The Chairman: The Rt. Hon. Dr Kim Howells, MP

INTELLIGENCE AND SECURITY COMMITTEE
Ground Floor, 35 Great Smith Street, London SW1P 3BQ

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ALLEGATIONS OF COMPLICITY IN TORTURE

Thank you for your letter of 12 February regarding the alleged involvement of the UK intelligence and security Agencies in the mistreatment of detainees under the control of foreign powers. Your letter raises a number of important points, as do articles appearing in the media, and I therefore thought it would be helpful to provide an open reply.

There have been allegations recently that the Security Service (known more commonly as MI5) has been "complicit in torture". The allegations are not that MI5 officers have themselves tortured an individual, but that an individual detained by another country has been mistreated by officers of those countries, and that the Security Service was aware, and therefore "complicit" (the position is of course not helped by the lack of any legal definition of "complicity" in UK law). These allegations raise key legal, political and ethical issues.

Oversight of the UK Agencies

Individual allegations of misconduct by the UK security and intelligence Agencies are not a matter for us: such allegations legally fall to the Investigatory Powers Tribunal to investigate. The Tribunal is drawn from senior members of the judiciary and legal profession and, according to the same legislation that established the ISC, it is the Tribunal which has the statutory authority to investigate allegations of

wrongdoing committed by, or on behalf of, the UK intelligence and security Agencies (including possible breaches of human rights) and not the ISC.

This is a common misunderstanding. We have ourselves previously referred individuals to the Tribunal, and if you are aware of individuals who have allegations of misconduct against the Agencies perhaps you would also make them aware that this little known body exists.

That being said, sometimes individual cases point toward policy failings, or structural or systemic failures within the Agencies. These are, of course, within the remit of the ISC and it is on these grounds that, in conducting its inquiries, the Committee has investigated certain individual cases in order to establish trends or uncover wider policy or administrative problems.

In addition to this widespread misconception of our role, there are a number of other misunderstandings about how the ISC conducts its business. This is understandable, given that we cannot publicise a lot of what we do, but I thought it might help if I provide further information about the Committee.

- Much has been made of the Prime Minister's influence over the Committee because he appoints the Members. However, whilst the original legislation states that appointments will be made by the Prime Minister, according to a resolution of the House approved in 2007, Parliament now also has a role as it nominates members of the Committee. The process is in fact now similar to that for appointments to joint parliamentary committees.

- Similarly, whilst the Committee does send its reports to the Prime Minister, he cannot change the facts in them (as is sometimes alleged) – they are published exactly as we have written them.

- Certain words in our reports are redacted, but not on the whim of the Prime Minister. Where the security and intelligence Agencies believe that to publish a figure, the name of a country, the name of an operation, a source, etc would damage national security they put that request in writing to the Committee with a carefully argued rationale as to exactly what harm would be done. The Committee scrutinises these and, whilst in some cases we agree that damage would be done and we replace the words with asterisks, in other cases (a considerable number) we refuse. No redaction has ever been made to one of our reports without our having scrutinised it and agreed that it was necessary. If that were to happen we would report publicly that we had been prevented from saying what we wish to say.

- The fact that the Intelligence and Security Committee does not launch full-scale attacks on the UK security and intelligence services does not indicate that we are not independent. The Committee chooses to present reasoned discussion rather

than going for the sensationalist media sound bite as others do. Whilst we cannot conduct our work openly (taking evidence from the security and intelligence agencies in public would be self-defeating) I can assure you that giving evidence before us is not a comfortable experience for anyone. The questioning is robust, often combative, issues are returned to, further explanations demanded, documents examined and the end results are often critical, albeit not sensationalist. Annual Reports (which contain our statutory work as opposed to special inquiries) such as our last one show that approximately two-thirds of our conclusions are critical of Government, whether that be the security and intelligence agencies or the departments that we also oversee.

- The Committee is fiercely protective of our independence which we consider absolutely fundamental to our role. Indeed over the last six months we have ourselves requested that the Cabinet Secretary make a number of changes designed to ensure our independence and secure a clear separation from those we oversee.

- During the course of our inquiries, the Committee often seeks the views of non-Government witnesses and considers open source material in addition to classified evidence and intelligence material (for example, the Committee considered your report of November last year). We routinely consider reports published by parliamentary committees, take oral and written evidence from non-governmental organisations and pressure groups, and consider allegations reported in the media.

  For example, during our Rendition inquiry, which we reported on in July 2007, we heard from and/or considered reports from Amnesty International, Liberty, Reprieve, UK Parliamentary Select Committees and Joint Committees, a Committee of the European Parliament, the Council of Europe, the UK Parliament's all-party group on Extraordinary Rendition, and journalists from a leading national newspaper. Evidence, and in some case allegations, from these groups supplemented the classified evidence we are able to see, in helping to form our judgments.

- The Committee generally publishes the outcome of its investigations by way of Reports laid before Parliament by the Prime Minister. Our Binyam Mohamed investigation, which I address below, and on which we reported to the Prime Minister on 17 March 2009, was an exception due to legal cases and police investigations.

Binyam Mohamed

As I outlined above, the Committee has on occasion considered individual cases in order to examine the wider policy issues that lie behind them. The case of Binyam Mohamed is one such example. We took evidence on the implications of Mr Mohamed's case during our Rendition inquiry and that Report was published in July 2007.

In May 2008, the Security Service wrote to us to explain that, as a result of Mr Mohamed's case in the High Court, it had discovered documentation which had not been disclosed to the Committee during our Rendition inquiry. The Security Service provided a summary of the newly discovered documentation and the ISC immediately reopened its investigation into Mr Mohamed's case.

As part of our reopened investigation, we obtained the classified material the High Court had considered in closed session, and also the High Court's closed judgment. In addition, we submitted a large number of detailed questions to the Security Service and SIS and held evidence sessions with the Agencies and the Foreign Secretary. We also held discussions with representatives of Mr Mohamed (Mr Clive Stafford Smith and Lt. Col. Yvonne Bradley).

It was as a result of this Committee's detailed questioning of the Agencies on this case, that additional historical documents relevant to Mr Mohamed's case were discovered in the Security Service's records (and this triggered further searches which discovered even more) which were then provided to the High Court.

The record-keeping of the security and intelligence Agencies is something that we have, even before this incident, criticised publicly. It is of grave concern to this Committee that key documents regarding Mr Mohamed were not made available to us, both in terms of the Service not treating the Committee's inquiries with the same rigour as the courts and also that their records are generally not fit for purpose.

Our letter to the Prime Minister

Although legal proceedings continued, we felt that it was important to report our own findings to the Prime Minister. We therefore wrote to him on 17 March 2009, detailing the background to Mr Mohamed's case, explaining the key issues, raising certain concerns (in particular regarding the state of the Agencies' record-keeping systems) and making recommendations.

Since we reported to the Prime Minister on this matter, the fifth and sixth judgments of the High Court and the judgment of the Court of Appeal has been handed down. These court judgments – as published – do not differ substantially from our own findings. (I address the issue of the omitted paragraph below.)

Further legal action

The cases in the High Court and Court of Appeal have been about the release of information (the original case having already been resolved when Mr Mohamed's US lawyers were provided with the documentation at issue by the US authorities), although of course this too was somewhat overtaken by the fact that relevant information was then published by the US courts.

The issue of possible wrongdoing by, or on behalf of, the UK Agencies was however not the central issue. This is a separate case that will be tested in the Civil Courts soon, as will the allegations against individual Agency personnel (whose actions are being investigated by the police). The High Court and Court of Appeal have found that the Security Service had information in its records from the US authorities showing that Mr Mohamed had been deprived of sleep. It is now for the police, the Crown Prosecution Service and ultimately the courts to decide whether or not the handful of people who were sent the documents in question acted appropriately, or whether they colluded or were "complicit" in the mistreatment of a detainee. These are matters for the appropriate authorities to take forward and I am concerned that it is potentially prejudicial to these cases that these matters are being played out in the media in the way that they are. For this reason, I will not comment on the specifics of Mr Mohamed's forthcoming litigation or the investigations of the police into Security Service personnel.

As I mentioned, the court judgements are substantially in line with our own findings. However, it has been widely reported that the Master of the Rolls had drafted a passage (which he omitted from the final judgement) which was highly critical of the culture within the Security Service. Our own detailed and wider investigations have found no evidence which would support this conclusion – we have not found there to be cultural failings. We are concerned as to whether a single case involving a handful of people should be taken as being indicative of broader cultural problems across the entire organisation. We await, therefore, the Court's clarification as to whether the draft paragraph will be reinstated and, if so, the detail of the evidence upon which it is based. (Alternatively, we may hear the reasoning as to why the Court decided it was right to amend its judgment.)

Guidance on detainees

Your letter raises a number of serious questions relating to the UK counter-terrorism and detainee policy. On 18 March 2009, the Prime Minister asked the Intelligence and Security Committee to review the policy on handling detainees. The Prime Minister said that the guidance would first be consolidated by Government. From that point on, the Intelligence and Security Committee made numerous requests to Government for this consolidated document. We made it clear publicly, in

September 2009, that we had still not received the guidance and criticised the Government for the delay.

We were finally given the guidance on 18 November 2009 and since then we have been taking evidence on it and considering the text, including taking our own independent legal advice. Whilst we understand there is interest in seeing the guidance, and perhaps pressure to report quickly, we consider it important to do a thorough job and not simply to rush something through. (It took the Government eight months to produce this guidance, which gives an indication of the complexity of the issues involved.) Whilst I cannot therefore respond to your specific questions now, I expect that many of them will be answered when our review is published in due course.

Evidence

Finally, you offer to provide evidence to this Committee, for which I am grateful. We have already, as I have mentioned earlier, taken evidence from those organisations that you mention, however if Human Rights Watch has any additional evidence that may be relevant we would of course welcome sight of this.

KIM HOWELLS