

**IN THE MATTER OF THE ALL PARTY PARLIAMENTARY GROUP ON
EXTRAORDINARY RENDITION**

**AND IN THE MATTER OF THE HUMAN RIGHTS RESPONSIBILITY ARISING
FROM MILITARY DETAINEE HANDOVERS IN IRAQ**

JOINT OPINION

1. The All Party Parliamentary Group on Extraordinary Rendition has asked for our opinion on these questions:
 - (1) Would a human rights violation arise under the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA) in the following situation: an individual in British detention in Iraq is handed over to US military personnel despite substantial grounds for considering that there is a real risk of that person being subjected to torture or inhuman and degrading treatment ?
 - (2) Would it make a difference if the individual, though detained, has never been arrested by British military personnel?
2. In our view, for the reasons which we will explain below, our answer to the questions are:
 - (1) "yes".
 - (2) "no".
3. These are questions of law, to be addressed as a matter of principle. However, it is an anxious context in which they have been posed. That context includes a statement issued on Monday 25 February 2008 by Mr Ben Griffin, a former SAS soldier who had been on active service in Iraq. In that statement Mr Griffin states

that British soldiers in Iraq and Afghanistan have detained individuals who have ended up in Guantanamo Bay, Bagram airbase, Abu Ghraib prison and other detention facilities. He states that he himself was “in no doubt” that individuals handed over to the United States military “would be tortured”. He also mentions a policy that British soldiers would detain but not arrest individuals in order to “distance” British soldiers from the legal process. The statement has reinforced the searching questions which arise as to British handovers of detainees to face ill-treatment. It also raises an issue as to whether responsibility can be avoided through a practice of detention without arrest. This Opinion neither assumes nor suggests that Mr Griffin's account is accurate.

4. There are a number of key points which underpin our conclusions, with which points we will deal in turn.
5. First, it is now well-established that in principle an individual in British detention outside British territory, at least in a British detention facility, falls within the responsibility of the United Kingdom under the ECHR and HRA, for a human rights violation by British military personnel holding the individual in detention. Accordingly the HRA and the ECHR have been held to apply to two individuals while they were detained in detention facilities in Iraq which were under the control of the British military: Mr Mousa in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 and Mr Al Jedda in *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.
6. Secondly, as the domestic case-law currently stands, the emphasis on the fact that detention occurs in a detention facility is significant. That was the way in which the Mousa case was described by Lord Brown in *Al-Skeini*: see §132 (Lord Carswell and Baroness Hale agreed: see §§90 and 97). In fact, this requirement should be approached with some circumspection:
 - (1) In *Al-Skeini*, the applicability of the EHCR to Mr Mousa was not disputed. Two things were in dispute. One was whether the scope of the HRA

matched the extra-territorial scope of the ECHR, to which the answer was yes. The other was whether the ECHR (and so HRA) was applicable to Iraqi civilians who came into contact with British military street patrols but without ever being detained, to which the answer was no (a conclusion now under challenge in Strasbourg).

- (2) Accordingly, the House of Lords did not need to decide any case which involved British military detention where the person was not taken to a British detention facility.
- (3) In fact, we think it highly unlikely that a subsequent case in Strasbourg or the House of Lords, in which the issue squarely arose, would uphold the approach whereby the HRA applies to persons detained by the British military only where they are detained in a British detention facility. We say that for these reasons:
 - (a) The ECHR has been recognised by the Strasbourg Court as applicable on the basis of an agent of a Contracting State's "authority and control" over a foreign national outside the State's territory.¹
 - (b) Some of the cases treat that principle as being a broad one. See especially *Isaak v Turkey*; and cf. *Issa v Turkey*. Such an approach links to earlier jurisprudence of the Commission: see eg. *Cyprus v Turkey* (1976) 4 EHRR 482.
 - (c) Even if the principle is to be seen as a narrow one, detention is a paradigm case of the agents of a State having "authority and control" over other persons. Indeed, where a State's forces hand-over a detained person to another state, it is difficult to see how that person would not have been within the authority and control of the

¹ E.g. *Issa v Turkey* (2004) 41 EHRR 567; *Isaak and others v Turkey* App. no. 44587/98, 28 September 2006.

former state, since the very act of handing-over a person represents a relinquishing of authority and control over them.

- (d) The implications would otherwise be very troubling. If the HRA was held not to apply to abuses committed by agents of the UK Government whenever a detainee is outside a detention facility, such agents of the State could evade responsibility simply by committing their abusive acts prior to taking detained individuals to a detention facility or possibly even by removing them from it. Indeed, there would be a disincentive to regularising detention by taking captured individuals to a detention facility.
- (e) The line between detention in a detention facility and detention outside it is also unprincipled and vague. It would lead to questions such as whether a vehicle could be a detention facility or whether the temporary use of civilian premises could be so characterised. From a principled perspective, there is no reason why abuses committed in such locations should not engage liability under the HRA.

7. Thirdly, once an individual is – by reason of his or her detention by British authorities – within the jurisdiction of the United Kingdom, there is good reason in principle to treat a ‘handover’ of that detainee as capable of constituting an ECHR/HRA violation.

- (1) Once the individual is accepted as being within the jurisdiction for HRA purposes, it would be surprising if no human rights responsibility could ever arise from handing them over to face ill-treatment at the hands of another State. Indeed, the applicability of human rights to such a situation appears to be the accepted premise of certain ‘understandings’ to which the British Government has referred in response to questions by

Mr Andrew Tyrie. The Secretary of State for Defence has stated, for instance, that,

“Whenever we have passed an individual from UK jurisdiction into the jurisdiction of the Iraqi, Afghan or US authorities, we have had in place an understanding that they would not transfer that individual to a third country without first seeking our consent or at least informing us of their intention.”²

In the case of hand-overs in Afghanistan, an MOU between the Government of the UK and the Government of the Islamic Republic of Afghanistan, signed on 30 September 2006, has been disclosed concerning transfer by the UK armed forces of persons detained in Afghanistan. This MOU states (amongst other things):

“The Afghan authorities will be responsible for treating ...individuals [transferred by UK Armed Forces] in accordance with Afghanistan’s international human rights obligations including prohibiting torture and cruel, inhuman and degrading treatment, protection against torture and using only such force as is reasonable to guard against escape. The Afghan authorities will ensure that any detainee transferred to them by the UK AF will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the UK.”³

- (2) The point can be tested by reference to ECHR Article 3, which enshrines one of the most fundamental values of a democratic society and that it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Art.1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Art.3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or

² The Rt. Hon Des Browne, Secretary of State for Defence, letter dated 31 January 2008; also see the letter dated 19 March 2008. See further HC Written Answers, 5 December 2007, Col. 1224-5W; 14 January 2008, Col. 885W, 31 January 2008 Col. 524W, and 20 March 2008 Col. 1310W.

³ Para. 3.2.

degrading treatment, including such ill-treatment administered by third parties.⁴

- (3) Two specific obligations appear to be directly relevant to the alleged actions of British forces in Iraq. The first is the obligation recognized in *Soering v United Kingdom* (1989) 11 EHRR 439 that Contracting States are prohibited from extraditing a person to a country where they face a real risk of suffering torture or inhuman or degrading treatment. The ECtHR in that case premised that obligation on the following statement of principle:

*It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.*⁵

Soering v United Kingdom was concerned with extradition, and it is very well-established that the HRA (and relevant provisions in the Extradition Acts themselves) would in principle prevent an extradition to face torture or other sufficiently serious ill-treatment at the hands of another State.

- (4) The same principle has been applied in the context of immigration removal or deportation: see eg. *Chahal v United Kingdom* (1996) 23 EHRR 413. The way in which the HRA/ECHR is engaged in such a context, and the potential applicability of Convention rights beyond Article 3, were the subject of the House of Lords' ruling in *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26. In the recent case of *R (Gentle) v Prime Minister* [2008] UKHL 20, the possibility of invoking the *Soering* principle was touched on in the wider context of sending British troops to face

⁴ E.g. *E v United Kingdom* (2003) 36 EHRR 31 at [88].

⁵ At [88]

danger, at least where that was the immediate and direct impact: see Lord Bingham at §8.

- (5) There are strong reasons for applying the principled logic of *Soering* and *Chahal* to a detainee within the jurisdiction of the UK and handed-over, for example, for torture or rendition. The matter can be tested in this way. Suppose an individual detained at Belmarsh were handed over to the US authorities. There, the ill-treatment by the US – whether on UK soil, in the US Embassy, on a US aircraft, or after being flown to the US or a third country, would all surely be directly relevant. It is helpful to consider the cases that have considered individuals that have been handed-over to officials of a Contracting State and forcibly removed by that State to face trial without the extradition procedures being applied (so-called “irregular extradition” cases). In *Öcalan v Turkey* (2005) 41 EHRR 985, the Convention was held applicable to conduct of Turkish officials in removing the applicant from Kenya by airplane. Suppose Kenya had been a Contracting State. It is in our view inconceivable that the acts of Kenyan officials in handing over a Mr Öcalan to face serious ill-treatment – whether in Kenya, Turkey or elsewhere – would be immune from human rights responsibility.
- (6) A second aspect of Article 3 is in any event potentially relevant to the conduct of British forces in Iraq is the positive obligation implicit in Article 3 to take reasonable steps to prevent abuses of Article 3. It is well established that Contracting States are under a positive obligation to,

*take those steps that could be reasonably expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have had knowledge.*⁶

⁶ *Z v United Kingdom*, App. No. 29392/95, 10 September 1999 at [94]; *E v United Kingdom* (2003) 36 EHRR 31

- (7) The position is reinforced by international law, which informs the interpretation of the ECHR: *Al-Adsani v United Kingdom* (2002) 34 EHRR 11. That makes it relevant to consider the UK's obligation under international law not to aid or assist another State, for example, to commit torture. Aiding or assisting internationally wrongful acts can itself violate international law: see Article 16 of the UN International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts. Thus, the International Court of Justice recognised the obligation on States not to render aid or assistance in maintaining the human rights violations created by Israel's Wall.⁷ This judgment was cited by approval by Lord Bingham in the House of Lords who stated that, "*the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture.*"⁸
- (8) It is therefore unsurprising to find the case-law as countenancing human rights responsibility as being engaged in a 'hand-over' situation. A good example is the case of *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344. That case was concerned with an individual who was said to be within the jurisdiction of the UK at the British Consulate in Melbourne, Australia. The Court of Appeal contemplated that the HRA could apply to a hand-over to State authorities, depending on the nature of the threat faced, and the inter-State position at international law. It is not difficult to suppose that there would indeed be direct responsibility in a case of the handover of a person detained in Iraq, and the fundamental protections of Article 3 would be engaged.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Territories*, ICJ Advisory Opinion, 9 July 2004, at [159]. Further support for a doctrine of complicity in international wrongful acts is contained in *Doe v Unocal Corp.*, US Court of Appeals 9th Cir. 18 September 2002 At [4]; and lower court: 110 F.Supp.2d 1294 (CD Cal 2000), but cf. *Doe v Exxon Mobil Corp.* 393 F.Supp. 2d 20 (2005).

⁸ *A (No. 2) v Secretary of State for the Home Department* [2005] UKHL 71 at [34].

8. Fourthly, the question in principle should be whether there were “substantial grounds” for considering that there was a “real risk”, post-handover, of ill-treatment against which Article 3 protects.
- (1) The well-established test, developed in the *Soering* case law, holds that where a state has “substantial grounds” for believing that there is a “real risk” that the individual in question will, if removed to another country, be subjected to inhuman and degrading treatment, the responsibility of the Contracting State is engaged and the individual must not be removed.⁹
 - (2) The Strasbourg Court has rejected the argument (made by the UK Government) that the security risk believed to be posed by the individual should be balanced against the risk of the individual suffering torture and inhuman treatment. The ECtHR stressed that the prohibition is absolute.¹⁰
 - (3) These requirements are to be attributed the following meanings. “Substantial grounds” means only that there is a proper evidential basis for concluding that a risk exists.¹¹ A “real risk” is more than a mere possibility but something less than a balance of probabilities or more likely than not.¹² Furthermore, the existence of such a risk must be assessed primarily with reference to those facts which were known *or ought to have been known* to the Contracting State at the time of the hand-over.¹³ In *Soering v United Kingdom*, the ECtHR stated that Contracting States bear responsibility under Article 3, “for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”¹⁴

⁹ *Chahal v United Kingdom* (1996) 23 EHRR 413 at [80] recently applied and affirmed in *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289 at [27].

¹⁰ *Saadi v Italy*, App. No. 37201/06, 28 February 2008, at [139]-[140].

¹¹ *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289 at [24].

¹² *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289 at [60]; *Saadi v Italy*, App. No. 37201/06, 28 February 2008.

¹³ *Saadi v Italy*, at [133].

¹⁴ (1989) 11 EHRR 439 at [86]. The potential mist-treatment does not have to be real and immediate so long as it is foreseeable: *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289 at [64].

- (4) Once it is accepted that the *Soering* principle can apply by analogy to a detainee (as to which see above), it follows that the same substantial grounds/ real risk test would be applicable to establish a violation by the UK in such a situation. There is good sense behind that conclusion. It is difficult to see why, in human rights terms, the UK should be absolved from human rights responsibility if the substantial grounds/ real risk test is satisfied in the context of handover of a detainee given that they would be responsible in the context of formal extradition or deportation.
9. Fifthly, there would be no sound basis for arguing that Article 3 is somehow qualified by reason of United Nations Security Council Resolutions.
- (1) In the *Al-Jedda* case the British Government responded to the claim based on the HRA by contending that: (a) the action of internment was attributable not to the UK but the UN (which argument failed); and (b) the human rights duty arising under ECHR Article 5 was qualified by reason of UN Security Council Resolutions mandating internment (which argument succeeded), by virtue of the UK's obligations under Article 25 of the UN Charter which obliges states to "accept and carry out" Security Council Resolutions.
- (2) This latter conclusion was arrived at because Security Council Resolution 1546 authorised the multinational force to carry out combat operations including "*internment where this is necessary for imperative reasons of security*".
- (3) There is, however, nothing in the relevant Security Resolutions that could be taken to justify British forces engaging in conduct which would constitute a breach of Article 3 of the Convention.
10. Sixthly, and finally, it would in principle be no answer for the United Kingdom to rely on the fact that the individual – although detained – was never arrested.

- (1) Suppose, in a case of a Mr Mousa or a Mr Al-Jedda, the British military personnel detains the individual but without ever formally arresting them. It is unthinkable that the UK would thereby avoid human rights responsibility under the ECHR and HRA.
- (2) Some of the ECHR cases have involved arrest, which can be seen as a powerful example of State authority and control. The logic would be that, where a person has been arrested by UK authorities, they are clearly within the authority and control of those personnel. But that would make arrest sufficient, rather than necessary, for jurisdiction to arise. It is noteworthy, for example, that under the Fourth Geneva Convention, protecting civilians in times of armed conflict, combatant states assume obligations over all civilians who are “in the hands of” of its military personnel.¹⁵
- (3) The Strasbourg Court has not stated that an arrest is necessary. For instance, in the irregular extradition cases (which recognize that jurisdiction can arise from the authority and control exercised by officers of a Contracting State over others) the fact of an arrest was not considered to be material. Thus in *Freda v Italy* (1980) 21 DR 250 it was stated (emphasis added):

...it is established that the applicant was taken into custody by officers of the Italian police and deprived of his liberty in an Italian Air Force aeroplane. The applicant was accordingly from the time of being handed over in fact under the authority of the Italian State and thus within the “jurisdiction” of that country, even if this authority was in the circumstances exercised abroad...

¹⁵ Article 4: Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

There, the issue of whether there had been a formal arrest was considered relevant only to the issue of whether the detention by Italian authorities was lawful under Italian law.

- (4) This analysis is consistent with the fact that Convention rights must be interpreted in a manner that makes them practical and effective. In particular, this has led the ECtHR to state that the Convention has regard to substance and not form.¹⁶ It follows that the notion of “authority and control” must be viewed as a matter of substance and whether or not there has been a formal arrest can only be one indicator of whether a person is or has been under the authority and control of a state. It is obvious that officers of a Contracting State can assume authority and control over a foreign national, including through detention, but without formally arresting them. A precondition of formal arrest would undermine the practical and effective nature of the protection, not least because of the opportunity for the armed forces of Council of Europe States to avoid responsibility by adopting a policy of not formally arresting detainees.
- (5) In the Mousa case, the Court of Appeal took the view that ECHR/HRA jurisdiction arose “from the time when he was arrested at the hotel and thereby lost his freedom at the hands of British troops”.¹⁷ But that was to emphasise that arrest was sufficient, and detention was not necessary. The Court of Appeal was not concerned with a situation in which there had been a detention without an arrest.
- (6) It would be very surprising if arrest were a precondition to human rights responsibility in the context of a detainee. In English common law, individuals may be detained and establish a false imprisonment without

¹⁶ *Deweert v Belgium* (1980) 2 EHRR 439, para.44; *Adolf v Austria* (1982) 4 EHRR 315 at [30].

¹⁷ At [108]

ever being arrested. That was the position of the anti-war protesters travelling to a demonstration at RAF Fairford, who were prevented by police from disembarking and were diverted back to London: see *R (Laporte) v Gloucestershire Chief Constable* [2006] UKHL 55. English law does attribute significance to the act of arrest, for example in triggering the duty to bring the individual promptly before a court. But the absence of an arrest would not avoid that same duty under the HRA, in the case of an individual who is detained, as is made very clear from the express terms of ECHR Article 5.

11. We have also considered the degree to which an assurance provided the Government of another state might in principle satisfy the obligations of British forces under the HRA:

- (1) The correct approach, as prescribed by the ECtHR, is that such assurances do not absolve the State of *"the obligation to examine whether such assurances provide, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention."* The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.¹⁸
- (2) Unless the assurance "eliminates"¹⁹ any real risk of inhuman and degrading treatment or torture the UK will be liable as a matter of Convention law.
- (3) An assurance may not be effective for a number of reasons: for example, because the terms of the assurance do not exclude the possibility of

¹⁸ *Saadi v Italy* App. no. 37201/06, 28 February 2008 at [148].

¹⁹ *Soering v United Kingdom*, (1989) 11 EHRR 439 at [98]; In *Chahal v United Kingdom* (1997) 23 EHRR 413 the Commission and the Court referred to the need for an assurance to be an "adequate" or "effective" "guarantee" (at [69 (133), 92]). The Council of Europe's Commissioner for Human Rights has stated that, "*Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.*": Report by Mr A. Gil-Robles, Sweden, 8/7/04, CommDH(2004)13, §9 (emphasis supplied); The Canadian Federal Court has also held that diplomatic assurances must be "effective", "meaningful" and "reliable" for the court to be satisfied that removal is lawful: *Sing v Canada* 2007 FC 361 at §§139, 142 (de Montigny J).

torture or ill treatment,²⁰ because there remains a foreseeable chance that the assurance might be breached, or because there is an ambiguity as to whether it applies in a particular case. The Court of Appeal in *AS & DD v Secretary of State* [2008] EWCA Civ 289 approved the following approach:

*"that the assessment of the value and effectiveness of assurances is less a matter of their text, though that can be relevant in showing what issues have been considered and what room may exist for a government to take a strictly legalistic view of what it has undertaken, and more a matter of the domestic political forces which animate a government and of the diplomatic and other pressures which may impel its performance of its obligations, or lead to a quick discovery and redress for any breach."*²¹

12. The ECtHR does recognize that assurances can be effective in some circumstances, but it will require convincing evidence that they will be effective. *Al-Moayad v Germany*, App. No. 35865/03 20 February 2008, is relevant to the present issue. In that case the ECtHR held that the extradition of a Yemeni national suspected of terrorist offences to the US did not violate Article 3 because of the presence of assurances that he would not be transferred to Guantanamo Bay or other detention facility outside the national territory of the US. The Court noted that the German courts had been satisfied that the assurances "precluded" the possibility of the applicant being detained outside the US. The ECtHR itself examined whether the assurance would be effective and, importantly, was able to rely on the fact that the applicant was at the time of its determination detained in the US and that there was no indication that he had been detained anywhere outside the US. This "confirmed" the effectiveness of the assurance in the applicant's case.²² The ECtHR also emphasized that, (1) the assurance was

²⁰ In the case of the United States, an undertaking to the effect that transferred individuals will not be subjected to inhuman or degrading treatment or torture, without more, would probably not satisfy the requirements of Article 3 because the US Government has made clear that its understanding of those terms does not exclude certain "enhanced interrogation techniques" that would be regarded as a violation of Article 3 as a matter of UK and Convention case law. See further the Opinion on Extraordinary rendition of terrorist suspects through United Kingdom territory, by J. Crawford SC and K. Evans, 9 December 2005 at [12]-[13].

²¹ *AS & DD v Secretary of State* [2008] EWCA Civ 289 at [51].

²² App. No. 35865/03 20 February 2008 at [67].

binding under international law, and (2) German authorities sent a representative to observe proceedings against the applicant in the US.²³

13. Alongside these principles of law there are, in relation to assurances given by US authorities to the UK authorities relating to the hand-over of detainees in Iraq and Afghanistan, specific concerns about the legality of the UK having accepted such assurances. Without having seen such assurances no concluded view can be expressed. However, we highlight a number of issues of concern relating to the sufficiency of reliance on such assurances by British authorities:

- (1) It is relevant that individuals handed-over to United States authorities would immediately upon transfer have been detained outside the territory of the US. As set out above, the ECtHR regarded it as of importance in *Al-Moayad*, in finding no breach of Article 3, that the applicant was detained within the territory of the United States. The applicant was therefore clearly within the jurisdiction and control of United States courts and the authorities responsible for the detention were open to public gaze and scrutiny.
- (2) The United States Government has registered reservations to the International Covenant on Civil and Political Rights and the Convention Against Torture stipulating that it considers itself bound by the prohibition of cruel, inhuman and degrading treatment only to the extent that it is prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the US Constitution and, moreover, the reservation also sets out a definition of torture that is narrower than that accepted by courts in the United Kingdom (in particular, in referring to an act intended to inflict severe physical pain and suffering). An undertaking not to engage in inhuman and degrading treatment or torture would not therefore

²³ At [69].

necessarily be sufficient to discharge the United Kingdom's obligations under the ECHR.

- (3) The US military, which would be responsible for the detention of detainees handed-over by the British military authorities, are known to have applied "enhanced interrogation techniques" to those within their custody believed to have intelligence value. These techniques are capable of amounting to inhuman and degrading treatment and torture in domestic law. In *A (No. 2)*, Lord Hope, in considering what conduct is capable of amounting to torture, stated that some of the interrogation techniques authorized for use in Guantanamo Bay, "would shock the conscience if they were ever to be authorized for use in our own country" (*A (No. 2) v Secretary of State for the Home Department* [2005] UKHL 71, §126). Lord Bingham stated that the interrogation techniques used by British authorities in Northern Ireland during the troubles, which were categorized as "inhuman and degrading" by the ECtHR in *Ireland v United Kingdom* (1978) 2 EHRR 25, would today be regarded as torture (§97).
- (4) It would be relevant to consider whether compliance with the assurances would have been subject to any independent monitoring or scrutiny, which is an important consideration when considering whether the assurances can safely be relied upon.
- (5) Further considerations will apply to the on-going ability of British authorities to rely on assurances given by United States authorities, including the following. If United States authorities breached assurances in the past, this will make it very difficult for the British Government to satisfy its stringent obligations under the HRA in the future by accepting assurances from United States authorities as to the treatment of detainees

handed-over to their custody by British military authorities. Furthermore, there are the differences in the meanings of torture and inhuman and degrading treatment as applied by the US Government, when compared with those meanings which are applicable under the ECHR and HRA. These differences undermine the ability of the UK Government to discharge its obligations by relying on an assurance by the US Government that it would not subject a person to such treatment. It is notable that the Foreign Affairs Committee in its Human Rights Annual Report 2008, concludes that, given the differences in the definition of torture, the UK Government, “can no longer rely on US assurances that it does not use torture, and we recommend that the Government does not rely on such assurances in the future.” (HC 533, 20 July 2008, §53).

14. For completeness, we should make this clear. It should not be assumed that liability under the HRA exhausts the legal obligations that regulate the hand-over of detainees in Iraq by British forces. UK forces operating in Iraq are potentially also subject to (1) UK criminal law, (2) tort law,²⁴ and/or (3) Iraqi law. Notably, section 134(1) of the Criminal Justice Act 1988 makes it a criminal offence for a public official, whatever his nationality and wherever located, to commit an act of torture. Aiding and abetting such an act may also be a criminal offence.

15. For these reasons, it is our opinion that:

- (1) A human rights violation would arise under the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA) in the following situation: an individual in British detention (or at least in a British detention facility) in Iraq is handed over to US military personnel

²⁴ In *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 the House of Lords held that no claim of false imprisonment could be made in relation to detention by British forces in Iraq, but that Iraqi law applied.

despite substantial grounds for considering that there is a real risk of that person being subjected to torture or inhuman and degrading treatment.

- (2) It would make no difference if the individual, though detained, has never been arrested by British military personnel.

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