any legitimate national security concerns.

Restriction to "Exceptional Circumstances"?: In this submission we have focused on the introduction of CMPs in the case of civil trials for damages where the state is alleged to have been involved in serious human rights violations. However, it is clear that the introduction of legislation to allow for a CMP in any civil proceeding would have far-reaching consequences. Amnesty International is concerned that even though the government has stated that its intention is that this procedure should only be used in exceptional circumstances, the Green Paper includes no thorough examination of the human rights implications of a CMP in different types of civil trials, for example, civil actions against the police, civil proceedings between private parties, habeas corpus claims, claims brought by public authorities against individuals. Even leaving aside the more fundamental objections to any application of CMP in certain proceedings as outlined above, there is no description or analysis in the Green Paper of what actual safeguards would or could be put in place to ensure that invocation of CMP did not in fact become the norm wherever "sensitive information" might be involved in a proceeding. We note that in fact the initial introduction of CMPs by the government in response to the *Chahal* judgment [49] and in the particular context of national security deportation cases was also, at the time, said to be restricted to that exceptional context. However, subsequently CMPs have leached across the civil justice system, and can now be used in a range of different contexts including control order hearings, terrorist asset freezing and financial restrictions proceedings, appeals before the Proscribed Organisations Appeal Commission, employment tribunal hearings and parole board hearings amongst others. The Green Paper proposals are themselves part of a process of expanding the role of just such so-called "exceptional" procedures far beyond their original stated scope.

b. Improvements to the Special Advocates system

Consultation question: *what is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardizing national security?*

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[47] *Al Rawi and Others v Security Service and Others* [2010] EWCA Civ 482 para 56. *See also Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 54 where the court concluded that "it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture".

[48] UN Human Rights Committee, General Comment no 31 para 6. The ECtHR has similarly held that restrictions on the fair trial guarantees ordinarily required of court proceedings can only be compatible with article 6(1) of the ECHR if they pursue a legitimate aim and the means employed are proportionate to the aim sought to be pursued. Even measures that meet these tests are only valid if the limitations do not have the effect of impairing the very essence of fair trial rights and if any restrictions are sufficiently counterbalanced by the procedures followed by the judicial authorities, *Rowe and Davis v the United Kingdom* [Grand Chamber], (App No 28901/95), 16 February 2001.

[49] *Chahal v United Kingdom,* (App No 22414/93), 15 November 1996.

Amnesty International remains of the view that the appointment of Special Advocates is insufficient to mitigate the unfairness of a CMP of the nature proposed by the Green Paper, and as stated above is opposed to the further expansion of such CMPs into civil cases for damages. Special Advocates themselves have also raised concerns about the fundamental unfairness of the system within which they operate, pointing to considerable obstacles - including but not limited to legal and resource-constraints, difficulties in accessing independent expertise and evidence, late disclosure of information by UK authorities and restrictions on communication - affecting their ability to conduct their work with the thoroughness they believe the role requires. [50]

Disappointingly, the proposals in the Green Paper both fail to recognize the fundamental flaws in the Special Advocate system, as it operates in a CMP, from a human rights perspective, and fail to address the practical challenges faced by existing Special Advocates, suggesting only peripheral changes. For example, the commitment to provide further training for Special Advocates cannot address the fundamental flaws within the system. It can also be queried why it is that increased training is only now being offered, despite the system of Special Advocates being in place for over ten years and repeated requests from Special Advocates for increased training. The proposals also do not deal with the real challenges faced by Special Advocates in adducing evidence in order to rebut allegations made against an individual in the secret material. Finally, with respect to the issue of communication, Amnesty International does not consider that there is any possible and compelling reason to prohibit Special Advocates from communicating confidentially with the open legal team on procedural matters, such as principled points of law and legal strategy. On substantive or factual matters the current degree of restriction and surveillance is also unjustifiable when considered against the tests for restricting ordinary due process rights. Securing the ability of lawyers to confidentially communicate with those whose interests they represent is an important safeguard in ensuring the fairness and independence of a legal proceeding. If CMPs are going to continue to be used in certain types of proceedings, then the government must surely accept the proposal made by the Special Advocates themselves that a more comprehensive review of different methods of safeguarding the interests of individuals in CMPs should be conducted and more fundamental reforms should be considered.[51]

c. Consultation question: ***If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the 'AF (No.3)' 'gisting' requirement does not apply. In what type of cases should there be a presumption that the disclosure requirement set out in AF (No.3) does not apply?***

The Green Paper proposes to limit by legislation those situations in which there is a presumption that the disclosure requirements established in *AF (No.3)* should apply, on the premise that doing so will result in more certainty. [52] However, given the government's continued resistance to the full application of *AF (No. 3)* the proposal actually appears to be an attempt to further restrict the ability of individuals to secure meaningful disclosure in cases where a CMP is used.[53] Further, even if a statutory presumption against the need for *AF (No. 3)* disclosure is legislated for in specific situations, it is likely to result only in further protracted litigation rather than more certainty, as individuals faced with CMPs will

[50] The *Justice and Security Green Paper: Response to consultation from Special Advocates* also identifies 8 significant problems which limit the effectiveness of Special Advocates. See also, for example, House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates,* (Seventh report of session 2004-5), 3 April 2005; Joint Committee on Human Rights, *Nineteenth Report,* 16 July 2007; and, *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010.*

[51] See *Justice and Security Green Paper: Response to Consultation from Special Advocates.*

[52] In the case of *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 (AF (No.3)), the House of Lords held that, in control order cases in which the Secretary of State's case was primarily contained in closed material, in order to comply with article 6 ECHR, she must provide the individual concerned with sufficient information about the allegations against them to enable them to give effective instructions to a Special Advocate.

[53] See *Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation,* February 2010, HL 64/HC 395 and *Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In,* March 2010, HL 86/HC 111. See also litigation in *Home Office v Tariq*, [2011] UKSC 35 13 July 2011, *Bank Mellat v HM Treasury [2010] EWCA Civ 483* 4 Mary 2010 and *Secretary of State for the Home Department v BC and BB* [2009] EWHC 2927 (Admin), 11 November 2009.

presumably still seek to challenge the unfairness of the process - requiring the courts to rule upon the applicability of *AF (No. 3)* and whether the disclosure provided in a specific case has satisfied article 6 requirements.

As already set out in this submission, Amnesty International opposes the proposed extension of CMPs to all forms of civil procedure in which it would apply to claims of violations of human rights. The proposed extension of CMPs would be even more egregious if it does not even include a process whereby the individual concerned is provided with meaningful information about the allegations against them at the outset of a case, preventing them from even making minimally effective use of the already-limited mechanism of instructing a Special Advocate. The government should also ensure that the *AF (No 3)* disclosure requirement is complied with in good faith.

IV. Inquests and Closed Material Procedures

Consultation Questions: ***What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other persons?***

Should any of the proposals for handling sensitive inquests be applied to inquests in Northern Ireland?

With respect to the handling of sensitive information during investigations into a death, it should be noted that in the absence of any clear detail as to the government proposals in this area Amnesty International is not able to provide a thorough assessment of their conformity with international human rights law and standards. Accordingly the organization wishes to take this opportunity to raise some general concerns with the proposals in relation to the introduction of CMP into inquests, raise a number of questions and draw the government's attention to some of the relevant human rights law and standards with respect to investigations into a death where the state is implicated. We would also strongly caution against any changes to the Coroners Rules which risks leading to inquests that fall short of the requirement for a full, independent, impartial and thorough investigation into deaths involving agents of the state as required by article 2 of the European Convention on Human Rights, by articles 6 and 2 of the ICCPR, and by other international standards.

As rightly acknowledged in the Green Paper, the right to life is protected by article 2 of the European Convention on Human Rights, and other provisions of international human rights law. In order for that right to be given proper effect the European Court of Human Rights and other bodies have recognized that it must be accompanied by an obligation on states to initiate prompt, effective, independent and impartial investigations into cases where there are credible allegations that the right may have been violated. The obligation to conduct such an investigation is also recognized as a central component of the right to an effective remedy and reparation. In cases of alleged violations of the right to life in the UK, including deaths in which the state is implicated, this obligation is often discharged by way of a coroner's inquest. The proposals in the Green Paper, as we understand them, focus on inquests in which "sensitive information" is so important or central to the investigation that the inquest would not be able to properly proceed because that information would be excluded under the PII system. It is in response to these so described "exceptional cases" that consideration is being given to amending the Coroners Rules to allow for the introduction of CMPs into inquests. In doing so the assumption is that the inquest would be more thorough and effective as the coroner would be able to consider all the relevant information pertaining to the death being investigated.

Amnesty International recognizes that there are particular challenges posed by the holding of inquests in cases which might require the consideration of material which could, if disclosed, be said to threaten national security insofar as it would demonstrably endanger the lives or safety of particular individuals or the general population. We also fully support the principle that in investigating a death the coroner should be provided with as much relevant information as is possible in order that the investigation is both thorough and effective – which requires that as far as possible the full facts are brought to light, that culpable and discreditable conduct is exposed and that lessons may be learned.

However, we question the necessity and appropriateness of introducing CMPs into inquests as a general solution to these challenges. We would note there have been several inquests where highly sensitive information was crucial to the investigation where alternative mechanisms have been employed to ensure that it the information is protected, whilst still providing the families of the deceased and their legal representatives with critical disclosure. These mechanisms have included: powers to hold parts of the proceedings in camera; enforceable confidentiality agreements; restricted access to the media; protecting identity of witnesses, for example, through the provision of code names; summaries of the material provided to the families with their lawyers able to access the underlying material under confidentiality agreements; and redaction of documents.[54] It is possible therefore to conduct a thorough inquest, with more disclosure to the deceased family and their lawyer than would seem likely under the proposed CMP, whilst protecting legitimate claims to national security.[55] The Green Paper fails to explain why these already-existing mechanisms for exceptional circumstances are not sufficient to address any concerns it has.

Further, powers already exist where it is deemed not possible to proceed with an inquest due to the degree of sensitive information to establish an inquiry under the Inquiries Act 2005. Though the establishment of such an inquiry is not an ideal solution, and Amnesty International's criticisms of the Inquiries Act 2005 are well established, it nevertheless represents an existing alternative avenue which may be used in those exceptional circumstances – though the inquiry must still be conducted in a manner which is compliant with article 2 of the ECHR and articles 2 and 6 of the ICCPR – which undermines any claim that the new proposals are necessary.

Turning to the proposal itself to amend or add to the Coroners Rules "to allow the coroner to have a CMP for part of all of an inquest, and provide for families to receive 'gists' of sensitive material and be represented by Special Advocates when sensitive information is presented to the inquest". As the government is aware the obligation to investigate under article 2 of the ECHR (right to life) as set out in the case law of the European Court of Human Rights includes a requirement that there be a "sufficient element of public scrutiny" so as to secure genuine accountability and that the family of the deceased are involved in the process to the extent necessary to safeguard their "legitimate interests".[56] While the Court has said that "disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement [of the procedural requirements for the *investigations*] under Article 2", it has also indicated that this does not mean information can be withheld from the public or victims indefinitely; rather, in such circumstances, "[t]he requisite access of the public or the victim's relatives may therefore be provided for *in other stages of the procedure*".[57] The truth is also an essential element of the right to an effective remedy. United Nations standards on investigation of "all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances" expressly provide that "[f]amilies of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence."[58]

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[54] For further detail see *Inquest and the Inquest Lawyers' Group's response to the Justice and Security Green Paper.*

[55] One such example is the recent inquest into the 07 July 2005 bombings in London, where Lady Justice Hallett, in ruling that she did not have the power to order a closed material procedure, emphasized the following, "I am still hopeful that, with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened … I repeat, sources may be withheld, redactions made. I do not intend to endanger the lives of anyone. I do not intend to allow questions which might do so."

[56] *Giuliani and Gaggio v Italy*, para 303, citing *Hugh Jordan v the United Kingdom*, (App No 24746/94), 24 March 2011, *Varnava and Others v. Turkey* [Grand Chamber], (App No 16064/90 and others), 18 September 2009, para 191; *Güleç v Turkey*, (App No. 21593/93), 27 July 1998, para 82; and *Oğur v Turkey [Grand Chamber],* (App No 21594/93), 20 May 1999, para 92.

[57] In one case, for example, the Court found the procedural aspect of article 2 to have been violated in part because during the administrative investigation the case file had been inaccessible to the victim's close relatives, and then a subsequent court ruling also relied on the papers in the file, with those court proceedings also being inaccessible to the victim's relatives *Giuliani and Gaggio v Italy*, (App No 24746/94), 24 March 2011, para 304.

[58] UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,

The proposal put forward by the government includes the possibility that a CMP could be used for *all* of an inquest. Amnesty International does not believe that an inquest in which the family of the deceased, their chosen legal representatives and the public were excluded from the entirety of the inquest process could be compatible with article 2 of the European Convention of Human Rights or with articles 2 and 6 of the ICCPR, including the requirement to ensure sufficient public scrutiny and involvement of the family of the deceased. Neither would it be compatible with the right to an effective remedy and reparation. Accordingly any proposal which would allow for this possibility must be rejected.

Regarding the possibility of using a CMP for a part of the inquest there are a number of points of concern with this proposal which need to be carefully considered. Amnesty International considers that restrictions on public access to an inquest, or on the involvement in the inquest proceedings of the family of the deceased, can only be valid if they are as narrowly drawn as is compatible with the legitimate requirement of protecting the rights of those whose life or security might be endangered by the full disclosure of material being considered by the inquest, and otherwise consistent with the requirements for limitation of rights under the European Convention and ICCPR (necessity, proportionality, non-impairment of essence of affected rights). Amnesty International is concerned that the introduction of a CMP into an inquest might not be proportionate to the risk and may lead to far less information being disclosed to the family of the deceased than is currently be the case.

There is also a risk that where a CMP is used the coroner may be unable to give the family or the public any coherent explanation or reasons for his or her verdict. The interests of the family of the deceased include, centrally, an interest in knowing, as far as possible, all of the circumstances in which their relative came to meet his or her death.[59] Their full participation is crucial to give them meaningful answers to their questions and allows for the prospects of discovering the truth to be maximized. The efforts of Special Advocates asking, in private hearings, questions which are intended to represent the interests of the family of the deceased will be no substitute for the next of kin being told all of the circumstances of the death of their relative. Moreover, as Lord Bingham recognized in the case of *Amin*, an important function of an inquest is to try and ensure that "those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others".[60] It is a real possibility that a coroner may not be able to make recommendations over matters dealt with in the closed part of the inquest.

Finally, Amnesty International would like to raise the importance of public scrutiny and public confidence in the inquest process. As is noted in the Green Paper, the inquests in which sensitive information is highly relevant are also likely to be high profile cases where there is a real public interest in knowing the full facts of the case. There is a concern that the increased secrecy which may surround inquests in which a CMP is utilized, where much of the inquest takes place in closed sessions, from which the public and the family of the deceased are excluded, could add to, rather than dispel, public concern as to how the individual in question came to lose her or his life. Normally where the general public and the media are excluded from parts of the inquest on grounds of national security, it is the ongoing involvement of the family of the deceased that provides an important counterweight to allaying suspicions that there is an attempt of the state to cover up wrongdoing. In a CMP, that counter-weight is lost, and the resultant secrecy may fuel fears that the state is attempting to deliberately prevent information about its own culpability in deaths becoming publicly known. This in turn could

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Economic and Social Council resolution 1989/65 of 24 May 1989, Annex, para 16.

[59] Which must be protected if the inquest is comply with article 2 ECHR, articles 2 and 7 ICCPR, the right to an effective remedy and reparation, and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para 17 which states "A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection."

[60] *Amin, R (on the application of) v. Secretary of State for the Home Department* [2003] UKHL 51, para.31 See also paras 18 and 23 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, on "guarantees of non-repetition" as an element of effective remedy.

undermine public confidence in the ability of coroners' inquests to deliver genuinely independent and impartial investigations into deaths which may have been the responsibility of an agent of the state.

There concerns are all the more pressing in the context of the legacy inquests in Northern Ireland, which include the examination of deaths which have been alleged to be the result of a 'shoot-to-kill' policy on the part of the Royal Ulster Constabulary (RUC). The ongoing failure to conduct article 2 compliant investigations into these deaths, some of which happened nearly thirty years ago, due primarily to the refusal to disclose information central to the investigation to the families and their legal representatives, makes the need for public scrutiny and proper involvement of the families of the deceased all the more crucial. Further, given the historical nature of these inquests it is difficult to accept the government's arguments that information pertaining to the deaths continues to jeopardize national security to the extent that the information cannot be provided to the families of the deceased and their lawyers, allowing the long overdue inquests to proceed effectively.

Clarity is also needed as to where the final determination for disclosure will lie. Amnesty International would be deeply concerned if the government were to be given the final say as to disclosure as this would compromise the independence of the investigation conducted by the coroner's inquest by what would, in effect, be a transfer from the coroner – an independent judicial officer – to a member of the executive of the power to determine whether a particular piece of evidence should or should not be made public. This is all the more problematic in those cases where the state is alleged to be responsible for the death. As such it is important that the final determination regarding disclosure be that public disclosure or disclosure limited to the families of the deceased and their lawyers should always lie with an authority independent of the executive.

V. Norwich Pharmacal

Question: what role should the courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?

This question considers the future of certain 'Norwich Pharmacal' claims: a civil law action available in the UK courts under which individuals have brought proceedings against the UK government seeking disclosure of information in order to assist them in a case against a third party. Under a *Norwich Pharmacal* action, where a third party who has been mixed up in wrongdoing has information relating to unlawful conduct, a court can compel them to assist the person suffering damage by giving them that information. Although the origin of this type of action is in the context of an intellectual property dispute, it has been used more recently by individuals seeking information held by the UK government relating to credible allegations of serious human rights violations (torture or other ill-treatment, and unlawful detention) overseas. The most notable of these cases is that of Binyam Mohamed, a former Guantanamo detainee, who brought a *Norwich Pharmacal* action against the Foreign Secretary, in order to obtain material he argued was necessary for his defence before a Military Commission in the United States, where he faced potential capital charges.[61] The lengthy litigation around Binyam Mohamed's case resulted in the disclosure of seven-paragraphs – contained in the initial Divisional Court's judgment but which had been redacted on the government's request - summarizing reports provided by US authorities to MI5 and MI6. The paragraphs describe reports of mistreatment faced by Binyam Mohamed at the hands of the USA which the Court said "could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities", and demonstrated that the UK had knowledge of that mistreatment.

It is a requirement of a *Norwich Pharmacal* action that the defendant, who holds the information sought, must have been mixed up in the wrong-doing concerned.[62] It is, therefore,

[61] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 2973 (Admin)

[62] As noted in the Green Paper there are five elements that a claimant must satisfy in order to successfully bring a *Norwich Pharmacal* claim:1) there must be arguable wrongdoing on the part of a third party; 2) the defendant must be mixed up in that wrongdoing, however innocently; 3) it must be necessary for the claimant to receive the information

only because the Court found that the UK was sufficiently involved in Binyam Mohamed's mistreatment that his case could be brought. As with the other proposals in the Green Paper, the context is crucial: in this situation, allowing for the withholding of evidence of serious human rights violations would constitute a very significant interference with the ability of the victims of those violations to exercise their rights to obtain information about the violations and to seek redress.

The Green Paper argues that 'the UK's critically important and hard earned secrets and those of our intelligence partners may be obtained by individuals though a recent development in our justice system. It is crucial that we rebuild the trust of our foreign partners in order to ensure that they can be satisfied that the range of sensitive material they share with us, and the communications on diplomatic channels, all of which take place with an understanding of confidentiality, will indeed remain confidential. This refers to the so-called 'control principle', used in intelligence-sharing relationships under which the originator of the intelligence material should retain control over the dissemination of that material. The government has claimed that the intelligence-sharing relationship with the US is already being negatively impacted by the risk that US originated intelligence material could be made public by the courts as a result of future *Norwich Pharmacal* actions.

The proposal put forward in the Green Paper is to legislate to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications where disclosure of the material in question would cause damage to the public interest.[63] There would be an absolute exemption from liability to disclosure for material held by or originating from one of the intelligence agencies; other material would be exempted from disclosure on a case-by-case basis by Ministerial Certificate. This second category (non-agency material) could be challenged by way of judicial review with the use of CMP for consideration of the nature of the material and the potential damage caused by disclosure. The Green Paper argues that this proposal is necessary to "reduce the potentially harmful impact of such court-ordered disclosure".

Amnesty International reminds the government that the information involved in these cases has concerned allegations of serious human rights violations, including torture and/or other deliberate cruel, inhuman or degrading treatment, in respect of which the UK is alleged to have been involved in or in receipt of information about. As emphasized throughout this submission information relating to torture and other serious human rights violations should not be protected, either by resort to national security arguments or by diplomatic principle. The UK has international and domestic legal obligations to prevent and prosecute the commission of torture and the prohibition of torture is a *jus cogens* obligation under international law which takes precedence over any diplomatic protocol. The Green Paper asks "*what role should the courts play in determining the requirement for disclosure of sensitive material?"*, the answer – in line with international human rights standards – is that in all cases where serious human rights violations are at stake, judges must be the ultimate arbiters in assessing the merits of a claim to secrecy by the state over information potentially relevant to a claim for serious violation of human rights. The proposals by the government in the Green Paper seek to usurp the power of judges to be the final arbiter in cases which the government deems as sensitive. In so doing an avenue by which victims of human rights violations are able to seek and obtain information about these violations in such cases would be closed to them.

It is also deeply problematic that the proposals seek to provide a complete exemption for any material held or originated by the intelligence agencies from disclosure. Amnesty International recognizes that in principle there may be genuine national security reasons for not disclosing information which will endanger the lives or safety of individuals or the general population. However, this cannot justify the provision of a blanket claim to secrecy for the intelligence agencies. Intelligence material, as with other types of sensitive material, must be subject to possible disclosure if a court determines that it contains evidence of human rights violations.

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by making *a Norwich Pharmacal* application; 4) the information sought must be within the scope of available relief, it should not be used for wide-ranging disclosure or evidence-gathering and it is to be strictly confined to necessary information; 5) the court must be satisfied that it should exercise discretion to make the order sought.

[63] The Green Paper rejects as disproportionate the option of scrapping entirely the ability to bring *Norwich Pharmacal* proceedings against any Government Department.

It may also be noted that the UN Human Rights Committee has pointed out that the obligation of each state party to the Covenant to respect human rights is not owed only to individuals but to every other state party as well. As such, the Committee emphasizes that "To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."[64] This principle should be taken into account in evaluating claims that restrictions on disclosure in cases claiming for violations of human rights can be justified on the basis of the desire to preserve diplomatic relations or intelligence-sharing arrangements with other states.[65]

It is also Amnesty International's view that the arguments set out the Green Paper in favour of limiting the *Norwich Pharamcal* jurisdiction are overstated. In the Binyam Mohamed case the Divisional Court made it clear that "there is nothing secret or of an intelligence nature in the seven paragraphs redacted from the first judgment. In providing the summary of the treatment of BM in those seven redacted paragraphs we are not in the judgment 'giving away the intelligence secrets of a foreign country' or making public 'American secrets'…of itself, the treatment to which BM was subjected could never be properly described in a democracy as 'a secret' or an 'intelligence secret' or 'a summary of classified intelligence'".[66] In fact, what is clearly demonstrated in *Binyam Mohamed* is that in *Norwich Pharmacal* cases, as with most litigation involving national security, the courts are particularly deferential to the government in the decision as to whether material is sensitive and whether disclosure would harm national security, and will tend only to order disclosure where the evidence of serious human rights violations is particularly compelling – certainly no fear of sweeping disclosure of a 'fishing expedition' nature can be said rationally to be raised by the cautious approach of the Court in *Binyam Mohamed.*

As an alternative to removing the *Norwich Pharmacal* jurisdiction, the Green Paper seeks views on an alternative option of legislating to provide more detail as to what will in future be required to satisfy each of the five elements of the *Norwich Pharmacal* test. Obviously it is open to the UK, within limits, to determine the particular procedures by which victims of serious human rights violations in which the UK is implicated may seek and obtain information relevant to the violations. As such, although Amnesty International would have no particular objection to the *Norwich Pharmacal* jurisdiction and its criteria being placed on a statutory footing, any moves to do so must not limit the ability of victims of human rights violations to use *Norwich Pharmacal* actions to obtain information about the violations.

VI. Non-judicial oversight of the security and intelligence agencies

As with the other questions posed by the Green Paper, the context, of potential involvement by the Security and Intelligence Agencies in human rights violations, is central to any analysis of the proposals. The right to a remedy and reparation for human rights violations includes the need for guarantees of non-repetition. Effective civilian control of military and security forces is both an element of the guarantee of non-repetition and part of the more general obligations on the UK to prevent human rights violations.

Amnesty International welcomes the intention expressed in the Green Paper to increase non-judicial oversight of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (the Security and Intelligence Agencies). The current mechanisms in the UK for overseeing the Security and Intelligence Agencies have proven to be

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[64] UN Human Rights Committee General Comment No.31, para 2.

[65] See *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 69, stating that it was, in the court's view, "difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing in the public domain such a summary of what its own officials reported as to how a detainee was being treated by them". The court asked why a "democracy governed by the rule of law would expect a court in another democracy to suppress a summary of evidence contained in reports by its own officials…where the evidence was relevant to allegations of torture…politically embarrassing though it may be".

[66] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 2973 (Admin), para 13 It can also be noted in relation to the Binyam Mohamed case that by the time of the final judgment of the Court of Appeal the documents originally sought by Binyam Mohamed and his legal team had been disclosed by the US authorities directly to Binyam Mohamed's US counsel, albeit with redactions.

inadequate. In particular they have failed to provide adequate scrutiny or accountability for the actions of the Security and Intelligence Agencies or to prevent their involvement in unlawful conduct. Robust and ongoing oversight and accountability for their actions may help to prevent future violations. But, whilst it is necessary and an important check and balance, reform of non-judicial oversight mechanisms cannot be a substitute or a trade-off for judicial scrutiny and a transparent civil justice system for holding the Security and Intelligence Agencies to account, especially when their actions may amount to involvement or complicity in serious human rights violations.[67]

For example, Amnesty International has voiced its concern over many years about the inadequacy of the Intelligence and Security Committee (ISC) as an oversight body, chiefly because of its lack of independence from the executive and its limited powers.[68] The ISC was established by the Intelligence Services Act 1994 to examine the policy, administration and expenditure of the Security and Intelligence Agencies. It is not expressly mandated to review operations. Its cross-party membership is made up of UK parliamentarians appointed by the Prime Minister "after considering nominations from Parliament and consulting with the leaders of the two main opposition parties". It is staffed by government employees and has been chaired by former members of the executive. The ISC is not a Parliamentary Committee; it meets in private and does not discuss its work, other than through the publication of its reports. "For reasons of national security" it reports to the Prime Minister, and Committee reports are published by the Prime Minister, not the Committee itself[69], often after substantial redactions at the request of the Security and Intelligence Agencies, "where the ISC has agreed, after careful consideration, that publication of the [un-redacted] material would harm national security". Because of the opaque nature of its processes, and failure to prevent, or to adequately investigate allegations of, UK involvement in torture, rendition and secret detention, the ISC has failed to gain the confidence of Parliament or the broader public.[70]

The two investigations conducted by the ISC into UK involvement in torture, rendition and secret detention keenly demonstrate the problems faced by the ISC and indicate a lack of capacity to detect, let alone remedy, failures by the Security and Intelligence Agencies to act consistently with the UK's international human rights obligations. For example, its 2007 report on rendition, the ISC said that it had found no evidence that the Security and Intelligence Agencies were complicit in any extraordinary renditions. The Director General gave oral evidence to the ISC that the security services had no knowledge of 'extraordinary renditions' through UK territory since 11 September 2001.[71] The report is heavily redacted and it is difficult to ascertain the extent of the information given to the ISC. But, it is clear that credible evidence has since emerged of UK involvement in renditions which implicates the Security and Intelligence Agencies and puts the ISC's assessments into doubt.[72] The ISC has

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[67] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs*, [2010] EWCA Civ 65, at para 42: "The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the court) is undiminished either by the possible exercise by the Intelligence and Security Committee of its responsibilities to inquire into possible wrongdoing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who may have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice".

[68] See for example, Amnesty International UK Director Kate Allen's oral evidence to the Foreign Affairs Committee on 10 June 2009: "From the perspective of Amnesty International, the Intelligence and Security Committee is appointed by the Prime Minister, reports to the Prime Minister, and the Prime Minister decides what the rest of us see. That is not an investigation that Amnesty International could have confidence in."

[69] There are two unpublished ISC reports on Detainees the first from March 2009 on its findings in the Case of Binyam Mohammed, (*'Alleged complicity of the UK intelligence and security Agencies in torture or cruel, inhuman or degrading treatment'*), and the second from March 2010, (*'Review of the Government's draft guidance on handling detainees'*). See *Intelligence and Security Committee: Annual Report 2010 – 2011,* footnote.226.

[70] See Joint Committee on Human Rights , *Allegations of UK Complicity in Torture,* 23rd Report, 2009, paras 57-66, and also Foreign Affairs Committee, *Human Rights Annual Report 2008*, 7th Report 2008, paras 60-63.

[71] On 21 February 2008 David Miliband MP, then Foreign Secretary announced to Parliament that two US rendition flights had landed in the British territory of Diego Garcia in 2002, see House of Commons Hansard, 21 Feb 2008, column 547.

[72] For example, in Binyam Mohamed's case it was found that the Security and Intelligence Agencies did know of his mistreatment by the US prior to his interrogation by MI6. See Lord Neuberger, Master of the Rolls at para 168: "it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that "they operated a culture that respected human rights and that coercive interrogation

also confirmed that during their original inquiry into rendition, there were a number of documents which were not provided to the ISC by the Security and Intelligence Agencies and which were only discovered following Binyam Mohamed's *Norwich Pharmacal* case.[73]

The lack of sufficient independence of the ISC is both caused and compounded by its limited powers, remit and resources, all of which must be addressed if oversight mechanisms are to be improved and the failings referred to above are not to be repeated. At present, there is no legal duty on the Security and Intelligence Agencies to provide the ISC with information on request (unlike the Commissioners and the IPT) and both agency heads and Ministers can veto the provision of information to the ISC on "public interest" grounds. The role of a sufficiently empowered ISC in providing some form of public oversight of the work of the Security and Intelligence Agencies is vital in ensuring that both that the agencies have public confidence and that they act within the law, including compliance with international human rights law.

Amnesty International recognizes that the oversight function of the ISC sits alongside the roles of the Intelligence Services Commissioner and Interception of Communications Commissioner ("The Commissioners") and the Investigatory Powers Tribunal ("IPT"). [74] However, the remit of these bodies are such that they are unable to play the same role as the ISC in preventing violations for example, by considering systematic issues relating to the policies or practices of the Security and Intelligence Agencies, scrutiny of which is vital to ensuring the prevention of human rights violations and the guarantee of non-repetition.[75]

The Special Rapporteur on counter-terrorism and human Rights has compiled a list of good practices on ensuring respect for human rights by intelligence agencies while countering terrorism which could guide the UK Government in its attempts to improve non-judicial oversight of the Security and Intelligence Agencies[76] Practice 7 provides that: "*Oversight institutions should have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates. Oversight institutions receive the full cooperation of intelligence services and law enforcement authorities in hearing witnesses, as well as obtaining documentation and other evidence*"[77]. This should include powers of access to information and the legal authority to view all relevant files and documents; inspect the premises of intelligence services and to summon any member of the intelligence services to give evidence under oath.

The principles outlined by the Special Rapporteur on counter-terrorism and human rights state that the combined remit of oversight institutions should "cover all aspects of the work of

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techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information" *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs, [2010] EWCA Civ 65*

[73] See *Mohamed, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin),Para 88.

[74] The IPT was established principally to deal with complaints against the Security and Intelligence Services and law enforcement agencies concerned with the investigatory powers under RIPA

[75] Martin Scheinin, the former UN Special Rapporteur on counter-terrorism and human rights has also identified the risk that "with compartmentalised oversight, whereby oversight bodies are assigned to examine just one part of the intelligence community, cross-cutting problems fall through the gaps between oversight bodies" UN Doc A/HRC/10/3.

[76] Report of the UN Special Rapporteur on counter-terrorism and human rights, *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, UN Doc A/HRC/14/46.

[77] *Ibid,* practice 7, para.14

intelligence services, including their compliance with the law, the effectiveness and efficiency of their activities; their finances; and their administrative practices". All dimensions of the work of intelligence services should be subject to the oversight of one or a combination of external institutions. One of the primary functions of a system of oversight is to scrutinise intelligence services' compliance with applicable law, including human rights. They should be able to hold intelligence services and their employees to account for any violations of the law and assess the performance of intelligence services". The operational aspects of the work of the Security and Intelligence Agencies is only scrutinised to a limited extent by the Commissioners in relation to warrants and the IPT in relation to individual cases where complaints have been made. In order to have full scrutiny of the work of the Security and Intelligence Agencies, the ISC must have powers to scrutinise their operational work.

In terms of resources, the Special Rapporteur on counter-terrorism and human tights recommends that oversight mechanisms need the human and financial resources necessary to make use of these powers and fulfill mandates. As such the commitment in the Green Paper to review the level of resourcing that the ISC requires to support it in the discharge of its functions and the nature of the skills the Committee requires to have at its disposal is important as the ISC must have the resources and expertise necessary to carry out investigations into the work of the Security and Intelligence Agencies. This includes independent legal and intelligence expertise as well as investigative capacity. Reform of the remit and legal basis for the ISC will be illusory without providing it with the necessary resources to carry out its work.

Amnesty International recommends that any changes to the combined systems for overseeing the Security and Intelligence Agencies should aim to increase transparency both of the work of the agencies and the oversight mechanisms themselves; ensure that the policies and operations of the agencies are scrutinised for their compliance with international human rights standards; and that any violations are remedied, including by making recommendations to ensure non-repetition of any violations.