Written Evidence to the Joint Committee for Human Rights

1. We welcome the opportunity to submit this evidence to the Joint Committee's resumed inquiry into allegations of torture and inhuman treatment carried out by British troops in Iraq. We would like to confine our written evidence to the final two questions being posed by the Joint Committee, namely:

Following up the UNCAT Report, does the government remain of the view that it is not necessary expressly to accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad?

What further improvements can be made to the training of troops on the ground, interrogators and legal advisors?

2. This evidence is prompted by the work being carried out by the OPCAT project which is run out of the School of Law at the University of Bristol. This is a three year Arts and Humanities Research Council (AHRC) funded independent research project looking at the Optional Protocol to the UN Convention Against Torture (OPCAT). OPCAT came into force in 2006 as an additional Protocol to the UN Convention Against Torture. It sets up a 'system' of visits to places of detention by an international committee, the Sub-Committee Against Torture (SPT) and national preventive mechanisms (NPMs). The UK ratified the OPCAT on 10 December 2003 and thus it came into force that the country on 22 June 2006. Under the Protocol, Articles 3 and 17, the government is obliged to, 'maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level' (Article 17). The British government's Ministry of Justice has been coordinating the discussions on this issue as to who should be the NPM for the UK and the information so far obtained indicates that the British government is considering a broad and comprehensive approach with the potential that a significant number of bodies will collectively be chosen as the NPM.[1]

3. Although application of OPCAT to prisons, mental health institutions, secure accommodation, for example, whether they be in England, Northern Ireland, Scotland or Wales appears to be accepted, less clear is the extent to which OPCAT applies to territory outside of the UK. This written evidence would like to make further reference to the requirements of OPCAT and the applicability of this to UK forces overseas. The UK government should be considering, in its choice of NPM, which body will be responsible for visiting such places abroad as well as its obligations under OPCAT to grant the SPT access to such places if the latter so wished to do so.

Places of detention within the context of OPCAT

4. Article 1 of OPCAT sets out the objective of OPCAT as being to establish regular visits 'to places where people are deprived of their liberty'. Article 4 provides that the SPT and NPM have access to 'any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'. Further, Article 4(2) provides 'deprivation of liberty means any form of detention or imprisonment or the placement of any person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial,

[1] A seminar was held at the University of Bristol on 26th November 2007 which brought together all the potential relevant parts of the UK NPM to discuss implementation of OPCAT in the UK, see: http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html.

administrative or other authority'. In the context of the JCHR's enquiry, the situation under consideration is whether the UK has responsibility for ensuring both a national independent visiting body and the UN SPT can visit places where individuals are deprived of their liberty by military forces in, e.g. Iraq or Afghanistan.

5. From what we understand, with respect to the activities of the UK, where individuals are detained in Iraq and Afghanistan as requested by the UK, they are held in UK military camps where they are also interrogated (sometimes in the same building). The question thus arises as to whether such places are within 'the jurisdiction and control' of the UK government, as required by Article 4 of OPCAT. It is worth noting that the French text of OPCAT refers to 'jurisdiction *or* control' ('…dans tout lieu placé sous sa juridiction ou sous son contrôle…') and that arguably the more broader interpretation which provides greater protection for the individual should be adopted. The application of the European Convention on Human Rights and its reference in Article 1 to 'within the jurisdiction' of the state, to detention facilities at a British military base in Iraq has now been accepted (*Al-Skeini and others v. Secretary of State for Defence, Al-Skeini and others v. Secretary of State for Defence (Consolidated Appeals)*, [2007] UKHL 26). In its 19th Report of the Session 2005-2006 on the UN Convention Against Torture, the JCHR looked at the territorial applicability of UNCAT and noted that 'the government should expressly accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad'.[2] In the same vein, Article 4 of OPCAT should apply to such situations. Therefore, the UK government should have an obligation under OPCAT to ensure that in its selection of the NPM, such places of detention should be covered.

6. As to other situations in which individuals may be deprived of their liberty in Iraq or Afghanistan or other states but where they are not held on British military bases, although the information we have been provided with suggests that there are no other circumstances in which individuals are held under the direction of the UK forces, it is worth examining whether OPCAT would apply if this were to happen. The legal regime in such situations will include not only international humanitarian law but also human rights law, and international jurisprudence has recognised their concurrent application.[3] The concept of jurisdiction in relation to human rights treaties refers to the exercise of legal authority over a territory and its inhabitants. It is premised on control over territory but with regards to national territory, such control is presumed.[4] It can extend beyond state borders but following mainly European Convention on Human Rights jurisprudence, different levels of control are required. In cases of occupation, the applicable level has been 'overall effective control'.[5] In cases of overall effective control, the state should secure the entire range of 'substantive rights'.[6] In situations other than occupation, control needs to be more detailed. These

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[2] Joint Committee on Human Rights, The UN Convention Against Torture (UNCAT), Nineteenth Report of the Session 2005-2006, HL Paper 185-I; HC 701-I, at para 73.

[3] *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Rep (2004) para 106; *Coard v United States*, Case 10.951, Inter-Am. C.H.R., Report No.109/99; Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Concluding Observations of the Human Rights committee: Israel, 21 August 2003, UN Doc. CCPR/Co/78/ISR, para 11; SC Res 1265 (1999); Art 72, 75 API

[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970),* ICJ Rep (1971) para 118

[5] *Cyprus v. Turkey* (Appl. No. 25781/94) ECtHR 10 May 2001, para 77; *Loizidou v. Turkey* (Preliminary Objections) ECtHR 23 March 1995, Series A, vol. 310, paras 62-64; *Bankovic and Others v. Belgium and 16 Other Contracting States* (Appl. no. 52207/99) ECtHR 12 December 2001, para 71

[6] *Cyprus v. Turkey* para 77

situations refer to personal control where agents of a state exercise power over people[7] and state control over certain establishments abroad such as diplomatic or consular premises, prisons, military barracks. In the context of OPCAT, therefore, the extent to which it applies beyond UK military places of detention depends on the degree of effective control exercised over spaces or individuals, something that needs to be decided on a case-by-case basis. As the Parliamentary Assembly of the Council of Europe put it 'the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders, is commensurate with the extent of their control ...'.[8] Such differentiated treatment has been recognised by the ICJ which required either territorial control or the exercise of sovereign rights in the territories occupied by Israel in order for the ICESCR to apply.[9] The UK NPM should have the capacity, therefore, to be able to visit such places of detention where appropriate.

The National Preventive Mechanism

7. The primary purpose of the OPCAT's system of visits, whether by the SPT or the NPM, is, as set out in Article 1, to prevent torture and other forms of abuse.[10] It is based on the premise that visits to places of detention can deter and prevent torture occurring.[11] The visits to places of detention in the context of OPCAT, therefore, must be viewed within this broader context of prevention. This has been held to impose a separate legal obligation on states[12] and one which is 'wide ranging' and where states should provide certain basic guarantees to all persons deprived of their liberty and prevent torture and ill-treatment 'in all contexts of custody and control'.[13] The UN Committee Against Torture has also stated that 'protection of certain minority or marginalized individuals or populations especially at risk of torture is part of the obligation to prevent';[14] and states should ensure 'continual evaluation'[15] and that 'law enforcement and other personnel receive education on recognising and preventing torture and ill-treatment'.[16] This is the consideration of various 'legislative, administrative, judicial and other measures' to which the preamble of OPCAT refers.

8. Prevention also, arguably, requires a regular and on-going relationship to be established between the NPM and those whom it visits so that any recommendations

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[7] *Ocalan v Turkey*, App. No. 46221/99, Eur. Ct. H.R (Judgment on the Merits, Mar. 12, 2003) para 93

[8] Parliamentary Assembly, Area where the European Convention on Human Rights cannot be implemented, Doc 9730, 11 march 2003, para 45

[9] Wall para 112

[10] Article 1, OPCAT.

[11] UN Special Rapporteur on Torture, Report to the General Assembly 2006, UN Doc. A/61/259, 14 August 2006, at para. 72; Civil and Political Rights including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment, Report of the Special Rapporteur on the Question of Torture, Manfred Nowak, E/CN.4/2006/6, 23 December 2005, at para. 21.

[12] In its ruling on *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007 the International Court of Justice held that the obligation to 'prevent' was separate from the obligation to 'punish' (in the context of the Genocide Convention), 'In particular, the Contracting Parties have a direct obligation to prevent genocide', ibid, para 165. 'The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope', para 427.

[13] Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, paras. 8, 13 and 15 respectively.

[14] Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 21.

[15] Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 23.

[16] Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 25.

it makes can be delivered. From the army perspective, a visiting body that provides recommendations and can then follow these up with advice on implementation may be particularly welcomed.

9. If one accepts the applicability of OPCAT to detainees 'within the jurisdiction or control' of the UK forces in Iraq or Afghanistan, for example, then the UK, as part of establishing the NPM under OPCAT, must also provide an institution which fulfils the OPCAT criteria of independence, 'required capabilities an professional knowledge', and with the 'necessary resources' (Article 18 OPCAT). Any visiting body should have the minimum powers, as set out in Article 19 OPCAT:

    a. To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
    b. To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
    c. To submit proposals and observations concerning existing or draft legislation.

10. Furthermore, the UK government must provide this body with:
    a. Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
    b. Access to all information referring to the treatment of those persons as well as their conditions of detention;
    c. Access to all places of detention and their installations and facilities;
    d. The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
    e. The liberty to choose the places they want to visit and the persons they want to interview;
    f. The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.[17]

11. There should be protections in place for those who communicate with the NPM and confidential information obtained by the NPM should be privileged.[18] The UK authorities are also required to 'examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures' as well as 'publish and disseminate the annual reports' of the NPM.[19]

12. At present, although we understand the ICRC visits places of detention under UK military control, this does not satisfy the OPCAT criteria as it is not a body established, maintained or designated by the UK itself.[20] Any body which is designated as the NPM with responsibility for such places of detention extra-territorially should also be one that understands the specific circumstances of the military context of detention.

13. The UK has yet to designate its NPM, despite this being now past the one-year deadline required by Article 17 of OCPAT. Article 24 gives states some leeway by

[17] Article 20, OPCAT.
[18] Article 21, OPCAT.
[19] Articles 22 and 23 respectively, OPCAT.
[20] Article 17, OPCAT.

enabling them to 'make a declaration postponing the implementation of their obligations'. Although the English text of OPCAT refers to this declaration being made 'upon ratification' versions of OPCAT in other languages refer to this being after ratification or 'once the Protocol is ratified' and some states have taken advantage of this. It is submitted that given the UK is already out of time with its obligation to designate an NPM, the government could use the ambiguity of Article 24 to, at the least, set out a clear timetable with the international bodies as to the process of designation. The JCHR should continue to press the government to explain its plans for designation.

14. Lastly, OPCAT also requires states to allow visits by the UN SPT, an independent body of ten members, to such places as referred to in Article 4 of the Protocol. Although the SPT has announced its visits for 2008, it is within its remit, therefore, on the same basis as above, to visit such places of detention in Iraq and Afghanistan and other extra-territorial locations as part of its own visiting scheme. States are required, in order to enable the SPT to undertake these visits, to receive the SPT 'in their territory' as well as to 'grant it access to the places of detention as defined in Article 4'.[21] The state authorities have to provide all relevant information that the SPT may request and examine its recommendations and enter into dialogue with it on possible implementation.[22]

15. The OCPAT therefore offers an important opportunity for the UK government to set up a visiting body which aims towards greater transparency of military detention extra-territorially, which could facilitate training of troops and others and take a concrete step towards prevention of future abuse.

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[21] Article 12, OPCAT.
[22] Articles 12(b) and (d), OPCAT.