



Fédération internationale des ACAT – Action des chrétiens pour l'abolition de la torture  
International Federation of ACATs – Action by Christians for the Abolition of Torture

**Joint alternative report by FIACAT and ACAT UK on the  
Implementation of the International Covenant on Civil  
and Political Rights by the United Kingdom of Great  
Britain and Northern Ireland**

**Janvier 2020**

## I. Article 7 – Prohibition of torture and other cruel, inhuman or degrading treatment or punishment

### A. Absolute prohibition of torture

1. Article 134 (4) and (5) of the 1998 Criminal Justice Act provides:

*“(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.*

*(5) For the purposes of this section “lawful authority, justification or excuse” means—*

*(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;*

*(b) in relation to pain or suffering inflicted outside the United Kingdom—*

*(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;*

*(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and*

*(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.”*

2. This provision is contrary to article 2 of the Convention against torture which provides that there is no exception to the absolute prohibition of torture and that there shall be no justification to torture. Despite several recommendations addressed by treaty bodies and by other member States during its UPR, the UK is still not considering repealing this provision. In fact, the State’s position remains the same since 2003. During its last UPR, the UK replied to a recommendation made by the Republic of Korea on the removal of this clause by referring to its rationale in its 4<sup>th</sup> periodic report to the CAT in 2003<sup>1</sup>, knowingly: *“Lawful sanction. There is some overlap between the defence of lawful authority, justification or excuse in the 1988 Act and the exception in article 1 of the Convention, which concerns lawful sanction. Although the defence in the 1988 Act goes wider than the exception in article 1, this is because of the broader definition of torture in the 1988 Act (as explained above). Furthermore, the 1988 Act defence only applies where the public official etc., is acting lawfully. There is nothing in the current case law which authorizes, far less requires, the use of this defence in circumstances that would amount to torture within the terms of the Convention.”*<sup>2</sup>.

3. It will be unclear to many why UK law needs to retain the defence of lawful authority for public officials when its application remains for all practical purposes unauthorised. However, it does not seem that any change of the legislation on this aspect is planned.

***The FIACAT and the ACAT UK invite the Human rights committee to ask the UK government:***

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<sup>1</sup> [Annexe to the response to the recommendations received on 4 May 2017](#), 29 August 2017, p.53

<sup>2</sup> Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/67/Add.2, para 41

- ***What steps have been taken in order to align its criminalisation of torture with the Convention against torture in particular, what steps have been taken to repeal the provision of the Criminal Justice Act 1988 which provides for the defence of lawful authority, justification or excuse to charges of torture?***

***B. Accountability for human rights violations committed by British forces abroad***

***1. Al Sweady Inquiry***

4. In 2009 the Administrative Court of the UK High Court of Justice conducted a judicial review on behalf of the uncle of one of a number of Iraqis alleged to have been unlawfully killed whilst in the custody of British troops at Camp Abu Naji. The review also considered claims by five other detainees that they were ill-treated at Abu Naji and later at Shaibah Logistics Base. It was alleged that the Secretary of State of Defence had failed to conduct an independent review into the claims and to accept liability for the deaths. When the Secretary of State conceded that inadequacies in the disclosure of evidence prevented the court from making a satisfactory ruling, the review was postponed. As a result, the Al Sweady inquiry was set up under the Inquiries Act 2005 on 29 November 2009 to examine allegations of ill-treatments and unlawful killings of Iraqis by British soldiers between 14 May 2004 and 23 September 2004. The Inquiry was concluded in 2014 and found that some cases of ill-treatment (including food and sleep deprivation, blindfolding) occurred during this period in breach of international law and the Ministry of Defence rules. In fact, the final report of the Inquiry states : “*Thus, as I make clear at various stages of this Report, I have come to the conclusion that certain aspects of the way in which the nine Iraqi detainees, with whom this Inquiry is primarily concerned, were treated by the British military, during the time they were in British custody during 2004, amounted to actual or possible ill-treatment.*”<sup>3</sup>. However, the more serious allegations, including those of unlawful killings, were rejected as “*wholly and entirely without merit or justification*”<sup>4</sup>.

5. As a conclusion, the report of the Al Sweady Inquiry drew up a list of 9 recommendations on the treatment of prisoners.

***2. The Iraq Historic Allegations Team (IHAT)***

6. The IHAT was established by the British government in 2010 to review and investigate allegations of offences ranging from murder to low-level violence by UK armed forces against Iraqi civilians from the start of the military campaign in Iraq (in March 2003) through the major combat operations of April 2003 and the following years spent maintaining security as part of a multi-national force until 2009. It had the power to refer cases of potential criminal acts to the Director of Service Prosecutions (DSP - military courts). At its peak, IHAT had over 147 staff.

7. Unfortunately, IHAT was bogged down from the outset by disputes over its structure, composition and independence, not to mention the sheer volume of its case workload. In fact, IHAT was criticised because of the involvement of members of the Royal Military Police (RMP) in the investigation of matters in which they had been involved in Iraq. In *R (Ali Zaki Mousa) v. Secretary of State for Defence* [2011] EWCA Civ 1334, the Court of Appeal held that the IHAT

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<sup>3</sup> [\*Al-Sweady inquiry report\*](#), 17 December 2014, para 5.196

<sup>4</sup> *Ibid*, para 5.198

was not sufficiently independent because of those reasons. As a result, the members of the RMP within the IHAT were replaced by other investigators (retired from civilian police forces or serving the Royal Navy Police personnel).

8. In *R (Ali Zaki Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin) (“AZM2”) while criticising the absence of appropriate input from the Director of Service Prosecutions, the Court found that the IHAT was sufficiently independent of the executive to meet the requirements of the ECHR.

9. Re-staffed with more civilians in place of members of the military police, IHAT started work in earnest in 2013. The caseload rapidly expanded to hundreds of claims, with many alleged victims and witnesses being interviewed in Turkey since war-torn Iraq was deemed too dangerous. Aside from the genuine difficulties of assembling direct evidence in challenging conditions, the process proved expensive and cumbersome, with Iraqis feeling that obstacles to travel to the UK placed them at a clear disadvantage. Limited to prosecuting low-ranking individual soldiers, the inquiry was criticised for failing to pursue systemic issues of accountability higher up the military command chain (e. g. how soldiers were trained and who told them to do what).

10. In 2016 the UK Attorney General commissioned a review of IHAT's systems and processes<sup>5</sup> and in 2017 a parliamentary defence sub-committee inquiry concluded that IHAT failed to distinguish between credible and non-credible cases and ignored the welfare of soldiers and their families<sup>6</sup>. One army officer claimed that the Ministry of Defence was keen to sacrifice its soldiers in order to cover up lack of training, infrastructure and leadership<sup>7</sup>. A popular feeling emerged that most claims were spurious and undermined the courage and sacrifices of British troops. Professional misconduct on the part of the now-defunct legal firm Public Interest Lawyers (PIL) in gathering and presenting evidence from some claimants was quickly seized on by Defence Minister Michael Fallon, with the support of the prime minister and numerous politicians and officials, to discredit the allegations brought by the firm and to close IHAT.

11. Finally, IHAT was wound down on 30 June 2017. By then it had received allegations relating to 3405 victims, decided not to pursue 1,668 allegations after an initial assessment and was closing 700. The main criteria for closing a case were lack of credible evidence or 'proportionality' (the allegations did not merit further investigative effort given the length of elapsed time). 34 allegations, relating to 108 victims, remained ongoing.

12. Two cases had been referred for prosecution to the DSP but were abandoned. Another two cases were referred to the RAF Police for further investigation and one soldier was referred to his Commanding Officer for disciplinary action and was fined £3 000. Pending investigations were taken over by the Service Police Legacy Investigations (SPLI - the military police of the armed forces) although information on this body is limited and most remaining cases seem to have been discontinued<sup>8</sup>. By September 2018, it had either closed or was in the processing of closing 1 122

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<sup>5</sup> Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#).

<sup>6</sup> The Guardian, [Why we may never know if British troops committed war crimes in Iraq](#), 7 June 2018

<sup>7</sup> Commons Select Committee, [Close IHAT this year and immediately dismiss remaining weak cases](#), 10 February 2017

<sup>8</sup> Iraq Historic Allegations Team, [IHAT Quarterly update – April to June 2017](#), paras 2 – 6.

allegations. 144 remained under investigation. The SPLI was expected to complete its work by the end of 2018 but no further information was available at the time of writing this contribution.

13. As a conclusion, costing over £50 million, IHAT failed to secure a single prosecution and the prospect of any serious investigation into alleged war crimes is now remote.

### **3. Other national mechanisms:**

14. The above two inquiries are the most prominent of a variety of legal processes established to address the issue of abuses committed during the Iraq war and occupation<sup>9</sup>. These include investigations by the Royal Military Police, reports conducted by senior military personnel (2008, 2010), a coroner-type, inquest-based process called the Iraq Fatality Investigations (IFI, 2014-2018), and civil suits. Four courts martial led to the conviction of seven soldiers, with most cases either discontinued or resulting in acquittal. IFI has to date investigated a number of deaths and made recommendations in several cases but is not a prosecutorial body<sup>10</sup>.

15. The Ministry of Defence (MoD) also conducted investigations into alleged breaches of articles 2 and 3 of the European Convention on Human Rights (ECHR) during military operations in Iraq. The purpose of the investigations was to establish grounds for further inquisitorial inquiry. Over 3,700 cases involving article 3 and more than 100 for article 2 were considered. In all but 5, the decision 'no inquiry' was reached.

### **4. ICC preliminary examination**

16. Partly at the instigation of the European Centre for Constitutional and Human Rights (ECCHR) and PIL, the International Criminal Court (ICC) instituted a 'preliminary examination' of whether detainee abuse was systematic. The preliminary examination of this situation was re-opened on 13 May 2014 after being previously concluded in 2006. Since 2006 this has been undertaken with the full engagement of the UK government, which has, however, made it clear that it wants the process to be closed, claiming (a) that the court lacks jurisdiction since the crimes were committed on a small scale, (b) existing judicial measures in the UK complement and therefore preclude such an examination under the ICC's own statutes, and (c) the examination is not based on credible information<sup>11</sup>.

17. On the issue of complementarity, it should be noted that independent researchers have raised serious concerns about the adequacy of domestic inquiries encumbered by structural constraints, political opposition and government interference. They also mention the negative impact of the lack of finality of investigations on the soldiers and victims and call into question the government willingness to ensure a genuine justice process<sup>12</sup>.

4. In its report on Preliminary Examination Activities 2018, the Office of the Prosecutor of the ICC, announced that it expected to finalise its admissibility assessment in the near future<sup>13</sup>.

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<sup>9</sup> Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, [The UK military in Iraq: efforts and prospect for accountability for international crimes allegations?](#), 1 October 2018, p.12.

<sup>10</sup> For more information on the Iraq Fatality Investigations see :

<https://www.gov.uk/government/collections/iraq-fatality-investigations>

<sup>11</sup> Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, [The UK military in Iraq: efforts and prospect for accountability for international crimes allegations?](#), 1 October 2018, p.25

<sup>12</sup> *Ibid.*, p.50.

<sup>13</sup> The Office of the Prosecutor, [Report on Preliminary Examination Activities – 2018](#).

***The FIACAT and the ACAT UK invite the Human rights committee to ask the UK government:***

- ***Please indicate what measures have been implemented to ensure that all allegations of torture and ill-treatment of Iraqi citizens by British service personnel in Iraq between 2003 and 2009 have been properly investigated and addressed.***

### ***C. Principle of non-refoulement***

#### *Diplomatic assurances and non-refoulement*

*The Committee is concerned that the State party continues to rely on its “deportation with assurances” policy to justify the deportation of foreign nationals suspected of terrorism-related offenses to countries where it is reported that they may face a real risk of torture or other forms of ill-treatment and notes that, while there are no plans to abandon the policy, its framework is under review by the Independent Reviewer of Terrorism Legislation. Despite the memorandums of understanding on deportation with assurances that have been concluded with a number of countries and the arrangements for post-transfer monitoring, the Committee remains concerned that these measures may not ensure that the individuals affected will not be subjected to treatment contrary to articles 6 and 7 of the Covenant (arts. 2, 6 and 7).*

*The Committee recalls its previous recommendation (see CCPR/C/GBR/CO/6, para. 12) and recommends that the State party strictly apply the absolute prohibition on refoulement under articles 6 and 7 of the Covenant; continue to exercise the utmost care in evaluating diplomatic assurances; ensure that appropriate, effective and independent post-transfer monitoring of individuals who are transferred pursuant to diplomatic assurances is in place; refrain from relying on such assurances where the State party is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.*

In order to fulfil its international obligations related to the absolute prohibition of torture, the UK government has pursued a policy of deportation with assurances (DWA) concerning foreign nationals suspected of terrorism. The policy was introduced to obtain assurances from the country receiving a deported foreign national — in the form of a so-called Memorandum of Understanding (MOU) — that a deportee considered a danger to national security would not be subjected to torture or other human rights abuses.

Already in a ground-breaking case in 1990 the UK had attempted to use a vaguely worded assurance from the Indian government in order to extradite the Sikh separatist Karamjit Singh Chahal. The European Court of Justice (ECJ) ruled the assurance as inadequate, however, and Chahal was released from detention in 1996.

Following these ruling, the UK government sought to overcome these obstacles and negotiated arrangements in the form of MOUs with Jordan (2005), Libya (2005)<sup>14</sup>, Lebanon (2005), Ethiopia (2008) and Morocco (2011). It also concluded with Algeria an 'exchange of letters' as the basis for deportations (2006). Negotiations with other countries (e.g. Vietnam) failed to reach agreement, while possible future partners for MOUs, such as Egypt and Pakistan appear to remain out of the question.

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<sup>14</sup> The MOU with Libya was effectively discontinued from 2007/08.

Assurances from Libya were judged inadequate in two appeals before the Special Immigration Appeals Commission (SIAC) and the Court of Appeal during 2007-8<sup>15</sup>, after which no deportations were attempted.

Other attempts to deport were constantly challenged in UK courts and many were aborted. A UK government review on counter terrorism in 2011 included recommendations for improving conditions for safety on return (SOR) and held out the prospect of an annual independent report on deportations under DWA. This never materialised, but a one-off comprehensive review was announced in November 2012 and published in 2017<sup>16</sup>.

In negotiating or arranging the monitoring of safety for returnees the UK applied the following criteria: (1) independence from the government of the receiving state, (2) capacity for the task (e.g. experts trained to detect signs of ill-treatment, access to doctors, lawyers, prisons and the police), and (3) financial independence.

In four countries monitoring was agreed with internal domestic organisations: the Ethiopian Human Rights Commission, The Adaleh Centre for Human Rights (Jordan), The Institute for Human Rights of the Beirut Bar Association (Lebanon), and the Organisation Marocaine des Droits Humains (OMDH, Morocco). In Algeria monitoring was performed by the British Embassy (Algiers) since it was not possible to negotiate an independent monitoring body. The arrangements with Algeria operated for nine deportees between 2006 and 2009 but in 2016 were judged by SIAC inadequate to support further deportations.

Several challenges regarding the monitoring arrangements were raised in the 2017 review, despite going beyond the mandate of the review, such as how time consuming and costly the conduct of monitoring can be; the lack of long-term funding for monitoring that may be required only occasionally for individual deportees; friction between authorities and monitors (e.g. on frequency of visits, presence of officers and cameras); and the inability (e.g. of the UK embassy in Algeria) to monitor the whereabouts of deportees, who may or not be detained or placed on trial in the receiving state.

Based on this arrangements with foreign countries, the 2017 review mentions 11 successful uses of the DWA process: nine persons had been deported to Algeria between 2006 and 2009 and two more were deported to Jordan in 2012-2013, A further person had been removed under DWA by July 2017 (no further details available), making a total of 12<sup>17</sup>. Of the deported Algerians, seven were not detained on return and the UK embassy lost contact with them. The embassy relied exclusively on assurances from the Algerian authorities, although detention by the Internal Security Service (DRS), with which the embassy never had any contact, was acknowledged as a problem. The SIAC concluded in 2016 that verification was not robust and that ill-treatment was likely.

It should be mentioned that in some cases, DWA proceedings were initiated but not pursued to completion. Some individuals were removed from the UK under other terms, while others remained in the UK. For example, the deportation of two Ethiopians was not pursued after the government's Special Representative on Deportation with Assurances, Anthony Layden, resigned

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<sup>15</sup> cases SC/42 and 50/2005

<sup>16</sup> D. Anderson and C. Walker, [Deportation with assurances](#), July 2017

<sup>17</sup> *The Home Office does not separately record returns by the arrangements that support them including Memoranda of Understanding (MOU), with foreign countries and as such the information requested could only be obtained at disproportionate cost* (<https://www.parliament.uk/written-questions-answers-statements/written-question/commons/2019-06-20/267362>).

in 2015, citing the failure of the scheme. Layden left because he believed that the UK government was trying to use MOU when there was no serious current threat to national security. For different, undisclosed reasons, deportation attempts against two other Ethiopians (J1 and XX) were also abandoned in 2014. In other cases, SIAC upheld appeals by seven Algerians (G in 2012 and U, W, Q, Z, BB, PP in 2016), against which the UK Home Office did not appeal. The government withdrew deportation orders against three further Algerians (AA, Q2, QJ) after the SIAC had ruled on the risk of treatment on return (2016). The Supreme Court ruled similarly on another Algerian (B) in 2018 and it is unlikely that further deportations will be attempted until conditions in the country may improve. Deportation proceedings against a Jordanian (N2), who had served 9 years for terrorism offences were withdrawn in July 2016 after Jordan repeatedly refused to provide assurances under the MOU. As for other states which have MOUs with the UK, it appears that deportations to Ethiopia have been ruled out as not feasible. No removals to Lebanon have ever been attempted.

Thus the use of DWA was fraught with difficulties from the outset. Already in 2006 a parliamentary Joint Committee on Human Rights (2006) stated “*The pursuit of bilateral agreements in relation to torture undermines the multilateral framework of the UN and other treaty bodies concerned with the eradication of torture. [...] the use of diplomatic assurances against torture undermines that universal legal prohibition, and presupposes that the torture of some detainees is more acceptable than the torture of others. [...] it risks damaging the validity and effectiveness of international human rights law as a whole.*”. Several NGOs have expressed deep reservations and have boycotted the scheme. DWA has been characterised by lengthy legal processes, with mixed results for the UK government. Monitoring processes are time-consuming, costly and often beyond the resources of both sending and receiving states. However, in October 2018 the UK Home Secretary, Sajid Javid, formally responded to the 201 review. He acknowledged many of the shortcomings of DWA but remained firmly committed to its principle. He suggested that appeal cases will be resolved in shorter time 'as the law is now clear', which might imply that appealing deportees with a well-founded fear of torture on return will not have to endure a protracted legal process while detained.

***The FIACAT and the ACAT UK invite the Human rights committee to ask the UK government:***

- ***Please indicate the number of deportations, extraditions, refoulement and expulsions carried out on the basis of diplomatic assurances by the UK since the last review by the Committee.***
- ***Please indicate under which conditions can a deportation with assurances can be carried out.***
- ***Please indicate how the monitoring of the deportations with assurances is insured in practice.***