



THE GOVERNMENT REPLY TO
THE TWENTY-THIRD REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2008-09 HL PAPER 152, HC 230

Allegations of UK Complicity in Torture

**Presented to Parliament
by the Secretary of State for the Home Department
and the Secretary of State for Foreign and
Commonwealth Affairs
by Command of Her Majesty**

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ALLEGATIONS OF UK COMPLICITY IN TORTURE

The Government is grateful to the Committee for this report and for its engagement in the debate on these important issues. The Government values the views and suggestions of the Committee and makes every effort to respond as fully as possible to its requests for information.

The Committee have identified accountability as a key issue, and the Government agrees that it is vital. We have provided the Committee with a series of detailed written responses to their specific questions and these are publicly available. The Government will always seek to provide as full a response as possible to the Committee.

The Committee made 21 conclusions and recommendations. Some of these recommendations have been grouped together for this response.

1. There is [...] no room for doubt, in our view, that complicity in torture would be a direct breach of the UK's international human rights obligations, under UNCAT, under customary international law, and according to the general principles of State Responsibility for internationally wrongful acts. (Paragraph 27)

2. We [...] conclude that complicity has different meanings depending on whether the context is individual criminal responsibility or State responsibility:

- **for the purposes of individual criminal responsibility for complicity in torture, "complicity" requires proof of three elements:**

(1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime;

- **for the purposes of State responsibility for complicity in torture, however, "complicity" means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place. (Paragraph 35)**

3. We agree with Professor Sands's view, that if the Government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on, systematically receiving and/or relying on the information but not physically participating in the torture, that might well cross the line into complicity. (Paragraph 41)

4. Systematic, regular receipt of information obtained under torture is in our view capable of amounting to "aid or assistance" in maintaining the situation created by other States' serious breaches of the peremptory norm prohibiting torture. We therefore consider that, if the UK is demonstrated to have a general practice of passively receiving intelligence information which has or may have been obtained under torture, that practice is likely to be in breach of the UK's international law obligation not to render aid or assistance to other States which are in serious breach of their obligation not to torture. (Paragraph 42)

5. It follows from the above that, in our view, the following situations would all amount to complicity in torture, for which the State would be responsible, if the relevant facts were proved:

- **A request to a foreign intelligence service, known for its systemic use of torture, to detain and question a terrorism suspect.**
- **The provision of information to such a foreign intelligence service enabling them to apprehend a terrorism suspect.**
- **The provision of questions to such a foreign intelligence service to be put to a detainee who has been, is being, or is likely to be tortured.**
- **The sending of interrogators to question a detainee who is known to have been tortured by those detaining and interrogating them.**
- **The presence of intelligence personnel at an interview with a detainee being held in a place where he is, or might be, being tortured.**
- **The systematic receipt of information known or thought likely to have been obtained from detainees subjected to torture. (Paragraph 43)**

Response to recommendations 1 – 5:

The Government notes the Committee's conclusions and recommendations. The Government agrees with the Committee that there are obligations on both individuals and States in respect of complicity in torture. The precise nature of the obligation depends on the particular provision of international or national law, including whether the context is individual criminal responsibility or State responsibility.

In respect of individual criminal responsibility, Article 4 of the United Nations Convention against Torture places an obligation on States Party to ensure that an attempt to commit torture and an act by a person which constitutes complicity or participation in torture is an offence under domestic criminal law. Under the domestic law of England and Wales and Northern Ireland complicity is covered by the common law and section 8 of the Accessories and Abettors Act 1861, which make a person criminally liable for aiding, abetting, counselling or procuring a criminal offence. Inciting a crime was also an inchoate offence at common law until October 2008. Since then, the common law offence has been replaced with statutory inchoate offences of assisting or encouraging the commission of a crime created in Part 2 of the Serious Crime Act 2007. Attempts are covered by the Criminal Attempts Act 1981 and the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983. In Scotland, complicity is covered by the common law principle of art and part guilt: that all persons who are concerned in the commission of a crime are equally guilty. Conspiracy, incitement and attempts to commit a crime are also dealt with under the common law.

In respect of State responsibility, States have an obligation not to "aid or assist" the commission of an internationally wrongful act by another State. Article 16 of the International Law Commission's Articles on State responsibility which broadly reflects customary international law provides as follows:

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State."

Accordingly, a State which aids or assists another State in the commission of torture would be internationally responsible for so doing if the conditions set out above were met.

The Government unreservedly condemns the use of torture and our clear policy is not to participate in, solicit, encourage or condone torture.

It would not be appropriate for the Government to comment on whether hypothetical examples would amount to complicity in torture or the provision of aid and assistance to the commission of torture. As the evidence before the Committee made clear, such hypothetical examples are generally not amenable to a straight yes or no answer in the abstract. Such matters need to be considered in light of all the facts and circumstances.

With regard to the question of receipt of intelligence, the suggestion from some quarters that the Government has a policy of accepting intelligence gained through torture is misleading. The reality of the situation is that the precise provenance of intelligence received from overseas is often unclear. However, we ensure that our partners are well aware that we find the use of torture unacceptable. The Government's position is that the receipt of intelligence should not occur where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture.

6. We note that the Foreign Affairs Committee was able to question the Foreign Secretary on a range of issues associated with torture and shed some light on matters we have only been able to explore in writing, as part of its wider inquiry into international human rights issues. This calls into question the reasons why the Foreign Secretary (and the Home Secretary) should refuse to give oral evidence to us. (Paragraph 52)

Through the Intelligence Services Act, Parliament – not the Government – has recognised the Intelligence and Security Committee (ISC) as the appropriate body to provide Parliamentary oversight of the security and intelligence Agencies. The decision by the Foreign and Home Secretaries not to appear before the Committee on this occasion was taken in this light and because it was considered that they would have been unable to provide further information on the issues raised. Some issues cannot be discussed publicly, for example cases that are sub judice and operational matters in respect of our security and intelligence Agencies.

The Foreign Secretary appeared before the Foreign Affairs Committee in the context of their inquiry into the FCO's Annual Human Rights Report. This followed established practice.

7. We fully accept that intelligence co-operation is both necessary and legitimate in countering terrorism, and that a degree of state secrecy is justifiable in this area. However, there must be mechanisms for ensuring accountability for such cooperation. The allegations we have heard about possible UK complicity in torture in Pakistan, the evidence which has emerged during the legal proceedings brought by Binyam Mohamed and the allegations by Craig Murray that the UK knowingly received evidence derived from torture are all extremely serious matters for which Ministers are ultimately accountable. Our experience over the last year is that Ministers are determined to avoid parliamentary scrutiny and accountability on these matters, refusing requests to give oral evidence; providing a standard answer to some of our written questions, which fails to address the issues; and ignoring other questions entirely. Ministers should not be able to act in this way. The fact that they can do so confirms that the system for ministerial accountability for security and intelligence matters is woefully deficient. (Paragraph 56)

The Government agrees with the Committee that accountability is vital. We do not, however, share the Committee's assessment of the current system for providing such accountability. We have provided the Committee with a series of detailed responses to their specific questions. These responses are publicly available.

Ministers and Agency heads have the primary responsibility to uphold our law and values. The law is the ultimate safeguard against wrong-doing and is available to those who feel their rights have been abused: the current cases where individuals have brought claims against the Government show that this is indeed the case.

The sensitive work of the Agencies requires a different set of checks and balances than the work of other parts of government. The ISC is the appropriate body to provide Parliamentary oversight of the security and intelligence Agencies. It exists to square the circle between secrecy and accountability. The Committee is a creation of Parliament, not Government. It is an independent body made up of senior members of both Houses of Parliament. The Committee, the Intelligence Services Commissioner, Interception of Communications Commissioner and Surveillance Commissioners who monitor and regulate the way intrusive or investigatory powers are exercised by the Agencies and others are an important part of our constitutional safeguards.

These bodies have access to the sensitive intelligence they need. They call in evidence and question Ministers and Agency heads. Their reports have shown the value of their probing and comprehensive questioning. The published versions of their reports show they do not stint in criticism where it is appropriate, and they help the Government to learn lessons in a fast-changing field. Together with the Investigatory Powers Tribunal, which investigates allegations by individuals about the Agencies' conduct towards them, these bodies provide comprehensive oversight.

8. We urge Members of the House of Commons regularly to take the opportunity to debate the membership of the ISC, to help ensure that the Committee is subject to frequent scrutiny. (Paragraph 59)

The Government welcomes and encourages the full engagement of Members in the House's procedures for recommending to the Prime Minister nominations for membership of the ISC. In July 2008, the House of Commons approved a Government motion for a change in standing orders to enable the Committee of Selection to propose, for the approval of the House, members to be recommended to the Prime Minister for appointment to the ISC. As the Committee has noted, the Prime Minister remains responsible for making the actual appointments – under the existing legislation, only the Prime Minister has the statutory power to do so (after consulting the Leader of the Opposition).

9. The missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services. In our view, this can be achieved without comprising individual operations if the political will exists to provide more detailed information to Parliament about the policy framework, expenditure and activities of the relevant agencies. The current situation, in which Ministers refuse to answer general questions about the Security Services, and the Director General of MI5 will answer questions from the press but not from parliamentarians, is simply unacceptable. (Paragraph 65)

The Government does not share the Committee's view that there is no proper ministerial accountability to Parliament. As outlined in the response to conclusion 7, the ISC is a significant means of democratic accountability, as the courts have recognised. Before passing the Intelligence Services Act 1994 which established the ISC, Parliament gave careful consideration to the statutory arrangements that were required to ensure proper and effective scrutiny of the expenditure, administration and policy of the security and

intelligence agencies. Members of the ISC have access to the sensitive information and intelligence they need to discharge their responsibilities. They call in evidence and they question Ministers and Agency Heads. They do not stint in criticism where it is appropriate and they help the Government to learn lessons. The Government is also accountable to Parliament through Departmental and Prime Ministerial questions and written and oral Parliamentary questions and does answer questions about the security services in this way to the extent that it is possible.

10. A good first step would be for the Government to propose to establish the ISC as a proper parliamentary committee, with an independent secretariat (including independent legal advice), which would establish ministerial accountability to Parliament in this area at a stroke. The recent allegations about complicity in torture should be a wake up call to Ministers that the current arrangements are not satisfactory. We look to the Government to respond positively to this suggestion and not to continue to hide behind a wall of secrecy. (Paragraph 66)

The Government notes the Committee's recommendation that the ISC should be reconstituted as a "proper parliamentary committee". However, effective scrutiny of the security and intelligence Agencies is always likely to require special arrangements. Any move to change the status of the ISC would need to take careful account of the need to maintain a proper level of protection for the sensitive evidence which it hears. As Parliament acknowledged in 1994, the ISC cannot be brought completely into line with select committees of the House. However, in its white paper published last year (The Governance of Britain – Constitutional Renewal; Cm 7342), the Government put forward a number of proposals further to improve the transparency, accountability and effectiveness of the ISC. Following their approval by both Houses, the Government was able to implement those measures immediately without need for legislation. In addition to the new arrangements for appointing members discussed above, the improvements included: provision for the ISC to hold public hearings where appropriate; provision for the ISC to obtain independent, confidential legal and financial advice; renewal of its independent general investigator post; and an increase in the complement of its secretariat to match those of comparable select committees.

11. We are concerned that the narrow remit of the Investigatory Powers Tribunal precludes investigation of individual complaints, where complainants are reluctant through fear for their safety or otherwise to approach the Tribunal directly, as well as of systemic issues, where a series of complaints suggests that there are wider problems with the policy or operations of the security services. (Paragraph 70)

The Investigatory Powers Tribunal has a wide jurisdiction to consider and fully investigate complaints by individuals who are aggrieved by conduct by the intelligence and security agencies. There is no need for potential complainants to fear reprisals when making a complaint to the Tribunal. The Investigatory Powers Tribunal Rules 2000 make detailed provision regarding the disclosure of information by the Tribunal. These provisions protect complainants as well as ensuring that the Tribunal carries out its functions in such a way as to secure that information is not disclosed that would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, economic well-being of the UK or the continued discharge of the functions of any of the UK intelligence services. All complaints and claims are dealt with through the Tribunal. The organisations that are the subject of a claim or complaint make all their responses to the Tribunal for its consideration. In particular, The Tribunal may not, without the consent of the complainant, disclose to any person any information or documents regarding the substance of a complaint. The restrictions on disclosure are reflected in the fact that, as the Committee has noted, only a limited number of judgements are available publicly – and then in suitably redacted form.

The Tribunal does not entertain complaints made on behalf of third parties, although a representative or adviser can act on the complainant's behalf. Other legal avenues exist through which third parties can pursue allegations against the Government and/or the security and intelligence agencies.

Other oversight mechanisms include the independent Commissioners, appointed under the Regulation of Investigatory Powers Act 2000, who are better placed than the Tribunal to review procedural or systematic concerns and can, where appropriate, assist the Tribunal.

12. The ISC's letter on alleged complicity in torture has yet to be published, over four months after it was submitted to the Prime Minister. We urge the Prime Minister to make its contents public, with the minimum of redaction, as soon as possible. (Paragraph 73)

The Government notes the Committee's recommendation. The ISC's letter addresses issues which remain the subject of legal proceedings and police investigation. The Government is therefore not in a position to take a decision on publication.

13. We welcome the Government's decision to consolidate and publish guidance to security services' personnel on work in detention and interrogation. We also welcome the Prime Minister's statement that redaction prior to publication will be kept to a minimum. (Paragraph 75)

The Government is grateful to the Committee for its conclusion.

14. We recommend that the Government clarify whether the Government or the ISC will be revising existing guidance as part of the consolidation and review process. We also recommend that the Government should release earlier versions of the guidance, subject to any necessary redaction. (Paragraph 76)

The Government notes the Committee's recommendations. Guidance to the security and intelligence Agencies is being consolidated by the Cabinet Office and is based on existing documentation and procedures. Once reviewed by the ISC and published, it will provide a comprehensive overview of the principles that will continue to govern the actions of intelligence officers and service personnel in relation to detainees held overseas.

The Government does not share the Committee's view on publication of previous guidance. The Government has made a commitment to publish consolidated guidance to intelligence officers and service personnel about the standards that we apply during the detention and interviewing of detainees. Through the work of the Intelligence and Security Committee (in particular their 2005 report on the handling of detainees by UK intelligence personnel in Afghanistan, Guantanamo Bay and Iraq, and their 2007 report on Rendition) information was released to Parliament and the public on how the guidance to staff on these issues developed over time.

15. We welcome the appointment of Sir Peter Gibson to monitor compliance with Government guidance to security services' personnel on detention and interrogation issues. We call on Sir Peter to ensure that he publishes as much information as possible on his work in this area in his annual reports, which we look forward to scrutinising. (Paragraph 77)

The Government is grateful to the Committee for its conclusion. The Government is also grateful to Sir Peter Gibson for the care and rigour with which he prepares his annual reports and will provide every assistance in ensuring that they continue to be published in as full a form as possible.

16. We recommend that the Government publish immediately all versions of the instructions/guidance given to intelligence officers and security service personnel concerning the standard to be applied in relation to the detention and interviewing of detainees overseas, including the current draft being considered by the Intelligence and Security Committee, to ensure that it fully and correctly reflects the UK's human rights obligations. (Paragraph 87)

As outlined in the response to recommendation 14, the Government does not agree with the Committee. The Prime Minister's commitment on 18th March was to publish the guidance once it has been consolidated and reviewed by the ISC. That remains the commitment. This is an unprecedented step to make plain the standards to which we hold ourselves. The Government takes very seriously its duty to ensure that the guidance to its intelligence officers and service personnel is consistent with UK law and international law obligations.

17. We do not accept, in this instance, that it is "in the interests of good governance" for the Government to refuse to waive its legal professional privilege by publishing the relevant legal advice. On the contrary, we consider that good governance demands it and that the Government's invocation of legal professional privilege is another disappointing example of resort to state secrecy to prevent proper parliamentary and public scrutiny of an issue of great public concern. (Paragraph 93)

18. We call on the Government to follow the American example by immediately putting into the public domain all relevant legal opinions provided to ministers. These should include any opinions concerning the relevant legal standards on torture and complicity and the implications of those legal standards for the Government's policies on the use of information which may have been obtained by torture and the sharing of information with foreign intelligence services. They should also include any relevant opinions concerning Article 4 UNCAT and the general principles of state responsibility for complicity. (Paragraph 96)

Response to recommendations 17 and 18:

The Government does not agree with the Committee's conclusion or its recommendation. Legal professional privilege is a well established principle, as reflected in section 35(1)(c) of the Freedom of Information Act 2000. It would not be possible for any Government to be able to make well informed decisions without full and frank legal advice. The regular publication of such advice would potentially diminish its future frankness and resulting value, impacting negatively on good governance. Further, in this instance, such a release could interfere with ongoing legal proceedings. The Committee refers in paragraphs 94-6 of its report to Lord Bingham's 2006 criticism of the non-publication of the Attorney General's legal advice on the lawfulness of the Iraq war. The issues discussed here are not comparable with the release of the Attorney General's advice on the legality of the Iraq war. The Committee acknowledges that the view Lord Bingham gave in 2006 on reliance on legal professional privilege was presented with the caveat that this was "not an accepted view". This is not an issue of state secrecy, but one of good governance.

19. In view of the large number of unanswered questions, we conclude that there is now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK's complicity in torture. (Paragraph 99)

20. We recommend that the independent inquiry which is set up to investigate allegations of UK complicity in torture should also be required to make recommendations about improving the accountability of the security and intelligence services, and removing any scope for impunity, having regard to the

recommendations recently made on this subject by bodies such as the UN Special Rapporteur, the Eminent Jurists Panel of the International Commission of Jurists, and the Council of Europe. (Paragraph 101)

21. We also recommend that any inquiry should also look into whether there was any connection between the UK Government's controversial view of the limited territorial scope of application of UNCAT on the one hand and the adequacy of its guidance to its intelligence and security operatives on the other. (Paragraph 102)

Response to recommendations 19 – 21:

The Government does not agree with these recommendations. These issues are already being addressed through a number of processes.

The police are considering allegations related to Mr Binyam Mohamed. They are also looking at a further case, following referral by the Attorney General. This case was referred to the Attorney General by SIS on its own initiative, unprompted by any accusation against the Service or the individual concerned. It is for the police to decide whether there is a case to answer. Any cases of potential criminal wrongdoing will continue to be referred to the appropriate authorities to consider whether there is a basis for inviting the police to conduct a criminal investigation. Furthermore, some detainees have already put their allegations before the civil courts to be tested.

In addition, the Prime Minister announced on 18 March 2009 a number of measures to address these issues. These include publishing our guidance to intelligence officers and service personnel concerning the standards applied in relation to the detention and interviewing of detainees overseas. The Prime Minister has invited Sir Peter Gibson, the Intelligence Services Commissioner, to monitor compliance with the guidance and to report to him annually.

The Prime Minister has also asked the ISC to consider any new developments and relevant information since their 2005 report on detention and their 2007 report on rendition. The Government sees no need for an inquiry given the above ongoing processes and legal action.



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