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Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism

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COMMENT

EXAMINING THE USE OF EVIDENCE OBTAINED UNDER TORTURE: THE CASE OF THE BRITISH DETAINEES MAY TEST THE RESOLVE OF THE EUROPEAN CONVENTION IN THE ERA OF TERRORISM*

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* Since this Comment was accepted for publication, a number of events occurred that require brief mention due to their relevancy on the issue of torture-induced evidence. Among these events was the recent decision by the House of Lords in the detainees' appeal, which overruled the Court of Appeal and prohibited the use of torture-induced evidence in judicial proceedings against persons suspected of terrorism. *See* discussion *infra* Postscipt (elaborating on the decision by the House of Lords and other subsequent developments).

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INTRODUCTION

Like many other nations, the United Kingdom responded to the September 11 attacks on the United States by passing anti-terrorist legislation, broadening the rights of the government and curtailing civil liberties in the name of national security.[1] The result was

1. *See* Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 21, 26 (Eng.) (allowing the Home Secretary to detain a foreign national suspected of terrorist

emergency legislation that authorized the U.K. Home Secretary to detain foreign nationals suspected of being terrorists.[2] Just days after the enactment of the U.K. anti-terrorist legislation, the Home Secretary made the first use of his new powers by detaining eight persons suspected of terrorist activity.[3] Three years after this initial use of powers, the United Kingdom is reconsidering its anti-terrorist legislation, following a House of Lords decision that ruled that the internment powers violated the United Kingdom's international commitment to basic civil liberties set forth in the European Convention on Human Rights ("European Convention").[4] In response to the House of Lords' decision, the new Home Secretary introduced a proposal to amend the Anti-terrorism, Crime and Security Act 2001 ("Anti-terrorism Act").[5] The proposed amendments present a dramatic departure from the Anti-terrorism Act by attempting to eliminate the disproportionate and discriminatory nature of the original legislation.[6]

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activities for six months before review); Warren Hoge, *U.S. Terror Attacks Galvanize Europeans to Tighten Laws*, N.Y. TIMES, Dec. 6, 2001, at B1 (discussing the proposal and initiation of new anti-terrorism laws in the European Union, France, Germany, Spain and the United Kingdom).

2. Anti-terrorism, Crime and Security Act, § 21 (providing for detention of foreign nationals when the Home Secretary can demonstrate a reasonable belief or suspicion that the individual is participating in terrorist activities).

3. *See* Ian Burrell & Jason Bennetto, *Blunkett Provokes Anger by Using New Terror Laws to Arrest Eight Suspects*, INDEP. (London), Dec. 20, 2001, at 1.

4. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, ¶ 73 (holding that the detention of the detainees was disproportional to the perceived threat to national security and that the Anti-terrorism Act was discriminatory since it only applied to foreign nationals); Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 4, 1950, Eur. T.S. No. 5 [hereinafter European Convention] (unifying European nations' law regarding the international enforcement of individual rights).

5. *See* Anti-terrorism, Crime and Security Act, §§ 9, 23; 430 PARL. DEB., H.C. (6th ser.) (2005) 305-09 (statement of Charles Clarke, Sec'y of State for the Home Dep't) (proposing changes to Part 4 of the Anti-terrorism Act and defending the continued need for the Anti-terrorism Act by citing national security concerns).

6. *See* 430 PARL. DEB., H.C. (6th ser.) (2005) 305-09 (statement of Charles Clarke, Sec'y of State for the Home Dep't) (recommending control orders consisting of intense surveillance and house arrest of the suspected terrorist in place of detention).

While the detainees wait for Parliament to reassess the Anti-terrorism Act, the detainees are appealing their detention on other grounds, including the claim that the United Kingdom based the detainees' detention on statements obtained through the torture of detainees held by the United States.[7] The detainees' claim came in the wake of recently revealed information about the contentious U.S. treatment of prisoners in Iraq, Cuba, and Afghanistan,[8] which raises questions about the propriety of some of the powers conferred upon the executive offices of many nations during the aftermath of the September 11 attacks.[9]

Despite the serious nature of the detainees' allegations regarding the potential of torture-induced evidence, there is a strong likelihood that Parliament will approve an amendment to the Anti-terrorism Act that will not address the problem.[10] Consequently, the detainees may look to the European Court of Human Rights ("ECHR") to gain redress.[11] Should the ECHR hear the case of the British detainees, an

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7. *See* A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶¶ 66, 381-86 (summarizing the detainees' argument that the United Kingdom used torture-induced evidence against them and acknowledging that the detainees presented sufficient evidence to prove the potential use of torture in the gathering of the evidence).

8. *See* discussion *infra* Part I.C (providing a general overview of the allegations of torture committed by the U.S. military).

9. *See, e.g.*, Dana Keith, *In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and the United Kingdom in the Aftermath of September 11, 2001*, 16 FLA. J. INT'L L. 405, 451-55 (2004) (considering the implications of Part 4 of the Anti-terrorist Act and comparing the U.K. Anti-terrorist Act to the USA PATRIOT Act).

10. *See id.* (outlining a plan for changing the Anti-terrorism Act that fails to address the evidentiary procedures of the Appeals Commission); *see also* Chris Moncrieff et al., *'Control Orders' Plan for Terror Suspects*, PRESS ASS'N, Jan. 26, 2005 (quoting MP Michael Meacher as stating that the proposed measures were a compromise and did not address the low standard of proof, the inability of the detainees to challenge the evidence against them, and the admissibility of torture-induced evidence); discussion *infra* Part II (analyzing the Anti-terrorism Act's incompatibility with Articles 3 and 6 of the European Convention).

11. *See* European Court of Human Rights, *Historical Background*, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/ (last visited Dec. 12, 2005) (explaining that the European Convention established the ECHR to pursue the aims of the Convention and address complaints by individuals).

ensuing decision may define the bounds between human liberties and national security for much of Europe in the age of terrorism.[12]

This Comment argues that the British detainees should bring their case before the ECHR if Parliament neglects to address the potential use of torture-induced evidence in amending the Anti-terrorism Act.[13] The ECHR would likely find that the United Kingdom violated international law when the U.K. Court of Appeal dismissed the detainees' claim that the U.K. government should prohibit torture-induced evidence from the legal proceedings that affirmed the detainees' continued imprisonment.[14] Additionally, it is probable the ECHR would find that the Court of Appeal wrongfully placed the burden on the detainees to prove evidence of torture.[15]

Part I provides an overview of the background of the detainees' complaint and explains the applicable provisions of the European Convention and Anti-terrorism Act. Part II will discuss why the detainees should bring their case before the European Court of Human Rights. Part II then considers whether the European Convention requires Member States to exclude evidence seized by torture, or whether the States have the option to admit the evidence and determine the weight accorded to the potentially torture-induced evidence.

Finally, Part III recommends that the evidence obtained from torture be excluded completely from proceedings, and that the method of weighing the evidence is not appropriate under the

12. *See* discussion *infra* Conclusion (explaining that the ECHR provides guidance to many European nations and arguing that the ECHR would admonish the use of torture-induced evidence should it hear the British detainees' case).

13. *See* discussion *infra* Part II (analyzing ECHR case law that suggests the ECHR may find that the United Kingdom violated Articles 3 and 6 of the European Convention and contending that the ECHR, as an international body dedicated to advocacy for human rights, provides a sympathetic forum for the detainees).

14. *See* discussion *infra* Part III.A (arguing that using evidence obtained under torture in a legal proceeding legitimizes torture, and the prejudicial effect of the evidence makes the proceeding unfair).

15. *See* discussion *infra* Part II.B.2 (analogizing the extraterritorial duties under Article 3 to the potential obligation for a Member State to assess another State's means of attaining evidence before the Member State uses the evidence in a proceeding).

European Convention. Furthermore, Part III proposes that the European Court of Human Rights place the burden on the United Kingdom to prove the non-use of torture, so long as the detainees can establish an arguable claim that torture induced the evidence. Lastly, Part III encourages the U.K. Parliament to cease the indefinite use of closed evidence when it amends the Anti-terrorism Act.

I. BACKGROUND

A. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention is often heralded as history's most successful international human rights treaty.[16] Much of the European Convention's success emanates from successfully establishing a court capable of interpreting and enforcing the provisions of the European Convention.[17] The ECHR considers complaints filed by individuals against Member States and awards compensation to the individuals for violations of the liberties afforded to them in the European Convention.[18]

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16. *See, e.g.*, MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 4 (1995) (noting that the European Convention has "one of the most advanced forms of any kind of international legal process").

17. *See* Council of Europe, *The European Convention on Human Rights*, http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM (last visited Dec. 12, 2005) [hereinafter Convention Overview] (proclaiming that the establishment of the ECHR as a supra-national court to overlook judgments of sovereign States was a historic move for international law and human rights theory, as it placed the rights of individuals above laws of States).

18. *See* European Convention, *supra* note 4, art. 5(5) (granting individuals an enforceable right to compensation for the illegal deprivation of their liberty); *see also* IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 48-49 (3d ed. 1998) (explaining that the ECHR cannot reverse convictions or order new trials and in most cases the only remedy for a State's violation of an individual's liberty is monetary damages). Member States usually give strong consideration to the ECHR's holdings, either by issuing new trials for the complainant or by changing the State's laws to prevent future reoccurrences of the problem. *Id.* at 50-51; *see, e.g.*, Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777, 777-78, 783-84 (2003) (discussing the decision of Spanish authorities to reopen a case after the ECHR held that the original trial was not fair and violated Article 6); Convention Overview, *supra* note 17 (enumerating examples of States modifying their domestic laws to comport with the holdings of the ECHR). *See*

1. Admissibility of Evidence and the Right to a Fair Trial Under Article 6 of the European Convention

Article 6 of the European Convention monitors judicial proceedings that threaten deprivation of an individual's rights under the European Convention.[19] It requires that all defendants receive a right to a fair and public hearing and articulates several standards to meet this requirement.[20] Although it is well-established under the jurisprudence of the ECHR that the admissibility of evidence is primarily a matter for national law, the ECHR can find a violation of Article 6 if it determines that the admissibility of certain evidence deprived the complainant of a fair trial.[21] The ECHR considers a fair trial to be an adversarial one, where the proceeding embraced the concept of "equality of arms," giving both parties a "real opportunity" to examine the evidence before them and comment thereon.[22] Specifically, the ECHR considers whether the domestic courts respected the rights of the defense by allowing the defense to

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generally European Court of Human Rights, *Dates of Ratification of the European Convention on Human Rights and Additional Protocols*, http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/ (last visited Dec. 12, 2005) (listing countries that have ratified the European Convention, which includes the United Kingdom as one of the original signatories).

19. *See* JANIS ET AL., *supra* note 16, at 375 (stressing that the primary purpose of Article Six is to examine whether the civil rights enumerated in the European Convention are carried out in a fair manner).

20. European Convention, *supra* note 4, art. 6(3) (enumerating the minimal standards for a fair hearing as including the right to legal assistance, the right to an interpreter if needed, and the right to examine witnesses against the person).

21. *See* Barberà v. Spain, 146 Eur. Ct. H.R. (ser. A) at 31 (1988) (declaring the defendants' trials unfair because the defendants did not have a chance to adequately analyze and rebut the evidence presented at trial). In *Barberà*, a Spanish court admitted a statement from a witness who did not appear in court after the witness fled from police. *Id.* at 12. The ECHR held that the fact that the defendants never had an opportunity to question the witness contributed to the unfairness of the proceedings. *Id.* at 37.

22. *See* Migon v. Poland, Eur. Ct. H.R., App. No. 24244-94, ¶¶ 68, 79 (2002), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (finding the right to an adversarial proceeding implicit in Articles 5(4) and 6). *Migo* involved a complainant imprisoned for aggravated fraud. *Id.* ¶ 8. The State court limited the access of the complainant and his lawyer to the case file against him, thereby causing the ECHR to hold that the State violated the complainant's rights under Article 5(4) of the European Convention. *Id.* ¶¶ 73-87.

challenge the legitimacy of the evidence and whether the defense had the right to question witnesses.[23] The ECHR also considers whether incriminating statements are voluntarily made and questions the overall quality of the incriminating evidence, including the reliability and accuracy of such evidence.[24] Finally, it considers whether the tainted evidence comprises a substantial or decisive basis for a conviction.[25]

2. Hearsay Evidence and the Right to Confront Witnesses Under Article 6

Article 6 of the European Convention states that individuals have the right to confront the witnesses against them.[26] When the ECHR addresses hearsay evidence, it frames the issue in the broader terms of whether the defendant received a fair trial.[27] Two cases that exemplify the ECHR's application of this principle and reveal some of the factors the ECHR considers in determining the fairness of a proceeding are *Ferrantelli v. Italy*[28] and *Kostovski v. Netherlands*.[29]

a. Ferrantelli v. Italy

Under *Ferrantelli*, the ECHR may consider the reason for a witness' absence and any corroborating evidence in determining whether the admission of the absent witness' statements resulted in

23. *See, e.g.*, Allan v. United Kingdom, 2002-IX Eur. Ct. H.R. 43, 56.

24. *See id.* (reasoning that there is much less of a need for corroborating evidence when the evidence is strong and there is no risk of the evidence being unreliable). In this regard, the ECHR requires an inquiry into whether admissions against the defendant resulted from inducement, entrapment or similar means. *Id.*

25. *See* Schenk v. Switzerland, 140 Eur. Ct. H.R. (ser. A) at 29-30 (1988) (holding that the use of illegally-obtained evidence does not necessarily cause a trial to be unfair, placing the emphasis instead on whether the State courts carefully considered the admission of the evidence and whether the evidence was the sole reason for the defendant's conviction).

26. European Convention, *supra* note 4, art. 6(3)(d).

27. *See* Kirst, *supra* note 18, at 782 (noting that if hearsay evidence imposes many handicaps on the defense, the ECHR is likely to consider the use of the hearsay evidence unfair).

28. 1996-III Eur. Ct. H.R. 937, 938.

29. 166 Eur. Ct. H.R. (ser. A) at 4 (1989).

an unfair trial.[30] In *Ferrantelli* the complainants claimed that the State violated their right to a fair trial under Article 6, in part because the evidence presented at their trial included statements made by a witness whom the defense was unable to question before the witness' death.[31] The ECHR considered the admission of the statements at trial and ruled that Italy did not violate the right to confrontation since the government was not responsible for the witness' death and additional evidence supported the witness' statements that the defendants assisted the witness in the commission of the crime.[32] *Ferrantelli* demonstrated that the right of confrontation is not absolute, so long as the State has a legitimate rationale for denying the right of confrontation and the State respects the right of the defense.[33]

b. Kostovski v. Netherlands

Kostovski considered the admissibility of anonymous witness statements.[34] In *Kostovski* the State court convicted the defendant on the basis of accounts from two anonymous witnesses who did not appear before the defendant in court.[35] Although the judge allowed

30. *Ferrantelli*, 1996-III Eur. Ct. H.R. at 950-51 (declaring that the State's use of statements from a deceased witness at trial did not violate the right to a fair trial because the State was not responsible for the witness' death and corroborating evidence supported the witness' statements).

31. *Id.* at 947. *Ferrantelli* involved the arrest of three individuals suspected of murdering two Italian police officers. *Id.* at 942. One of the three suspects admitted to the murders and implicated the other two suspects during a police interrogation, but the next day retracted his statements regarding the involvement of the other two suspects. *Id.* After the accomplice retracted his statements, Italian authorities found him hanged in a prison hospital under questionable circumstances, but determined his death a suicide. *Id.* at 943. The complainant implied that the accomplice, who only had one arm, would have had a difficult time hanging himself and noted that, strangely, authorities found a handkerchief in the accomplice's mouth. *Id.*

32. *Id.* at 950-51 (referring to the fact that the two suspects did not have alibis and there was evidence they assisted in buying the gas bottles used in the attacks).

33. *See id.* at 951.

34. *Kostovski*, 166 Eur. Ct. H.R. (ser. A) at 19-21 (questioning whether the use of anonymous witness statements makes a trial unfair, thereby contravening the European Convention).

35. *Id.* at 10 (noting that the witnesses feared retaliation from their testimony).

the defense counsel to submit a list of questions for the witnesses, the judge only asked the witness two of the defense's fourteen questions.[36] In a strongly worded opinion, the ECHR disapproved of the use of the anonymous statements at trial, particularly since the conviction relied "to a decisive extent" on the anonymous statements.[37] The ECHR held that the use of the statements, without better safeguards set up to protect the rights of the defense, constituted a violation of the Article 6 right to a fair trial because such statements do not allow the defendant to confront his accusers.[38]

3. Article 3: The Absolute Prohibition Against Torture

Article 3 of the European Convention states that "[n]o one shall be subject to torture or inhuman or degrading treatment or punishment."[39] Article 3 serves the important purpose of elucidating the rule of law principle set forth in the Preamble.[40] The importance placed on Article 3 is also apparent by the prohibition of Article 3's derogation by Article 15.[41]

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36. *Id.* at 11 (stating that the judge felt that the other twelve questions submitted by the defense counsel might disclose the identity of the witnesses).

37. *Id.* at 21 (maintaining that although the European Convention does not rule out reliance on anonymous witnesses, the use of anonymous witness testimony as the basis for a conviction "is a different matter").

38. *Id.* at 20 (reasoning that the anonymity of the witness prevents the defense from ascertaining the veracity, partiality, or reliability of the statements).

39. European Convention, *supra* note 4, art. 3.

40. *See id.* pmbl. (agreeing to the core values of "political traditions, ideals, freedom and the rule of law"); Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 16-17 (1975) (looking to the Preamble for the object and purpose of the European Convention and concluding that the "rule of law" constitutes a founding principle of the European Convention); *see also* Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, art. 31(2), U.N. Doc. A/CONF.129/15, *reprinted in* 25 I.L.M. 543 (requiring States to turn to the preamble of a treaty for interpretation of the treaty's purpose).

41. European Convention, *supra* note 4, art. 15 (prohibiting derogation from Articles 2, 4, and 7, in addition to Article 3).

a. The State's Obligation to Investigate Claims of Torture

States have an obligation under the European Convention to investigate complaints of torture or ill-treatment.[42] This obligation arises whenever an individual raises an "arguable claim"[43] of torture or ill treatment by State authorities.[44] The ECHR holds that the duty to investigate claims of torture is implied under both Articles 3 and 13 of the European Convention.[45]

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42. *Id.* art. 13.

43. *See* Silver and Others v. United Kingdom, 61 Eur. Ct. H.R. (ser. A) at 42 (1983) (holding that Member States of the European Convention should have domestic remedies available for persons bringing arguable claims concerning alleged breaches of the Convention, and stipulating that these remedies should include an opportunity to have the claim decided and redressed if appropriate). Because the ECHR did not define the concept of "arguable," national authorities must interpret the term on a case-by-case basis. *See* Committee of Ministers, Council of Europe, *Explanatory Memorandum to Recommendation No. R(98)13 of the Comm. of Ministers to Member States on the Right of Rejected Asylum Seekers to an Effective Remedy Against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights*, 641st mtg. ¶ 13 (1998) [hereinafter Comm. of Ministers Recommendation] (explaining that in cases of asylum-seeking, some nations have interpreted an arguable claim as a claim that "contains substantial grounds for believing that there is a real risk . . . [of] treatment contrary to Article 3 of the Convention").

44. *See* European Convention, *supra* note 4, art. 1; Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (finding a distinction between ill treatment and torture). In *Ireland*, the ECHR considered the use of interrogation practices by British officials on the Irish Republican Army ("IRA"), a terrorist organization determined to end British rule of Northern Ireland. *Id.* at 11. Among the techniques considered were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. *Id.* at 41. The ECHR held that while these techniques were "inhuman and degrading," they were not intense or severe enough to be considered torture. *Id.* at 66-67; *see also* Assenov v. Bulgaria, 1998-VIII Eur. Ct. H.R. 3264, 3290 (reading Article 3 in conjunction with Article 1 to establish an obligation for the State to investigate claims of torture or ill-treatment).

45. *See* Aydin v. Turkey, 1997-V Eur. H.R. Rep. 1866 (finding a violation for the State's failure to conduct an investigation into allegations of torture under Article 13). The ECHR held that such inaction violates Article 13 of the European Convention and did not explain why it placed this obligation under Article 13 instead of Article 3. *Id.* at 300; *cf. Assenov*, 1998-VIII Eur. Ct. H.R. at 3290 (interpreting a duty to investigate claims of torture under Article 3). The ECHR cases suggest that the court looks to the broader wording of Article 3 when there is not conclusive evidence in the complaint to reach a finding of torture or ill-treatment. *See* A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN

b. Extraterritorial Application of Article 3

In *Soering v. United Kingdom* the ECHR placed Article 3 responsibility on the United Kingdom for the U.K.'s plan to extradite a German citizen to the United States to stand trial for capital murder charges.[46] The ECHR recognized the strong public interest in bringing fleeing criminals to justice, but reasoned that the U.K. decision to extradite the individual would directly result in a foreseeable violation of Article 3 due to the use of the death penalty in the United States.[47] The ECHR referred to Article 3 of the United Nations Convention Against Torture ("Convention Against Torture"), which explicitly prohibits extradition of a person to a country where there is a substantial risk of torture, and held that the same obligation is inherent under Article 3 of the European Convention.[48]

B. THE CURRENT STATUS OF THE BRITISH DETAINEES AND THE ANTI-TERRORISM ACT

1. The British Detainees' Indefinite Imprisonment

Although the United Kingdom began imprisoning foreign nationals suspected of terrorism almost four years ago,[49] the public

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COURT OF HUMAN RIGHTS 63 (2004) (theorizing that the ECHR only turns to Article 3 in exceptional cases of a State's failure to investigate claims of torture).

46. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 11 (1989) (explaining that the applicant admitted to the murder of two people in Virginia).

47. *Id.* at 39 (finding that the applicant faced a serious risk of receiving the death penalty).

48. *Id.* at 34-35 (implying that a specialized treaty may spell out obligations inherent in the provisions and ideals of the European Convention). This case represented the first time the ECHR applied Article 3 responsibility to a Member State for actions that occur outside a Member State's jurisdiction. *Id.* at 33-34.

49. *See* David Barrett, *Eight Are Detained Under Terrorism Act*, LIVERPOOL DAILY POST, Dec. 20, 2001, at 3 (noting that Home Secretary David Blunkett wasted little time in exercising the newly endowed powers bestowed upon him by the Anti-terrorism Act); *see also* Robert Verkaik, *We Say in a Democracy It Is Unacceptable to Lock Up Potentially Innocent People Without Trial or Without Any Indication When, if Ever, They Are Going to Be Released: Ben Emmerson QC Opens the Case of* A and Others vs. the Home Secretary, INDEP. (London), Oct. 5, 2004 (explaining that British officials detained nine men just hours after the Anti-

knows little about the detainees the United Kingdom holds.[50] Yet recent reports reveal that the detainees may be suffering from mental health problems.[51] The uncertainty of their detention seems to bring more hardship to the detainees than their imprisonment.[52] This uncertainty has proved so unbearable that at least one of the detainees is seriously considering choosing deportation to his home country of Algeria, where he faces possible torture or death upon his return, rather than continuing to face unspecified charges and imprisonment in the United Kingdom.[53] The detainees remain imprisoned while they appeal their detention[54] and wait for

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terrorism Act came into force). As of October 2004, a total of seventeen people had been detained, twelve of whom were still incarcerated. *Id.*

50. *See* Nick Cohen, *Guantanamo UK*, OBSERVER, Dec. 14, 2003, at 29 (implying that the United Kingdom purposely keeps the British detainees out of the press to prevent criticism of the Anti-terrorism Act); *see also* Martin Bright, *Prisoner 'A': No Charge, No Trial, No Conviction, and No Release Date. Welcome to Britain's War on Terror*, OBSERVER, Aug. 29, 2004, at 12 (explaining how the public and courts refer to individual detainees by a letter of the alphabet assigned to identify each detainee due to a court order safeguarding the anonymity of the detainees and their families).

51. *See* Ian Robbins et al., The Psychiatric Problems of Detainees Under the 2001 Anti-Terrorism Crime and Security Act, 2004, at 4, http://www.liberty-human-rights.org.uk/issues/internment-psychiatric-report.PDF (reporting on the physical and mental conditions of the detainees and finding that the overwhelming health concern with the detainees is mental deterioration); Robert Verkaik, *Belmarsh Detainees: Terror Suspects are Mentally Ill After Torture, Warn Doctors*, INDEP. (London), Oct. 14, 2004, at 4 (detailing findings that showed that all the detainees are suffering from mental illness, have considered suicide, and some have even intentionally harmed themselves); *see also* Bright, *supra* note 50 (stating that many of the detainees take antidepressants); Sanjay Suri, *Britain's Guantanamo*, INT'L PRESS SERV., June 24, 2004, *available at* http://www.antiwar.com/ips/suri.php?articleid=2868 (explaining that officials had to transfer the detainee known as "G" to a mental facility after he suffered psychotic attacks).

52. *See* Bright, *supra* note 50 (conveying information obtained by an interview with a detainee who expressed his despair at the "unknowns" of his situation).

53. *See id.*

54. *See* Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 25, 27 (considering the Appeals Commission's review as a fact-based appeal from the Home Secretary's decision, and providing further appeal on questions of law). In accordance with the Anti-terrorism Act, the Appeals Commission reviewed the certification of each of the detainees now appealing their imprisonment. *See* Dept. for Constitutional Affairs, *Special Immigration Appeals Commission*, http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/siac.htm (last visited

Parliament to reevaluate the Anti-terrorist Act following the advisory opinion of the House of Lords that found the Anti-terrorism Act incompatible with the European Convention.[55]

2. *The Anti-terrorism, Crime and Security Act of 2001 Gives the U.K. Home Secretary a Draconian Power over Non-citizens*

The origins of the Anti-terrorism Act stem from the United Kingdom's response to the September 11 attacks on the United States.[56] In an attempt to remain compliant with the European Convention, the United Kingdom opted out of Article 5 of the European Convention, which guarantees that States will not unjustly imprison individuals.[57] The conflict between the European Convention and the Anti-terrorism Act arises from Part 4 of the Anti-terrorism Act, which gives the U.K. Home Secretary unfettered

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Dec. 12, 2005) (listing decisions of the Commission). The Commission affirmed the detainees' continued detention, based in large part on closed evidence. *See, e.g.*, E v. Sec'y of State for the Home Dep't, [2003] UKSIAC 4/2002, ¶¶ 2, 11.

55. *Compare* Law Teacher.net, Parliamentary Sovereignty, http://www.lawteacher.net/ELS/Law%20Making/Parlsoveriegn.htm (last visited Dec. 12, 2005) (explaining the concept of parliamentary sovereignty and stating that no judicial body can amend or reverse a law Parliament approves), *with* Joshua Rozenberg, *Second Advocate Resigns Over Detainees Held Without Trial*, DAILY TELEGRAPH (London), Jan. 17, 2005, at 4 (explaining the erosion of the concept of parliamentary sovereignty by an agreement based on the Human Rights Act that promises that the U.K. Parliament will amend any legislation the ECHR declares incompatible with the European Convention).

56. *See* Virginia Helen Henning, Comment, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?*, 17 AM. U. INT'L L. REV. 1263, 1264-70 (2002) (noting the United Kingdom's strong stance behind the United States following the September 11 attacks and detailing the history of the Anti-terrorism Act's swift passage through Parliament).

57. *See* Human Rights Act, 1998, c. 42, § 3 (Eng.) (incorporating the European Convention into domestic law and ordering that domestic laws be interpreted so that they are compatible with the provisions of the European Convention); *see also* The Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 3644/2001, art. 2, *available at* http://www.uk-legislation.hmso.gov.uk/si/si2001/20013644.htm (derogating from Article 5(1) of the European Convention since the expansive powers of the Anti-terrorism Act threatened the United Kingdom's compliance with the European Convention); European Convention, *supra* note 4, art. 5 (guaranteeing individuals threatened with the deprivation of their liberty the right to certain procedures meant to guard against unjustified imprisonment).

power to detain a foreign national without review for a minimum of six months.[58] Six months after the Home Secretary's detention of the individual, the Special Immigration Appeals Commission ("Appeals Commission") reviews the detainee's case and affirms the need for continued detention if the Appeals Commission believes there is a reasonable belief or suspicion the suspect is involved in terrorist activity.[59]

According to the Appeals Commission's own procedural rules, the Appeals Commission may consider evidence that would normally be inadmissible in a court of law.[60] The Commission may appoint a Special Advocate to protect the detainee's interests,[61] but the procedural rules do not allow the Special Advocate to take instructions from the detainees or discuss the evidence with them absent special permission from the Appeals Commission.[62] Furthermore, the procedural rules specify that the Appeals Commission may deny the detainees access to the evidence against them if it concludes that such access could compromise national security concerns.[63] The detainees may appeal any ruling by the

58. Anti-terrorism, Crime and Security Act, §§ 21-26 (setting a procedure for the detention and appeal of suspected international terrorists whereby the Home Secretary may detain a foreign national on the basis of a reasonable belief or suspicion the individual has links to terrorism).

59. *See id.* § 26 (granting review upon a detainee's application for appeal or under the Commission's own determination that a review is necessary because of a change in the state of affairs). The Anti-terrorism Act requires the Appeals Commission to review appeals "as soon as is reasonably practicable" following the six month period. *Id.* Further, it provides that the reasonable suspicion needed to affirm the continued detention can arise from the individual's acts, membership in terrorist organizations, or links to terrorist groups. *Id.* § 21.

60. Special Immigration Appeals Commission (Procedure) Rules, 2003, S.I. 2003/1034, § 44 (relaying the rules of evidence that govern the Appeals Commission's procedures, including, for example, a provision allowing witness testimony in either oral or written form).

61. *Id.* §§ 34-35 (allowing the special advocate to make submissions at any hearings from which the government excludes the detainees).

62. *Id.* § 36 (specifying that the detainee may only communicate with the special advocate in writing, and the special advocate may not respond to the detainee's communication, except to acknowledge the receipt of the written communication).

63. *See id.* § 37 (granting the U.K. Home Secretary the right to submit closed materials to the Appeals Commission and requiring the Secretary to provide the Special Advocate with a copy of the material, the reasons for the material's

Appeals Commission concerning a question of law to the Court of Appeal.[64]

3. *The Detainees' First Appeal: Convincing the House of Lords that the Anti-terrorism Act Is Discriminatory and Disproportionate*

The detainees' first appeal ended before the House of Lords, where the detainees convinced the Law Lords that the United Kingdom violated the European Convention by distributing rights and freedoms in a discriminatory manner[65] and imposing severe limitations on civil rights beyond what the perceived threat of terrorism justified.[66] Following the House of Lords decision, the Home Secretary proposed changes to the Anti-terrorism Act meant to eliminate its discriminatory and disproportionate provisions.[67] Among the proposed changes is a recommendation to broaden the scope of the Anti-terrorism Act, so that the provisions apply to all persons, irrespective of nationality.[68] Moreover, the Secretary

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disclosure, and if possible, a statement of the material in a form that will not threaten public interest and that can be served to the detainee). The Appeals Commission may hold a hearing on the Secretary's request for closed evidence and choose to uphold or deny the secrecy of the evidence. *Id.* § 38. Should the Appeals Commission deny the Secretary's request for concealment, the Secretary may decide against using the evidence in the Appeals Commission proceedings. *Id.*

64. *See* Anti-terrorism, Crime and Security Act, § 25 (allowing appeals if brought within the first three months of detention or with the approval of the Commission).

65. A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, ¶ 33 (finding the Anti-terrorism Act discriminatory since it only applies to foreign nationals when there exists a genuine threat of terrorism from British citizens as well).

66. *Id.* ¶ 43 (characterizing the Anti-terrorism Act as disproportional because the Act has the potential for detaining persons who do not pose a threat, and yet the Anti-terrorism Act does not fully address the claimed threat of national security since the measures only apply to non-citizens).

67. *See* 430 PARL. DEB., H.C. (6th ser.) (2005) 305-09 (statement of Charles Clark, Sec'y of State for the Home Dep't) (defending the survival of the Anti-terrorism Act and introducing "control orders" in the form of house arrest for all persons the Home Secretary suspects of terrorist involvement but cannot prosecute for a particular reason).

68. *See id.* at 307 (acknowledging that the proposal to apply the Anti-terrorism Act to all persons, including British citizens, represents a dramatic increase in the power of the Home Secretary, but contending that such an increase in power is necessary to combat terrorism).

proposed house arrest in lieu of imprisonment for persons accused of terrorism under the Anti-terrorism Act.[69] However, the Secretary refused to release the current detainees to house arrest until Parliament approved new legislation.[70]

4. *The Detainees' Second Appeal: Questioning the Evidence Under the Provisions of the European Convention*

The detainees also challenged their detention by claiming that the British government used torture-induced evidence in the Appeals Commission proceedings that determined the need for the detainees' continued detention.[71] Although Parliament and the Home Secretary are considering amendments to the Anti-terrorism Act, neither Parliament nor the Secretary have introduced amendments that address the evidentiary procedures that allow for the potential use of torture-induced evidence.[72]

On August 11, 2004, the Court of Appeal addressed the use of torture-induced evidence in the Appeals Commission proceedings.[73]

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69. *See id.* at 308 (adding that the surveillance and restrictions would vary depending on the threat each individual posed).

70. *See id.* (justifying his decision not to release the detainees because of the threat they pose, and adding that he would only revoke their detention if the threat changes). While the possibility of house arrest rather than imprisonment is generally good news for the detainees, at least two of the detainees are making a stance by stating that they may choose to remain detained since house arrest would only "be replacing one type of indefinite detention without trial with another." *See* Karen Mcveigh, *Terror Suspects May Opt for Jail Over House Arrest*, SCOTSMAN, Feb. 1, 2005, at 4.

71. *See generally* Diana Muriel, *Thwarting Terror Cells in Europe*, CNN, Jan. 23, 2002, *available at* http://archives.cnn.com/2001/WORLD/europe/10/25/thwarting.cells/index.html (averring that the use of torture during the interrogation of suspected terrorist Djamel Beghal led to arrests of other suspected terrorists in Europe).

72. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, ¶ 71 (expressing no opinion on the detainees' claims of alleged breaches of Articles 3 and 6); 430 PARL. DEB., H.C. (6th ser.) (2005) 305-09 (statement of Charles Clark, Sec'y of State for the Home Dep't) (focusing only on the proportionality and discriminatory provisions of the Anti-terrorism Act for the proposed amendments).

73. A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶¶ 85, 126 (upholding the Appeals Commission's use of the evidence based in part on the view that investigating the evidence could hinder the cooperation of the United Kingdom with other nations in the global effort to thwart terrorism).

All three justices dismissed the detainees' first argument that admission of torture-induced evidence violated obligations under the Convention Against Torture.[74] Two of the justices also dismissed a similar argument that the admission of evidence that was possibly torture-induced violated the European Convention.[75] These justices agreed that weighing the evidence provided appropriate protection under the Article 6 fair trial standard.[76]

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74. *See id.* ¶¶ 119, 266, 434 (reasoning that the United Kingdom had not incorporated the Convention Against Torture into U.K. domestic law and maintaining that the courts possess no authority to apply international law until it is incorporated into a statute). The detainees alleged that the United Kingdom used torture-induced evidence in the detainees' legal proceedings, and that this directly violated Article 15 of the Convention Against Torture, which prohibits the use of any statements "established to have been made as a result of torture" as evidence in any proceeding. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, art. 15, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture]. The Committee Against Torture—the international body established to monitor the implementation of the Convention Against Torture—considered the extraterritorial application of Article 15 in *P.E. v. France*. *See* P.E. v. France, Communication No. 193/2001, U.N. CAT, 29th Sess., U.N. Doc. CAT/C/29/D/193/2001 (2001), *available at* http://www.worldlii.org/int/cases/UNCAT/2002/14.html [hereinafter UNCAT Communication]. *P.E.* involved the arrest of a German national in France for suspicion of involvement with a terrorist organization. *Id.* ¶¶ 1.2, 2.1. Spain requested extradition of the German national based on a statement from a third party implicating the individual in a plot to attack the Spanish air force. *Id.* ¶ 2.4. Before France could extradite the German national, the third party retracted his accusation, claiming that Spanish officials tortured him during questioning. *Id.* ¶ 5.4. Nevertheless, French courts agreed to the extradition. *Id.* ¶ 2.13. When the Committee Against Torture considered *P.E.*, the threshold issue was whether Article 15 engaged the responsibility of a Member State to question a third State's methods of obtaining information. *Id.* ¶ 4.14. The Committee Against Torture held that, while France had a duty to ascertain the veracity of the allegations, it was ultimately for the complainant to "demonstrate that [the] allegations are well-founded." *Id.* ¶¶ 6.3-6.6.

75. *A*, [2004] EWCA Civ. 1123, ¶ 83 (recalling that the ECHR regularly holds that admission of evidence is a matter for national courts to decide).

76. *Id.* ¶ 84 (highlighting the complainant's argument regarding the submission of the evidence allegedly obtained through torture and concluding that weighing the evidence is appropriate since it is not certain whether torture induced the statements). *But see id.* ¶ 426 (Neuberger, L.J., dissenting) (proclaiming that the prejudicial nature of the evidence outweighed the evidence's probative value, and the court should exclude the statements from the Appeals Commission's proceedings). Justice Neuberger maintained that the burden of proving the absence of torture should fall on the prosecution since the Home Secretary is the party attempting to rely on the statements. *Id.* ¶¶ 503-13. He suggested a balance of

C. THE EVIDENCE SUGGESTING THE UNITED STATES MAY BE ENGAGING IN PRACTICES OF TORTURE AND ILL-TREATMENT IN THE CUSTODY AND INTERROGATION OF U.S. DETAINEES

The detainees' claim that the United Kingdom is using torture-induced evidence provided by the United States is particularly important given recent reports accusing the United States of engaging in torture in Cuba, Afghanistan, and Iraq as a tactic to fight the War on Terror.[77] While the Bush administration stated that it employs "unconventional methods" to fight the war,[78] it denies that the U.S. military engages in torture or other forms of ill-treatment.[79] This denial contradicts an increasing amount of evidence suggesting the U.S. military actively employs tactics that fit in the realm of ill-treatment or torture.[80]

The most detailed account of life inside Guantanamo Bay comes from three British detainees whom the United States released without charge in March 2004, after nearly two and a half years of detention.[81] The former detainees claimed that, inter alia, the military

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probabilities standard for the prosecution to overcome, preferring the civil standard rather than the criminal standard of proof beyond a reasonable doubt, as the criminal standard would require undue hardship of the government since the government was not a party to the interrogations. *Id.* ¶ 514.

77. *See infra* notes 81-92 and accompanying text (illustrating, through personal accounts and the exposure of classified government documents, the evidence suggesting the United States may be engaging in torture in its fight against terrorism).

78. *See Bush Accuses Kerry of Misunderstanding Terror Threat*, THE FRONTRUNNER, Oct. 12, 2004.

79. *See* Patrick E. Tyler, *Ex-Guantanamo Detainee Charges Beating*, N.Y. TIMES, Mar. 12, 2004, at A10 (quoting a Pentagon spokesperson as saying that all detainees are treated humanely in accordance with the Geneva Convention); *see also Bush Denies Ordering Torture of Detainees, Releases Official Documents*, THE FRONTRUNNER, June 23, 2004 (quoting President Bush as stating, "[w]e do not condone torture. I have never ordered torture. I will never order torture").

80. *See infra* notes 81-92 and accompanying text.

81. *See* SHAFIQ RASUL ET AL., COMPOSITE STATEMENT: DETENTION IN AFGHANISTAN AND GUANTANAMO BAY ¶¶ 2, 56 (2004) (reporting on the three detainees' experiences in American custody in Afghanistan and Guantanamo Bay).

beat them, threatened them with dogs,[82] systematically deprived them of sleep,[83] subjected them to hours of short-shackling at freezing temperatures,[84] and exposed them to deafening music.[85]

Other accounts by detainees and unnamed government sources corroborate the composite statement of the three British detainees.[86] One military official, Specialist Shawn Baker, described a training drill gone awry, where his commander ordered him to put on an orange jump suit and pose as a detainee.[87] Officials, who did not realize Specialist Baker was posing for training, attacked him, slamming his head against the floor, resulting in a traumatic brain injury to Specialist Baker.[88] In addition, Moazam Begg, a British detainee at Guantanamo Bay, claimed he witnessed the deaths of two detainees "at the hands of the U.S. military personnel" in a letter his attorney assumed must have passed through the censor by mistake.[89]

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82. *See id.* ¶¶ 269-71 (claiming that military guards intimidated the detainees with dogs and one of the dogs attacked a detainee, severely injuring the detainee's leg).

83. *See id.* ¶ 52 (explaining that the guards constantly moved the detainees throughout the night to prevent them from sleeping).

84. *See id.* ¶ 183 (describing short-shackling as an uncomfortable position where the detainee's hands and feet are tied together for long periods of time).

85. *See id.* ¶ 226. Additionally, there was often a lack of food, water, and clothing at holding sites in Afghanistan and Guantanamo Bay and the detainees were so dehydrated and famished that they attacked one another over food. *Id.* ¶¶ 6-7, 65. U.S. Secretary of Defense Donald Rumsfeld approved at least some of this harsh treatment at Guantanamo Bay. *See Bush Denies Ordering Torture of Detainees, Releases Official Documents*, *supra* note 79 (pointing out that in November 2002, Rumsfeld approved techniques such as the use of dogs to threaten detainees and wall-standing for up to four hours).

86. *See, e.g.*, Global Policy Forum, *Guantanamo Bay Prisoners Complain of a Year Long Torture by U.S. Military*, Mar. 26, 2003, http://www.globalpolicy.org/wtc/analysis/2003/0326gua.htm (last visited Dec. 12, 2005) (recounting that many of the detainees had diarrhea and tuberculosis, and that intelligence agents beat and tortured the detainees).

87. *See Bush Denies Ordering Torture of Detainees, Releases Official Documents*, *supra* note 79 (conveying Specialist Baker's account of the incident and noting that the drill was meant to train the guards how to handle uncooperative detainees).

88. *See id.*

89. *See* Richard Alleyne & Nick Britten, *Briton's Letter 'Tells of Torture in Guantanamo,'* DAILY TELEGRAPH (London), Oct. 2, 2004, at 13 (relaying Moazam

The reported deaths of two detainees who died in the same week in December 2002 support Mr. Begg's claims.[90]

A Department of Justice memorandum written in August 2002 indicates the allegations of torture may bear some substance.[91] The memorandum surfaced in the press and revealed that the Bush administration considered ways of justifying the use of torture under international law.[92]

II. ANALYSIS

The British detainees should bring their claim regarding the potential use of torture-induced evidence before the ECHR if the detainees lose their appeal and Parliament does not address the troublesome evidentiary procedures of the Appeals Commission.[93]

Begg's statements that the military subjected him and other detainees to torture and created a terrifying interrogation environment).

90. *See* Peter Slevin, *U.S. Pledges to Avoid Torture; Pledge on Terror Suspects Comes Amid Probes of Two Deaths*, WASH. POST, June 27, 2003, at A11 (showing that although military pathologists blamed a heart attack for one death and a blood clot in the lung for the other death, both bodies exhibited injuries attributable to blunt force trauma). The deaths of the two detainees occurred in Bagram in December 2002, the same time Mr. Bregg was held there. *Id.*

91. *See Shameful Revelations Will Haunt Bush*, ECONOMIST, June 18, 2004, at 1.

92. *See id.* (noting that the memorandum interpreted the United Nations Convention Against Torture and the U.S. ratification of the treaty as tolerating torture under some circumstances). The interpretations are based on a narrow definition of torture, the president's authority during war-time, and immunity through self-defense and necessity defenses. *Id.*; *see also* Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3 (setting forth arguments against the memorandum which suggest the Department of Justice was attempting to circumvent international law). *See generally* United States Dept. of Justice Office of Legal Counsel, *About OLC*, http://www.usdoj.gov/olc/ (last visited Nov. 21, 2005) (noting that the agency serves as legal advisor to the President and executive agencies and provides written and oral legal opinions upon the request of the President).

93. *See* Council of Europe, *Notes for the Guidance of Persons Wishing to Apply to the European Court of Human Rights*, ¶ 6 (2004), http://portal.coe.ge/downloads/NOTES-ENG.pdf (last visited Dec. 12, 2005)

The ECHR, as an international guardian for the protection of basic human rights and civil liberties, is likely to be a sympathetic forum for the British detainees whom the United Kingdom have imprisoned indefinitely without charge or a proper trial to establish the detainees' guilt or innocence.[94] At least two articles of the European Convention call into question the United Kingdom's use of third party statements obtained under torture. First, the ECHR may question whether the United Kingdom's use of hearsay evidence, and the limited adversarial nature of the Appeals Commission proceedings, denied the detainees their right to a fair trial under Article 6.[95] Second, the ECHR may consider whether the absolute prohibition against torture in Article 3 prohibits the use of evidence obtained under torture.[96]

A. STATES MUST EXCLUDE EVIDENCE OBTAINED UNDER TORTURE OF THIRD PARTIES TO COMPLY WITH THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION

It is probable that the ECHR would hold that the admission of the questionable evidence in the detainees' proceedings resulted in an unfair trial. The examination of the Appeals Commission proceedings demonstrate an overall unfairness due to the detainees' limited rights in the proceedings, the inability to question witnesses, the possibility of coerced statements and related lack of reliability and accuracy from such statements, and the substantial reliance of the Appeals Commission on the questionable evidence. Given the totality of these inequitable conditions, the ECHR would likely find

(stating that an individual may only turn to the ECHR for help after the individual has exhausted all domestic remedies).

94. *See* Rozenberg, *supra* note 55 (noting that the United Kingdom is likely to fear an application to the ECHR since the ECHR would almost certainly agree with the House of Lords).

95. *See* discussion *infra* Part II.A (examining whether the Appeals Commission adequately safeguarded the detainees' rights and whether the admission of the third party statements harmed the fairness of the proceedings).

96. *See* discussion *infra* Part II.B (finding that the ECHR would likely consider the use of evidence obtained under torture a violation of Article 3 of the European Convention).

that the Court of Appeals' decision to weigh the evidence did not adequately protect the detainees from the danger of an unfair trial.

1. The Evidentiary Rules of the Appeals Commission Proceedings Did Not Adequately Protect the Detainees' Rights

The proceedings of the Appeals Commission presented a number of disadvantages to the detainees in their efforts to defend themselves against the government's claims of their involvement in terrorist activities.[97] Even the U.K. Parliament itself acknowledged the unfairness of the proceedings and made special mention of two of the more worrisome problems with the evidentiary procedures: the unknown nature of the closed evidence and the limits on the special advocate to safeguard the detainees' interests.[98]

While the Appeals Commission provides for a special advocate to oversee the detainees' interests, the restraint against conferring with the detainees prevents the special advocate from doing little more than pointing out obvious problems in the evidence.[99] Moreover, the

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97. *See generally* Ferrantelli v. Italy, 1996-III Eur. Ct. H.R. 937, 950 (proclaiming that, even though admissibility of evidence is generally a matter for the States to determine, the State must respect the rights of the defense in regards to the fairness of the evidentiary procedures to satisfy the fair trial requirement under Article 6).

98. *See*, JOINT COMMITTEE ON HUMAN RIGHTS, UNITED KINGDOM PARLIAMENT, FIFTH REPORT ¶¶ 51-59 (2003) (stating that the limited role of the special advocate and the closed evidence prevents the detainees from dealing with the accusations against them in a meaningful manner). The Joint Committee on Human Rights defined "closed evidence" as evidence withheld from the detainee for reasons of national security. *Id.* Notwithstanding its concern regarding these evidentiary procedures, the Joint Committee felt that the potential threat to the nation justified the inequality in the proceedings. *Id. See generally* Parliament, *Joint Committee on Human Rights*, http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm (explaining that the Joint Committee on Human Rights is made up of members of Parliament who oversee and provide proposals for issues concerning the Human Rights Act 1998).

99. *See* S v. Sec'y of State for the Home Dep't, [2004] UKSIAC 25/2003, ¶ 39, *available at* http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/outcomes/sc252003(s).htm (acknowledging the difficulty the special advocate faces in making an effective challenge to the evidence without conferring with the detainee); *see also* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 98, ¶¶ 51-59 (addressing the problems the special advocate faces in defending a detainee, and noting that while the special advocate may apply to the Appeals Commission for permission to discuss the evidence with the detainee, there are no criteria for

secrecy of the evidence precluded the detainees from proving their innocence by providing alibis or innocent explanations to rebut the accusatory statements.[100] In essence, the procedural rules prevented the detainees from attaining the equality of arms balance that the ECHR has consistently upheld as inherent to an adversarial process and fair trial.[101] This lack of an adversarial challenge to the closed evidence tainted the truth-finding process and prevented the Appeals Commission from making a fully informed decision on the suspiciousness of the detainees.[102]

The inequitable process continued throughout the detainees' appeal, as the Home Secretary also denied the appellate court access to the closed evidence.[103] This denial of access to decisive evidence forced the Court of Appeal to rely solely on the judgment of the Appeals Commission in regards to the evidence, and effectively denied the detainees a real opportunity to appeal the judgment of the

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deciding these requests). *But see* Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 471-72 (1996) (proposing in dicta the Canadian Immigration Act as a model for balancing national security and the adversarial process). The Canadian Immigration Act sets forth the procedures that the United Kingdom subsequently replicated in Part 4 of the Anti-terrorism, Crime and Security Act 2001 by allowing for the use of closed evidence, provided a security-cleared counsel represents the rights of the defense. Immigration Act, R.S.C., ch. I-2, § III (1985).

100. *See* Cohen, *supra* note 50; *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 1001-02 (2002) (recognizing a similar problem with the use of secret evidence in immigration proceedings in the United States). The author found that once the U.S. courts forced the government to reveal the evidence, many detained immigrants were able to rebut the evidence and prove their innocence. *Id.*

101. The consistency of the ECHR in upholding the need for adversarial proceedings by giving both the prosecutor and the detainees an equal footing with which to participate is best seen in cases such as Migon v. Poland, Eur. Ct. H.R., App. No. 24244-94, ¶ 68 (2002); Winterwerp v. Netherlands, 33 Eur. Ct. H.R. (ser. A) at 24 (1979); and Sanchez-Reisse v. Switzerland, App. No. 9862/82, 9 Eur. H.R. Rep. 71 (1987).

102. *See The Use of Secret Evidence in Immigration Proceedings and H.R. 2121 Before the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of David Cole, Professor, Georgetown University Law Center), *available at* http://www.fas.org/sgp/congress/2000/cole.html [hereinafter *Use of Secret Evidence*].

103. *See* A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶ 69 (acknowledging that the Court of Appeal would prefer to work with "established facts than with hypotheses").

subordinate Appeals Commission.[104] In light of the palpable inequity of arms, the ECHR may find that the secrecy of the evidence and the limits on the special advocate denied the detainees the opportunity to challenge the reliability and significance of the evidence.[105]

2. The ECHR Would Likely Recognize that the Inability of the Detainees to Question Witnesses Contributed to the Overall Unfairness of the Appeals Commission Proceedings

The detainees' case also presents the added problem of hearsay evidence, which the European Convention explicitly prohibits through the Right of Confrontation in Article 6.[106] Yet the United Kingdom could attempt to invoke the *Ferrantelli* exception by convincing the ECHR that the Right of Confrontation should not

104. *See* Schops v. Germany, App. No. 25116/94, ¶ 44 (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (requiring appellate courts to review both procedural and substantive judicial procedures, and explaining that the substantive examination should entail consideration into whether the detention is lawful by examining the reasonableness of the suspicion upon which the detention is based).

105. *See* Allan v. United Kingdom, Eur. Ct. H.R., App. No. 48539/99, ¶ 43 (2002) (suggesting that courts may meet the Article 6 requirement of a fair trial by allowing the defendant to challenge the authenticity of the evidence). In *Allan*, the defendant argued that the State convicted him of murder based on the testimony and recording of the complainant's conversation with a police informant placed inside the complainant's cell. *Id.* at 2. The ECHR held that use of this evidence at trial violated the complainant's right to silence since the evidence suggested the statements were coerced. *Id.* at 2, 15. However, the ECHR held that the use of the evidence at trial did not violate the complainant's right to a fair trial since the State courts thoroughly considered the admissibility of the evidence and decided it had probative value and was not completely unreliable. *Id.* at 14.

106. *See* European Convention, *supra* note 4, art. 6 (according individuals the right to examine witnesses against them in criminal proceedings); *see also A*, [2004] EWCA Civ. ¶¶ 381-82 (conceding that in other proceedings in the United Kingdom, third party statements are inadmissible if considered hearsay); Engel & Others v. Netherlands, 22 Eur. Ct. H.R. (ser. A) at 34 (1976) (recognizing the ECHR has held that a criminal charge has an "autonomous" meaning that does not necessarily depend on a State's labeling of the offense); FRANCIS G. JACOBS & ROBIN C. A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 142 (3d ed. 2002) (noting this independent approach allows the ECHR to look at the substance of State action and prevent Member States from avoiding their obligations under the European Convention by classifying a criminal charge under the guise of a different offense).

apply since the United Kingdom is not responsible for the absence of the witnesses, who remain in the custody of the United States.[107]

In order to convince the ECHR to allow an exception to the Right of Confrontation, the United Kingdom would have to convince the ECHR that the Appeals Commission proceedings sufficiently protected the detainees' rights despite the detainees' inability to examine the witnesses.[108] In this respect, the anonymity of the witnesses works against the United Kingdom's argument, since as *Kostovski* showed, the ECHR does not look kindly upon the use of anonymous witness statements.[109] In addition, the fact that the Appeals Commission relied on the anonymous statements to a decisive extent in its decisions[110] is likely to be an important factor for the ECHR, which repeatedly has held that questionable evidence should not form the basis for a court's judgment.[111]

Moreover, the proceedings for the detainees are even more disturbing than the proceeding in *Kostovski*, where the State courts at the very least allowed the defendant to submit a list of questions for the court to ask the witnesses.[112] The United Kingdom did not give

107. *See* Ferrantelli v. Italy, 1996-III Eur. Ct. H.R. 937, 950-51 (upholding the fairness of the proceedings despite Italy's use of hearsay evidence obtained after the witness' death because Italy had no part in causing the deaths of the witness).

108. *See* Kostovski v. Netherlands, 166 Eur. Ct. H.R. (ser. A) at 20-22 (1989) (ruling that the absence and anonymity of the witnesses handicapped the complainants' defense and resulted in an unfair trial for the complainants).

109. *See id.* at 20 (reasoning that the anonymity of a witness prohibits the opposing counsel from demonstrating the witness' unreliability, prejudice, or hostility). The ECHR also noted that the absence of the witness precludes the court from observing the witness' demeanor during questioning, thus depriving the court the opportunity to form its own impression of the witness' reliability. *Id.*

110. *See, e.g.*, E v. Sec'y of State for the Home Dep't, [2003] UKSIAC 4/2002, ¶ 10, *available at* http://www.courtservice.gov.uk/judgments/siac/outcomes/Sc42002E.htm (holding that "the material which drives us to [our] conclusion is mainly closed"); G v. Sec'y of State for the Home Dep't, [2003] UKSIAC 2/2002, ¶¶ 6, 15 (conceding that the main evidence consisted of closed material that confirmed the decision for the detainees' continued imprisonment).

111. *See, e.g.*, *Kostovski*, 166 Eur. Ct. H.R. (ser. A) at 21 (finding that the use of anonymous witnesses and the court's substantial reliance on their testimony resulted in an unfair trial for the defendant).

112. *Id.* at 20.

the detainees a similar right, nor did it provide an alternative.[113] In sum, there is little to suggest that the United Kingdom adequately protected the detainees' interests in the absence of allowing confrontation with witnesses, and the ECHR is not likely to find the proceedings fair under the circumstances.

3. *The Dubious Circumstances of the Third Party Statements Cast Doubt on Whether the Statements Were Voluntary, Reliable, and Accurate*

The ECHR would likely be troubled by the evidence that suggests the United Kingdom is using statements allegedly obtained by the United States through torture of U.S. detainees in Cuba and Afghanistan.[114] If U.S. authorities obtained the evidence against the detainees through the use of torture, as the detainees claim, the use of such evidence seriously undermines the fairness of the proceedings due to the unreliability of the evidence.[115]

Ample evidence demonstrates that torture can yield false statements.[116] The tortured are anxious to end their suffering and the

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113. *But cf.* Edward Alden et al., *Legal Cases in Germany and the United States Show How Authorities with Interests that Often Diverge Are Inching Towards Greater Co-operation in Prosecuting Suspects*, FIN. TIMES, Oct. 7, 2004, at 19 (reporting that the United States complied with Germany's request for evidence from the U.S. detainees after defense lawyers for suspected terrorists in Germany pressed the courts to exclude statements made by the detainees).

114. *See* Cohen, *supra* note 50 (reporting that a secret service agent admitted that Britain's secret intelligence agency uses statements obtained under torture); *see also* Andrew Woodcock, *U.K. Diplomat Condemns 'Torture-Induced Intelligence,'* PRESS ASS'N, Oct. 11, 2004 (arguing that information obtained through torture is normally unreliable and thus unfair).

115. *See infra* notes 116-119 and accompanying text (explaining that evidence obtained under torture is inherently unreliable and often inaccurate).

116. *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 249 (2002) (recounting a case in which Philippine authorities used torture to induce a prisoner into confessing even though no one believed he was guilty); *In re* Application of the United States for Material Witness Warrant, 214 F. Supp. 2d 356, 357-60 (S.D.N.Y. 2002) (describing the case of an Eqyptian national that involved a torture-induced confession). The F.B.I. detained the Egyptian as a material witness after a security guard found a copy of the Qur'an and a transmitter capable of being used for air-to-ground communication in his room. *Id.* at 358. During interrogations Higazy falsely confessed to owning the transmitter. *Id.* at 360. The F.B.I. later discovered that the security guard had repeatedly lied to them, and an

torturers are usually very suggestive of the admissions they desire to hear.[117] The potential for torture-induced evidence in the detainees' case expounds the false statement problem because the statements purportedly come from third parties, and accusatory statements of others do not involve the same counter-intuitiveness and self-destructiveness a tortured person copes with when making a confession.[118] In addition, the third party statements allegedly obtained under torture are inherently more unfair to the detainees than self-incriminating statements obtained under torture, where the detainees could at least testify about the circumstances of the interrogation.[119]

Ferrantelli suggests that the ECHR would require the detainees to present evidence that indicates something more than suspicious circumstances suggesting U.S. authorities induced the third party statements under torture.[120] The detainees should be able to meet this standard, considering that even the Court of Appeal found that a "serious issue" existed regarding the presence of torture after it considered the various accounts of former detainees and military officials, as well as the exposure of government documents implying

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American pilot staying in the same hotel was the actual owner of the transmitter. *Id.* at 359.

117. *See, e.g.*, SHAFIQ RASUL ET AL., *supra* note 81, ¶¶ 185-200 (noting an interrogator persistently insisted the detainee should admit to being in a video that took place in Afghanistan even though the detainee was working and attending college in England at that time). Shafiq claims the guards isolated, short shackled, and interrogated him for long periods of time for five to six weeks before he finally relented. *Id.* ¶ 199. He stated, "I was going out of my mind and didn't know what was going on. I was desperate for it to end and therefore eventually I just gave in and admitted to being in the video." *Id.*

118. *See* James R. Agar, *The Admissibility of False Confession Expert Testimony*, 1999 ARMY LAW. 26, 27 (explaining the false confession theory that suspects usually do not offer spontaneous confessions because self-condemnation is abnormal).

119. *See* A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶ 66 (Neuberger, L.J., dissenting).

120. *See* Ferrantelli v. Italy, 1996-III Eur. Ct. H.R. 937, 943-51 (noting that the suspicious death of the witness in *Ferrantelli*, when balanced with the ECHR's conclusion that the State was not responsible for the witness' death, was insufficient to show unreliability).

U.S. approval of torture that indicate a use of torture in U.S. tactics.[121]

Furthermore, the United Kingdom's decision against using confessions obtained at Guantanamo Bay against four British men whom the United States recently released to U.K. custody is also likely to sway the ECHR into believing that there is good cause to suspect that the evidence is torture-induced.[122] The United Kingdom's acknowledgment that statements obtained in Guantanamo Bay would be inadmissible in a British court evidences the potential unreliability and involuntariness of such statements, and the ECHR is not likely to allow the United Kingdom to use evidence that it acknowledges itself is questionable merely because the detainees are processed under the guise of a civil proceeding.[123]

4. *The Court of Appeal Improperly Held that Weighing the Evidence Sufficiently Protected the Detainees' Rights*

The Court of Appeal erroneously failed to recognize that the European Convention's provision for a fair trial requires that the United Kingdom establish better safeguards to allow the detainees a fair trial in light of the secrecy and questionable nature of the evidence. Although the U.K. method of weighing the evidence might have alleviated some of the unfairness, the approach was unlikely to dispel the prejudicial effect of the evidence and the tendency of fact-

121. *See A*, [2004] EWCA Civ. ¶ 122 (noting that the detainees submitted more than four volumes of material on the evidence of torture); discussion *supra* Part I.C (detailing personal accounts of detainees' lives inside Guantanamo Bay and discussing the Department of Justice memorandum that interpreted torture as justifiable under international law).

122. *See* Jason Bennetto et al., *Guantanamo Britons Return: Police Chief Rules Out Prosecutions that Rely on Guantanamo Evidence*, INDEP. (London), Jan. 26, 2005, at 4 (reporting that the police commissioner said the prosecution would either have to obtain a confession from the four men or find additional evidence before the case could be tried).

123. *See id.* (discussing the disparate treatment by the United Kingdom of the recently released Guantanamo Bay detainees as compared with the treatment of the U.K. detainees). The police will likely release the previously held Guantanamo Bay detainees if there is insufficient evidence to charge them with a crime while the U.K. detainees continue to be detained without a trial. *Id.* The Commissioner added that he did not favor trying the released prisoners under the Anti-terrorism Act in an attempt to detain them without a trial. *Id.*

finders to overvalue negative facts.[124] Moreover, the decision by the United Kingdom not to use evidence obtained in Guantanamo Bay against recently released U.S. detainees demonstrates that the evidence has little probative value.[125]

In addition, the Court of Appeal should have acknowledged that the United Kingdom's low burden of proving a reasonable suspicion or belief makes the prohibition of potential torture-induced evidence even more imperative.[126] Although the Home Secretary has six months to gather legitimate evidence to meet this low standard of proof,[127] the decisions of the Appeals Commission show that the Commission repeatedly relied on closed evidence to substantiate the detainees' continued imprisonment.[128] Given the low standard of proof, this is hardly understandable, and it suggests that instead of actively pursuing the investigations into the detainees, the Home Secretary chose to rely on the closed evidence as a convenient means of keeping the detainees imprisoned.[129] By allowing the Appeals

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124. *See* Miguel A. Mendez, *California's New Law on Character Evidence: Having Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1045-48 (1984) (demonstrating that people are more likely to give credence to negative evidence than positive evidence of the same magnitude which may lead to incorrect results).

125. *See* Bennetto et al., *supra* note 122 (quoting the police commissioner as saying that the evidence obtained in Guantanamo Bay would be absolutely inadmissible in a British court due to the torturous methods by which it was obtained).

126. *See* Anti-terrorism, Crime and Security Act, 2001, c. 24, § 25 (requiring the Home Secretary to prove that there are reasonable grounds for believing or suspecting the detainee is involved in terrorist activities); Audrey Gillan, *No Right to Trial for 10 Terror Suspects: Men Can Be Detained Indefinitely, Judges Rule*, GUARDIAN, Oct. 30, 2002, at 6 ("The shockingly low burden of proof . . . violates the right to the presumption of innocence.").

127. *See* Anti-terrorism, Crime and Security Act, § 26 (encouraging the State to gather evidence "as soon as is reasonably practicable").

128. *See, e.g.*, *supra* note 110 (providing examples where the Appeals Commission relied on closed evidence to a decisive extent); A v. Sec'y of State for the Home Dep't, [2003] UKSIAC 1/2002/2, ¶ 27 (mentioning that the decision to continue the detainees' imprisonment can only be properly sustained by analyzing closed evidence).

129. *See* Bright, *supra* note 50 (reporting that until recently no British official attempted to interrogate any of the detainees regarding their alleged involvement

Commission to continue to weigh the evidence rather than excluding it from the proceedings, the Court of Appeal essentially encouraged the Home Secretary to carry on "sloppy practices" without regard to the effect such evidence has on the detainees' rights.[130] Accordingly, the Court of Appeal's reliance on the method of weighing the evidence is mistaken since it failed to adequately protect the detainees' right to a fair trial set forth under Article 6 of the European Convention.

B. THE ECHR MAY INTERPRET ARTICLE 3 OF THE EUROPEAN CONVENTION AS REQUIRING THE EXCLUSION OF EVIDENCE OBTAINED UNDER TORTURE

The opinion in *Soering v. United Kingdom* indicated that the ECHR may apply Article 3 extraterritorially when a State's actions are causally linked to torture in another country.[131] Therefore, if the ECHR determines that the European Convention's ban on torture includes a ban on evidence obtained under torture, the ECHR could find the United Kingdom liable for a violation of Article 3.[132] Moreover, by following the reasoning set forth in *Soering*, the ECHR may require the United Kingdom to investigate the circumstances of the evidence.[133] This holds true regardless of any reasons the United Kingdom may proffer for using the evidence.[134]

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with terrorist organizations). After the press criticized the Home Office for its lack of questioning, the Home Secretary mailed letters to the detainees requesting to discuss any intelligence the detainees may possess. *Id.*

130. *See Use of Secret Evidence*, *supra* note 102 (evaluating the use of secret evidence in the Immigration and Naturalization Service proceedings in the United States and declaring that the lack of an adversarial challenge in the evidence encourages the government to rely on substandard evidence considered "innuendo and rumor").

131. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34-35 (1989) (enforcing Article 3 obligations when a State's extradition of an individual risks acts of torture or ill-treatment).

132. *See* discussion *infra* Part II.B.2 (explaining how the use of torture-induced evidence is causally related to the practice of torture).

133. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 88 (stating that the European Convention's ban on torture does not allow for exceptions and places liability on a State for actions that risk foreseeable violations of Article 3).

134. *See* discussion *infra* Part II.B.3 (noting that the ECHR has explicitly stated that the fight against terrorism was not a reason for avoiding Article 3 obligations).

1. The ECHR May Find that the European Convention's Ban on Torture Implicitly Prohibits the Use of Evidence Obtained Under Torture

The ECHR could interpret the European Convention's ban on torture as implicitly prohibiting the use of evidence obtained under torture. In interpreting such an implicit obligation under Article 3, the ECHR may refer to the Convention Against Torture, which explicitly prohibits States from using statements made as a result of torture in any proceeding.[135] By following the reasoning of the drafters of the Convention Against Torture, the ECHR would recognize that the admission of torture-induced evidence in a proceeding provides an important motive for the continued use of torture.[136] Through such analysis, the ECHR could hold that the United Kingdom's actions are causally linked to the occurrence of torture and hold the United Kingdom responsible for a violation of Article 3.[137]

Such a finding is probable, especially in light of the ECHR's willingness to refer to the Convention Against Torture for issues involving torture.[138] In *Soering* the ECHR implied that Article 3 contains some implicit responsibilities that are laid out in detail in the provisions of the Convention Against Torture.[139] Thus, just as the

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135. *See* Convention Against Torture, *supra* note 74, art. 15.

136. *See id.*; *see also* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 148 (1988) (expressing the view that torture is usually aimed at acquiring evidence for prosecution and relating the drafters' hopes that prohibiting evidence obtained under torture could prevent torture from occurring).

137. *See* RAZA HUSAIN, THE EXTRATERRITORIAL EFFECT OF THE ECHR 3 (2002) (theorizing that the ECHR will apply extraterritorial obligations under Article 3 when a State's act "causes consequences which are sufficiently serious and direct").

138. *See, e.g.*, *Soering*, 161 Eur. Ct. H.R. (ser. A) at 34-35 (turning to the Convention Against Torture for guidance on whether to impose extraterritorial responsibility for extraditing an individual when there are grounds for believing the extradition would put the individual at risk of torture).

139. *See id.* at 35 ("The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article Three of the European Convention.").

ECHR adopted the Convention Against Torture's prohibition against extraditing a person when there is a danger of torture involved, so too may the ECHR adopt the Convention Against Torture's prohibition against using evidence obtained under torture.[140]

In addition to the Convention Against Torture, various other international treaties engage the responsibility of a State that uses evidence obtained under torture.[141] The ECHR's leadership role among international judicial courts, coupled with its strong condemnation of torture, makes it probable that the ECHR would recognize such a responsibility as well.[142]

2. The ECHR May Establish Extraterritorial Obligations on States Intending to Use Evidence Obtained Under Torture

Assuming the ECHR establishes a causal link between torture and the use of evidence obtained under torture, the question remains whether the ECHR would engage the responsibility of the United Kingdom to investigate and disprove claims of torture involving the evidence. It is possible that the ECHR would require the State to investigate claims of torture before using questionable evidence in a proceeding, just as the ECHR required the United Kingdom in *Soering* to assess conditions in a foreign State before extraditing a criminal.[143] Because the ECHR already obligates a State to investigate arguable claims of torture, it is sensible that the ECHR could create a similar obligation for arguable claims of torture-

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140. *See id.*

141. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200, art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (prohibiting the use or admissibility of statements or confessions obtained through torture in judicial proceedings); Rome Statute of the International Criminal Court, art. 69, July 17, 1998, 2187 U.N.T.S. 90 (declaring that "[e]vidence obtained by means of a violation of this statute or internationally recognized human rights" is inadmissible).

142. *See generally* Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 414 (1996) (affirming unequivocally that protection against torture is absolute under the European Convention).

143. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 34-35 (enforcing the obligation to examine conditions in foreign States despite the United Kingdom's argument that such examination incurs serious hardship).

induced evidence.[144] The International Criminal Tribunal for the Former Yugoslavia and even the United Kingdom's own domestic law creates such an obligation and places the burden on the prosecution to prove that statements introduced as evidence are voluntarily made.[145] The ECHR may follow these readily established examples and likewise place the burden on the United Kingdom to prove the voluntariness of evidence, provided that it is the party that seeks to rely on the evidence.[146]

3. The Importance of Article 3 Will Likely Override Any Interests the State May Have in Creating an Exception to Article 3

If the ECHR imposes an extraterritorial obligation upon the State to investigate the circumstances of the evidence, it will probably not accept any reasons the United Kingdom may proffer for allowing an exception to this obligation. It is probable that the United Kingdom would reiterate the argument it made to the Court of Appeal, claiming that the serious threat of terrorism justifies the use of the evidence without further investigation into the methods used to obtain it.[147] In particular, the United Kingdom may argue that there exists a strong interest in using any available evidence to detain

144. *See supra* notes 42-45 and accompanying text (discussing the ECHR precedent that places the burden on the State to investigate a complainant's arguable claim of torture).

145. *See* Prosecutor v. Delalic, Case No. IT-96-21, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶ 42 (Sept. 25, 1997), *available at* http://www.un.org/icty/celebici/trialc2/decision-e/70925EV2.htm (placing the burden on the prosecution to prove convincingly and beyond a reasonable doubt that authorities obtained the evidence without using oppressive conduct); *see also* Police and Criminal Evidence Act, 1984, c. 60, § 76 (Eng.) (obligating the prosecution to establish beyond a reasonable doubt that confessions are voluntary).

146. *See* A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶ 513 (Neuberger, L.J., dissenting) (arguing that because the Home Secretary is adducing the evidence, he is more likely to know of the circumstances under which authorities obtained the evidence).

147. *See id.* ¶ 126 (recounting the U.K. argument that U.N. Security Council Resolution 1373 supports the view that the government should "cast its net wide in obtaining information"); *see also* S.C. Res. 1373, ¶ 2, U.N. SCOR, U.N. Doc. S/RES/1377 (Sept. 28, 2001) (declaring that terrorism is a challenge for all States and requiring States to cooperate and provide assistance in the fight against terrorism).

suspected terrorists due to the difficulty States face in gathering evidence and prosecuting terrorists under the normal rules of law.[148]

Yet the ECHR is not likely to accept such an argument, especially since the ECHR has explicitly stated that it will not allow Article 3 exceptions to combat terrorism.[149] Consequently, although the United Kingdom is likely to name some very strong reasons against requiring it to investigate the circumstances of the evidence, it is probable that the ECHR would find that the importance of Article 3 supercedes any public interest the United Kingdom presents.[150]

III. RECOMMENDATIONS

A. THE ECHR SHOULD CONTINUE ITS STRONG STANCE AGAINST TORTURE BY PROHIBITING THE USE OF TORTURE-INDUCED EVIDENCE IN PROCEEDINGS

The absolute prohibition of torture adopted by the European Convention, along with the European Convention's "special character as a human rights treaty"[151] strongly suggest that the ECHR should interpret the European Convention as prohibiting the use of statements obtained under torture.[152] The use of torture-induced evidence in legal proceedings essentially legitimizes the methods

148. *See A*, [2004] EWCA Civ. ¶ 373 (noting that the U.K. legislature passed Part 4 of the Anti-terrorism Act to address the problems of obtaining sufficient evidence to criminally convict suspected terrorists under the normal rule of law); *see also* Sireesha Chenumolu, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385, 412-13 (2003) (discussing the problems that arise in using financial information to track and prosecute terrorists).

149. *See* Indelicato v. Italy, App. No. 31143/96, 35 Eur. H.R. Rep. 40, ¶ 30 (West 2002) (holding that the European Convention does not tolerate torture under any circumstances, even in the fight against terrorism or in an emergency that threatens the life of the nation).

150. *See id.*

151. *See* Al Adsani v. United Kingdom, App. No. 35763/97, 34 Eur. H.R. Rep. 11, ¶ 55 (2002) (stressing the nature of the European Convention and emphasized that the European Convention should not be construed without regard to other rules of international law).

152. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 32 (1989) (proclaiming that in interpreting the European Convention, the ECHR must regard the goal of enforcing human rights and freedoms).

used to obtain the evidence.[153] In order for the ECHR to continue its strong stance against torture, the ECHR needs to follow the same principle recently set by the Israeli Supreme Court that a "democracy must often fight with one hand tied behind its back."[154] The ECHR should refer to the Convention Against Torture as authority for recognizing that the use of evidence obtained under torture is abhorrently linked to the practice of torture, and it should disavow any approach that does not prohibit the evidence from the courtroom.[155]

B. A BURDEN SHIFTING ANALYSIS BEST PROTECTS THE INTERESTS OF THE STATE AND THE INDIVIDUAL

If the ECHR determines that a statement obtained under torture is inadmissible, it will then have to determine whether the detainees or the United Kingdom should prove the existence or nonexistence of torture, and what should be the standard for this burden of proof.[156] The ECHR should establish a burden shifting analysis whereby the detainees must first establish an arguable claim that authorities obtained the evidence through torture.[157] In response, the State must

153. *See* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1507-09 (2004) (outlining the slippery slope argument for the ban on torture). "'[O]nce legitimated, torture could develop a constituency with a vested interest in perpetuating it.'" *Id.* at 1508 n.100 (quoting John H. Langbein, *The History of Torture*, *in* TORTURE (Sanford Levison ed., 2004)).

154. HCJ 5100/94 Pub. Comm. Againt Torture in Isr. v. Israel [1999], ¶ 39, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html (refusing to justify torture by Israeli intelligence despite the problem of terrorism in Israel, regarding the matter as one for the legislature).

155. *See* discussion *supra* Part II.B.1 (explaining the view that a State's use of the products of torture ultimately encourages the continued practice of torture).

156. *See* A v. Sec'y of State for the Home Dep't, [2004] EWCA Civ. 1123, ¶ 291 (Neuberger, L.J., dissenting) (discussing the need to determine whether the burden of proof of torture should fall on the detainees or the United Kingdom). Since the other two justices in the Court of Appeal held that weighing the evidence sufficiently protected the fairness of the proceedings, the justices did not address the issue of on whom the burden would lie to prove the use or nonuse of torture. *Id.* ¶¶ 258-59.

157. *See* Assenov v. Bulgaria, 1998-VIII Eur. Ct. H.R. 3264, ¶ 102 (obligating States to investigate and dispel an arguable claim of torture when an individual claims torture by the State authorities).

prove by a balance of the probabilities the nonexistence of torture in the procurement of the evidence.[158]

This burden shifting analysis takes into account the disadvantages both the United Kingdom and the detainees face in evaluating and proving the conditions of the U.S. interrogations. The arguable claim standard may allow the detainees to meet their burden through circumstantial evidence, making the survival of their claim possible even in light of the little knowledge the detainees have on the evidence against them.[159] A higher standard, on the other hand, could easily preclude the detainees from bringing forth a valid claim due to the impossibility of working with the closed evidence.[160] For instance, without knowing the identity of the third parties, the detainees would have to prove their case by setting forth evidence showing a generalized claim that the United States systemically uses torture in the War on Terror.[161] But without at the very least knowing the identity of the third party, the detainees could not prove that the United States tortured the actual third party who made the statement.[162] Additionally, the detainees face the challenge of demonstrating their claim in light of the Bush administration's refusal to allow U.N. inspectors or the media access to holding facilities in Guantanamo Bay, Afghanistan, and other countries allied

158. *See* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251, 257, 261 (2002) (defining the balance of the probabilities as a "more likely than not" test).

159. *See A*, [2004] EWCA Civ. ¶¶ 128-29, 138 (discussing the circumstantial evidence of inhuman conditions at Guantanamo Bay and rejecting the complainant's claim, as it did not prove that the evidence had actually been procured through torture).

160. *See id.*; Special Immigration Appeals Commission (Procedure) Rules, 2003, S.I. 2003/1034, § 4(1) (denying the detainees access to evidence when the Appeals Commission believes the evidence could pose a risk to national security).

161. *See, e.g.*, UNCAT Communication, *supra* note 74, ¶¶ 3.5.4-3.5.13, 6.4 (assessing the various reports of international organizations the complainant produced in an attempt to set forth his charge before the Committee Against Torture that France used torture-induced evidence in his extradition proceeding).

162. *See* Josh Meyer, *Court Upholds Terrorism Law Secrecy*, L.A. TIMES, Jan. 1, 2003 (quoting an attorney for an Islamic charity accused of supporting terrorism as saying that the U.S. government's use of secret evidence against the charity has him "working in the dark").

with the United States.[163] Similarly, the arguable claim standard recognizes the difficult task the detainees face in demonstrating the presence of torture through news reports and eyewitness statements of other detainees and unnamed government officials whose credibility may be questionable.[164]

Nevertheless, the arguable claim standard assures that the detainees must satisfy a meaningful standard by introducing sufficient evidence to demonstrate that their claim has merit.[165] For example, the ECHR may require the detainees to present evidence from a variety of sources and reference reports from well-respected

163. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 8 (Sept. 2002), *available at* http://www.rcfp.org/homefrontconfidential; *see also* Colum Lynch, *U.N. Investigators Appeal to U.S.: Human Rights Workers Seeking Access to Detention Centers*, WASH. POST, June 26, 2004, at A17 (reporting that human rights investigators appealed to the United States for permission to send specialists "trained to check for evidence of torture, arbitrary detention, medical and physical abuse, and judicial independence" to detention centers in Iraq, Guantanamo Bay, and Afghanistan). The revelations of torture in Iraq brought renewed demands that President Bush rescind his refusal to allow U.N. inspectors to examine the conditions of its prisons. *See* Joan McAlpine, *Sorry About the Torture, But Cruel Interrogation Goes On*, HERALD (Glasgow), May 6, 2004, at 16 (averring that in addition to refusing U.N. inspectors access to the prison in Guantanamo Bay, the administration also tried to undermine the Convention Against Torture by refusing to help finance it). However, the Bush administration argues that such secrecy is necessary to prevent al-Qaeda from developing counter-techniques to prevent the gathering of intelligence. *See* Jeffrey F. Addicott, *Into the Star Chamber: Does the U.S. Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 873-81 (2003) (providing a thorough background of the torture allegations and theorizing on interrogators' techniques and reasons for secrecy regarding the methods used).

164. *See* Addicott, *supra* note 163, at 895 (arguing that it is to be expected that detainees would allege that their captors tortured them, pointing out testimonials from other detainees who proclaim that the United States treated them well at Guantanamo Bay).

165. *See* Nahigian v. Leonard, 233 F. Supp. 2d 151, 170 (D. Mass. 2002) (suggesting that an arguable claim is equivalent to a colorable claim, and explaining that an arguable claim should be seemingly valid and not frivolous); *see also* Neitzke v. Williams, 490 U.S. 319, 325 (1989) (defining a frivolous claim as a claim in which "[none] of the legal points [are] arguable on their merits" (quoting Anders v. California, 386 U.S. 738 (1967))).

organizations.[166] The requirement for such evidence demonstrates that the detainees must show that substantial grounds exist for believing the United Kingdom is using evidence induced from torture by U.S. officials, while at the same time realizing the limited nature of the evidence available to the detainees.[167]

Likewise, the balance of probabilities standard appropriately considers the difficulties the United Kingdom would face in examining the interrogation methods used by U.S. intelligence officials.[168] By challenging the United Kingdom to meet the balance of probabilities standard, the United Kingdom would have to show that the majority of the evidence favored the non-existence of torture.[169] While this is a significant hurdle, it is not as stringent as the higher standard of proof beyond a reasonable doubt, where the United Kingdom would face the almost impossible task of proving the nonexistence of torture to a virtual certainty.[170] Thus, both standards require the parties to meet meaningful but attainable burdens of proof.

There are several reasons for placing the ultimate burden on the State. First, by placing the initial burden on the detainees, the analysis ensures that the United Kingdom does not need to act on a frivolous claim.[171] Next, because the United Kingdom is the party

166. *See, e.g.*, Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (revealing a confidential Red Cross report that found that the U.S. military was engaging in tactics "tantamount to torture" on Guantanamo Bay prisoners).

167. *See* Comm. of Ministers Recommendation, *supra* note 43 (explaining that whether substantial grounds exist for an alleged breach of the European Convention is often a factor in setting forth an arguable claim).

168. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 32 (1989) (expressing the view of the United Kingdom that it would face grave difficulties in conducting investigations into the affairs of another State).

169. *See* Clermont & Sherwin, *supra* note 158, at 257 (noting that the balance of probabilities standard is the equivalent of the preponderance of the evidence standard).

170. *See id.* at 252 (noting that the balance of probabilities standard may be the best standard for situations where many of the facts are unknown).

171. *See* text accompanying note 43 (explaining that the ECHR has not defined the term "arguable claim," and that it is generally defined on a case-by-case basis, but is most often referred to as a claim that has substantial grounds for alleging a breach of the Convention).

wishing to use the evidence, it is appropriate that the United Kingdom prove its veracity.[172]

Finally, the United Kingdom stands a much better chance than the detainees in obtaining further details on the circumstances of the evidence from the United States.[173] For instance, the United States is likely to respond to U.K. demands for further inquiry if it feels that a refusal to do so would jeopardize the prosecution against the detainees. This exact scenario occurred when the United States complied with Germany's request for information after German courts threatened to acquit a suspected terrorist due to the uncertainty of the evidence the United States provided.[174] This high-profile dispute demonstrates that the United Kingdom has the power to obtain further information regarding the evidence against the detainees, and thus should be the party that bears the ultimate burden of proof.

C. THE U.K. PARLIAMENT SHOULD ENJOIN THE INDEFINITE USE OF CLOSED EVIDENCE BY THE HOME SECRETARY

The U.K. Parliament must not allow the Home Secretary to rely on closed evidence indefinitely as a means of imprisoning the detainees. As the United Kingdom considers amending the Anti-terrorism Act to make it compliant with the European Convention, Parliament must

172. *See* Prosecutor v. Delalic, Case No. IT-96-21, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶ 42 (Sept. 25, 1997), *available at* http://www.un.org/icty/celebici/trialc2/decision-e/70925EV2.htm (placing the burden on the prosecution to prove that statements the prosecution introduces as evidence are voluntarily made).

173. *See* GlobalSecurity.org, *Guantanamo Bay, Camp X-ray*, http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm (last visited Dec. 12, 2005) (noting that in an effort to mollify claims of mistreatment, the United States allowed the British government to visit the prison).

174. *See* Alden et al., *supra* note 113 (revealing that Germany successfully used the threat of acquittal as a means of acquiring information on the interrogation of a third party witness in U.S. custody). The dispute arose when a German court acquitted a suspected terrorist after the United States refused a request from Germany to allow the witness, who was a U.S. detainee, to testify at trial. *Id.* Several months after this initial dispute, another suspected terrorist challenged the evidence against him. *Id.* Germany once again requested information from the United States regarding the circumstances of the interrogation, and this time the United States complied, responding to Germany's twenty-seven page request and providing detailed accounts of the interrogation. *Id.*

keep in mind the commitment the United Kingdom made in the European Convention to guarantee all persons the right to a fair trial.[175] Parliament should interpret a fair trial to mean a trial in which the adversarial process applies to all meaningful aspects, including the right to challenge evidence.[176] An imminent threat to the security of the nation may justify the temporary detention of an individual, but it does not justify prolonged detention of the individual without charge or trial.[177] Parliament should establish a reasonable time frame in which the use of closed evidence ceases so that the Home Secretary must carry out investigations that produce more reliable evidence and assist in the truth-finding process.[178] The United Kingdom, home to the Magna Carta, should not be a nation dependent upon secret evidence as a means of indefinite imprisonment.[179]

CONCLUSION

Since September 11, 2001, democratic nations have been asking their citizens to surrender certain liberties for the sake of national security.[180] The United Kingdom provides the latest example of this relinquishment of liberties by accepting without question evidence provided by the United States, despite increasing indicia that the

175. *See* European Convention, *supra* note 4, art. 6(1) (guarantying persons the right to a fair trial and enumerating basic minimum rights inherent in a fair trial).

176. *See* Jasper v. United Kingdom, 30 Eur. H.R. Rep. 441, ¶ 51 (2000) (noting that a fundamental aspect of a fair trial is the right to have knowledge of, and the ability to defend against, the evidence adduced by the State).

177. *See U.K. Court Blasts Detention Without Charge*, RECORD (Ontario), Dec. 17, 2004, at A5 (quoting a Law Lord as stating that a statute permitting indefinite detention without trial is contrary to the history of the United Kingdom).

178. *See Use of Secret Evidence*, *supra* note 102 (criticizing the use of closed evidence as interfering with the ultimate goal of reaching the truth and noting that closed evidence encourages cynicism of the legal process).

179. *See* Bartleby.com, *Magna Carta*, http://www.bartleby.com/65/ma/MagnaCar.html (last visited Dec. 12, 2005) (relaying the history of the Magna Carta and its status as being a beacon of liberty).

180. *See* Hoge, *supra* note 1 (mentioning some of the various nations that enacted legislation circumventing civil liberties in response to the September 11 attacks on the United States).

United States uses torture in its fight against terrorism.[181] As a protector of human rights and civil liberties, the ECHR must provide guidance to the nations bound together by the European Convention as these nations struggle to remain steadfast to democratic ideals in the age of terrorism.[182] Therefore, it is essential that the ECHR admonish the use of torture-induced evidence should it consider the case of the British detainees.[183]

POSTSCRIPT

Since acceptance of this Comment for publication in January 2005, several important events occurred that affect how democratic nations and international courts are handling possible torture-induced evidence in trials against suspected terrorists. Most importantly for purposes of this Comment, the House of Lords ruled on the detainees' appeal on December 8, 2005, and admonished the use of evidence obtained under torture in judicial proceedings.[184]

A. THE DECISION OF THE HOUSE OF LORDS

The House of Lords unanimously overturned the Court of Appeal by holding that the United Kingdom may not use evidence that a foreign State has procured through torture in a judicial proceeding against a suspected terrorist.[185] However, the Law Lords disagreed as to what should be the standard for determining whether the foreign State used torture in obtaining the evidence. Lord Bingham suggested that, where the detainee brings forth "some plausible

181. *See* discussion *supra* Part I.E (providing an overview of some of the evidence implying the United States uses torture for interrogation).

182. *See* discussion *supra* Part I.A (explaining how the European Convention is heralded as a successful human rights treaty).

183. *See* discussion *supra* Part III.A (arguing that torture-induced evidence should be prohibited from the proceedings of the Appeals Commission).

184. *See* A v. Sec'y of State for the Home Dep't, [2005] UKHL 71.

185. *Id.* ¶ 1 (restating the arguments by the Home Secretary and by the detainees, and holding that torture-induced evidence may not be admitted in an Appeals Commission hearing, even where the United Kingdom did not partake in the torture); *see also id.* ¶ 33 (relying on ECHR case law to find that *Soering* created an extraterritorial responsibility for States to implement measures that would prevent torture by other States).

reason" for why the evidence may be torture-induced, the Appeals Commission should direct an investigation that would enable it to make an informed judgment as to whether there was a "real risk" that the evidence was obtained under torture.[186] Lord Bingham felt that if the Appeals Commission is unable to conclude that there was a real risk that the foreign State procured the evidence through torture, it should disallow the evidence from the proceedings.[187] Lord Hope, on the other hand, recommended a standard that would shift the onerous burden of proving torture to the detainee, so that the Appeals Commission would admit evidence where the detainees could not establish that there was a real risk that the evidence was torture-induced.[188] The Law Lords decided in a four to three split in favor of Lord Hope's standard.[189]

B. NEW DEVELOPMENTS IN THE UNITED KINGDOM

In addition to the ruling by the House of Lords on the detainees' case, the United Kingdom experienced some important changes to its anti-terrorism laws and policies since this Comment was accepted for publication. While these changes did not affect the detainees' case, they are nonetheless important to the issues brought forth in this Comment.

1. The Prevention of Terrorism Act 2005

On March 14, 2005, Part 4 of the Anti-terrorism Act expired.[190] In a last-minute vote, Parliament approved sweeping changes to the

186. *Id.* ¶¶ 54-56 (noting the potential for unfairness in applying a conventional approach to atypical cases in which defendants are normally prevented from having access to the evidence against them).

187. *Id.*

188. *Id.* ¶ 118 (using as a guide Article 15 of the Convention Against Torture, which Lord Hope interpreted to require the "establishment" of torture by the party requesting the exclusion of the evidence). Lord Hope wrote to make clear in his opinion that he believed his standard and that of Lord Bingham's differed only where the Appeals Commission has balanced the probabilities and is unable to conclude that torture occurred during procurement of the evidence. *Id.*

189. *Id.* ¶¶ 54-57. The decision was split with Lords Nicholls and Hoffman agreeing with Lord Binghman's approach, and Lords Rodger, Carswell, and Brown supporting Lord Hope's approach. *Id.* ¶¶ 80, 99, 145, 158, 172.

190. *See* Prevention of Terrorism Act, 2005, c. 2, § 16 (Eng.).

United Kingdom's anti-terrorism legislation, resulting in the passage of the Prevention of Terrorism Act 2005.[191] Unlike the Anti-terrorism Act, the Prevention of Terrorism Act does not allow the Home Secretary to detain individuals indefinitely without charge.[192] Instead, the Prevention of Terrorism Act sustains the extensive powers of the executive through the use of "control orders," which allow the Home Secretary to enforce "any" imposition on an individual's liberty that the Home Secretary believes is necessary to limit suspected terrorist activities.[193]

The control orders endeavor to impose a more proportional approach than indefinite detention and also attempt to prevent the discriminatory provisions that the House of Lords found in the Anti-Terrorism Act.[194] However, the Prevention of Terrorism Act did nothing to alter the use of torture-induced evidence, which arose

191. *Id.*; *see also* JOINT COMMITTEE ON HUMAN RIGHTS, UNITED KINGDOM PARLIAMENT, NINTH REPORT ¶ 8 (2005), *available at* http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/61/6102.htm (declaring that Parliament was rushing through passage of the Prevention of Terrorism Bill without appropriate scrutiny, despite the fact that the legislation bestows unprecedented powers on the executive). The Committee recommended that the Government restrict the Prevention of Terrorism Bill to the current detainees until Parliament had a proper opportunity to examine and debate the new legislation. *Id.*

192. Prevention of Terrorism Act, § 1 (giving the Home Secretary the power to impose control orders on persons suspected of terrorism). The Act favors prosecution of individuals over the imposition of control orders, so long as there is evidence available for prosecution. *Id.* § 8(2). *But see infra* notes 211-212 and accompanying text (explaining that new legislation may once again allow for prolonged detention of individuals suspected of terrorism before officials file charges against the suspects).

193. *See* Prevention of Terrorism Act, § 1(3) ("The obligations that may be imposed by a control order made against an individual are *any* obligations that the Secretary of State . . . considers necessary." (emphasis added)). The Prevention of Terrorism Act lists some of the possible impositions as prohibiting the individual's association with certain persons, restricting the individual's movements, requiring the individual to comply with searches and seizures of the individual's property without court-obtained warrants, and monitoring of the individual through electronic tags. *Id.* § 1(4).

194. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, ¶ 43 (criticizing the method of relying on immigration laws as a means of resolving national security problems and for ignoring the potential danger that may arise from U.K. citizens).

from the permissive procedural rules of the Appeals Commission.[195] Thus, had the House of Lords not ruled in the detainees' favor, the use of possible torture-induced evidence in certain proceedings against persons suspected of terrorism may have continued.

2. Roberts v. Parole Board

Though not addressed in the detainees' case, the House of Lords recently reaffirmed the use of the procedures set forth for dealing with closed evidence in *Roberts v. Parole Board*,[196] in which the Law Lords approved of the closed evidence procedures in the context of parole hearings.[197] The House of Lords allowed the closed evidence procedures to expand beyond the confines of national security interests,[198] and found that its use was consistent with the rights afforded under the European Convention.[199]

C. NEW DEVELOPMENTS IN THE ECHR

However, in a recent decision by the Grand Chamber, the ECHR has shown reluctance in allowing a nation to limit a defendant's access to evidence, even when the State cites national security concerns due to alleged terrorist activities by the defendant.[200] In the

195. *See supra* notes 60-63 and accompanying text (explaining that the procedural rules of the Appeals Commission allow for the admission of evidence that would otherwise be inadmissible in a court of law).

196. [2005] UKHL 45.

197. *Id.* ¶ 1 (explaining the case of Harry Roberts, who received a life sentence in 1966 for murdering three police officers).

198. *Id.* ¶ 3 (noting that the reason for withholding evidence in Robert's parole hearing was based on the government's fear of reprisal on the witnesses providing the evidence).

199. *Id.* ¶ 58 (recognizing that the United Kingdom developed the closed evidence procedures in response to dicta by the ECHR suggesting that such procedures may be allowable under certain conditions). Lord Bingham in a dissenting opinion admonished the use of the special advocate system, arguing that the procedure makes the right to challenge the lawfulness of detention under the European Convention "all but valueless." *Id.*; *see also* Clare Dyer, *Parole Board Can Use Terrorism Powers, Say Law Lords*, GUARDIAN, July 8, 2005, at 16 (reporting that the appellant planned to file an application to the ECHR).

200. *See* Ocalan v. Turkey, App. No. 46221/99 (2005), http://www.echr.coe.int/eng.

May 2005 decision of *Ocalan v. Turkey*, the Grand Chamber recognized the complainant's denial of access to the evidence against him as a restriction to the right of a fair trial.[201] In *Ocalan*, the complainant's attorneys had limited access to the evidence, but the State never allowed the complainant's attorneys a chance to speak with the complainant about the evidence before his trial.[202] The ECHR acknowledged that, had the complainant had knowledge of the evidence, he "would have been able to identify arguments relevant to his defense other than those which his lawyers advanced without the benefit of his instructions."[203]

Another case currently before the ECHR also has implications for the issues set forth in this Comment. In the application of *Ramzy v. Netherlands*,[204] the ECHR will consider the use of secretive evidence for prosecuting persons suspected of terrorism.[205] The complainant in the case risks being deported to Algeria, where he may face torture by Algerian authorities, after Netherlands failed to convict him on terrorism-related charges.[206] The State court acquitted the complainant due to the unknown origin of intelligence evidence which the State used in its prosecution.[207] Immediately following his acquittal, the State detained the complainant and held him for deportation.[208] The United Kingdom is among a number of countries

201. *Id.* ¶¶ 138-44 (invoking the equality of arms doctrine and finding that the denial of access to the evidence, in addition to other facts, so restricted the complainant's rights as to deny him the right to a fair trial).

202. *Id.* (acknowledging the restrictions placed on the attorney's access to the files as another condition that compounded the applicant's difficulty in attaining a fair trial).

203. *Id.* ¶ 143.

204. App. No. 25424/05 (2005), http://www.echr.coe.int/eng.

205. *Id.*; *see also* Press Release, European Court of Human Rights, Application Lodged with the Court *Ramzy v. The Netherlands* (Oct. 10, 2005) [hereinafter *Ramzy* Press Release], *available at* http://press.coe.int/cp/2005/554a(2005).htm.

206. *See Ramzy* Press Release, *supra* note 205 (noting that the complainant applied for asylum, but the Netherlands denied his request).

207. *See id.* (reiterating the State court's reason for dismissing the charges as the government's refusal to explain the origins of the evidence so that the defense could properly verify its accuracy).

208. *See id.* (noting that the Acting President postponed the deportation of the complainant to Algeria while his case is before the ECHR).

intervening in the case, arguing that the ECHR should consider national security concerns against the potential for torture.[209]

D. CONCLUSION

The importance of the detainees' case is apparent by the similarity it shows to subsequent cases that have arose and will surely continue to arise concerning the issue of torture-induced evidence used in the prosecution of terrorist suspects.[210] As governments attempt to quickly respond to the horror of terrorist attacks, the judicial systems of many States are left to decide where government has crossed the line with civil liberties. When the July 7, 2005 bombings in London occurred, the U.K. government promptly began to consider additional anti-terrorism legislation, namely the Terrorism Bill 2005.[211] Among the provisions contemplated in the Terrorism Bill 2005 is a recently agreed-upon amendment that would allow law enforcement to hold a person suspected of terrorism for twenty-eight days before charging the suspect with a crime.[212] It is obvious that the possibility of detention without charge is finding its way back

209. *See id.* (listing the countries intervening in the case, including the United Kingdom, Italy, Lithuania, Portugal, and Slovakia).

210. *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (ruling in the case of a group of Guantanamo detainees and asserting a U.S. prohibition on torture-induced evidence in the context of U.S. military tribunals). The district court discussed the possibility that the evidence against the detainees was torture-induced. *Id.* at 473-74. The court also considered the detainees' lack of access to the evidence against them and held that the complete denial of access to the evidence deprived the detainees of a fair defense. *Id.* at 465-74. The court then endorsed a procedure that would allow a representative for a detainee access to the evidence against the detainee, but would preclude the detainee from the evidence. *Id.* at 465-68.

211. Terrorism Bill, 2005, *available at* http://www.publications.parliament.uk/pa/pabills.htm#t.

212. *See* 439 PARL. DEB., H.C. (6th ser.) (2005) 310-21 (debating whether the time of detention allowable under the proposed legislation should be twenty-eight days or ninety days); *see also* Letter from Andy Hayman, Assistant Commissioner of the Metropolitan Police, to Charles Clarke, Home Secretary (Oct. 6, 2005) (setting forth arguments for a ninety day detention due in part to the international scale of terrorism networks); Sam Coates, *After All the Fuss Dies Down, What Really Happened*, TIMES (London), Nov. 10, 2005, at 9 (explaining the status of the Terrorism Bill and reporting that Parliament refused to accept Prime Minister Blair's ninety day proposal for detention, and instead agreed on a twenty-eight day limit for holding persons suspected of terrorism).

into the laws of one of the world's oldest democracies. Thus, although the ECHR will not hear the case of the British detainees discussed in this Comment, subsequent developments and similar situations in like nations continue to suggest that the ECHR may lead the way in curbing governmental power, as democratic nations respond to terrorist attacks by disregarding well-established civil liberties.