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Members of the United Nations Committee against Torture
Attn: Joao Nataf
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CH 1211 Geneva 10
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HUMAN RIGHTS WATCH
HRW.org

April 19, 2013

Re: Submission to the United Nations Committee against Torture on the United Kingdom

Dear Committee Members,

Human Rights Watch submits this memorandum to the UN Committee against Torture (the Committee) ahead of its review of the United Kingdom in May 2013.

This memorandum highlights a number of concerns regarding the UK's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "the Convention"). It contains information on accountability for UK complicity in torture and other ill-treatment overseas, including by UK military forces; the UK's reliance on "diplomatic assurances" to deport foreign terrorism suspects to places where they risk torture; inadequate risk assessment prior to the deportation of failed asylum-seekers at risk of torture or other ill-treatment; and the use of material obtained by torture for intelligence and policing purposes.

Accountability for UK complicity in Torture (Articles 2, 4, 11, 12, 13 – paragraph 28 in the list of issues)

There is growing evidence that the UK government's counterterrorism cooperation with other countries in the period following September 11, 2001, in some cases led to UK complicity in torture. Human Rights Watch

documented complicity by the UK security services in torture in Pakistan[1] and uncovered evidence in September 2011 that the UK security services were complicit in the illegal transfer (rendition) of two men to Libya under Gaddafi despite knowledge that they were likely to be tortured.[2] The two Libyan cases are the subject of ongoing criminal investigations in the UK.

On the basis of a cache of documents discovered by Human Rights Watch researchers in Libya in 2011 and other information, we know that Sami al-Saadi, his wife, and his four children were forced onto a plane in Hong Kong, in a joint UK/US/Libyan operation in 2004. They were handcuffed, hoods were placed over their heads, and their legs were tied up with wire. Al-Saadi's wife and children were imprisoned for two months in Libya, but then released. Sami al-Saadi was held for six years and says he was repeatedly beaten, subjected to electric shocks, and threatened that he would be killed. In December 2012, the UK government offered to pay al-Saadi £2.2 million in compensation, which al-Saadi accepted, but the UK government still does not accept responsibility for his treatment.

In a similar case, another prominent Libyan opposition figure, Abdul Hakim Belhaj and his wife, who was pregnant at the time, were rendered to Libya with the involvement of the UK. A 2004 fax from Sir Mark Allen, the head of counterterrorism at the Secret Intelligence Service (MI6) at the time, to the Libyan intelligence chief, Moussa Koussa, was found by Human Rights Watch researchers after the fall of Tripoli. In it Allen says, "I congratulate you on the safe arrival of [Mr Belhaj]. This was the least we could do for you and for Libya. I know I did not pay for the air cargo [but] the intelligence [on him] was British." Like al-Saadi, Belhaj was imprisoned by the Libyan authorities and routinely mistreated and tortured.

Belhaj initially refused to accept compensation, but in March 2013 he offered to settle his civil suit case against the UK government, former Foreign Secretary Jack Straw and Sir Mark Allen for £1 from each defendant provided he receives an apology from the UK government and recognition of liability for his and his wife's renditions. The case is ongoing. Newspaper reports indicate that Jack Straw and Sir Mark Allen have told a court that they cannot

1 Human Rights Watch, "Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan", November 2009, http://www.hrw.org/reports/2009/11/24/cruel-britannia-0.
2 Human Rights Watch, "Delivered into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya", September 2012, http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf.

respond to the allegations of their role in the torture of Belhaj and his wife without revealing official secrets.

The payment of compensation does not absolve the UK government of the duty to investigate what happened and to ensure that any UK officials involved in abuse are held to account, up to the highest level.[3] A police investigation into the two cases began in January 2012 but little public information has been given about its scope, including whether police will investigate possible criminal responsibility of senior politicians, or if they will have access to all relevant documents, including all those in the possession of MI6 and the Foreign and Commonwealth Office. Any prosecution for torture would need the approval of the Attorney General, a politician and member of the government.

Lack of an independent inquiry into UK complicity in rendition and torture overseas (paragraph 24 in the list of issues)

An effective and independent inquiry into the UK's complicity in rendition and overseas torture has yet to take place.

In June 2010, the UK government announced an inquiry into UK complicity in rendition and overseas torture, under retired judge Peter Gibson. This was initially welcomed by Human Rights Watch, which had called for such an investigation to be established. But by August 2011, it had become clear that the limitation imposed on the inquiry by the government, including on disclosure of documents and questioning of members of the security services, made an effective process impossible, leading NGOs, including Human Rights Watch, and lawyers acting for victims to boycott the inquiry.[4] In January 2012, the UK government announced it was shelving the inquiry, citing the need for criminal investigations into the Libya cases uncovered by Human Rights Watch.

The UK government has said it intends to launch a second inquiry once the Libya criminal investigations in the cases of al-Saadi and Belhaj are resolved. But it is not evident that it has paid sufficient attention to the criticisms made about the first inquiry. A fresh and

3 Human Rights Watch, "UK: Accountability Still Needed on Libya case", December 2012, http://www.hrw.org/news/2012/12/14/uk-accountability-still-needed-libya-case.

4 "International human rights experts call for key changes to the Detainee Inquiry as Abdul Hakim Belhadj joins list of survivors refusing to participate", January 2012, http://www.hrw.org/news/2012/01/06/international-human-rights-experts-call-key-changes-detainee-inquiry-abdul-hakim-bel.

credible independent judicial inquiry is an essential step to restoring the UK's moral authority and to prevent such abuses from recurring.

The government stated in its response to the Committee's list of issues that the Inquiry had sent its report to the government on June 27, 2012 but at the time of this writing that report had not been made public.

Human Rights Watch urges the Committee to seize the opportunity of its review of the UK to:

- Request information about the status of the criminal investigations into the cases of al-Saadi and Belhaj, including if the Attorney General has any role.
- Request information as to the UK government's plans to set up a new inquiry into UK complicity in rendition and overseas torture following its closure of the inquiry headed by Peter Gibson, and what changes it intends to make to powers and scope of the new inquiry to address the concerns raised by Human Rights Watch and other human rights NGOs over the Gibson inquiry's lack of independence and transparency.
- Request information as to when the report written by the Inquiry will be made public and why it has not been published to date.

Accountability for abuses by UK forces in Iraq (paragraphs 21, 25, and 27 in the list of issues)

Allegations of torture and cruel, inhuman and degrading treatment by UK forces in Iraq from 2003 to 2009 have continued to increase, particularly since the departure of UK forces. Over 180 allegations of abuse have been submitted to the UK courts. However, successive UK governments have continued to resist a full public inquiry, and have failed to take steps to ensure genuine independent criminal investigations and prosecutions into torture and ill-treatment by UK forces, including possible command responsibility for senior political and military figures.

One public inquiry was forced on the government following a court ruling, into the death of an Iraqi hotel receptionist in British custody, Baha Mousa. The inquiry found that his death in UK military detention in 2003 occurred after serious abuse. Yet, only one soldier, Corporal Donald Payne, was convicted of crimes related to this abuse and sentenced to one

year in prison. It is not clear if the UK government has accepted in practice all the recommendations of the Baha Mousa inquiry, including that detention facilities run by UK forces in the world are inspected by the official independent inspectorate of prisons.

A second inquiry has been established to investigate the so-called "Danny Boy" incident in Iraq in 2004, in which witnesses alleged that British soldiers tortured and executed up to 20 Iraqis following a fierce gunfight between British troops and fighters for the Mahdi Army. This inquiry opened in early 2013, again after the government had been ordered to it by a UK court.

Most recently, British soldiers have come forward with information that "[p]ersonnel from two RAF squadrons and one Army Air Corps squadron were given guard and transport duties" to Camp Nama, a secret prison at Baghdad International airport, where US military and civilian interrogators subjected detainees to electric shocks, hooding, and other physical abuse, according to a report the Guardian published in April 2013.

In 2006, Human Rights Watch documented extensive abuse against detainees at Camp Nama, where they were regularly stripped naked, subjected to sleep deprivation and extreme cold, placed in painful stress positions, and beaten. The Ministry of Defence has refused to acknowledge whether ministers knew of human rights abuses taking place at the prison or to reveal how British airmen and soldiers were helping to operate the secret prisons.

The UK government continues to resist holding a general public inquiry into the hundreds of allegations of abuse in Iraq. Successive governments have resisted genuine independent criminal investigation and prosecution for crimes, including torture, committed in Iraq for both military and civilians. The "Iraq Historic Allegations Team" was set up to investigate all allegations of abuse, but has been criticized by a UK court as lacking independence because it included military police. It now includes naval police, still subject to the military chain of command, and has not led to a single prosecution.

It is not clear if UK law currently provides for the criminalisation of command responsibility for torture for military and civilian commanders (as the Committee has stated should apply in General Comment no 2) outside of war crimes. All prosecutions for torture under the Criminal Justice Act 1988 in England and Wales still require the approval of the Attorney General, a politician and member of the government.

We urge the Committee to call on the UK government to:

- Immediately set up a public independent inquiry into the use of torture and cruel, inhuman or degrading treatment or punishment in Iraq from 2003 to 2009, including identifying if there was any policy to order or tolerate such abuses.
- Create a genuinely independent mechanism within the criminal justice system to investigate incidents of torture, or complicity or participation in torture by UK military, officials, and politicians anywhere in the world. Investigators and prosecutors should not be part of the military chain of command and any decisions to prosecute should be made by the Director of Public Prosecutions, and not the Attorney-General.
- Independent criminal investigators and prosecutors should immediately investigate torture in Iraq and prosecute those responsible, up to the highest level.
- Ensure the UK law clearly criminalises command responsibility for torture for military and civilian commanders.
- Clarify whether the Iraq Historic Allegations Team can investigate military and civilian commanders under the principle of command responsibility for torture.

Expanded use of secret hearings in civil cases (paragraph 31 in the list of issues)

The Justice and Security Bill extends the use of secret hearings known as "closed material procedures", or CMPs, to the civil courts on national security grounds. It also prevents disclosure of material showing that the UK was involved in wrongdoing by third parties, where doing so would undermine national security. Both houses of Parliament have agreed the text of the bill which will become an Act of Parliament once it has received Royal Assent. The use of such procedures violates the right to a fair hearing and the principle of open justice. It also risks undermining efforts to secure accountability through the civil courts for UK official involvement in torture and other wrongdoing.

Once the Justice and Security Bill becomes law, it can be applied in cases where applicants bring civil claims that the UK government was responsible or complicit in their torture. Their cases could be decided without them knowing on what grounds, and the government can cite national security to prevent the publication of evidence showing its responsibility in torture overseas.

The UK government proceeded with the bill despite serious concerns raised by a broad range of actors, including the UN Special Rapporteur on Torture, who specifically expressed concern about the risk that it would undermine accountability efforts, and human rights NGOs. The bill also drew opposition from the Law Society and Bar Council (representing the UK's two legal professions) and, importantly, from the majority of Special Advocates (the security cleared lawyers tasked with representing applicants in CMPs) who have stated that CMPs are "inherently unfair and contrary to the common law tradition."[5]

The UK government's plans to widen the use of secret hearings were announced by Prime Minister David Cameron in July 2010 after a series of embarrassing revelations came to light. The most prominent of these was the case of British citizen and former Guantanamo Bay detainee Binyam Mohammed, who brought a civil case against the British government for its alleged involvement in his interrogation and torture. In his case, the previous government had fought hard to prevent the publication of seven paragraphs of the court judgement which, when finally published, revealed that the UK knew early on that Binyam Mohammed was being subjected to torture. This was deeply embarrassing and in this context it is hard to avoid the conclusion that a key motivation of the legislation is to ensure that if abuses are repeated, they will not come to light in British courts.

We urge the Committee to call on the UK government to:

- Clarify the steps it will take to ensure that the Justice and Security Act will not become an obstacle to accountability for UK complicity in overseas torture.

Breach of the principle of *non-refoulement* (Article 3)

The UK's reliance on "diplomatic assurances" against torture (paragraphs 13 and 14 in the list of issues)

The UK continues to rely on "diplomatic assurances" against torture as a means of deporting foreign nationals suspected of terrorism related offences to countries where they face a real risk of torture and or other ill-treatment, which constitutes a breach of the UK obligation of *non-refoulement* under Article 3 of the Convention. The UK has agreed "memorandums of understanding" (MoUs) with Jordan, Libya, Lebanon, Ethiopia[6], and

5 Special Advocates' further memorandum to the Joint Committee on Human Rights on the Justice and Security Bill, 18 February 2013, http://adam1cor.files.wordpress.com/2013/02/supp-note-for-jchr-final.pdf.
6 Human Rights Watch "UK: Ethiopian 'Assurances' No Guarantee Against Torture", September 2009, http://www.hrw.org/news/2009/09/17/uk-ethiopian-assurances-no-guarantee-against-torture.

Morocco[7], which provide "diplomatic assurances" that the person deported on national security grounds will receive humane treatment in the country to which he or she has been transferred.

The UK has also used informal assurances to remove terrorism suspects to Algeria and Pakistan.

A review of counterterrorism and security powers by the UK Home Secretary has recommended that the UK government should "actively pursue deportation arrangements with more countries, prioritising those whose nationals are engaged in terrorist related activity here or are judged most likely to do so in future".[8]

Diplomatic assurances are an ineffective safeguard against the risk of torture and other ill-treatment, where a real risk of such torture or ill-treatment exists in a country, whether or not they are formalized in a memorandum of understanding and irrespective of any post-return monitoring mechanisms that may be in place. The use of such assurances to removing a person to a country where he or she is at risk of torture constitutes a breach of Article 3 of the Convention. [9]

Since diplomatic assurances are unenforceable promises, a country that breaches them is unlikely to experience any serious consequences if the assurances are violated. In many instances, moreover, it is practically impossible to ascertain whether a breach has occurred. Because torture is carried out in secret, and victims often do not complain for fear of reprisals against them or their families, the practice is hard to investigate and easy to deny. Notably, neither the sending state nor the receiving state has any incentive to carry out such investigations seriously. To do so might not only reveal human rights violations, but might complicate efforts to rely on assurances in the future.

Nor are post-return monitoring mechanisms capable of resolving the defects inherent in such assurances. The key problem is the lack of confidentiality. Unlike systemic monitoring of an entire detention facility, confidentiality cannot be provided when monitoring an

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7 Written statement to Parliament by Home Secretary Theresa May, "Deportation with Assurances", 8 November 2011, https://www.gov.uk/government/speeches/deportation-with-assurances.
8 Review of Counterterrorism and Security Powers: Review Findings and Recommendations, January 2011 (Cm 8004), http://www.official-documents.gov.uk/document/cm80/8004/8004.pdf.
9 Human Rights Watch report "Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances", October 2008, http://www.hrw.org/en/reports/2008/10/22/not-way-forward-0.

isolated detainee, since it will be easy to identify who has reported the abuse. The threat of reprisals against a detainee or his family makes the person very unlikely to report abuse.

The case of Othman ("Abu Qatada")

The UK government is continuing its efforts to deport Omar Othman (known as "Abu Qatada") to Jordan, despite a real risk that he would be tortured and that evidence obtained under torture will be used against him in court in that country. Abu Qatada has been tried twice *in absentia* for terrorism offenses by Jordan's State Security Court and is likely to face a re-trial on the same charges if he is returned.

Human Rights Watch regrets that the ruling of the European Court of Human Rights in the case of Abu Qatada in January 2012 suggests that the UK memorandum of understanding with Jordan would offer a greater safeguard against torture than other forms of assurances.[10] Our research indicates that torture remains widespread in Jordan, despite promises by the King and other senior figures to end it, and that the applicant in that case remains at real risk of torture if returned even with the assurances obtained by the UK government.

The European Court of Human Rights did, however, rule against Abu Qatada's deportation to Jordan due to the likelihood that he would face a retrial in which evidence obtained under torture would be used against him, as that would constitute a "flagrant denial of justice" in breach of Article 6 of the European Convention on Human Rights (which guarantees the right to a fair trial).

Since the ruling by the European Court of Human Rights, the UK government has continued its attempts to deport Abu Qatada to Jordan and he was rearrested in April 2012 in view of his deportation. The government stated that it had received further assurances from the Jordanian authorities that he would receive a fair trial in Jordan.[11]

In November 2012, the Special Immigration Appeals Commission (SIAC) ruled that Othman could not be deported to Jordan as the risk that evidence obtained under torture would be

10 Human Rights Watch, "UK: European Court Ruling Sends Mixed Message on Torture", January 2012, http://www.hrw.org/news/2012/01/18/uk-european-court-ruling-sends-mixed-message-torture

11 Statement by Home Secretary Theresa May to the House of Commons, 17 April 2012, http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/debtext/120417-0001.htm#12041733000003.

used against him remained.[12] The Home Office's appeal against this ruling was dismissed by the Court of Appeal in March 2013, stating that "torture is universally abhorred as an evil" and that "a state cannot expel a person to another state where there is a real risk that he will be tried on the basis of evidence which there is a real possibility may have been obtained by torture."[13]

The UK government has sought leave to appeal against the Court of Appeal's judgment before the Supreme Court.

We urge the Committee to call on the UK government to:

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country or place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment.
- Halt immediately all efforts to remove foreign terrorism and national security suspects, including Othman, who are at risk of torture and ill-treatment on return using "diplomatic assurances" from countries with established records of practicing such abuse, regardless of whether they are formalized in "memorandums of understanding."
- With regard to the UK government's statement in its response to the Committee's list of issues that the UK no longer considers the Memorandum of Understanding with Libya to be operational, clarify whether the UK has any plans to negotiate a new Memorandum of Understanding with the current authorities in Libya.

12 Othman v Secretary of State for the Home Department, Special Immigration Appeals Commission, 12 November 2012, http://www.siac.tribunals.gov.uk/Documents/Othman_substantive_judgment.pdf.
13 Othman (aka Abu Qatada) v Secretary of State for the Home Department [2013] EWCA Civ 277 (27 March 2013), http://www.bailii.org/ew/cases/EWCA/Civ/2013/277.html.

Inadequate Risk Assessment Prior to Deportation of Failed Asylum Seekers (paragraph 15 in the list of issues)

Human Rights Watch is concerned that the assessment by the UK authorities deciding on the deportation of failed asylum-seekers has failed, in some cases, to take into account the real risk of torture those individuals would face upon their return.

Research by Human Rights Watch has found that some returned Tamil asylum seekers with perceived links to the Tamil Tigers (LTTE) from the United Kingdom have been subjected to arbitrary arrest and torture upon their return to Sri Lanka. [14]

Despite this evidence and similar evidence from other non-governmental organizations, the UK Border Agency (UKBA) declined to change its approach to deporting failed Tamil asylum seekers to Sri Lanka, and continued to carry out deportations.

On February 13, 2013, UKBA released under the Freedom of Information Act, evidence that between May 2009 and September 2012 the UK had granted refugee status to at least 15 Tamils who had been removed from the UK after their asylum claim was initially rejected and who claim they were subjected to torture or other ill-treatment upon their return to Sri Lanka.[15] On 28 February, the High Court of Justice halted the removal of Tamil failed asylum seekers due to be deported on a charter flight to Sri Lanka that day. The UK Border Agency (UKBA) reportedly said it would appeal against the order.[16]

Taken together, this information raises serious questions that the UK is prioritizing immigration control over its obligations to assess risk of torture on return in the case of rejected Tamil asylum seekers, and wider questions about the effectiveness of the risk assessment mechanisms in its immigration system.

14 Human Rights Watch], "UK: halt deportations of Tamils to Sri Lanka", February 2013, http://www.hrw.org/news/2012/02/24/uk-halt-deportations-tamils-sri-lanka
15 Freedom from Torture, "Alarming new evidence from UKBA on removals to Sri Lanka", 12 February 2013, http://www.freedomfromtorture.org/news-blogs/7104
16 http://www.guardian.co.uk/uk/2013/feb/28/border-agency-tamils-sri-lanka

We urge the Committee to call on the UK government to:

- Ensure that its asylum and deportation procedures contain adequate mechanisms for assessing risk of torture on return, as required under article 3 of the Convention, and to refrain from returning anyone to a country where there are substantial grounds for believing they would be in danger of being subjected to torture.

Reliance on Material Obtained Under Torture for Intelligence and Policing Purposes (Articles 2, 15 – paragraph 30 in the list of issues)

The UK government accepts that material obtained under torture cannot lawfully be used as evidence in court proceedings. It should be noted that that acceptance came only after the ruling of its highest domestic court in 2005.[17]

Human Rights Watch remains concerned that the burden of proof on the admissibility of torture material in the British courts lies with the defendant/applicant rather than with the government, creating a real risk that evidence obtained under torture from third persons will in practice be admitted in court because the individual will be unable to prove that it was obtained under torture.

Human Rights Watch also remains concerned that the UK government has yet to fully repudiate the use of material obtained by torture for intelligence and policing purposes. The UK continues to cooperate with security services with poor records on torture in the absence of clear indications to those governments that it does not seek and will not accept material obtained through torture.[18]

The 2010 "Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees" gives too much discretion to officers, appear to envision the use of assurances to mitigate the risk of torture, despite their unreliability as a safeguard against torture, and leave open the possibility of ongoing engagement even where there is evidence of torture, provided it is authorized by ministers. The UK has also yet to remedy ambiguous provisions in two domestic laws that appear to create a defence

17 Human Rights Watch, "UK: Highest Court Rules Out Use of Torture Evidence", December 2005, http://www.hrw.org/news/2005/12/07/uk-highest-court-rules-out-use-torture-evidence.
18 Human Rights Watch, "No Questions Asked: Intelligence Cooperation with Countries that Torture", June 2010, http://www.hrw.org/reports/2010/06/28/no-questions-asked-0.

against the crime of torture (under section 134 of the Criminal Justice Act 1988) and permission for the UK security services (under chapter 13 of the Intelligence Services Act 1994) to carry out otherwise illegal actions overseas when officially sanctioned.

We urge the Committee to call on the UK government to:

- Publicly repudiate reliance on intelligence material obtained from third countries through the use of torture or cruel, inhuman, or degrading treatment.
- Reaffirm the absolute prohibition on torture, including the use of torture evidence at any stage of the judicial process.
- Repeal section 134(4) and 134(5) of the Criminal Justice Act 1988.
- Clarify procedure rules on admissibility of torture evidence in criminal and civil proceedings to make clear that, where an allegation that a statement was made under torture is raised, the burden of proof is on the state to show that it was not made under torture.
- Publicly accept that the UN Convention against Torture applies fully to the UK, including all UK officials, with both criminal and civil law consequences, anywhere in the world.
- Ensure that the guidance to members of the security service on cooperation with foreign governments is amended as to require that cooperation discontinue in any case where there is evidence of ill-treatment or torture and ensure that opposition to such treatment is clearly communicated to the country providing the information.

Extraterritorial Application of the Convention Against Torture (paragraph 4 in the list of issues)

The United Kingdom has still not made clear its acceptance of the global application of the Convention, in particular to its armed forces and officials, who may commit, participate in, or be complicit in torture or cruel, inhuman, or degrading treatment or punishment.

This is despite the clear recent rulings of the European Court of Human Rights, concerning the application of the European Convention of Human Rights to the actions of UK armed

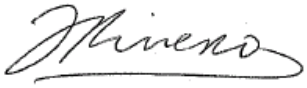
forces in Iraq, including cases of torture, stating that that convention applies.[19] These rulings have direct effect in the United Kingdom.

As long as the United Kingdom refuses to clarify its position, it is not clear whether it considers itself under a duty under CAT to investigate and prosecute those persons responsible for torture or complicity in torture which took place anywhere in the world.

We urge the Committee to call on the UK government to:

- Finally clarify its position and accept the global application of the Convention to its forces and officials.

Thank for your attention to our concerns, and with best wishes for a productive session.



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19 European Court of Human Rights Al Saadoon and Mufdhi v United Kingdom (application n. 61498/08); Al Skeini and others v United Kingdom (55721/07); Al Jedda v United Kingdom (27021/08).