



**UN Convention Against Torture (UNCAT):  
United Kingdom Fifth Periodic Review  
(May 2013)**

**JUSTICE Written Submission**

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## Introduction

1. JUSTICE is a UK-based law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.
2. In accordance with the guidance issued by the Committee, we limit our comments to a few key areas, grouped thematically. We focus on the UK Government's response to the list of issues adopted by the Committee, published on 27 March 2013 ("Government Response"). This submission should not be treated as a comprehensive analysis of JUSTICE's concerns about the UK's compliance with its obligations under the United Nations Convention Against Torture (UNCAT). We raise address concerns based on our recent work on four distinct issues:
  - **Deportation, torture and diplomatic assurances (Q 7,13, 14)**
  - **Allegations of UK complicity in torture (Q 23 - 24)**
  - **Closed Material Procedures, Secret Evidence and the Justice and Security Bill (Q 30 – 31)**
  - **Treatment of prisoners, access to justice and legal aid (Q 35)**
3. While the UK remains a world leader in promoting human rights standards globally, high-profile political and legal challenges at home and abroad (including each of those considered in more detail below) threaten to undermine the reputation of the UK as a rights respecting nation and to limit our ability to share good practice with other States through capacity building, peer-review and other bilateral and multilateral forms of engagement:
  - **Protecting human rights at home (Q2):** Prime among these is the growing political and increasingly toxic debate over the virtues of the protection of individual rights at home by the Human Rights Act 1998 and the ongoing participation of the United Kingdom in the European Convention on Human Rights. Importantly, at the heart of some complaints about either the operation of the HRA 1998 or the ECHR, lies the political interest in the deportation of non-nationals to countries where they might be at risk of treatment which may also violate UNCAT, testing the UK Government's commitment to the absolute prohibition on torture that is at the heart of the Convention. For example, the determination by both the European Court of Human Rights, and domestic courts, that Abu Qatada could not be deported to Jordan to face trial on evidence likely obtained by torture without violation of Article 6 ECHR, has drawn open criticism by some Government Ministers. This caseremains a consistent flashpoint for attacks on the credibility of the domestic and regional mechanisms for the protection of human rights.<sup>1</sup> Notably, the recently appointed President of the UK Supreme Court, Lord Neuberger has pointed out that many of the obligations in the ECHR simply reflect the wider obligations of the UK in international law.<sup>2</sup> We note that while the current coalition Government has

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<sup>1</sup> See for example, Daily Mail, *Terror suspect Abu Qatada goes home and it could take YEARS to get rid of him*, 12 November 2012.

The decision of the European Court of Human Rights in January 2012 in *Othman v UK* App No 8139/09 that he could not be deported to Jordan without violation of Article 6 ECHR led the domestic courts to release him from custody on bail, as the prospect of deportation was no longer imminent, provoking significant political tension, fostered by senior figures in Government (for example, here the Secretary of State for Justice is quoted). The Supreme Court is expected to consider a further attempt to deport by the Home Office later in the year, following a factual assessment by the lower courts that the situation in Jordan was such that – following the guidance of the Strasbourg Court – he could not be deported without violation of Article 6 ECHR.

<sup>2</sup> See for example, The Week, *Lord Neuberger slams 'slanted' portrayal of human rights*, 5 March 2013. Referring to the UDHR, Lord Neuberger said "An obvious example is attacking the [European] human rights convention because we can't send back nasty terrorists because they might be tortured. Well, even if you think we should be able to be send them back ... there's a UN convention going back to 1948 which says you can't do that – which stops it on its own, unless we are going to pull out of the UN."

committed to both the HRA 1998 and the ECHR,<sup>3</sup> senior Conservative party figures in the Cabinet (including the Home Secretary and the Secretary of State for Justice) have made public statements indicating that they intend to revisit these arrangements (and may consider withdrawal from the ECHR) after the next general election, likely in 2015.<sup>4</sup> We urge the Committee to recognise the clear political dissonance between the commitments made on an international stage by the UK Government and the corresponding uncertainty surrounding the human rights framework domestically.

- **The scope of international treaties (Q4):** The UK Government continues to consistently resist the application of international law standards to its extra-territorial conduct overseas, including in the course of military operations. This default has been evident in two high profile cases in which JUSTICE has acted in the last year. In *Smith v Ministry of Defence* (pending judgment),<sup>5</sup> the UK argues that despite the conclusion of the European Court of Human Rights that Iraqi civilians might be brought within the jurisdiction of the UK for the purposes of the application of the ECHR by virtue of the activities of UK forces, those forces are themselves outside jurisdiction. In *Rahmatullah* the Government resisted the application of habeas corpus jurisdiction to a person held by US forces at Bagram Airbase, following capture by the UK in Iraq and transfer to the US pursuant to a diplomatic agreement on the standard of treatment to be enjoyed by detainees.<sup>6</sup> The rejection of the Committee's assessment of the extra-territorial scope of the Convention is consistent with this ongoing narrow legal interpretation of the UK's international obligations. The Committee may wish to consider reiterating its observation that UNCAT applies extra-territorially in any circumstances where the UK exercises *de facto* or *de jure* control.
- **Individual Petition (Q42):** JUSTICE supports the right of individual petition as a crucial part of the United Nations treaty mechanism. In the Government Response, the UK Government repeats its scepticism about the practical value of individual petitions. Its substantive position has not shifted significantly since the Committee's last concluding observations, albeit that the UK has now accepted the right to individual petition under both CEDAW and UNCRPD. The UK has stated that it will consider the evidence gathered from its participation in these mechanisms before considering further expansion of the right to individual petition to other treaty bodies. In its latest report, *Human Rights and Democracy*, the UK Foreign and Commonwealth Office stresses that the UK supports the work of the independent UN human rights treaty body system and that the treaty bodies "form the heart of the international human rights protection system". While this is welcome, to exclude the Committees' role in the consideration of individual complaints from the UK's praise sends a disappointing and fragmented message about the role and effectiveness of the UN mechanisms and the UK Government's confidence in them. The Committee may wish to consider asking the UK Government to better explain its continued scepticism about the right of individual petition.

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<sup>3</sup> Government Response, para 2.1.

<sup>4</sup> See for example, the Home Secretary, 2 March 2013, *A great day for British justice: Theresa May vows to take UK out of European Court of Human Rights*, The Daily Mail, here: <http://www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html#ixzz2MeRFpQCW>. Similarly, the Secretary of State for Justice on 18 December 2012, *Human rights no defence for criminals and terrorists, says Grayling*. Daily Telegraph, here: <http://www.telegraph.co.uk/news/uknews/law-and-order/9751945/Human-rights-no-defence-for-criminals-and-terrorists-says-Grayling.html>

<sup>5</sup> UKSC 2012/0249. A fuller summary of the case is available on the Supreme Court website: [http://www.supremecourt.gov.uk/current-cases/CCCCaseDetails/case\\_2012\\_0249.html](http://www.supremecourt.gov.uk/current-cases/CCCCaseDetails/case_2012_0249.html).

<sup>6</sup> *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48

**a) Deportation/prisoner transfer, torture and diplomatic assurances (Q 7,13, 14)**

4. The Committee has asked for up to date statistical information on the use of diplomatic assurances in connection with extradition or removal cases (Qs 13-14). The Government also raises the use of diplomatic assurances – or Memoranda of Understanding (MoUs) – in connection with the transfer of prisoners or detainees (Q7). The Government outlines the statistical information thus: no further MoUs have been concluded, the UK Government considers the existing agreement with Libya lapsed; since 2005, ten individuals have been deported subject to assurances in MoUs, nine to Algeria and one to Jordan.
5. JUSTICE is concerned that this statistical analysis paints a very sterile picture of the operation and impact of the Government's use of MoUs and diplomatic assurances to secure deportation or removal to countries where individuals are proved to face a real risk of torture.
6. In 2012, in *Othman*, the European Court of Human Rights held that, taking into account the high profile of the case, on a factual assessment, *Othman*, also known as Abu Qatada, – could be deported subject to the UK MoU with Jordan and would face no real risk of torture in violation of Article 3 ECHR. It set out a number of factors relevant to its assessment. The mere granting of assurances was not 'in themselves sufficient to ensure adequate protection against the risk of ill treatment', but it was necessary to determine whether the particular assurances provided 'in their practical application', a 'sufficient guarantee that the applicant will be protected' from ill-treatment contrary to Article 3 ECHR (para 187). The Court then set out a number of factors to which it would have regard (para 189), including, in particular:
  - whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; and
  - whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible (paras 189 (viii) and (ix)).
7. The Court did however conclude that deportation would violate Article 6 ECHR, as the applicant would be returned to face trial which would likely be based on evidence procured through torture.<sup>7</sup>
8. The UK Government has continued to press the boundaries of the law on assurances in litigation. In its attempts to secure deportations to Ethiopia, the UK Government is consistently arguing that independent monitoring and verification are not essential for any diplomatic assurance to be effective.<sup>8</sup> In the examination of the relevance of MoUs governing the transfer of detainees between the UK and US during hostilities in Iraq, the UK Government conceded that, in circumstances where it was alleged that a detainee was being held unlawfully and in violation of international standards, that it would be "futile" to

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<sup>7</sup> *Othman v UK*, App No 8139/09, 17 January 2012. JUSTICE intervened in this case to argue that deportation would violate Article 3 ECHR. Most notably – in *Othman* – the UK Government has continued to try to persuade the domestic courts that fresh developments in Jordan are adequate to ensure that torture evidence will not be relied upon. Despite findings on the facts by the domestic courts that the trial process in Jordan is inadequate to protect against this result, the Supreme Court is likely to consider this case again during 2013.

<sup>8</sup> See *XX v Secretary of State for the Home Department*, [2012] EWCA Civ 742 (JUSTICE intervened in this case), paras 5 – 8; *J1 v Secretary of State for the Home Department* [2013] EWCA Civ 279, para 65.

make any diplomatic request despite the existence of the relevant MoUs.<sup>9</sup> If this limited significance is given to such diplomatic assurances in the context of the close relationship between the UK and the US, it raises serious questions about the factual relevance of other MoUs.

9. JUSTICE shares the view of the UN Special Rapporteur against Torture that these assurances – made in circumstances where an individual is to be returned to a State where he faces a real risk of torture - are not only unreliable and ineffective but also threaten to erode the principle of *non-refoulement* which is an integral part of the international prohibition on torture in the Convention.<sup>10</sup> Where a State has a long record of failing to meet their multilateral obligations in UNCAT, using bilateral diplomatic agreements, accompanied by a detailed factual assessment of the likely adherence to those agreements on a case by case basis, fundamentally undermines the coherence and credibility of the Convention and ultimately the international legal framework.
- 10. We urge the Committee to concur with the assessment of the Special Rapporteur that MoUs concluded with States liable to commit torture and acts of inhuman and degrading treatment or punishment for the purposes of securing the removal, deportation or extradition from the jurisdiction of the United Kingdom are inconsistent with the principle of *non-refoulement*. The Committee might wish to consider whether these arrangements are being applied in a way which undermines the international prohibition on torture and - through the deployment of bilateral, non-binding diplomatic assurances giving comfort to States who otherwise disregard their multilateral obligations in UNCAT - the international rule of law.**

#### ***b) Allegations of UK complicity in torture (Q 23-24)***

11. High profile allegations of involvement or complicity of UK troops and intelligence services in torture and ill-treatment of detainees overseas have tainted the UK Government's reputation for most of the last decade. These have included allegations in relation to the operation of UK troops in Iraq, involvement in relation to detention of individuals in Pakistan and Egypt and allegations in connection with the treatment of *Binyam Mohammed*, who was detained in Pakistan and then at Guantanamo Bay.<sup>11</sup> More recently, detailed allegations have arisen in connection with the alleged rendition of individuals to Libya, in the cases of *Belhadj* and *Al-Saadi*.
12. In November 2011, speaking to accusations of complicity in torture, ill-treatment and rendition, the UK Foreign Secretary said that he intended to “draw a line” under these allegations. He said “the very making of these allegations undermined Britain's standing in the world as a country that upholds international law and abhors torture”. He explained that the Government considers that it had then taken steps – in the announced public inquiry on the treatment of detainees (the *Gibson* inquiry, led by Sir Peter Gibson) and the introduction

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<sup>9</sup> *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48, para 15. The Supreme Court expresses their surprise at this assertion by the UK Government: “*Memoranda of Understanding or their equivalent, Diplomatic Notes, are therefore a means by which courts have been invited to accept that the assurances which they contain will be honoured. And indeed courts have responded to that invitation by giving the assurances the weight that one would expect to be accorded to solemn undertakings formally committed to by responsible governments. It is therefore somewhat surprising that in the present case Mr Parmenter asserted that it would have been futile to request the US government to return Mr Rahmatullah. As the Master of the Rolls pointed out in para 39 of his judgment, this bald assertion was unsupported by any factual analysis. No evidence was proffered to sustain it.*”

<sup>10</sup> A/HRC/16/52 at paras 63 – 64, Report of the Special Rapporteur to the Sixteenth Session of the UN Human Rights Committee, 3 February 2011.

<sup>11</sup> Some of these allegations are set out in an inquiry by the Parliamentary Joint Committee on Human Rights. See [Twenty-third Report of Session 2008-09, Allegations of UK complicity in torture, HL 152/HC 230](#).

of proposals to enable litigation on allegations of ill-treatment to proceed under special Closed Material Procedures (CMP)<sup>12</sup> – in order to ensure a full inquiry into existing allegations and proper investigation into similar claims in the future (we return to CMP, below).

13. The terms of reference and procedure adopted by the *Gibson* inquiry significantly undermined its capability to undertake an effective and independent review. The Government (in the form of the Cabinet Secretary) would have retained ultimate control of disclosure of material and a significant part of the inquiry was to be conducted behind closed doors and with no avenue for full public scrutiny of the allegations concerned. In light of its failings, the detainees, their legal teams and a number of civil society organisations – including JUSTICE - decided to boycott the inquiry.<sup>13</sup> Following the boycott and the announcement of further criminal investigations in connection with the outstanding Libyan allegations, in January 2012, the Government took the decision to wind up the *Gibson* inquiry. In June 2012, Sir Peter Gibson submitted a report on the conduct of the inquiry to the Government. In July 2012, the Government committed to publish as much of that report “as possible”.<sup>14</sup> Nothing has yet been placed in the public domain.
14. The Government has committed to hold an “independent judge-led inquiry” once all the related police investigations are concluded. JUSTICE commends the Government’s commitment to ensuring the integrity of the ongoing criminal investigations. These investigations are likely to be complex, involving cross-border cooperation and the investigation of increasingly historical events. However, police inquiries have now been ongoing for over a year with little indication of the timescale for completion or any report on progress. In the meantime, the investigation and inquiry into those cases where criminal prosecution has already been ruled out are stalled.
15. The Government Response explains that the UK Government does not share the concerns of JUSTICE and others that the *Gibson* terms of reference were flawed. Our concerns, summarised above, are grounded in the principles of openness, transparency and accountability familiar to international law, and to the UNCAT Committee. In particular, we were concerned that its terms of reference failed to provide for adequate engagement and meaningful participation by the detainees and their representatives. In January 2012, the Special Rapporteur on Torture set out basic guidance for the operations of commissions of inquiry for this purpose. He outlined in detail the international legal obligations on States to investigate and prosecute allegations of torture, both under UNCAT and the ICCPR. However he also identified a series of best practice principles for the establishment of more informal commissions of inquiry. Importantly, these included:
  - **Engagement:** “To ensure inclusiveness and ownership of a commission’s methodology, broad and genuine consultations with relevant international and national actors, including civil society should be undertaken when drafting the commission’s terms of reference”
  - **Transparency, independence and accountability:** “Under no circumstances should ‘secrets of State’ be invoked as a justification to conceal the commission of human rights violations. The members of the commission of inquiry alone should be the judges of whether confidential or closed proceedings are necessary. Only in exceptional circumstances should hearings be confidential; in such cases, the

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<sup>12</sup> The full text of the Home Secretary’s speech is available online: <http://www.fco.gov.uk/en/news/latest-news/?view=Speech&id=692973282>

<sup>13</sup> [Letter to the Detainee Inquiry, 3 August 2011](#). See also [JUSTICE Press Release, 6 July 2011](#).

<sup>14</sup> HC Deb, 17 July 2012, c132WS.

precise justification for the confidentiality must be transparent and disclosed to the public”<sup>15</sup>.

16. We welcome the commitment in the Government Response to consult civil society on the terms of reference of any future inquiry. However, no planning has begun for the successor inquiry to *Gibson*. Planning could proceed without any real risk to the integrity of any ongoing police investigation. However, no attempt has been made to consult with either detainees or stakeholder organisations on the future terms of reference for any new inquiry. While this might appear short-sighted, it appears clear from the Government Response that the Government does not consider that any future change to increase transparency is necessary or warranted. This position is disappointing and shows a lack of regard for the effectiveness of the future inquiry or the engagement of the detainees in the process of inquiry.
17. Until the UK Government takes seriously its commitment to draw a line under this dark period in its recent history, by conducting a full, independent and transparent inquiry into allegations that the UK has been complicit in torture, the UK’s reputation as a world leader in the promotion of fundamental human rights and the commitment to the rule of law will be at risk.
18. **In light of the above, JUSTICE urges the Committee to explore what progress has been made in the outstanding criminal investigations surrounding allegations of UK complicity in torture, and on plans for a new independent, transparent, judge-led public inquiry.**
19. **The UK Government should explain why the report prepared by Sir Peter Gibson following the conclusion of the Gibson inquiry has not yet been published. We urge the Committee to recommend that the report be published in as full a form as possible, without delay.**

***c) Closed Material Procedures, Secret Evidence and the Justice and Security Bill (Q 30 – 31)***

20. The Justice and Security Act 2013 will be enacted shortly. It will make Closed Material Procedures (“CMP”) available in any civil proceedings where “national security” is at risk and CMP would be in the “interests of the fair and effective” administration of justice in those proceedings. In CMP, one party to a case may be excluded from any part or all of the proceedings, with his interests represented by a security vetted “special advocate” whom he cannot instruct. Questions 30-31 take issue with the existing operation of these procedures and their expansion.
21. The Government Response argues that the purpose of the Bill is to “ensure that in civil proceedings the UK courts are able to take into account all relevant information, even if that information would damage the interests of national security if it were disclosed”. It argues that the current system which operates to protect national security, “public interest immunity” (PII) is less fair than CMP: “PII is exclusionary – if a claim is granted the result is that relevant material is excluded from proceedings entirely. The court has powers to summarise, gist and redact material, but all these do is mitigate the impact on the proceedings of excluding the relevant material. The Government argues that national security material might be excluded which might be essential to its defence. It argues that CMP are “sufficiently fair” and under the Act, the court will retain discretion.
22. The assertions made by the Government Response present an extremely benign picture of the operation of CMP and of their incarnation in the Justice and Security Act. Each is challenged by JUSTICE and by the Special Advocates at the heart of CMP system:

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<sup>15</sup> A/HRC/19/61 Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, January 2012, paras 66 – 67.

- Special Advocates opposed the expansion of CMP as “inherently unfair” and unjustified.<sup>16</sup>
- JUSTICE rejected the Government’s claim that PII had forced settlement without effective defence: the Guantanamo claims were settled before PII had been considered and at a time when the Supreme Court was still considering whether CMP was an option.
- The discretion afforded to the judge under the Justice and Security Act 2013 may be extremely limited. The Government resisted amendments –recommended by the UK Parliament Joint Committee on Human Rights (a scrutiny Committee comprised of members of both Houses of Parliament) and supported by the Special Advocates – that would have given the judge the power to consider alternatives to CMP before ordering a secret hearing; to allow the court to consider the wider public interest in the fair and open administration of justice and to balance the corresponding risk to national security (The Government also resisted amendments which sought to expressly exclude the consideration of allegations of torture and torture evidence in CMP). As it stands, no matter how small the risk to national security or the corresponding seriousness of the allegations involved, in most cases, the court may have little option to grant an application for a closed hearing, giving a significant litigation advantage to the Government.

23. The expansion of CMP means that cases like that brought by *Binyam Mohammed* or the Guantanamo bay litigants in *Al-Rawi* – involving serious allegations of complicity in human rights abuses likely to violate UNCAT – are very unlikely to get off the ground. It will be very difficult for solicitors to advise a client on prospects of success necessary to secure funding for litigation, or to advise on litigation strategy in full knowledge that the evidence in the case may be presented in closed session. If claims do begin, material that might previously have been disclosed under PII may never see the light of day. The Government was extremely resistant to any clear limits being placed on the availability of these extraordinary procedures, including any suggestion that the court should be free to consider less draconian alternatives, such as redaction, anonymity orders or confidentiality rights before allowing CMP to be used. The estimated number of CMP claims a year ranges from 7–15; with the Government accepting that figures may be forced downward as CMP takes effect. The Justice and Security Act will require an Annual Report to be provided to Parliament on the operation of CMP. After five years, it will be subject to independent review. However, the Government will control how much information may be placed in the public domain. In light of the inability of the Government Response to even confirm or deny whether any evidence alleged to have been obtained through torture has been considered in CMP (see below), this suggests that any review will paint a very sketchy picture of the operation of these controversial measures.

24. The Rules of Court associated with the application of the Justice and Security Act are yet to be drafted. It is unclear what guidance the Rules will give on the role which Special Advocates may be able to play to ensure that the excluded party is effectively advised including whether the Government intends to give any particular guidance on whether these lawyers will have a specific role on providing advice on prospects of success, on offers to settle and on appeal. These are all issues which will be crucial if CMP are to operate in the context of ordinary civil litigation and matters which the Government failed to grapple with during the passage of the Act.

25. JUSTICE considers that the adoption of the Justice and Security Act 2013 and the expansion of CMP is a retrograde step, not only for compliance with our international

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<sup>16</sup> The concerns of the Special Advocates were reported to – and supported by – the UK Parliament Joint Committee on Human Rights during the course of their scrutiny of the Bill. Their reports, and the Special Advocates evidence can be accessed here: <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/128/12802.htm>

obligations, and centuries of common law principle on open and adversarial justice, but for the long-standing and global respect afforded to our civil justice system and our judges.<sup>17</sup>

#### *A v UK: Summaries and “gisting”*

26. The Committee has asked for information from the UK Government on how it has implemented the requirement in the judgment in *A v UK* that individuals excluded during CMP should be provided with such information about the case against them as necessary to enable them to properly instruct the Special Advocate.
27. The UK Government has taken a very narrow approach to this requirement and argued successfully before the domestic Supreme Court in *Tariq* that a summary is not required in all cases in order to ensure a fair hearing. The Government Response refers to this line of authority (para 31.5) to support its approach. However, it has neglected to inform the Committee that *Tariq* is subject to an application to the European Court of Human Rights (JUSTICE is intervening in this case). The majority in *Tariq* relied heavily on the analysis of the ECtHR decision in *Kennedy v UK*, a case which concluded that the procedural arrangements of the Investigatory Powers Tribunal were compatible with Article 6 ECHR despite a lack of transparency (it operates a completely closed procedure without even the appointment of a special advocate). In a dissenting judgment in *Tariq*, Lord Kerr skilfully sets out the defects of the approach to Article 6 ECHR in *Kennedy*, which he dismisses as an anomaly.<sup>18</sup>
28. This is clearly a rapidly evolving area of the law, where the Government seeks to uphold secrecy over open justice in so far as possible. This narrow approach is reflected in the Justice and Security Act which directs the court to provide a summary where to do so would pose no risk to national security. The court is given a corresponding duty to comply with Article 6 ECHR. However, how the courts will reconcile these competing duties will be likely be determined in closed hearings without public scrutiny and may only be reported in closed judgments incapable of external assessment.
29. **The Committee might consider exploring how a judicial hearing subject to CMP might meet the obligations under Articles 13 and 14 UNCAT where claims are pursued to seek redress for allegations that the Convention has been violated. Further it might consider how the UK Government might explain (a) how the Rules of Court made under the Justice and Security Act 2013 will govern the provision of summaries to enhance the participation of excluded persons, (b) whether the court’s discretion under the “fair and effective” test includes the power to consider alternatives to CMP, including redaction, anonymity orders and confidentiality undertakings and (c) whether judgments which are closed will remain closed indefinitely without any subsequent opportunity for review after any risk to national security has passed, and if so, why.**

#### *CMP and torture evidence (Q 31)*

30. JUSTICE is deeply concerned to read the UK Government “neither confirm nor deny” how the handling of evidence alleged to have been procured through the use of torture has been managed in existing CMP. The Government Response explains that, where this issue is handled in a closed judgment, it is for the individual judge to determine whether material may be disclosed or not (para 30.5). This means that, the Government considers itself barred from either confirming or denying whether any individual tribunal has ever been

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<sup>17</sup> JUSTICE conducted 18 months of scrutiny of these proposals. All of our relevant briefing documents can be accessed online: <http://www.justice.org.uk/resources.php/325/justice-and-security-bill> This commentary provides a detailed description of the arguments for and against the expansion of CMP, including the critique of the Special Advocates.

<sup>18</sup> *Tariq v Home Office* [2011] UKSC 35, paras 117 – 137, in particular, see 124 – 129.

invited to consider material allegedly tainted by torture in closed session, let alone whether that court has applied the rule in *A v Secretary of State for the Home Department (No 2)* and whether the evidence has been admitted or excluded.

31. In the light of the likelihood that many cases involving allegations of torture, inhuman or degrading treatment or punishment may also involve national security risks; it is likely that in cases involving a risk that evidence may be tainted by torture, that this issue will be considered in closed session. If the Government does not accept any responsibility to ensure transparency in the consideration of the question of admissibility, it will be exceptionally difficult for the public or the international community to assess the compatibility of the UK's conduct with the requirement in Article 15 UNCAT that no "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" (emphasis added). That CMP procedure allows for secrecy without exception cannot allow the UK to carve out an exemption from Article 15. It begs the question how precisely the ability of the UK to comply with the prohibition on the admissibility of torture evidence will be achieved if the UK Government is permitted to take a "neither confirm nor deny" approach to all CMP. At its heart, this admission provides yet another illustration of why the CMP which currently operate – and the new CMP envisaged under the Justice and Security Act - may operate to undermine the effectiveness of the UK's ability to meet its commitments under UNCAT by discouraging open and frank reflection and by restricting individual access to justice.
32. **The Committee might consider exploring how the UK might illustrate its compliance with Article 15 UNCAT if it can neither confirm nor deny that any evidence obtained through the use of torture has been admitted during CMP. The Committee may wish to ask the UK Government how it might adapt the application of the Rules of Court, or make provision in the relevant reports to Parliament, to ensure that adequate information is provided in open judgments (or elsewhere) to allow for the assessment of compliance with Article 15 UNCAT in cases involving CMP.**

**d) Treatment of prisoners, access to justice and legal aid (Q 35)**

33. Question 35 seeks further information about the number and types of complaints of mistreatment pursued by prisoners. In this section, the Government response outlines in some detail these statistics and provides a narrative description of each of the complaints mechanisms open to prisoners in England and Wales, Northern Ireland and Scotland. Clearly, the ability of prisoners to complain about maltreatment and to seek independent redress for harm is highly significant to ensuring that the treatment of those incarcerated by the State meets international standards, including those outlined in UNCAT, designed to prevent torture, inhuman and degrading treatment or punishment within closed institutions.
34. JUSTICE regrets – and draws the attention of the Committee to – recent proposals by the Ministry of Justice to significantly restrict the ability of prisoners to access legal aid in connection with complaints in connection with mistreatment and disciplinary matters. In *Transforming legal aid: delivering a more credible and efficient system*, the UK Government sets out its intention to reduce legal aid costs through a number of measures, including removal of legal aid traditionally allocated to allow prisoners access to advice and assistance in connection with their treatment in prison and the conduct of prison disciplinary issues.<sup>19</sup> Under existing rules, prisoners must satisfy means and merits eligibility tests, and must exhaust all existing methods of redress (including internal complaints procedures) before legal aid may be considered.
35. Under the Government's proposals, prisoners will only be eligible for criminal legal aid in cases involving the determination of a criminal charge, issues in connection with the right to

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<sup>19</sup> CP14/2013, published 9 April 2013 with consultation until 4 June 2013.

have on-going detention reviewed and a limited number of disciplinary issues.<sup>20</sup> This will preclude prisoners seeking funded legal advice or representation in connection with alleged mistreatment in most cases. While prisoners will remain eligible to seek civil legal aid, following previous cuts and restrictions to the civil legal aid budget, most claims are likely to be out of scope except those which are able to satisfy assessors on an application for exceptional funding, for example, by establishing a well-founded claim that their rights under the ECHR have been violated during detention. These circumstances when exceptional funding will be made available is yet to be tested, and are likely to be closely circumscribed. In this context, JUSTICE is concerned that the proposal to withdraw criminal legal aid will prevent genuine grievances from being raised and will prevent some serious allegations from being heard. While the UK Government outlines in some detail the non-judicial complaints mechanisms provided for prisoners, these operate entirely within the prison service and lack independence (the Internal Prisoner Complaints Process) or are unable to award a remedy direct to the complaining prisoner (the Prisons and Probation Ombudsman or the local Independent Monitoring Board). The announcement of the review has been accompanied by sweeping Ministerial allegations about “unnecessary” complaints brought by inmates. However, the Government narrative neglects the impact of cases brought to challenge bullying and mistreatment, including treatment liable to contribute to the risk of death in custody.<sup>21</sup> Leading UK prison lawyers have criticised the proposals as an effective barrier to independent redress:

*Many are simply unable to pursue a complaint without assistance. Prison governors who consider complaints are not lawyers let alone judges. They are not independent of the institutions within which they work. There is far too much room for error. The Prison and Probation ombudsman, who has oversight of the complaints system, does have independence but he is not a lawyer. It is not his job to ensure that the operation of prisons and the regulation of prisoners within them are conducted in accordance with the rule of law. That is the role of the courts.<sup>22</sup>*

36. **The Committee might explore whether the proposal to limit prisoners’ access to legal aid for the purposes of securing advice and assistance on maltreatment and disciplinary matters is compatible with the right of those seeking to enforce the right to have any allegation of mistreatment incompatible with the Convention promptly and impartially examined (Article 13 UNCAT) and the corresponding obligation on the State to provide for access to redress and an enforceable right to fair and adequate compensation (Article 14 UNCAT).**

**JUSTICE  
19 April 2013**

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<sup>20</sup> Ibid, paras 3.14 – 3.15

<sup>21</sup> 4 April 2013, *Grayling sets sights on prisoners’ legal aid*, Law Society Gazette. Previous challenges brought with legal advice and assistance have included the challenges to the continuing practice of “slopping out” (criticised by the Committee in its last concluding observations, paragraph 4(g)). The exclusion would also impact upon claims challenging decisions on segregation, cases brought by nursing mothers refused access to Mother and Child Units and separated from their children and claims brought by physically and mentally disabled prisoners denied access to support and assistance (including in circumstances where they might wish to challenge the accessibility of rehabilitation programmes relevant to eligibility for parole).

<sup>22</sup> 15 April 2013, *The legal status of prisoners is a mark of its humanity*, Phillippa Kaufmann QC, Edward Fitzgerald QC et al, *The Justice Gap Blog*. <http://thejusticegap.com/News/the-legal-status-of-prisoners-in-this-country-is-a-mark-of-its-humanity/>