



July 19, 2010

Rt. Hon. Sir Peter Gibson
The Intelligence Services Commissioner
c/o 2 Marsham Street
London SW1P 4DF

Re: Torture Inquiry - Recusal

Dear Sir Peter:

I am, naturally, very glad that there is to be an inquiry into the complicity of Britain in torture. However, if the inquiry is to achieve its stated goals – including ridding Britain of the stain that has blemished our reputation – it is essential that the procedure used is of the highest possible standard.

Each of those running the inquiry should be, like Caesar's wife, not only virtuous but above any reasonable suspicion. The standard must be one of appearances, even if an individual feels personally that he could hold the balance.

It is with great regret that I need to ask you to consider whether you ought to step aside from the inquiry. Below, I set out various questions to you. If you feel, as a result of these and any other issues, that you should disqualify yourself from sitting on the inquiry, no more need be said.

If you feel that, despite these matters, you should continue working on the inquiry, then I would be grateful for a written response to my letter. I would be grateful if you could respond within the next ten days.

I shall copy this letter to the Prime Minister, who asked you to serve in this role, so that he can make the same assessment.

My Questions

1. Do you agree that the proper standard for assessing whether you should disqualify yourself, or be disqualified, from sitting as the judge in a judge-led inquiry is the same as that for a judge in a court hearing?
2. Would you agree that when an interested party raises the issue of bias, the judge leading an inquiry on a matter of such importance should assess the

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issue under Lord Hope's test in the *Pinochet* case: where facts "can even by remote imagination infer a bias or interest in the Judge"?¹

3. Do you agree with David Miliband's public statement in a recent interview that you have already conducted a secret internal review of some of the matters that will be considered in the inquiry in your role as Intelligence Services Commissioner (ISC)?
 - a. If you agree with Mr Miliband, do you believe that this is reason sufficient to require your disqualification?
 - b. If you disagree with Mr Miliband, please explain why he is wrong.
4. Do you agree that you will be a highly material witness before any proper and fair inquiry? You have been the Intelligence Services Commissioner (ISC) for more than four years. Your role has been to provide statutory oversight of the Security and Intelligence Services. During your tenure, there are many cases in which allegations of complicity in torture have been made.
 - a. If you have not done anything to investigate these matters so far, this will raise the most serious questions about the effectiveness of your statutory oversight function and whether the inquiry ought to make recommendations to alter it.
 - b. If you have investigated these allegations, but concluded that there is no problem, this will lead to further troubling questions given the documentation now in the public domain.
5. Please could you share what your conclusions were as ISC in any evaluation that you made concerning allegations of complicity in torture by the Security Services.
 - a. Did your confidential 2006, 2007, 2008 or 2009 reports include any assessment of the Services' violation of prisoners' rights or of cases involving co-operation with countries suspected of using torture, or of cases where allegations of complicity in torture have been made?
 - b. If not, why not?

¹ See, e.g., *In re Pinochet* (15 Jan. 1999) (Opinion of Lord Hope of Craighead) ("The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."). Of course, there are various formulations of the disqualification test, but I am sure you would agree that the highest possible standard would be appropriate in a matter of such public importance. Additionally, it would seem clear that you should disqualify yourself no matter what the standard.

- c. If so, what were your conclusions?
 - d. Do you consider that your expressed opinion in your public 2006, 2007, 2008 reports that the Security Services personnel were “trustworthy, conscientious and dependable” reflects a bias that requires you to step aside?
 - e. Does the fact that Lord Neuberger found that members of the Security Services over the same time period in 2008, to have acted improperly in the *Binyam Mohamed* case require you to step aside?
 - f. If you cannot share your confidential reports from these years with the public, please could you explain how the public can have faith that you have not already prejudged other relevant issues?
 - g. Does your (as yet unpublished) 2009 report deal with these issues, either in the public or the confidential version? If not, why?
6. Do you believe that your role as ISC raises any other concerns with respect to your appointment to chair the inquiry? In particular:
- a. Since 2006 you have been required to review the propriety of illegal acts abroad authorized by the Secretary of State under section 7 of the Intelligence Services Act 1994. Evidence will be presented to the inquiry about otherwise-illegal British complicity in torture during that period that was (or should have been) precleared by the authorization of the Secretary of State. If it was precleared, presumably you played a role in it; if it was not precleared, then your assessment that there were only “minor” irregularities in the actions of the Security Services would again be flawed.
 - b. Please could you explain how you are able to preside over an inquiry about British complicity in torture during the time period in which you were responsible for the statutory oversight of the Security and Intelligence Services? The allegation that you will have to rule on is (with apologies for putting it so frankly) that you were either asleep on your watch or were hoodwinked. Out of fairness to victims of torture, the Security Services and yourself, do you believe that you can rule fairly on such issues?
 - c. Does the fact that you were charged, in March 2009, with reviewing compliance with the Government’s torture policy mandate that you step aside from an inquiry that will review whether what the policy was, and whether the Security Services complied?
7. Would you agree that a judge sitting on a judge-led inquiry is bound, with or without a request, to make disclosure of any matters that might call into question his impartiality?

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8. Do you believe that there are other reasons why you may suffer from an appearance of partiality?
- a. If so, please could you identify them.
 - b. If you cannot identify them, please could you explain why you cannot.

Various background information relevant to your responses

Since the issue before us is, it would seem, partly one of public perceptions of partiality, allow me to set out some of the information that is in the public domain.

First, there is the surprising revelation made by Rt Hon David Miliband MP when he recently appeared on the BBC's Andrew Neil Show on July 8, 2010. Mr Miliband, who was Foreign Secretary at the relevant time, stated clearly that you have already completed an "inquiry" into these allegations. I set out the exchange in full:

[Andrew Neil]: Why didn't you, if you didn't think that, why didn't you mount or appoint an independent inquiry?

[David Miliband]: Because we had independent inquiries going on. First of all by the Intelligence Services Commissioner. As it happens, Peter Gibson, the man who has now been appointed by David Cameron to do the inquiry if it happens after the mediation

AN: There was no appointment of an independent public inquiry.

DM: Yes there is.

AN: Why didn't you...that would have been real leadership.

DM: No, it wouldn't because what we did was, one, use the Intelligence Services Commissioner, two, we took exactly the same position as the government, the current government, which is that you cannot have an independent inquiry of the sort that you are requiring while court cases are going on. It's important that court cases are allowed to complete their work, and that is what happened. That's what is happening, it hasn't finished yet, the court cases...

Andrew Neil Show, July 8, 2010 (transcript included as Attachment A).

In other words, according to David Miliband, you have already reviewed the allegations that the Security Services were complicit in torture, at the request of

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the previous Government. One must assume that you reached some conclusions, or made some recommendations. You cannot now conduct a further independent inquiry having already reached conclusions on some or all of the issues. A fair minded member of the public would see that as acting as a judge in an appeal against your own decision.

It is worth noting that in the *Pinochet* case the entire bench stepped aside when an appearance of bias became apparent on Lord Hoffmann's part, since the other judges "had already expressed their conclusion on the points at issue." Here, the problem is far worse: According to Mr Miliband (who has promised to appear as a witness before the inquiry, if called), you have reached conclusions that we cannot know as they are presumably secret.

Statements prejudging the trustworthiness of the Security Services

You have been ISC since April 2006 – for over four years. During that time, you appear to have, *inter alia*:

- (a) Been required to take actions that could be intimately relevant to the inquiry.
- (b) Already reported on and considered policies and practices that will be challenged in the inquiry.
- (c) Expressed publicly your belief each year that the personnel of the Security Services are "trustworthy, conscientious and dependable".

In your 2008 ISC report, for example, you said the following about the personnel who you were assessing –

In exercising these powers I experienced the fullest possible co-operation on the part of all those concerned. Indeed, members of the various agencies at all levels have appeared willing to confide in me all possibly relevant information and, where appropriate, to share with me their concerns. I have concluded that *all staff in this difficult and challenging area of work continue to be trustworthy, conscientious and dependable.*²

You repeated the same conclusion essentially verbatim in 2006 and 2007, and one must anticipate that you will have included the same phrase in your 2009

² Report of the Intelligence Services Commissioner for 2008 (21st July 2009), at para. 32, <http://www.official-documents.gov.uk/document/hc0809/hc09/0902/0902.pdf> (emphasis supplied).

report – or, if you have omitted it for the first time in four years, you have done so because you recognize that it fatally compromises your role in this inquiry.

These are the very people whose actions you are meant to assess during this inquiry. However, there is strong evidence that at least some officers of the Security and Intelligence services are not trustworthy; indeed that they have committed improper and unlawful conduct.

Compare your own conclusions with the conclusions of Lord Neuberger, the Master of the Rolls, who was reviewing the trustworthiness of some of the same people who had caused evidence to be submitted to the Foreign Secretary, and under oath to the Court, in the *Binyam Mohamed* case:

as the evidence in this case showed, at least some Security Services officials appear to have a dubious record when it comes to actual involvement and frankness about such involvement with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question of whether any statement in the certificates on an issue concerning such mistreatment can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information.

The Queen on the Application of Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, paragraph 168 (Feb. 26, 2010) (as amended in the final version of Lord Neuberger's judgment).

One important question before the inquiry will be who is right – you or Lord Neuberger? Is this something you can reasonably judge for the nation?

General public criticisms of total lack of public accountability in your ISC reports.

There have been various criticisms from respectable sources that you have gone out of your way to avoid making public any criticisms of the intelligence services. For example, an article in the Sunday Telegraph (21 Sept. 2008) regarding your appointment to an earlier inquiry commented:

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The choice of Sir Peter is unlikely to "raise expectations" among the families, or anyone else. His annual reviews of GCHQ, MI5 and MI6 shed almost no light on their workings. They do not even reveal such mundane matters as the number of warrants issued to MI5 for entry to premises. *Sir Peter's review will no doubt follow the pattern he has set in his annual reviews - that is, he will reveal hardly anything at all.*

(emphasis supplied) A review of the public versions of your 2006, 2007, and 2008 reports suggest that these criticisms are valid.³ The three reports follow the same pattern with little deviation.

Each year, roughly 50% of the report (57% in 2007) consists of a restatement of the outline of RIPA 2000, the functions of the Commissioner, the functions of the intelligence services and the regulations regarding the issuing of warrants and authorizations.

The section of the report dedicated to the "discharge of my functions" comprises an average of just 22% of each report. However, even here, a comparison of the text shows that this section in each report is almost entirely repetitive. Essentially each report restates the following, with no significant difference in essence or detail:

- You have visited departments and "sought to satisfy myself that statutory conditions governing the exercise of investigatory powers have been met".
- You have "read the files relating to a number of warrants and authorisations issued during the course of the year and some of those where the warrants or authorisations previously issued have been renewed"; you have reviewed material and questioned those involved.
- You have checked the "integrity and quality of the personnel involved in the warranting process" and are "as satisfied as I believe I possibly can be" that powers have been properly exercised.
- You have "experienced the fullest possible co-operation on the part of all those concerned".
- You conclude every year that "all staff in this difficult and challenging area of work continue to be trustworthy, conscientious and dependable."

³ See Report of the Intelligence Services Commissioner for 2007 (22nd July 2008), <http://www.official-documents.gov.uk/document/hc0708/hc09/0948/0948.pdf>; Report of the Intelligence Services Commissioner for 2008 (21st July 2009), <http://www.official-documents.gov.uk/document/hc0809/hc09/0902/0902.pdf>.

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- Each year you decline to provide “the number of warrants or authorizations issued” in the public section of the report.

The implications of your general duties as the ISC.

The role of the Intelligence Services Commissioner (ISC) is defined by the RIPA (Regulation of Investigatory Powers Act) 2000, Part IV (Scrutiny etc. of investigatory powers and of the functions of the intelligence services), section 59.⁴ Salient clauses include:

(1) The Prime Minister shall appoint a Commissioner to be known as the Intelligence Services Commissioner.

(2) Subject to subsection (4) [see below], the Intelligence Services Commissioner shall keep under review, so far as they are not required to be kept under review by the Interception of Communications Commissioner—

(a) the exercise by the Secretary of State of his powers under sections 5 to 7 of the [1994 c. 13.] Intelligence Services Act 1994 (warrants for interference with wireless telegraphy, entry and interference with property etc.);

(b) the exercise and performance by the Secretary of State, in connection with or in relation to—

(i) the activities of the intelligence services, and

(ii) the activities in places other than Northern Ireland of the officials of the Ministry of Defence and of members of Her Majesty’s forces, of the powers and duties conferred or imposed on him by Parts II and III of this Act;

(c) the exercise and performance by members of the intelligence services of the powers and duties conferred or imposed on them by or under Parts II and III of this Act;

(d) the exercise and performance in places other than Northern Ireland, by officials of the Ministry of Defence and by members of Her Majesty’s forces, of the powers and duties conferred or imposed on such officials or members of Her Majesty’s forces by or under Parts II and III; and

⁴ http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en_1.

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(e) the adequacy of the arrangements by virtue of which the duty imposed by section 55 is sought to be discharged—

(i) in relation to the members of the intelligence services; and

(ii) in connection with any of their activities in places other than Northern Ireland, in relation to officials of the Ministry of Defence and members of Her Majesty's forces.

(3) The Intelligence Services Commissioner shall give the Tribunal all such assistance (including his opinion as to any issue falling to be determined by the Tribunal) as the Tribunal may require—

(a) in connection with the investigation of any matter by the Tribunal; or

(b) otherwise for the purposes of the Tribunal's consideration or determination of any matter.

(4) It shall not be the function of the Intelligence Services Commissioner to keep under review the exercise of any power of the Secretary of State to make, amend or revoke any subordinate legislation.

Sections 5-7 of the Intelligence Services Act 1994 deal with "Authorisation of certain actions". These actions include the issuing of warrants and "authorization of acts outside the British islands":

"If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section."

The 1994 Act provides various predicate acts required before the Secretary of State may give such an authorization.⁵

⁵ In your 2006 ISC Report you outlined your remit as including the following: "b. to keep under review the exercise by the Secretary of State of his powers to give, renew and cancel authorisations under section 7 of ISA, i.e., authorisations for acts done outside the United Kingdom, authorisations in practice issued by the Foreign Secretary..."

It is clear that the inquiry must review alleged actions that have taken place since you became ISC where the UK Security Services committed acts that would clearly be criminal within the UK. *Reprieve* would expect to present evidence in this regard at any inquiry. There are two possible hypotheses here: either you reviewed those actions as required by the law, and took the view that they were acceptable – in which case you have authorized complicity in torture. Or, the procedures set out in the 1994 Act were violated, you were kept in the dark, and your view that the personnel are “trustworthy, conscientious and dependable” is misplaced. Either way, your testimony before any inquiry will be of great significance. As a witness, you may obviously not be the judge.

The implications of the duties added to your remit by Gordon Brown 16 months ago.

Your pre-existing duties were expanded on 18 March 2009, when Gordon Brown MP announced to Parliament that in order “to protect the reputation of our security and intelligence services and to reassure ourselves that everything has been done to ensure that our practices are in line with United Kingdom and international law” the Government would do various things, including “invite Sir Peter Gibson who is the former Lord Justice of Appeal and current Intelligence Services Commissioner to monitor compliance with the [torture] guidance and report to the Prime Minister annually.”⁶

The 23rd Report of the Joint Committee on Human Rights (21 July 2009) elaborated on what this meant noting, at paragraph 77, that you would “focus on the systemic issues you describe rather than individual cases”, and that you would “cover compliance in this area in [your] published annual reports as Intelligence Services Commissioner”.⁷

While more than a year has gone by, the public does not know (a) whether you have been monitoring compliance with the torture policy; (b) what policy you were applying; (c) what criticisms you levelled (although presumably you would have considered the legality of the notorious 2004 Torture Policy that the Labour Government was so keen to keep secret); and (d) whether you have submitted an annual report to the PM either as part of your 2009 ISC report or separately. Presumably, then, in an inquiry that is meant to assess the adequacy of past policies, you should be a witness before it, rather than its judge.

Your report for 2009 should include a section on “compliance” that will presumably prejudice some of the issues before the inquiry. Similarly, your classified 2006, 2007 and 2008 reports should have included conclusions on the

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<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090318/wmstext/90318m0001.htm#09031892000014>

⁷ <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>

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legality of the Services' actions. If they did, you have prejudged the issues; if they did not, you would presumably agree that your function as ISC is part of the alleged problem, and should be considered in the inquiry.

While it may be that the materials discussed above meet the standard of actual bias, the issue is also one of public perception. I invite you to consider whether you can continue to act with the confidence of both the public, and the alleged victims of complicity in torture, in your independence and impartiality. If you feel there is no appearance of bias, I would be grateful for an early response to the questions set out above.

Yours sincerely,



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cc. Rt. Hon. David Cameron MP
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