

# **AMNESTY INTERNATIONAL**

## **External Document**

AI Index: EUR 45/027/2004 (Public)  
4 October 2004

**Embargo Date: 4 October 2004 10:00 GMT**

## **UK: Text of Amnesty International submission to House of Lords opposing indefinite detention**

**IN THE HOUSE OF LORDS  
ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL**

**BETWEEN:-**

**Appellants**

**A and others**

**-v-**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT  
Respondent**

**INTERVENTION ON BEHALF OF  
AMNESTY INTERNATIONAL LIMITED**

### **PART 1: INTRODUCTION**

1.1 Amnesty International Limited makes these submissions pursuant to the permission granted by Your Lordships' House on 29th July 2004 for it to intervene, in writing, in the Appellants' appeal. In its Petition of 20th July 2004, Amnesty International set out its expertise and interest in these proceedings, together with a broad outline of the issues on which it sought Your Lordships' leave to make submissions.

1.2 The Appellants' appeal challenges the compatibility with their human rights of the scheme contained in Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") in light of the

derogation entered by the United Kingdom to article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). Under the scheme contained in Part 4 of the 2001 Act the Secretary of State is empowered to detain indefinitely foreign nationals – who cannot be deported or otherwise removed owing to international obligations – whom he certifies as “suspected international terrorists” and a “risk to national security” based upon his reasonable belief and suspicion. In *Chahal v United Kingdom* 1996) 23 EHRR 413 at para 112 the European Court of Human Rights held that the authority to detain a foreign national with a view to deportation conferred by article 5(1)(f) of the Convention does not authorise detention in this situation because article 5(1)(f) requires that “action is being taken with a view to deportation”. It is because the 2001 Act encompasses detention of persons whose deportation or removal cannot be effected that the United Kingdom has derogated from its obligations under article 5(1) of the Convention.

1.3 In summary, Amnesty International submits that the scheme of Part 4 of the 2001 Act:-

- (i) Is incompatible with the Appellants’ fair trial rights under article 6 of the Convention and article 14 of the United Nations International Covenant on Civil and Political Rights (“the Covenant”) and/or under article 5(4) of the Convention.
- (ii) Is incompatible with article 3 of the Convention, article 7 of the Covenant and article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) because, according to the Court of Appeal’s judgment delivered on 11 August 2004, the scheme requires the admission of evidence obtained by torture or other ill-treatment where the torture or other ill-treatment was neither committed nor connived in by United Kingdom officials.
- (iii) Is, by reason of the incompatibilities with the requirements of articles 3, 5(4) and 6 of the Convention, incompatible with the Human Rights Act 1998.
- (iv) Fails to meet the requirements established under article 15 of the Convention for lawful derogation because it is inconsistent with other international obligations, namely articles 3, 6 and 5(4) of the Convention; articles 7 and 14 of the Covenant and article 15 of CAT.

1.4 In these submissions Amnesty International will address the following matters:-

1. The nature and scope of permissible derogation under article 15 of the Convention:

**Part 2.**

2. The terms of the derogation: **Part 3.**
3. The scheme established under Part 4 of the 2001 Act: **Part 4.**
4. The application and violation of articles 6 and 5(4) of the Convention and article 14 of the Covenant: **Part 5.**
5. The application and violation of articles 3 of the Convention and article 7 of the Covenant: **Part 6.**
6. The application and violation of article 15 of CAT: **Part 7.**
7. The existence of a *prima facie* case that torture and other inhuman or degrading treatment has been used to obtain evidence at Guantanamo Bay, Cuba, at Bagram airbase, Afghanistan, and at other undisclosed locations where people have been held in US custody: **Part 8.**
8. The incompatibility of the measures contained in Part 4 with the Human Rights Act 1998: **Part 9.**

9. The incompatibility of the measures with article 15 of the Convention: **Part 10.**

## **PART 2: THE NATURE AND SCOPE OF PERMISSIBLE DEROGATION**

2.1 Article 15 of the Convention, entitled “Derogation in time of emergency”, provides for the circumstances in which a high contracting party may derogate from its obligations under the Convention.

“1. In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

“2. No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

“3. Any high contracting party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.

2.2 Section 14 of the Human Rights Act 1998 (“the 1998 Act”) establishes a procedure for a derogation to be designated:

- (1) In this Act ‘designated derogation’ means
  - a. ...
  - b. Any derogation by the United Kingdom from an Article of the Convention, or of any protocol of the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.
- (2) ....
- (3) If a designated derogation is amended or replaced it ceases to be a designated derogation.
- (4) But, subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.
- (5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect –
  - a. Any designation order; or
  - b. The effect of subsection 3.
- (6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

2.3 By section 1(2) of the 1998 Act, the articles set out in subsection (1) and Schedule 1 to the 1998 Act have effect subject to any designated derogation.

2.4 Section 16(1)(b) of the 1998 Act provides that a designated derogation shall lapse after 5 years. However, under sub-section (2) the Secretary of State may extend the designation order for a further period of five years at any time before it lapses.

2.5 Section 30 of the 2001 Act confers exclusive jurisdiction on the Special Immigration Act Commission (“the Commission”) to determine any issue relating to a derogation from article 5(1) for the purpose of detaining foreign nationals where there is an intention to deport:-

“(1) In this section ‘derogations matter’ means –

(a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or

(b) the designation under section 14(1) of the Human Rights Act 1998 of a derogation within paragraph (a) above.

“(2) A derogation matter may be questioned in legal proceedings only before the Special Immigration Appeals Commission; and the Commission –

(a) is the appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to proceedings all or part of which call a derogation matter into question; and

(b) may hear proceedings which could, but for this subsection, be brought in the High Court or the Court of Session.”

### **PART 3: THE TERMS OF THE DEROGATION**

3.1 On 13 November 2001 the Human Rights Act (Designated Derogation) Order 2001, SI 3644/2001 (“the 2001 Order”) came into force, having been made on 11 November and approved by both Houses of Parliament. The Order contains a Schedule notifying the Secretary General of the Council of Europe of the intention of Her Majesty’s Government to derogate from Article 5(1) of the Convention, and by paragraph 2, designates for the purpose of the Human Rights Act 1998 the proposed derogation set out in the Schedule. On 18th November 2001 the Secretary General of the Council of Europe was informed of the United Kingdom’s derogation by note verbale in the terms of the Schedule.

3.2 The Schedule/notification identifies the events of September 11th 2001 as the basis upon which it is claimed by the government that there is a public emergency in the United Kingdom. It further identifies the measures contained in the Anti-terrorism, Crime and Security Act 2001 which have been introduced as a result of the claimed public emergency and explains the reasons why it has been considered necessary to derogate in order to implement these measures. Amongst the reasons advanced, it is said that it may not be possible to prosecute given the strict rules of evidence and high standard of proof that apply in the United Kingdom criminal justice system.

3.3 On 14th December 2001 the relevant provisions of the 2001 Act came into force.

3.4 On 19th December 2001 the Human Rights Act 1998 (Amendment No. 2) Order 2001 SI 4032/2001 was made and came into force on 20 December 2001. Paragraph 2 inserted before Part II of Schedule 3 to the Human Rights Act 1998 the text of the derogation set out in the Schedule to the Order which is in the same terms as the Schedule to the Derogation Order.

### **PART 4: THE SCHEME ESTABLISHED UNDER PART 4 OF THE 2001 ACT**

4.1 The power to detain under Part 4 of the 2001 Act arises in respect of a foreign national who has been certified by the Secretary of State in accordance with section 21:

“21. *Suspected international terrorist: certification.*

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably –

- a. Believes that the person’s presence in the United Kingdom is a risk to national security, and
- b. Suspects that the person is a terrorist”.

4.2 The terms “terrorist” and “terrorism” have the same meaning as section 1 of the Terrorism Act

2000: subsection 5. “Terrorism” means the use or threat of action where:

- a. the action falls within subsection (2),
- b. the use, or threat is designed to influence the government or to intimidate the public or a section of the public, and
- c. the use or threat is made for the purpose of advancing a political, religious or ideological cause.

4.3 Action falls within subsection (2) if it

- a. involves serious violence against a person,
- b. involves serious damage to property,
- c. endangers a person’s life, other than that of the person committing the action,
- d. creates a serious risk to the health or safety of the public or a section of the public, or
- e. is designed seriously to interfere with or seriously to disrupt an electronic system.

Any action falling within subsection 2 which involves the use of firearms or explosives is terrorism whether or not it is designed to influence the government or to intimidate the public or a section of the public: section 1(3) of the 2000 Act. The definitions given to the terms “action”, “person” “property”, “public” and “government” by subsection 4 establish that the definition of terrorism encompasses action occurring outside the United Kingdom.

4.4 A person who is certified by the Secretary of State under section 21 is referred to as a “suspected international terrorist”, and a power to detain him is conferred by section 23.

4.5 Section 25 of the 2001 Act confers a right of appeal to the Commission against the decision of the Secretary of State to certify under section 21. Subsection (2) provides:-

“On appeal the Commission must cancel the certificate if –

- (a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or
- (b) it considers that for some other reason the certificate should not have been issued”.

4.6 If the Commission does not cancel the certificate it must dismiss the appeal (subsection (3)). A certificate which is cancelled shall be treated as never having been issued (subsection 4).

4.7 An appeal against certification must be commenced within 3 months of the date of certification, although the Commission has a discretion to extend time. But in any event an appeal must be commenced before the date of the first review under section 26 (subsection 5).

4.8 Section 26 imposes a duty on the Commission to conduct a review of each certificate as soon as is reasonably practicable after the expiry of six months beginning with the date of certification, or the date on which an appeal was determined under section 25. Second and subsequent reviews must be conducted as soon as reasonably practicable after the expiry of a period of three months beginning with the date of determination of the previous review. On a review the Commission must cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b). Otherwise, it may make no order, save as to leave to appeal (subsection (5)).

4.9 By section 27(9) of the 2001 Act the Secretary of State is empowered to issue another certificate, whether on grounds of change of circumstance or otherwise, in respect of an individual whose certificate has been cancelled by the Commission.

4.10 The procedure before the Commission on a review or appeal is governed by Parts 3, 4 and 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003/1034. These

Rules came into force on 1 April 2003 and were made by the Lord Chancellor pursuant to a power conferred under section 27(5) of the 2001 Act in conjunction with sections 5 and 8 of the Special Immigration Commission Act 1997 (the 1997 Act”).

4.11 The Rules provide for two kinds of hearing before the Commission – “open evidence hearings” and “closed evidence hearings”. At the open evidence hearing, the appellant is represented by counsel of his choosing and is provided with the material upon which the Secretary of State is relying and does not object to disclosing or which, though he objects, the Commission has ordered him to disclose. At the closed hearing, the appellant and his legal representative are excluded and are, therefore, kept unaware of any of the evidence presented by the Secretary of State. This is evidence which the Secretary of State has not disclosed and the Commission has not ordered disclosed where that objection is supported by the Commission. At the closed hearing the Appellant is represented by a special advocate; that is an advocate appointed under section 5 of the 1997 Act, 1 by the Attorney-General “to represent [the Appellant’s] interests” in any proceedings before the Commission from which he and his legal representative are excluded”. Under rule 35, the functions of a special advocate are to represent the interests of the appellant by

- (a) making submissions to the Commission at any hearings from which the appellant and his representative are excluded;
- (b) cross examining witnesses at such hearings; and
- (c) making written submissions to the Commission.

There is no limit on the communication the special advocate may have with the Appellant before s/he is provided with the closed material. However, once that material has been served the special advocate must not communicate with the appellant or his representative about any matter connected with the proceedings unless s/he has obtained a direction from the Commission authorising him to do so: rule 36.

4.12 If leave is granted, the detainee may appeal – in the first instance to the Court of Appeal and only on points of law – the decision of the Commission to confirm the certificate: section 27(1) of the 2001 Act and section 7(2) of the 1997 Act.

4.13 Under section 29(1), sections 21 and 23 were to expire 15 months after the 2001 Act came into force unless renewed by Order of the Secretary of State made by statutory instrument. Such an order revives the sections for a period of one year. By section 29(7), sections 21 and 23 shall cease to have effect at the end of 10 November 2006.

4.14 Detention following certification can be brought to end in the following ways:-

1. Following the cancellation of a certificate by the Commission on appeal or review.
2. By the Secretary of State himself revoking the certificate or releasing the detainee;
3. By the detainee leaving the United Kingdom. The apparent choice of the detainee in these circumstances is not choice at all: it may in fact amount to constructive *refoulement* unless a “safe” third country is prepared to host him. It makes the price of liberty an “agreement” on the part of the detainee which puts him at risk of severe human rights violations.
4. By the detainee being granted bail. This is a power which will be exercised to prevent a violation of article 3 or 8 of the Convention arising out of the circumstances and conditions of detention. Thus, if detention itself is causing severe mental

suffering bail might be granted;<sup>2</sup>

5. By the power to detain lapsing.

4.15 The effectiveness of appeals to the Commission and their inconsistency with articles 6 and 5(4) of the Convention and article 14 of the Covenant is considered in detail in Part 5 of these submissions below. In respect of the other so called safeguards, a number of factors since the enactment of the 2001 Act indicate that, in practice, they offer scant protection:

(i) The Privy Counsellor Review Committee<sup>3</sup> reporting on the 2001 Act on 18th December 2003 observed at paragraph 200 that the “authorities appear to have given no thought to what change in circumstances might lead them to conclude that an individual should be released or dealt with differently (beyond the general observation that detention under Part 4 powers would cease if those powers lapsed or if new information came to light which put a different complexion on the case)”.

(ii) The Secretary of State has already made two orders extending the application of sections 21 and 23 under section 29(1).<sup>4</sup> As the Privy Counsellor Review Committee observed in the foreword to its report on the 2001 Act at pp. 3-4:-

“In September 2002, the Home Secretary.... commented: ‘Since the September 11th attacks, we have had some success in damaging al Quaeda’s capability, and in thwarting attacks. But the terrorist threat remains real, and serious. As recent events have shown, no country is immune from attack, and it simply is not possible to guarantee against more attacks in the future’. His statement remains valid today. It is clear that the nature of the terrorist threat confronting the United Kingdom makes it prudent to assume that special legislative response is likely to be required for the foreseeable future”;

(iii) In a recent statement issued by the Secretary of State on 6 August 2004, he again confirmed that the threat was continuing and has remained high for some time. 5 ;

(iv) By the date of this hearing, the Appellants will already have been detained for nearly three years. While sections 21 and 23 of the 2001 Act shall cease to have effect on 10 November 2006 by operation of section 29(7), it is open to the Secretary of State to issue a fresh designation order under section 14(4) of the 1998 Act. It is submitted, therefore, that the formal mechanisms which exist after certification and appeal to bring detention to an end, at present, show little sign of making a material impact on the long-term indefinite nature of detention under the 2001 Act. It is important that this be recognised so that the true extent to which Part 4 of the 2001 Act offends the right to liberty and constitutes a grave punishment is to be acknowledged: there is, at present, no end in sight.

4.16 It follows that the “safeguards” aimed at preventing mistakes being made in the certification and detention process are burdened with the essential task of preventing very grave miscarriages of justice. The extent of those “safeguards” and their compatibility with fair trial rights guaranteed under international human rights law constitute essential components in the assessment of the lawfulness of the measures.

## **PART 5: THE APPLICATION OF FAIR TRIAL GUARANTEES**

5.1 In this Part, Amnesty International will address the nature of the fair trial guarantees engaged in the certification and detention process established under Part 4 of the 2001 Act and the manner in which, in its submission, those guarantees are violated. Amnesty International submits that the certification and detention process established under Part 4 of the 2001 Act, in substance and effect, amounts to the determination of a criminal charge. This is so even though it is plainly not categorised as such under domestic law. It is submitted that under international human rights law a state cannot circumvent fair trial guarantees by placing outside the ordinary criminal process a procedure which in substance amounts to the determination of a criminal charge. Ascertaining what in substance is the nature of a particular procedure requires the focus to be on the procedures themselves. This is because, by their very nature they have been designed to avoid the requirements of regular criminal procedures. It would beg the question to determine the nature of the proceedings, and therefore the nature of the safeguards required, by reference to the safeguards that have

actually been afforded. Rather, the question must whether the object of the procedure is to determine criminal conduct and impose penal consequences. If it is, then plainly, fair trial safeguards are called for.

5.2 It is further submitted that whether article 6 is engaged in its criminal or civil aspect, or the compatibility of the procedure for detention is assessed under article 5(4) of the Convention, the procedures constitute a flagrant breach of the due process guarantees to which individuals subjected to the Part 4 scheme are entitled.

**(1) The relevant guarantees**

5.3 Article 6 of the Convention provides:-

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

“(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

“(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

(e) to have the free assistance of an interpreter if he does not understand or speak the language used in court.”

Article 5(4) of the Convention provides:-

“Everyone deprived of his detention by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

Article 14 of the Covenant provides:-

“(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the

parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

“(2) Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

“(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) ...

“(5) Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher court or tribunal.

“(6)....

“(7) ...”

**(2) The certification and detention process established under Part 4 of the 2001 Act involves the determination of a criminal charge.**

(a) *The process of charging and its determination*

5.4 The Commission rejected the application of article 6 in its criminal aspect because it found that:-

(i) Certification by the Secretary of State does not amount to the bringing of a charge;

- (ii) Certification does not involve the commencement of proceedings; and
- (iii) An appeal to the Commission does not determine any charge.

5.5 It is submitted that the Commission's approach displays a formalism which is antithetical to that which underlies the interpretation and application of international human rights obligations. Under international human rights law, the approach is one which seeks to render human rights guarantees practical and effective, not theoretical and illusory,<sup>6</sup> which insists that regard be had to substance and not form, and that it is necessary to look beyond appearances to the reality of the situation. <sup>7</sup>

5.6 In the pursuit of its fundamental aim to ensure the effective enjoyment of the rights guaranteed under the Convention so as to afford effective protection irrespective of how an individual's entitlement to their protections may be masked domestically, the Court has given an autonomous meaning to key Convention concepts, such as criminal charge<sup>8</sup>, civil obligation, deprivation of liberty, and penalty<sup>9</sup>. By decoupling the meaning of these concepts from the definition given in domestic law, the Convention prevents states from circumventing its protections by sleight of hand.

5.7 In keeping with this approach, the notion of what amounts to the bringing of a charge is not equated with the domestic characterisation. In *DeWeer v Belgium* (1980) 2 EHRR 439 the European Court identified the "charge" as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" and closely related to that, "whether the situation of the suspect has been substantially affected".

5.8 It is not disputed that the conduct which underpins certification constitutes a criminal offence. The situation of the suspect is plainly substantially affected as he becomes immediately liable to indefinite detention under the 2001 Act. Furthermore, when one steps behind appearances and looks at the reality of the situation, the deliberation of the Secretary of State which ends in certification and detention is at one and the same time the commencement of proceedings as well as the procedure whereby the charge is determined and the penalty is imposed.

5.9 The Commission rightly observed that its own proceedings and jurisdiction did not amount to proceedings involving the determination of a criminal charge but failed to recognise that this was because the criminal charge had already been determined by the Respondent.

(2) *The concept of a "criminal charge"*

5.10 The Secretary of State does not dispute that the conduct on which certification and detention are based amount to the commission of criminal offences. But, under domestic law the certification and detention process provided for in Part 4 of the 2001 Act is an administrative procedure falling outside the scope of the criminal law. However, because of the autonomous meaning which is given by the European Court to the concept of "criminal charge" that domestic characterisation is not decisive.

5.11 The question of whether the procedure in question determines a "criminal" charge is governed by the three *Engel* criteria:-<sup>10</sup>

- (i) The domestic classification, which serves only as a starting point where the classification is not criminal;
- (ii) The nature of the offence – a criterion which carries more weight;<sup>11</sup>
- (iii) The severity of the penalty. This is the most important consideration: "In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness

of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so".<sup>12</sup> In assessing the severity of the penalty regard must be had to the potential as well as the actual penalty that the individual risks having imposed.<sup>13</sup>

5.12 In respect of the second and third *Engel* criteria, Amnesty International respectfully endorses the observation of Hale LJ in her dissenting judgment in *R (West) v Parole Board* [2003] 1 WLR 705 at para 51: "[t]hese are both terms which beg the question and might be better expressed as 'the nature of the conduct in question' and 'the nature and severity of the consequences.'"

5.13 Analysed in these terms, it is submitted that the second and third *Engel* criteria are clearly met. As already noted, there is no dispute as to the criminal nature of the conduct which forms the basis of a decision to certify and detain. It is accepted that merely because conduct fits the particulars of a criminal offence this does not require that a criminal trial ensue. Sedley LJ, in *West* (at para 43), gives the example that a civil action in tort does not become criminal proceedings because the conduct complained of also amounts to a criminal offence. However, this is precisely where the third *Engel* criterion is significant: what international human rights law prohibits, whether under article 6 of the Convention or article 14 of the Covenant, is the imposition by the State of consequences of a nature and severity ordinarily reserved to the criminal sphere in respect of conduct that amounts to a criminal offence without the attendant internationally recognised fair trial guarantees associated with criminal proceedings. To allow otherwise would indeed be to permit States to circumvent the "object and purpose of the Convention".<sup>14</sup>

5.14 Furthermore, it is not incompatible with the determination of a criminal charge that the consequence is the imposition of a preventative measure. A significant number of sentencing powers are preventative in purpose, but nonetheless when exercised following conviction, amount to the imposition of a punishment for the offence.<sup>15</sup> And, in *Benham v UK* (1996) 22 EHRR 293, which concerned proceedings leading to detention for non-payment of the community charge, the European Court found that article 6 was engaged even though the purpose of imprisonment was not to punish, but to coerce payment. In relation to article 7 of the Convention, the European Court of Human Rights held that a confiscation order imposed for a preventative purpose constituted a "penalty", because "the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements in the very notion of punishment".<sup>16</sup> Further, as Hale LJ observed:-

"All imprisonment is necessarily preventive and, in the eyes of many, that is one of the main justifications for imposing it. We do not at the moment have purely preventive imprisonment in this country. But if it were introduced, for example, for those whose behaviour and personalities were such as to give rise to a likelihood that offences would be committed if they were left at large, then surely that would be regarded as the determination of a criminal charge against them? Why should it attract any less rigorous procedural safeguards than apply to those who are accused of actually having committed such offences? In using the words "imposed as a punishment or deterrent" the European court is trying to put its finger on a distinction which we all intuitively understand between punishment and regulation or internal discipline."<sup>17</sup>

This point is all the more compelling where, as under Part 4 of the 2001 Act, the individuals concerned are "accused of actually having committed" criminal offences. As Neuberger LJ observed in the generic appeals, *A and ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123 (11th August 2004) at para. 404:

“While appeals to SIAC under section 25 are, technically, civil proceedings, they are, from the point of view of an appellant, in many ways as penal as criminal proceedings, and, in light of the nature of the evidence which is sufficient to justify an appellant’s indefinite imprisonment, in some ways more penal than criminal proceedings.”

5.15 There has been no recent consideration by the Convention organs whether the process of internment amounts to the determination of a criminal charge. It is submitted that the conclusion in *Lawless v Ireland* (1961) 1 EHRR 15 at paragraph 12 that article 6 was not engaged because there was no charge or conviction cannot stand with the evolution of the Court’s subsequent jurisprudence which has recognised the autonomous meaning of “criminal charge” coupled with the emphasis on looking behind appearance to the reality of the situation so as to ensure that the rights guaranteed under the Convention are practical and effective, not theoretical and illusory.

### **(3) Summary of violations.**

5.16 Amnesty International submits that the following aspects of the scheme established under Part 4 of the 2001 Act are inconsistent with the United Kingdom’s international obligations under the criminal limb of article 6 of the Convention and article 14 of the Covenant:-

- (1) The right to a determination by an independent and impartial tribunal. It is a fundamental aspect of a fair trial that the accused’s guilt is established by an independent and impartial tribunal and not by the executive.
- (2) The removal of the presumption of innocence and the attendant lowering of the standard of “proof” to one of reasonable belief and suspicion a standard lower even than the civil standard of proof.
- (3) The absence of sufficient information and particularised allegations such as to enable detainees to know the case against them and to mount a defence. Open “evidence” consists in the main of assertions. The bulk of the “evidence” supporting those assertions is withheld from the detainees and their counsel of choice and admitted in “closed evidence proceedings”. Under the “closed evidence proceedings”, detainees and their counsel of choice are denied disclosure of the most important “evidence” against them. This is contrary to article 6(3)(a)-(c) of the Convention and article 14(3)(a), (b) and (d) of the Covenant;
- (4) The incursion into the right to be represented by counsel of one’s choosing, contrary to article 6(3)(c) of the Convention and article 14(3)(d) of the Covenant.

### **(4) Article 6(1) of the Convention article 14(1) Covenant**

5.17 The guarantees in paragraphs 2 and 3 of article 6 are specific aspects of the right to a fair trial guaranteed in article 6(1). As such they will not be considered separately but will be considered in the context of the fairness of the Part 4 scheme as a whole.<sup>18</sup>

5.18 For the reasons advanced above, Amnesty International submits that it is the Secretary of State and not the Commission who determines the criminal charge. Under international

law, an appeal may be capable of remedying any violation of article 6 that results from the determination by the Secretary of State.<sup>19</sup> Accordingly, the assessment of the compatibility of the scheme contained in Part 4 must encompass not only the determination by the Secretary of State but also the appeal process. Amnesty International notes that the appeal process is plainly key as it marks the first point in the procedure at which an individual has any possibility to challenge the decision to certify and detain him. If the fair trial guarantees of article 6 are to be met, then this must be in the proceedings before the Commission.

*(a) Independence*

5.19 Amnesty International submits that the scheme contained in Part 4 of the 2001 Act fails to meet the most basic of fair trial guarantees, namely that the determination of the charge be by an independent tribunal. Inherent in the notion of an independent tribunal as guaranteed by article 6(1) of the Convention, is that a tribunal has the power to make binding determinations.<sup>20</sup> The Commission's jurisdiction does not have the necessary decision making power required to meet the condition of independence.

5.20 This is so for two reasons. Firstly, and generally, because the Secretary of State is empowered under s.27(9) of the 2001 Act to issue a fresh certificate and so to override any successful appeal against certification, even absent any change in circumstance. Whether he exercises this power or not, the fact that he is possessed of it in law is sufficient to offend the right to an independent determination<sup>21</sup>.

5.21 Secondly, the Commission ruled, in its "generic" judgment of 29 October 2003, that it does not have full jurisdiction under section 25 of the 2001 Act because it may not substitute its own finding for that of the Secretary of State. Thus:

"It is a possibility that the Commission could conclude that there were reasonable grounds for the suspicion or belief without itself holding the requisite suspicion or belief. But its task under section 25 is to consider the reasonableness of the grounds rather than to cancel a certificate if, notwithstanding the reasonableness of the grounds, it were unable subjectively to entertain the suspicion or hold the belief to which the statute refers" [para 40].<sup>22</sup>

5.22 In summary, the fact that the Commission has neither the power to make a finally determinative ruling on the lawfulness of detention, nor to substitute its own assessment of the facts for that of the primary decision maker means that it fails to meet the requirements of article 6(1).<sup>23</sup>

*(b) The presumption of innocence*

5.23 The presumption of innocence contains a number of vital safeguards for the avoidance of miscarriages of justice. Implicit is the duty on the state to prove its case so that any doubt is resolved in the accused's favour.<sup>24</sup> The presumption of innocence, enshrined in article 6(2) of the Convention and 14(2) of the Covenant is a peremptory norm which states cannot lawfully violate by invoking article 15 of the Convention or article 4 of the Covenant: see UN Human Rights Committee General Comment 29 (U.N. Doc. CCPR/C/21 Rev.1/Add.11) at paragraph 11.

5.24 Section 21 permits the Secretary of State to certify not on the basis of proof, but merely of suspicion and belief, albeit held on reasonable grounds. As the Commission noted this "is not a demanding standard for the Secretary of State to meet".<sup>25</sup> The extent of the violation is aggravated by the Commission's conclusion in the generic ruling that, where past acts are relied upon by the Secretary of State to found his suspicion, he is not required to prove them on the balance of probabilities, let alone to the criminal standard [paragraphs

57-61].26

5.25 In the Court of Appeal in the generic case of *A and others v SSHD* [2004] EWCA 1123 (11th August 2004), Laws LJ observed (at para 224) that “[i]t is axiomatic that a power of executive detention on grounds of no more than belief and suspicion – albeit reasonable belief and suspicion – is on its face grossly antithetical to established constitutional rights”. The point is all the more true when the power in question is recognised to be the power to determine a criminal charge.

*(c) The right to a defence and fair trial guarantees*

5.26 The right to mount a defence lies at the heart of the right to a fair trial. The specific rights guaranteed in sub-paragraph (3) of the fair trials guarantees of the Convention and the Covenant, serve to underpin that broader right. The rigour of the standards of fairness guaranteed under the criminal limb of articles 6 of the Convention and 14 of the Covenant reflect the gravity of the power the state exercises when it subjects an individual to its criminal process. A key object of the guarantees is the prevention of a miscarriage of justice. To that end the defendant should ordinarily have full disclosure of the case against him and the opportunity to challenge that case including by the cross examination of witnesses.

“It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6(1) requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for and against the accused”. 27

In relation to cross examination:-

“21. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see the *Van Mechelen and Others* judgment cited above, p. 711, § 51; and the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 21, § 49).” 28

5.27 But, the right of the accused to a fair trial must not be considered in a vacuum. The courts have recognised a triangulation of interests: the accused, the victim and his or her family and the public. And to each of these, not just the defendant, the court must act fairly.<sup>29</sup> This means that full participation for the accused can be required to give way to the protection of the interests of others. But where the protection of other interests justifies a restriction on the right of the accused to defend himself, this must be to the minimum extent necessary to protect the conflicting interest, and there must be adequate accompanying safeguards. Thus, for example,

“61.... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the

defence which are, strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.”<sup>30</sup>

But, there are necessarily limits on the extent to which the right of the accused to defend himself can be restricted for the protection of others consistently with the duty to secure to the accused a fair trial. Thus in *Kostovski v The Netherlands* (1989) 12 EHRR 434 where anonymous witnesses gave evidence against Mr Kostovski in the absence of the accused and his counsel, the Court found a violation of article 6 even though it recognised that the witness had good reason to fear reprisals:-

“44. Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government’s, submissions appear to the Court to lay insufficient weight on what the applicant’s counsel described as ‘the interest of everybody in a civilised society in a controllable and fair judicial procedure’. The right to a fair administration of justice holds so prominent a place in a democratic society ... that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact the Government accepted that the Applicant’s conviction was based ‘to a decisive extent’ on ‘anonymous statements’.

5.28 Under the scheme established under Part 4 of the 2001 Act, the first opportunity for the detainees to mount any form of challenge to the process is after the charge has been determined by certification, at the appeal stage. But, even then the decision on the appeal is largely made on the basis of secret evidence heard in his absence in the “closed evidence proceedings” when the state puts forward and the court considers most, if not all, of the specific evidence which forms its case against the accused. This secret process, from which the detainee is excluded replaces wholesale the ordinary trial process together with the accompanying guarantees of the presumption of innocence, equality of arms, including disclosure and the right to mount a defence. The procedure established under Part 4 is the antithesis of the protections that article 6 requires.

(d) *Special counsel*

5.29 A key issue, therefore, is whether the role performed by the special advocate sufficiently mitigates the prejudice to detainees to comply with their fair trial rights. For the reasons set out below Amnesty International submits that it does not.

5.30 In its recent decision in *R v H* [2004] 2 A.C 134 Your Lordships’ House cautiously endorsed the use of a special advocate in criminal proceedings. However, Your Lordships were concerned not with their participation in the trial itself but in discrete preliminary proceedings to determine whether to withhold documents from the defence on grounds of public interest immunity: paragraph 22. Your Lordships made it clear that their use, even in this limited context, will be appropriate only in exceptional cases where the interests of justice require it, and furthermore, that there may be cases where, even a special advocate, will not remedy the unfairness of a trial if the outcome of the PII application is that the material should not be disclosed: for example, where the defendant cannot safely be notified of the making of a PII application, yet the material withheld is of significant help

to the defence. In that instance, special counsel cannot receive any instructions from the defendant and Your Lordships considered that there must be a very serious question whether the prosecution should proceed: para 36.

- 5.31 The European Court of Human Rights has not yet considered or endorsed the use of special advocates in criminal proceedings. In *Edwards and Lewis v United Kingdom* 22 July 2003 the Court found a violation of article 6(1) where the judge who had determined a PII application in the absence of the defendant subsequently determined an abuse of process application based on entrapment which he dismissed. The unfairness arose because the judge when deliberating on the PII application might have seen evidence adverse to the defendant and have been influenced by that evidence when, as a tribunal of fact, he was later required to determine an abuse of process application. The Court found that despite the potential relevance of the undisclosed material to the abuse of process application, the applicants were denied access to the evidence, with the result that it was not possible for the defence representatives to argue the case on entrapment in full before the judge. Furthermore, when considering the entrapment argument, the judge had already seen evidence which may have been relevant. The Court held that the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms or incorporate adequate safeguards to protect the interests of the accused (see paras 57-59).<sup>31</sup> The Court did not state whether a different procedure could have been adopted in relation to the determination of one or both issues which would have provided sufficient protection for the applicants to safeguard their rights under article 6(1). It is submitted that a special advocate could not have remedied the unfairness because although s/he would see the material, he would be prohibited from taking any instructions from the defendant to challenge its non-disclosure and in the event that the judge did direct that it be withheld from the defence, the problem of his being influenced by it in the entrapment hearing would remain.
- 5.32 It is submitted that precisely the same situation found by the European Court of Human Rights to violate article 6(1) in *Edwards* occurs in the context of Part 4 proceedings. The Commission comprises only a very small number of members. It is clear from the generic judgment of the Commission that much of the evidence adduced by the Secretary of State will be applicable to more than one appeal, it is therefore inconceivable that there will not be occasions on which the same individuals are required to determine disclosure issues and then also to consider the substantive appeal. This situation is further exacerbated by the fact that even if the Commission rules certain material to be disclosable, the Secretary of State may nonetheless decide to withdraw it, rather than disclose it. Again, this results in a real risk of unfairness in that the Commission, in determining the appeal, may have been influenced by such material.
- 5.33 Given the ruling of the European Court in *Edwards* it is submitted that the limited endorsement of the use of special advocates by Your Lordships in *R v H*, in a discrete pre-trial disclosure hearing, where the judge will not subsequently be the trier of fact in the substantive trial, cannot be extended to the completely different setting of the trial itself. In PII cases the restriction on the defendant's participatory rights is limited to the hearing on whether to disclose.<sup>32</sup> If the decision is taken not to disclose to the defendant, then the evidence forms no part of the prosecution case whatever, and is never put to the tribunal of fact. In the trial itself the defendant enjoys full rights of defence and has disclosure of all the evidence upon which s/he is being tried. Furthermore, even though the special advocate cannot take instructions after s/he has had disclosure of the withheld material, s/he will have been able to take detailed and meaningful instructions before then because the defendant will know in large part the case against him or her from the disclosure that the prosecution has been able to make. In these circumstances the task of representing

the defendant's interests in the PII hearing is more likely to be a meaningful one.

- 5.34 By contrast, under the Part 4 scheme, the special advocate's ability to "represent the interests" of the detainee is hopelessly circumscribed by the restrictions under which he is required to operate. S/he is unable to challenge the evidence or cross-examine witnesses effectively because he lacks the material on which to do so, namely informed instructions from the accused. Despite the statutory function with which he is charged, s/he is in truth, able to do little if anything to safeguard the interests of the accused.
- 5.35 Even if the safeguard of the special advocate is the least restrictive measure that can be applied,<sup>33</sup> in substance, it does little to repair the total eradication, under Part 4 of the 2001 Act, of the right to defend oneself that is an essential element of a fair proceeding. There is no meaningful distinction to be drawn in substance between the limitations on the rights of the defence under Part 4 of the 2001 Act and those which the European Court found irreconcilable with the guarantees contained in article 6 in the *Kostovski* case.
- 5.36 The ability of the special advocate procedure to meet the requirements of a fair trial is yet further undermined by the fact that counsel who perform this function are assigned by the Attorney-General; not only a member of the Government seeking to defend the certification under appeal, but the very individual who, in some cases, will be appearing in court to argue against the detainee.<sup>34</sup> This, in and of itself, undermines at least in appearance, the right of the detainee to independent counsel – and thus the right to defence.

*(e) Other safeguards*

- 5.37 For the reasons advanced above, Amnesty International submits that Part 4 of the 2001 Act very substantially exceeds the threshold demarcating those restrictions on the rights of the accused that can be accommodated consistently with the guarantee of a fair trial from those which cannot. Amnesty International submits that, whether taken in isolation or together, the extent to which the scheme under Part 4 of the 2001 Act fails to meet the requirements of these four fundamental aspects of the fair trial guarantees – independence, the presumption of innocence, and equality of arms, encompassing the right to mount a defence and the right to counsel – constitutes the most grave of violations.
- 5.38 Furthermore it is submitted that none of the measures identified as possible safeguards, in addition to an appeal to the Commission, can begin to cure the wholesale absence of the essential guarantees of a fair trial. This is so whether those measures are considered separately or together. They are:-
- 1) the right of appeal to the Court of Appeal on a point of law;
  - 2) the right of review under section 26
  - 3) the need to extend by Order the power to certify under section 29
  - 4) the sunset clause contained in section 29(7).
- 5.39 The right to a review suffers from precisely the same deficiencies in securing fair trial guarantees as the original appeal to the Commission under section 25. In essence it is a right in form but not substance. Once an individual is certified it is difficult to conceive of circumstances in which he, rather than the Secretary of State, can bring an end to his certification. There is nothing he can usefully put forward in the review hearing that he has not already advanced in the appeal before the Commission because he remains just as ignorant of the evidence against him as he was at that time.
- 5.40 The right of appeal to the Court of Appeal arises only on a point of law. The Court of

Appeal does not make its own determination whether the conditions for certification are met. It can only review the decision of the Commission on grounds of rationality.

- 5.41 None of these so called safeguards is concerned with maximising the right of the individual to defend himself in the certification and detention process, or raising the standard of proof. They do nothing to bolster the quality of decision making or to reduce the risk of a grave miscarriage of justice. Such mechanisms cannot be “considered therefore to compensate for the severity of the limitations” which the scheme under Part 4 of the 2001 Act imposes.<sup>35</sup>
- 5.42 In addition, Amnesty International considers that the consideration by the Secretary of State and the Commission of evidence obtained as the result of torture and other ill-treatment constitutes a further violation of article 6 of the Convention and article 14 ICCPR. However, this will point not be developed by Amnesty International in this appeal in light of the Court of Appeal’s ruling in **A & 9 Ors v Secretary of State for the Home Department** (2004) [2004] EWCA Civ 1123.

**Civil fair trial rights and the right to a fair determination of the lawfulness of detention**

- 5.43 In the event that Your Lordships find that the scheme for certification and detention under Part 4 of the 2001 Act does not involve the determination of a criminal charge, it will be necessary to consider whether the scheme for certification and detention under Part 4 of the 2001 Act engages the civil limb of article 6(1) because it involves the determination of the right to liberty. In the Court of Appeal Lord Woolf CJ held that article 6(1) of the Convention is engaged in the determination of an appeal or review under sections 25 and 26 of the 2001 Act, in that these amount to civil proceedings (para.57).
- 5.44 In the event that Your Lordships’ determine that the Commission procedure under Part 4 of the 2001 Act engages article 5(4) of the Convention it is necessary to analyse the requirements of fairness by reference to the procedural requirements of article 5(4) of the Convention. The United Kingdom’s derogation is limited to article 5(1). The purpose and extent of the derogation is set out in the derogation notification. Its sole purpose is to make it possible to detain foreign nationals whom the United Kingdom wishes to deport but is prevented from deporting by, among other things, its obligations under international law. The derogation purports to target those foreign nationals who the Secretary of State believes pose a threat to national security because of their connection to Al Qaeda or its associates. The notice of derogation is silent about the procedure to be adopted in determining whether to detain any individual, and in any event, under the terms of article 15 of the Convention, the extent of the derogation is limited to that “strictly required by the exigencies of the situation”. In this regard, it is of particular importance that there has been no derogation from those parts of article 5, such as article 5(4)<sup>36</sup>, which guarantee a fair procedure in the determination of the lawfulness of any resulting deprivation of liberty.<sup>37</sup>
- 5.45 Like criminal fair trial rights, the civil limb of article 6(1) and 5(4) guarantee a determination by an independent tribunal. For the reasons given at paragraphs 5.19 to 5.22 above the scheme contained in Part 4 of the 2001 Act fails to meet the requirement of independence.
- 5.46 Under both article 6(1) and 5(4) (as well as the common law) the requirements of fairness are not immutable. They vary according to the nature of what is at stake, and in the case of article 5(4) “the procedure followed [must have] a judicial character and give to the individual concerned the guarantees appropriate to the kind of deprivation of liberty in question. In order to determine whether a proceeding provides adequate guarantees regard must be had to the particular circumstances in which such proceedings take place”.<sup>38</sup>

5.47 The European Court of Human Rights has not yet had to adjudicate on whether the use of a special advocate procedure can provide a means of securing compliance with the requirements of the civil limb of article 6(1) or 5(4), where issues of national security are at stake. However, in three cases involving questions of national security, in finding a violation of articles 6(1) and 5(4), it attached significance to the use of special advocates in other countries noting that “there were techniques which could be employed which both accommodated legitimate security concerns about the nature and sources of intelligence information, yet accorded the individual a substantial measure of procedural justice.<sup>39</sup> *Chahal* and *Al-Nashif* are the most relevant because the applicants’ fair trial rights were restricted in connection with a decision to detain. However, it is of crucial importance to recognise that the detention in those cases was of a completely different kind to that arising under Part 4 of the 2001 Act. In *Chahal* and *Al-Nashif*, detention was with a view to deportation, which cannot be for an indefinite period and is only lawful so long as active steps are being taken to deport. Under the 2001 Act, detention is indefinite and long term. The level of procedural fairness required is not therefore comparable. Given the far more serious measure of indefinite detention, these authorities, which do not in any event endorse the use of special advocates where short term detention is at stake, do little to support the proposition that their use is adequate to safeguard the interests of those subject to the scheme contained in Part 4 of the 2001 Act.

5.48 Where the nature of what is at stake is indistinguishable from the consequences of the most serious of criminal trials, the flexible standards of procedural fairness call for fair trial safeguards which are just as exacting. Whether an indefinite deprivation of liberty flows from the determination of a criminal charge or an executive decision, the detriment to the individual and to society of a miscarriage of justice is the same.<sup>40</sup>

5.49 For these reasons it is submitted that Lord Woolf CJ erred in the Court of Appeal when he held at paragraph 57 that there was no contravention of the civil limb of article 6(1) in that “having regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved.” For the reasons advanced in relation to the criminal limb of article 6(1) even if Lord Woolf was right that no more could be done in the circumstances to make the proceedings fairer, the rights of the detainees in the proceeding under Part 4 of the 2001 Act are restricted to an extent that is incompatible with the guarantees which must be provided given the nature of the interests at stake.

## **PART 6: EVIDENCE OBTAINED BY TORTURE - THE APPLICATION OF ARTICLE 3 OF THE CONVENTION AND ARTICLE 7 OF THE COVENANT.**

6.1 Amnesty International submits that the prohibition on the admissibility in any proceedings (save those against the alleged torturer) of evidence obtained by torture is an essential component of the absolute prohibition on torture and inhuman or degrading treatment contained in article 3 of the Convention and article 7 of the Covenant. This prohibition is a *jus cogens* or peremptory norm of customary international law which has been described as “a right inherent in the concept of civilisation”<sup>41</sup>. In *R v Bow street Magistrate, ex parte Pinochet (No.3)* [2000] 1 AC 147 at 198 C-E, Lord Browne-Wilkinson cited with approval the following excerpt from the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) 10 December 1998, Case No IT-95-171/1-T 10:

“Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force...the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.

Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”

6.2 It is submitted, for the reasons developed below, that it is essential to the effectiveness of this universal prohibition that evidence obtained by torture or other inhuman or degrading treatment never be given cognisance in judicial proceedings, save as evidence against the alleged perpetrator to prove that torture or other prohibited treatment occurred.

6.3 Article 3 of the Convention provides:  
“No one shall be subject to torture or to inhuman or degrading treatment or punishment”

Article 7 of the Covenant provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

6.4 In determining the scope and content of these rights, in addition to the principles of interpretation outlined at paragraph 5.5 above, the following principles are also of central importance:

(i) The interpretation given should be that which “is most appropriate in order to realise the aim and achieve the object of the treaty”<sup>42</sup>;

(ii) The Convention and Covenant are “living instruments” which “must be interpreted in the light of present-day conditions.” The “present-day” content of a right is informed by other international conventions and treaties: for example, in *Sigurjonsson v Iceland* (1993) 16 EHRR 462, the European Court of Human Rights drew on the European Social Charter and the International Labour Organisation Conventions 87 and 98 in interpreting article 11 of the Convention to include a right not to join an association; in *Selmouni v France* (2000) 29 HRR 403, the European Court of Human Rights looked to CAT to assess the evolution in the definition of torture and interpreted article 3 of the Convention accordingly.

6.5 In giving effect to these principles the European Court of Human Rights and the United Nations Human Rights Committee have frequently “read in” elements of Convention and Covenant rights which, although not expressly provided for on the face of the Convention and Covenant, are deemed to be “inherent” in the article in question because they are essential for the effective protection of the express right. Examples are the “procedural” or “adjectival” duty on the State under article 2 of the Convention to investigate deaths within its jurisdiction<sup>43</sup> and under article 3 of the Convention to investigate allegations of torture or inhuman and degrading treatment.<sup>44</sup> These “procedural” rights have been found to be essential for the effective guarantee of substantive rights and for ensuring future compliance.

6.6 Amnesty International submits that the substantive prohibition on torture and inhuman and degrading treatment is of such profundity that it comprises not only an absolute duty on states to refrain from committing such acts, but also an inherent obligation to take steps to combat their commission. One manifestation of this is the recognition of the obligation to exercise universal criminal jurisdiction in respect of acts of torture (aut dedere aut iudicare):

“The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed... the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution”<sup>45</sup>.

6.7 Further, notwithstanding that article 3 is expressed in terms of prohibition rather than prevention, the European Court of Human Rights has repeatedly found a preventative obligation within it: it has, for example, ruled that State parties must provide adequate protection in domestic law criminalizing ill-treatment administered by private individuals<sup>46</sup>; that there is a duty to take reasonable steps to protect children from abuse<sup>47</sup>; that there is an obligation to refrain from deporting individuals to places where they risk torture or inhuman or degrading treatment<sup>48</sup>; and, as already noted, there is a duty on states to investigate alleged breaches of the substantive right. It is submitted that the prohibition on deporting individuals to places where they risk torture or inhuman or degrading treatment demonstrates that the Strasbourg Court recognises the inter-connectedness of *prima facie* lawful acts by state parties and the violative actions of non-state party third countries; it has not sought to draw a veil between the two.

6.8 The contours of the preventative obligations inherent in the prohibition were considered by the ICTY in *Furundzija*:

“The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left. [para. 146]

...

“States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.” [para. 148]

...

“The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect. [para.150, emphasis added]

6.9 The ICTY is here clearly identifying that the universal prohibition is not limited to a negative duty to refrain from committing acts of torture, but includes an obligation to condemn torture, to deter its future commission and to suppress all of its manifestations. Amnesty International submits that article 3 of the Convention and article 7 of the Covenant must not be read any more restrictively. Further, the obligations in articles 3 and 7 make no distinction in the nature

of the prohibition of torture and that of inhuman and degrading treatment: both are absolute and no derogation is permitted from them under article 15 of the Convention and article 4 of the Covenant.

6.10 Amnesty International submits, therefore, that the acceptance in evidence of statements obtained by torture or other inhuman or degrading treatment (other than as proof of such acts against their perpetrators) is fundamentally antithetical to the preventative obligation, which is inherent in the universal prohibition: the nexus between the use of evidence obtained by torture or other ill-treatment and its procurement, however remote, will never be negligible. It is an aspect of the very definition of torture<sup>49</sup> that its infliction is often for *the purpose of obtaining information*. The acceptance of such information as evidence in judicial proceedings cannot but lend succour to such a purpose, even where it is not the torturer but a third party who seeks to rely on the statements thereby obtained. At very least, the use of such evidence may be viewed as turning a blind eye to its provenance and runs the real risk of being viewed as condonation.

6.11 The situation with regards to evidence obtained by torture and other inhuman or degrading treatment is not analogous to that of evidence obtained by other unlawful means or in breach of other, qualified, rights. The prohibition on torture and inhuman or degrading treatment is absolute. It permits no derogation or qualification even in times of war or other public emergency threatening the life of the nation or in combating the most heinous crimes, including terrorism.<sup>50</sup> Further, as detailed above, its status as one of the most fundamental and universal standards carries with it a positive imperative to deter and suppress its future commission, as is evidenced by, among other things, the obligation on states to exercise universal criminal jurisdiction over such acts. Just as it would be “inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.”<sup>51</sup> so, it is equally inconsistent to require the prosecution of those who commit torture and yet allow our courts in other proceedings to rely on statements thereby obtained: a course which at best fails to register the requisite condemnation and at worst gives effect to the perpetrator’s purpose, by providing an outlet for the information obtained.

6.12 This causal connection has been expressly recognised by the UN Human Rights Committee. In its General Comment on article 7 Covenant [General Comment 20 (1992) para.12], the HRC states:

“It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”

In its concluding observations on Georgia [UN Doc. A/57/40 vol. I (2002) para. 8(e)], the HRC recommended that:

“All statements obtained by force from detained persons should be investigated and may *never* be used as evidence, except as evidence of torture. [Emphasis added]

In its concluding observations on Ukraine [UN DOC. A/57/40 vol. I (2002), para. 74(15)], the HRC recommended that:

“All allegations of statements of detainees being obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture.”

In its concluding observations on the Republic of Korea [01/11/99. CCPR/C/79/Add.11 para. 14], the HRC explained the link between admitting statements obtained through torture and other ill-treatment and the prevalence of these crimes:

“the seemingly widespread reliance of the prosecuting authorities and the courts on confessions by accused persons and accomplices, facilitate acts of torture and cruel, degrading and inhuman treatment by interrogating officials.” 52

- 6.13 The connection has similarly been noted by the United Nations Committee against Torture: “the existence in procedural legislation, of detailed provisions on the admissibility of unlawfully obtained confessions and other tainted evidence” is “one of the essential means of preventing torture” [A/54 44, para 45, referring to Yugoslavia].
- 6.14 It is submitted that this clear and obvious reasoning is just as valid across international borders as it is within individual states.
- 6.15 The General Comment and concluding observations cited above make clear that the HRC has interpreted article 7 of the Covenant as including the prohibition on the admissibility of torture evidence as an essential component. Amnesty International submits that article 3 of the Convention must also be read in this way: the admission into evidence of material obtained by torture or other inhuman and degrading treatment is fundamentally incompatible with the obligation to condemn and deter such action. To risk encouraging, or worse, by providing an outlet, fulfilling the very purpose for which the torture was inflicted, strikes at the heart of article 3.

#### *Burden of proof*

- 6.16 Amnesty International submits that where, before the Commission or the higher courts on appeal, a *prima facie* case is made out that statements on which the Secretary of State has relied upon in certifying and/or seeks to rely upon before the Commission have been obtained by torture or other inhuman or degrading treatment, it must be for the Secretary of State to disprove that they were so obtained. To place the burden of proof on the detainee, where he is faced with multiple hearsay from anonymous witnesses presented at hearings to which neither he nor his counsel of choice has access, would be to render the prohibition on the admissibility of such evidence entirely illusory.
- 6.17 In the context of articles 7 and 10 of the Covenant, the HRC has observed that the burden of proving that evidence has been obtained by prohibited means should not lie on the individual seeking to exclude it.<sup>53</sup>
- 6.18 It is submitted that these factors are determinative of the burden of proof in relation to the prohibition on the admissibility of evidence obtained by torture or other inhuman or degrading treatment inherent in article 3 of the Convention and article 7 of the Covenant. However, were it to be argued that article 15 of CAT suggests a different interpretation, the specific wording of that provision in relation to the burden of proof is considered at paragraphs 7.8 to 7.11 below.

## **PART 7: THE APPLICATION OF OF CAT**

7.1 For the reasons set out above, Amnesty International considers the prohibition on the admissibility of evidence obtained by torture or inhuman or degrading treatment to be an essential element of the substantive prohibition on such treatment in article 3 of the Convention and article 7 of the Covenant, thus rendering the scheme of Part 4 of the 2001 Act incompatible with the Human Rights Act and the derogation in violation of article 15 of the Convention. However, in addition, CAT articulates the preventative obligations inherent in the substantive prohibitions in article 3 of the Convention and 7 of the Covenant, thereby constituting a further source in which the international obligation to prohibit the use of torture evidence is located.

7.2 Article 2 of CAT provides:

- “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
  2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
- ...”

Article 15 of CAT provides:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

7.3 The UK ratified CAT on 8 December 1988, without any reservations.

7.4 Following the 9/11 attacks, the United Nations Committee against Torture (“the CAT Committee”) issued a statement condemning the atrocities in the strongest terms, and reminded State parties of the non-derogable nature of the obligations undertaken by them in ratifying the Convention:

The obligations contained in Articles 2 (whereby “no exceptional circumstances whatsoever may be invoked as a justification of torture”), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances. [CAT Committee annual report, UN Doc. A/57/44 (2001), para. 17]

7.5 Nowhere does CAT limit the application of article 15 to statements used against the person from whom they were obtained through torture, or to cases where the state conducting the proceedings has itself procured or connived in the obtaining of the statement by torture. Indeed, the CAT Committee has specifically stated that:

“Statements obtained *directly or indirectly* under torture should not be admissible as evidence in the courts.<sup>54</sup>

7.6 Further, in *PE v France* 10 IHRR 421, the CAT Committee clearly contemplated the application of article 15 in circumstances where one state sought to adduce evidence allegedly obtained by torture in another state.

7.7 The UN Special Rapporteurs on Torture (Special Rapporteur/s) have consistently followed the line of the CAT Committee in their reports.<sup>55</sup>

### **Burden of proof under article 15 CAT**

- 7.8 The majority of the Court of Appeal in *A and ors v Secretary of State for the Home Department*, [2004] EWCA Civ 1123 (11th August 2004) found that the burden of proof under article 15 CAT lies on the party alleging that the impugned statement was obtained by torture: Pill LJ at para 136 and Laws LJ at para 271.
- 7.9 However, it is submitted that this is both out of step with the jurisprudence of the HRC (as cited at para. 6.17, footnote 53 above) and is based on a misinterpretation of the reasoning of the CAT Committee in *PE v France*.
- 7.10 It is right that in *PE v France*, the CAT Committee dismissed the author's complaint because:
- "bearing in mind that it is for the author to demonstrate that her allegations are well founded, [the Committee] considers that, on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture." (para 6.6)

However, in Amnesty International's submission, this passage refers to the burden of proof in relation to the CAT Committee's own procedures in considering individual communications and *not* to that contained within article 15. This is apparent from an earlier passage in the judgment: "The Committee considers in this regard that the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations." (para. 6.3)

These passages only make sense when recognised as referring to different tests: when they are read as referring to the same test, they are directly contradictory.

- 7.11 The approach which places the burden of disproving torture on the state has been adopted by the Special Rapporteur: in relation to Turkey, he recommended that, on the question of the admissibility of statements or confessions, "the burden of proof should be on the State to demonstrate the absence of coercion."<sup>56</sup>

### **The burden of proof in the present cases**

- 7.12 It is submitted that in light of the above, whenever the Secretary of State proposes to rely on evidence and there is *prima facie* information suggesting that torture or other ill-treatment are widely or systematically being used at the location at which the source of that evidence has been detained or by the questioning authorities, the burden of proving that the evidence on which he seeks to rely was not obtained by such torture or other inhuman or degrading treatment lies on the Secretary of State.
- 7.13 In Amnesty International's submission there is clear *prima facie* evidence to suggest that torture and/ or other inhuman and degrading treatment are widely or systematically being practised in US interrogation of detainees including at the detention facilities in Bagram, Afghanistan; Guantanamo Bay, Cuba and in Iraq. Further there are reasonable grounds to believe that the Secretary of State has relied upon evidence so obtained both in certifying

detainees and in the appeals before the Commission.

## **PART 8: PRIMA FACIE EVIDENCE OF TORTURE AND/OR OTHER INHUMAN AND DEGRADING TREATMENT**

8.1 In a memorandum dated 7 February 2002, to the Vice President, the Secretary of State, the Secretary for Defence and others, President George W. Bush set out his view of the status and rights of “Taliban and al-Qaeda” detainees:<sup>57</sup>

The President determines, *inter alia*, the following:

(1) That “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world” [para. 2(a)];

(2) That, specifically, “common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees” [para. 2(b)];

(3) That, specifically, “because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war” [para. 2(d)].

“Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” (para 3)

8.2 By this the President established the following:

- (i) That there are detainees, and (in light of the above) presumably “al Qaeda” detainees are among them, who in the USA’s view “are not legally entitled” to be treated humanely. It has been the USA’s consistent position that “by its own terms, the Covenant is inapplicable to conduct by the United States outside its sovereign territory.” (emphasis in original).<sup>58</sup> Further, the Department of Justice memorandum<sup>59</sup> submitted to the White House in preparation for the President’s memorandum, concludes, *inter alia*, that:  
“...customary international law has no binding legal effect on either the President or the military.”
- (ii) That The USA would nevertheless treat those detainees humanely, but “as a matter of policy” rather than as a matter of the state’s international legal obligations. It should be noted that this position has been reiterated officially by the USA, see for instance “letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights,” UN Doc. E/CN.4/2003/G/73, 7 April 2003, at 4.
- (iii) That the USA may treat those detainees “in a manner consistent with the principles of Geneva,” but only do so “to the extent appropriate and consistent with military necessity”. This is fundamentally inconsistent with the Geneva Conventions in particular and international humanitarian law in general, which prohibit certain acts absolutely, such as targeting civilians or mistreating detainees and prisoners, regardless of whether or not doing so could be militarily beneficial, and categorises any breach thereof, in all circumstances, as “grave breaches” or war crimes. In addition, the Geneva Conventions contain a fundamental obligation to treat all detained persons humanely: Article 3, common to all four Geneva Conventions, provides:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely...”

See also, articles 13, 20 and 26 of the 3rd Geneva Convention and articles 27, 37 and 127 of the 4th Geneva Convention.

8.3 In practice, this “*ex gracia*” “humane treatment” has been given the following interpretation: in his memorandum of 11 October 2002,<sup>60</sup> Secretary for Defense Donald Rumsfeld approved “[T]he use of stress positions (like standing) for a maximum of four hours”; “[U]se of the isolation facility for up to 30 days”; “[D]eprivation of light and auditory stimuli”; use of “a hood placed over his head during transportation and questioning,”; “[R]emoval of clothing”; “[U]sing detainees individual phobias (such as fear of dogs) to induce stress”; and “[U]se of mild, non-injurious physical contact such as grabbing, poking in the chest with a finger and light pushing”. There is no explicit limitation on combining some or all of these methods.

8.4 In this context, the judgment of the European Court of Human Rights in *Ireland v United Kingdom* 2 EHRR 25 is apposite: the five techniques of wall-standing, hooding, subsection to noise, sleep deprivation and deprivation of food and drink were found to constitute inhuman and degrading treatment in violation of article 3 of the Convention.<sup>61</sup>

8.5 In Amnesty International’s submission, the fact that the USA has officially and explicitly purported to strip “terrorist” detainees of all legal rights, including the right to “humane treatment,” is sufficient to establish a *prima facie* case for excluding reliance on statements extracted by US interrogators, unless it is established that neither torture nor other ill-treatment were in fact used.

8.6 This presumption is supported by media and other reports of torture and other ill-treatment of “terrorist” detainees. These began surfacing soon after the war in Afghanistan, and have since increased in detail and volume.<sup>62</sup>

8.7 Media reports of interrogation techniques include accounts such as the following:

“...interrogators used graduated levels of force, including a technique known as “water boarding,” in which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown.”<sup>63</sup>

8.8 To these reports should be added those of international human rights NGOs, for example:

Amnesty International, “Guantánamo Bay: a coercive regime”; Amnesty International, *United States of America: Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, 15 April 2002; Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties*, New York, LCHR, 2003, Ch. 4.

8.9 Following the scandal that broke when photographs depicting the humiliation and sexual abuse, at times amounting to torture, of Iraqi detainees at Abu Ghraib in mid-2004, a string of investigative reports were issued by the US authorities, some of them linking the abuse to interrogation policies and techniques used against “terrorist” detainees elsewhere. The Final

Report of the Independent Panel To Review DoD Detention Operations, August 2004 (“the Schlesinger Report”) stated (at p. 9):

“During July and August 2003, the 519th Military Intelligence Company was sent to the Abu Ghraib detention facility to conduct interrogation operations. Absent any explicit policy or guidance, other than FM 34-52, the officer in charge prepared draft interrogation guidelines that were a near copy of the Operating Procedure created by SOF [“Special Operations Forces”]. It is important to note that techniques effective under carefully controlled conditions at Guantanamo became far more problematic when they migrated and were not adequately safeguarded.

Similarly, an internal USA army investigation<sup>64</sup> found that:

“The JIDC [Joint Interrogation and Detention Centre] October 2003 SOP [Standing Operating Procedure] ... created by CPT [Captain] Wood, was remarkably similar to the Bagram (Afghanistan) Collection Point SOP. Prior to deployment to Iraq, CPT Wood’s unit (A/519 MI BN) allegedly conducted the abusive interrogation practices in Bagram resulting in a Criminal Investigation Command (CID) homicide investigation. [...]

- 8.10 It is clear from these reports that the interrogation methods and practices employed at Abu Graib were carried across from documents and personnel in Afghanistan and Guantanamo. The techniques employed in JTF-GTMO [Joint Task Force Guantanamo] included the use of stress positions, isolation for up to thirty days, removal of clothing, and the use of detainees’ phobias (such as the use of dogs) as the 2 December 2002 Counter-Resistance memo, and subsequent statements demonstrate. As the CID investigation mentioned above shows, from December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation. Interrogators in Iraq, already familiar with the practice of some of these methods, implemented them even prior to any policy guidance from CJTF-7 [Combined Joint Task Force Seven]. These practices were accepted as SOP by newly-arrived interrogators. Some of the CJTF-7 ICRPs [Interrogation and Counter-Resistance Policies] neither effectively addressed these practices, nor curtailed their use.
- 8.11 Even after the investigations, the recommendations and the changes, including the withdrawal of authorisation for some interrogation techniques and the reaffirmation of the applicability of the Geneva Convention to detainees in Iraq (but not to detainees in Guantanamo, Bagram and other detention facilities), the following facts remain:
- (i) The USA does not recognise “terrorist” detainees in its custody outside of the USA as having any legal rights;
  - (ii) Detainees have been held incommunicado for months and years;
  - (iii) Interrogation methods which violate the absolute prohibition on torture and other inhuman and degrading treatment are authorised and approved, while others have been used possibly without authorisation;
  - (iv) Both the memoranda and the investigations concentrate on the various forces subject to the authority of the Department for Defense. Another force, deeply involved in interrogations, the CIA, seems to have escaped scrutiny, and possibly the limitations imposed on DoD-related interrogations. According to the Schlesinger report (p. 70):

“No memorandum of understanding existed on interrogations operations between the CIA and CJTF-7, and the CIA was allowed to operate under different rules.”

- 8.12 In light of the above and in view of the official denial of the applicability of international human rights and international humanitarian law by the US authorities to detainees within their responsibility, Amnesty International strongly reiterates its submission that there exists ample *prima facie* evidence that torture and other ill-treatment are used in a systematic or widespread manner by US interrogators. As a result, neither the Secretary of State nor the Commission should consider or rely on any statements resulting from such interrogations, unless the Secretary of State can prove that they have not been obtained by means of torture or other inhuman and degrading treatment.

**Conclusions in relation to the admissibility of evidence obtained by torture or inhuman or degrading treatment**

- 8.13 In light of the above, Amnesty International is strongly of the view that there is clear *prima facie* evidence that information obtained by US interrogators has been procured by use of methods previously found by both the European Court of Human Rights and the Committee against Torture to constitute torture and inhuman and degrading treatment. Amnesty International submits, for the reasons given, that admission in any proceedings of evidence obtained by torture or inhuman or degrading treatment is antithetical to the universal, absolute and non-derogable prohibition on such treatment. It is clear from the comments and observations of the HRC, the Committee against Torture and the Special Rapporteur that reliance on such evidence is recognised as a significant driver in perpetuating the “market” for, and thus the generation of, such evidence. Participation in the fuelling of such demand is, in Amnesty International’s submission, clearly incompatible with the preventative obligation inherent in article 3 of the Convention and article 7 of the Covenant, in the *jus cogens* prohibition at customary international law and as articulated expressly in the CAT.

**PART 9: INCOMPATIBILITY OF PART 4 OF THE 2001 ACT WITH THE HUMAN RIGHTS ACT 1998**

- 9.1 The designated derogation relates only to article 5(1) of the Convention. Articles 3, 5(4) and 6 continue to have effect under the Human Rights Act 1998. Accordingly, section 3 of the 1998 Act requires the scheme established under Part 4 of the 2001 Act to be interpreted so far as possible compatibly with the detainees’ rights under those articles and if a compatible interpretation is not possible, Your Lordships’ are entitled to make a declaration of incompatibility (under section 4).

*Fair trial rights*

- 9.2 It is submitted that, applying the guidance of Your Lordships’ on the application of the interpretive obligation in section 3 of the 1998 Act, most recently restated in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, it is not possible to interpret sections 21 and 25 compatibly with the presumption of innocence. The very object of the Part 4 scheme is to permit detention on grounds of suspicion and belief, albeit reasonable, and not proof.

- 9.3 However, those other aspects of the scheme which offend articles 6 and 5(4) are contained in subordinate legislation, namely the Special Immigration Appeals Commission (Procedure) Rules 2003. Insofar as they are ultra vires the 1998 Act they can and should be declared void.

*Torture evidence*

- 9.4 According to the Court of Appeal, the scheme contained in Part 4 requires the admissibility of evidence obtained by torture, where the torture is perpetrated by third parties. Assuming that this is the correct analysis of the operation of the scheme, it follows that paragraph 44 of the 2003 Rules must be interpreted to permit the admission of such evidence. Accordingly, Amnesty International submits that it is appropriate to make a declaration that paragraph 44(3) of the 2003 Rules is incompatible with article 3 of the Convention insofar as it authorises the

admission before the Commission of evidence obtained by torture.

**PART 10: INCOMPATIBILITY OF PART 4 OF THE 2001 ACT WITH ARTICLE 15 OF THE CONVENTION**

- 10.1 Amnesty International submits that the scheme established under Part 4 of the 2001 Act falls outside the scope of permissible derogation under article 15 of the Convention on the ground that the derogating measures are inconsistent with the United Kingdom's other obligations under international law. The inconsistency of the derogating measures with each and every one of articles 3, 5(4) and 6 of the Convention, 7 and 14 of the Covenant and 15 of CAT take it outside the scope of permissible derogation under article 15.
- 10.2 It is particularly important that any derogation be consistent with those other international obligations from which there can be no derogation. The inconsistency with article 3 is, therefore, a particularly stark incompatibility with the requirements of article 15. In Amnesty International's submission so too is the inconsistency with fair trial guarantees because certain elements of the right to a fair trial, including the presumption of innocence, are explicitly guaranteed under international humanitarian law during armed conflict. They must, *a fortiori* belong to those from which a state cannot derogate in times of lesser emergency. Those rights, established under the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 include:-
- (i) the right to be tried by a court offering the essential guarantees of independence and impartiality;
  - (ii) the right to be tried in one's presence;
  - (iii) the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

10.3 In General Comment No. 29 the UN Human Rights Committee stated:

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.<sup>65</sup>

It is submitted that article 15 of the Convention, which is in almost identical terms to article 4 of the Covenant, falls to be interpreted in the same way.

EDWARD FITZGERALD QC

PHILLIPPA KAUFMANN and RUTH BRANDER



1 By section 27(1) of the 2001 Act, section 5 of the 1997 Act applies to appeals and reviews  
under sections 25 and 26 of the 2001 Act.

2 See judgment of the Commission dated 20 May 2004 in the case of *G v Secretary of State for  
the Home Department*, Appl No. SC/2/2002, Bail application: SCB/10

3 The Committee was charged with the task of reviewing the 2001 Act within 2 years, under  
section 122.

4 The Anti-Terrorism, Crime and Security Act (Continuance in force of sections 21 to 23) Order  
2003 SI 2003/691 and The Anti-Terrorism, Crime and Security Act (Continuance in force of  
sections 21 to 23) Order 2004 SI 2004/751.

5 Stat 035/2004 – see Home Office Website at  
[http://www.homeoffice.gov.uk/n\\_story.asp?item\\_id=1051](http://www.homeoffice.gov.uk/n_story.asp?item_id=1051)

6 *Airey v Ireland* (1979) 2 EHRR 305 at para 24; *Marckx v Belgium* (1975) 2 EHRR 330; *Artico  
v Italy* (1980) 3 EHRR 1; *Soering v United Kingdom* (1989) 11 EHRR 439

7 *Deweert v Belgium* (1980) 2 EHRR 439; *Adolf v Austria* (1982) 4 EHRR 315; *Welch v United  
Kingdom* (1995) 20 EHRR 247; *Ezeh and Connors v United Kingdom* Appl Nos 39665/98  
and 40086/98, 9.10.2003 at para 123; and *Stafford v United Kingdom* (2002) 35 EHRR 1121  
at para 64.

8 *Engel v Netherlands* (1979-80) EHRR 647 at para 81; *Ozturk v Turkey* (1984) 6 EHRR 409 at  
para 49.

9 *Welch v United Kingdom* (1995) 20 EHRR 247.

10 *Engel v Netherlands* (1979-80) EHRR 647 at paragraphs 81-3.

11 *Benham v United Kingdom* (1996) 22 EHRR 293 at para 56).

12 *Engel* at para 82.

13 *Engel* at para 82; *Ezeh and Connors v United Kingdom* Appl Nos 39665/98 and 40086/98,  
9.10.2003, at para 128.

14 *Engel v Netherlands* (1979-80) EHRR 647 and *Ozturk v Germany* (1984) 6 EHRR 409.

15 E.g. section 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act, longer than  
commensurate sentence to protect the public in the case of violent and sexual offences;  
extended licences under section 85 of the 2000 Act.

16 *Welch v United Kingdom* (1995) 20 EHRR 247.

17 *West*, Per Hale LJ at para 53.

18 *Edwards v the United Kingdom* (1992) 15 EHRR 417, para 33.

19 *Ibid*, at para 33

20 *Van de Hurk v Netherlands* (1994) 18 EHRR 481 at para 45.

21 *Ibid*, paras 50-52

22 The approach of the Commission was approved by the Court of Appeal in *M v Secretary of  
State for the Home Department* [2004] EWCA Civ 324.

23 The independence and impartiality of the Commission is also brought into question by the role  
that it performs in deciding whether material should be disclosed despite the Secretary of  
State's objection. This is addressed in paragraph 5.31-2 below.

24 In its General Comment No. 13 (Article 14) the United Nations Human Rights Committee  
explained the presumption in the following terms: "the burden of proof of the charge is on the  
prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the  
charge has been proved beyond reasonable doubt. Further, the presumption of innocence  
implies a right to be treated in accordance with this principle. It is, therefore, a duty for all  
public authorities to refrain from prejudging the outcome of a trial."

25 See paragraph 71 of the generic judgment.

26 Laws LJ in *A and Others v SSHD* [2004] EWCA 1123, 11 August 2004, at paras 229-230  
considered that this was an inevitable consequence of the statutory language.

27 *Rowe v United Kingdom* (2000) 30 EHRR 1 at para 60. This principle has been repeated in a  
number of cases concerning the withholding of material on grounds of public interest  
immunity: see *Jasper v United Kingdom* (2000) 30 EHRR 441 at para 51; *Edwards and Lewis*

v *United Kingdom* at para 52.

28 *P.S v Germany* (2003) 36 EHRR 61. See also *Van Mechelen v Netherlands* (1997) 25 EHRR  
647; *Doorson v Netherlands* (1996) 22 EHRR 330.

29 *R v H* [2004] 2 A.C 134 at para 12.; and *Attorney-General's Reference (No. 3 of 1999)* [2001]  
2 AC 91, 118 per Lord Steyn.

30 *Rowe and Davis v United Kingdom* at paras 61-2. For an application of the same principles in  
relation to the right to cross examine witnesses see *P.S v Germany* at paras 22-23.

31 C.f. *Jasper v United Kingdom* (2000) 30 EHRR 441 and *Fitt v United Kingdom* (2000) 30  
EHRR 480 In these cases the European Court of Human Rights found that there was no  
violation of article 6(1) where the same procedure was applied in the determination of a PII  
application. However, in these cases, there was no factual issue for the judge to determine  
and the material which was withheld on his order formed no part of the evidence considered  
at trial.

32 This is an important consideration for the European Court of Human Rights when ascertaining  
whether article 6(1) has been violated in cases where disclosure is withheld on PII grounds:  
see e.g. *P.G and J.H v United Kingdom* (Reports of Judgments and Decisions 2001-IX, p. 195)  
[2002] Crim LR 308 at para 71.

33 As it is required to be to conform to the requirements of Article 6(1): see *Van Mechelen v The  
Netherlands* (1997) 25 EHRR 647 at para 58. "Having regard to the place that the right to a  
fair administration of justice holds in a democratic society, any measure restricting the rights  
of the defence should be strictly necessary. If a less restrictive measure can suffice then that  
measure should be applied."

34 See in this connection, the decision of the HRC in ***Sergio Euben Lopez Burgos v. Uruguay,  
Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), where it  
was held to be a violation of article 14(3)(d) ICCPR where a defendant was forced to  
accept as his counsel a Colonel appointed by the prosecuting authorities.***

35 See *Tinnelly v United Kingdom* (1998) 27 EHRR 249

36 The right to habeas corpus is a peremptory norm of international law from which states may  
not be permitted to derogate – see, for instance, Advisory Opinion on the non-derogability of  
habeas corpus in times of emergency: Inter-American Court on Human Rights, Advisory  
Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987); HRC General  
Comment 29.

37 In the generic appeal, the reasoning of Laws LJ, at paragraph 233, appears to suggest that a  
necessary feature of the United Kingdom's derogation from Article 5(1) is that Parliament can  
legislate for the detention of foreign nationals who cannot be deported according to wholly  
arbitrary procedures.

38 *Bouamar v Belgium* (1988) 11 EHRR 1; *De Wilde, Ooms and Versyp v Belgium* 1 EHRR 373  
and *Jecius v Lithuania* Appl No. 34578/97. Where a substantial term of imprisonment is at  
stake article 5(4) requires an adversarial procedure involving legal representation and the  
possibility of calling and questioning witnesses: *Hussain v United Kingdom* (1996) 22 EHRR  
1.

39 In *Tinnelly and Sons and others and McElduff and others v United Kingdom* (1998) 27 EHRR  
249, the applicants' right of access to the court under article 6(1) in a discrimination claim was  
removed by the issuing of a certificate that the alleged discriminatory decision not to award  
the applicants a contract was done to safeguard national security. The certificate was  
conclusive of the facts stated within it, and the court was prevented therefore from making its  
own determination in the discrimination claim. The Court held that while the protection of  
national security was a legitimate basis on which to place restrictions on the right of access to  
the court, the certification process was disproportionate. Taking into account alternative  
models such as the appointment of a special advocate, the court concluded it was possible to  
both safeguard national security and afford a measure of access to the courts. In *Chahal v  
United Kingdom* (1996) 23 EHRR 413, the European Court of Human Rights found a  
violation of article 5(4) in the secret procedure before a panel which advised the Secretary of

- State following a decision to deport a foreign national on grounds of national security. Again, the Court attached significance to the Canadian special advocate procedure as evidence that it was possible to afford a substantial measure of procedural justice while at the same time safeguarding national security. *Al-Nashif v Bulgaria*, Appl No. 50963/99, 20 June 2002 was, like *Chahal*, a case in which detention followed an order for deportation on grounds of national security. Under Bulgarian law there was no judicial appeal against a deportation order. In finding a violation of article 5(4) the European Court relied on its reasoning in *Chahal*.
- 40 See the observations of Hale LJ at paragraph 5.14 above.
- 41 Lord Cooke in *Higgs v Minister of National Security* [2000] AC 228, p. 260E-F. See also *Filartiga v. Peña-Irala*, 630 F.2d 876, 882 (1980); *Abebe-Jiri v. Negewo*, WL 814304 (N.D. Ga., 1993), at 3; *Kadic v. Karadzic* 70 F.3d 232, 245 C.A.2 (N.Y.1995); *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1360 (S.D. Fla., 2001). For academic writers see for instance Antonio Cassese, *International Criminal Law*, Oxford, OUP, 2003, at 119; Christopher Greenwood, 'International Law and the "War against Terrorism,"' 78 (no. 2) *International Affairs* 301 (2002), at 316; Winston P. Nagan and Lucie Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement," 14 *Harvard Human Rights Journal* 87 (2001), at 113; Rebecca Wallace, *International Human Rights: Texts and Materials*, London, Sweet & Maxwell, 1997, at 310.
- 42 *Wemhoff v Germany* (1979–80) 1 EHRR 55, reflecting article 31(1) of the Vienna Convention on the Law of Treaties, May 1969
- 43 *McCann v United Kingdom* (1996) 21 EHRR 97; *Jordan v United Kingdom* App.No.24746/94 judgment of 4 May 2001; *R(Amin) v SSHD* [2004] 1 AC 653
- 44 *R(Wright and Bennett) v SSHD* [2001] EWHC Admin 520
- 45 Lord Browne-Wilkinson in *R v Bow Street Magistrates, ex parte Pinochet* (No.3) [2000] 1 AC 147 at 198 F citing *Demjanjuk v Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571.
- 46 *A v United Kingdom* (1998) 27 EHRR 611; *HLR v France* (1997) 26 EHRR 29.
- 47 *Z v United Kingdom* [2002] 34 EHRR 3.
- 48 *Soering v United Kingdom* 11 EHRR 439.
- 49 See, for example, article 1 of the UNCAT.
- 50 *Tomasi v France* (1992) 15 EHRR 1 para. 115.
- 51 *Furundzija* para. 156.
- 52 For similar statements see concluding observations and recommendations regarding Cambodia, UN Doc. A/54/40 vol. I (1999), para. 305; Mexico, UN Doc. A/54/40 vol. I (1999), para. 61; Syrian Arab Republic, UN Doc. A/56/40 vol. I (2001), para. 81(8); and Uzbekistan, UN Doc. A/56/40 vol. I (2001), para. 79(8).
- 53 See, for example the HRC's concluding comments regarding the Philippines: UN Doc. CCPR/CO/79/PHL, 1 December 2003, para 12
- 54 UN Doc. A/52/44 (1997), para. 109. See also, UN Doc. A/51/44 (1996), para. 137; UN Doc. A/53/44 (1998), para. 193; and UN Doc. A/54/44 (1999), para. 51.
- 55 See general observations and recommendations UN Doc. E/CN.4/1993/26, 15 December 1992, paras. 587, 589, 590, 591; UN Doc. E/CN.4/1995/34, 12 January 1995, paras. 926 (a), (b), (d); UN Doc. A/54/426, 1 October 1999, paras. 12(e), 60(i); UN Doc. E/CN.4/2001/66, 25 January 2001, paras. 1316(a), (d), (f); UN Doc. A/56/156, 3 July 2001, paras. 39(d), (f); UN Doc. E/CN.4/2002/76, 27 December 2001, Annex I(d), (f); UN Doc. A/57/173, 2 July 2002, para. 22; UN Doc. E/CN.4/2003/68, 17 December 2002, paras. 26(e), (g); UN Doc. E/CN.4/2004/56, 23 December 2003, paras. 33, 34, 38. See also their observations regarding specific states, for instance Azerbaijan, UN Doc. E/CN.4/2001/66/Add.1, 14 November 2000, para. 120(e); Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para. 169(h); India, UN Doc. E/CN.4/1994/31, 6 January 1994, para. 313; Kenya, UN Doc. E/CN.4/2000/9/Add.4, 9 March 2000, paras. 92(d), (g); Romania, UN Doc. E/CN.4/2000/9/Add.3, 23 November 1999, para. 57(i); Uzbekistan, UN Doc. E/CN.4/2003/68/Add.2, 3 February 2003, paras. 26, 70(j), (k); and Venezuela, UN Doc. E/CN.4/1997/7/Add.3, 13 December 1996, para. 85(i).

- 56 UN Doc. E/CN.4/1999/61/Add.1, para.113 (e).
- 57 President of the United States Memorandum, February 7, 2002, Subject: Humane Treatment of al Qaeda and Taliban: Detainees.
- 58 See *Rasul et al v. Bush*, Brief for the Respondents, March 2004, at 50.
- 59 Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. Re: Application of treaties and laws to al Qaeda and Taliban detainees. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002.
- 60 Memorandum for Commander Joint Task Force 170, Dated: 11 October 2002.
- 61 It is submitted that, in light of the stricter approach which the European Court of Human Rights now takes under article 3, the same treatment would today be characterised as torture. See also the conclusions of the Committee against Torture in respect of Israel: UN A/52/44, paras 253-260, 9 May 1997.
- 62 See for example, Michael Elliott, "The Next Wave," *Time Magazine*, 17 June 2002; Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *Washington Post*, 26 December 2002; Paul Harris and Burhan Wazir, "Briton tells of ordeal in Bush's torture jail," *The Observer*, 29 December 2002, Steve Johnson, "Unraveling the psyche of al-Qaida: Experts say painful torture is wrong method for questioning Mohammed," MSNBC News website, <<http://www.msnbc.com/news/881132.asp>>, 5 March 2003, Don van Natta Jr., "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, 9 March 2003; Olga Craig, "They will do what is needed to get the information - and fast," *The Daily Telegraph*, 9 March 2003; Michele Orecklin, "Why They Crack," *Time Magazine*, 24 June 2003; Mark Bowden, "The Dark Art of Interrogation," *The Atlantic Monthly*, October 2003. David Johnston and Neil A. Lweis, "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," *New York Times*, 13 May 2004.
- 63 James Risen, David Johnston and Neil A. Lewis, "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," *New York Times*, 13 May 2004.
- 64 AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade MG George R. Fay, p. 29.
- 65 United Nations Human Rights Committee General Comment, UN doc, GAOR A/56/40 (Vol 1), p.206 para 16.

Public Document

\*\*\*\*\*

Amnesty International, 1 Easton St., London WC1X 0DW. web: <http://www.amnesty.org>

For latest human rights news view <http://news.amnesty.org>