



**UPHOLDING THE ABSOLUTE BAN ON TORTURE**  
**Submission to the Independent Human Rights Act Review**  
March 2021

Hogan  
Lovells

**REDRESS**

Ending torture, seeking justice for survivors

## INTRODUCTION

1. This submission is made in response to the call for evidence of the Independent Human Rights Act Review (the “**Review**”), published 13 January 2021. This submission has been prepared jointly by REDRESS and Hogan Lovells International LLP (“**Hogan Lovells**”).
2. REDRESS is a UK charity that uses the law to seek justice and reparation for survivors of torture, to combat impunity for governments and individuals who perpetrate torture, and to develop and promote compliance with international standards. REDRESS has been at the forefront of developments in the law relating to victims of torture and reparations for 25 years and has developed expertise through detailed research, innovative litigation, and progressive standard-setting.
3. Hogan Lovells is an international law firm with a long history of pro bono work involving human rights in the UK and around the world. The firm’s pro bono practice has made significant contributions to matters at the heart of human rights, including establishing the precedent for compensation payments for victims of transnational trafficking, representing families bereaved by terrorism, representing women who experience gender-based violence in a domestic setting or in war zones, and working on issues of racial discrimination.
4. In preparing this submission, REDRESS and Hogan Lovells consulted with a number of experts, including: Professor Helen Duffy of Human Rights in Practice, and Leiden University (current trustee at REDRESS); Professor Sir Malcolm Evans KCMG OBE of the University of Bristol, formerly Chair of the UN Subcommittee on Prevention of Torture (current trustee at REDRESS); Reverend Nicholas Mercer, formerly the Command Legal Adviser to the 1st Armoured Division during the Iraq War of 2003 (current trustee at REDRESS); and Sudhanshu Swaroop QC, barrister at Twenty Essex chambers.
5. In response to the call for evidence, the principal aim of this submission is to share an understanding of how the Human Rights Act 1998 (the “**HRA**”) has, through its existing framework, effectively implemented the absolute prohibition of torture and inhuman or degrading treatment or punishment, as set out in Article 3 of the European Convention on Human Rights (the “**ECHR**”). However, the Article 3 prohibition cannot properly be understood in isolation from the other ECHR rights, or from other human rights obligations accepted by the UK. Accordingly, where responses to questions in the call for evidence require, a holistic view is offered.
6. We note that the call for evidence indicates the Review intends to engage with interested parties once written submissions have been considered. REDRESS and Hogan Lovells would welcome the opportunity to participate further in the Review’s process.

## THE VITAL ROLE OF THE HUMAN RIGHTS ACT

7. Before addressing the specific questions raised in the call for evidence, it is necessary to make seven overarching points:
- a) Firstly, the HRA was carefully and successfully designed to address the constitutional tensions the call for evidence considers. The HRA's provisions modestly provide for domestic courts to pay due regard to the jurisprudence of the European Court of Human Rights ("EctHR"), rather than that they are bound to follow its judgments and other decisions. The existing HRA framework also maintains a careful and appropriate balance between the courts, the executive and Parliament, ensuring the rights of individuals are adequately protected, the executive remains accountable and Parliament remains sovereign. In other words, it carefully reflects, and protects, the existing constitutional framework.
  - b) Secondly, since coming into force just over two decades ago, the HRA has been extremely effective, ensuring the protection of individuals' rights across a wide range of areas. With regard to Article 3, through the existing framework of the HRA, protections have rightly been secured in relation to: child abuse; the ill treatment of individuals in need of medical care; domestic violence; the torture and ill treatment of prisoners; the torture and ill treatment of individuals held in military detention; the torture and ill treatment of asylum seekers; instances of extraordinary rendition; and many other circumstances. Others will no doubt be able to provide the Review with a great many examples of how the HRA's existing framework has secured justice and redress for individuals in relation to other of the ECHR rights.
  - c) Thirdly, while the call for evidence generally focuses on how the HRA functions in relation to the courts, it is important to highlight the broader impact that the HRA has had in putting human rights at the heart of public decision making. As a result of the HRA, the UK's public authorities consider the human rights impacts of any decisions which affect a broad range of actors, from multinational companies investing and operating in the UK to the most vulnerable members of society. While judicial remedies exist as a backstop where things go wrong, the important preventative effect that the HRA has had must not be forgotten. In the context of Article 3, the HRA has ensured UK public authorities have paid closer attention to the prevention of torture and ill treatment, avoiding abuses that might otherwise have been committed.
  - d) Fourthly, beyond the protection of individuals' rights domestically, the HRA represents an essential part of the UK's commitment to the rule of law and the rules-based international order. In weighing any options for change to the HRA framework, as outlined in the Review's call for evidence, it must be recognised that any measures that weaken, or are perceived to weaken, the protection of human rights in the UK would significantly undermine the country's influence on human rights in the global context and the UK's international standing more broadly.
  - e) Fifthly, the absolute prohibition of torture and inhuman or degrading treatment or punishment does not exist solely under the ECHR. It is a widely recognised precept of international law that features in various international treaties that the UK has

ratified, including the Geneva Conventions.<sup>1</sup> It is also a norm of customary international law, and thus is part of domestic law according to the principle of incorporation. The prohibition of torture has been recognised as a *jus cogens* norm, that is, one which cannot be derogated from in any circumstances.<sup>2</sup> This has been explicitly accepted by UK courts.<sup>3</sup> Consequently, any changes to the HRA framework that in any way dilute the application in the UK and to UK public authorities of the absolute prohibition of torture and inhuman or degrading treatment or punishment would put the UK in breach of a wide array of international obligations. Any failures domestically to address breaches of Article 3, or indeed any of the other rights protected under the ECHR, as a result of changes to the HRA would very likely result in an increase in interventions by the ECtHR and other international human rights mechanisms and procedures.

- f) Sixthly, the two limbs of Article 3 are indivisible; the absolute nature of the Article 3 prohibition applies both to torture *and* inhuman or degrading treatment or punishment. Article 3 makes no provision for exceptions and no derogation from either limb is permissible under Article 15, even in the event of a public emergency threatening the life of the nation, as has been repeatedly confirmed by the ECtHR.<sup>4</sup> Any efforts to divide the two limbs should be firmly rejected.
- g) Finally, the ECHR rights represent an interwoven tapestry of protections. For example, in relation to the duty to investigate, Article 3 is very closely linked to the Article 2 right to life. Equally, on questions relating to the possible use at trial of evidence acquired in violation of the prohibition, Article 3 is supported by the Article 5 right to liberty and security and the Article 6 right to a fair trial. It is essential that policymakers understand that if even seemingly slight limitations are imposed on the way in which any of the ECHR rights are applied in the UK and to UK public authorities, that could have unintended and severe consequences for the entire tapestry of rights in the UK.

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<sup>1</sup> The Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977, Articles 2 and 16 of the UN Convention against Torture, Articles 7 and 8 of the Rome Statute 1998, Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the Universal Declaration of Human Rights all prohibit the use of torture and other cruel, inhuman or degrading treatment or punishment under any circumstance, including in times of war.

<sup>2</sup> Vienna Convention on the Law of Treaties 23 May 1969 (entered into force, 27 January 1980), Article 53. See also: European Court of Human Rights, *Al-Adsani v UK*, App. No 35763/97 (21 November 2001), at paras 30, 60, 61, quoting International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Furundzija* (10 December 1998, case no. IT-95-17/I-T) at paras 147, 153-154; *Prosecutor v Ieng Sary*, Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem, Amnesty and Pardon) ECCC Case File No. 002/19-09-2007-ECCC/TC (3 November 2011), at paras 38-39.

<sup>3</sup> *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 [2006] 2 AC 221 at para 33, recently cited in *McGuigan & McKenna v Chief Constable of the PSNI* [2019] NICA 46 at para 76.

<sup>4</sup> *Ireland v the United Kingdom*, 18 January 1978, Series A no. 25 at para 163; *Chahal v the United Kingdom* [GC], 15 November 1996, Reports of Judgments and Decisions 1996-V at para 79; *Saadi v Italy* [GC], No. 37201/06, ECHR 2008 at para 127.

## THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE ECtHR

8. The relationship between the domestic courts and the ECtHR is a healthy and productive one. The key provision of the HRA that governs the domestic courts' duties with regard to the ECtHR's jurisprudence is section 2, which imposes an obligation on the domestic courts to "take into account" that jurisprudence. The provision was deliberately drafted to ensure that the UK courts would not be bound to follow ECtHR judgments and other decisions, both so that the courts might depart from ECtHR decisions in appropriate circumstances and so that they might even lead the way in developing human rights jurisprudence where novel questions arise.<sup>5</sup> On the infrequent occasions where the domestic courts and the ECtHR have disagreed, both the UK Supreme Court and the ECtHR have proved willing and able to engage in judicial dialogue.

### **Question 1(a): How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?**

9. The appropriate application of the section 2 duty was articulated by Lord Bingham in *R (Ullah) v Special Adjudicator*: the domestic courts are not bound to follow ECtHR judgments and other decisions, but in the absence of special circumstances they should follow "any clear and constant jurisprudence of the Strasbourg court."<sup>6</sup> The position was reaffirmed by Lord Neuberger in the Supreme Court as follows:

This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law... Of course, we should usually follow a clear and constant line of decisions by the European court... But we are not actually bound to do so...<sup>7</sup>

10. With regard to Article 3, the application in practice of the section 2 duty has resulted in important protections being secured across a range of areas, including in relation to: child abuse; the ill treatment of individuals in need of medical care; domestic violence; the torture and ill treatment of prisoners; the torture and ill treatment of individuals held in military detention; the torture and ill treatment of asylum seekers; instances of extraordinary rendition; and many other circumstances.
11. Section 2 should not be amended. The provision was intended to ensure that domestic courts would give due consideration to ECtHR judgments and other decisions when determining questions arising in connection with ECHR rights, without being bound to follow them.<sup>8</sup> This is entirely appropriate; it would be anomalous if domestic courts did not at least have regard to ECtHR jurisprudence in addressing such questions. The UK courts have applied the section 2 duty in accordance with this intention, departing

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<sup>5</sup> See Lord Irvine's speech during parliamentary debate on section 2 at HL Deb 18 November 1997, vol 583, cols 514–515.

<sup>6</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [2004] 2 AC 323 at para 20.

<sup>7</sup> *Pinnock v Manchester City Council* [2010] UKSC 45 [2011] 2 AC 104 at para 48.

<sup>8</sup> During parliamentary debate on section 2, the then Lord Chancellor, Lord Irvine, made clear that the intention behind the drafting was to "permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg." Lord Irvine went on to explain "where it is relevant we would of course expect our courts to apply convention jurisprudence and its principles to the cases before them." HL Deb 18 November 1997, vol 583, cols 514–515.

from ECtHR jurisprudence where the particularities of the UK are such that the ECtHR's reasoning is inapplicable, or where ECtHR reasoning in relation to the UK is based on a misunderstanding of some aspect of UK law.

**Question 1(b): When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?**

12. The margin of appreciation is a doctrine that exists within the jurisprudence of the ECtHR, by virtue of which the ECtHR shows considerable deference to States when determining how to give effect to the range of ECHR rights. The margin can be wide or narrow depending on the subject matter. It is not for domestic courts to determine whether an issue falls within the margin of appreciation.
13. With regard to the Article 3 absolute prohibition of torture and inhuman or degrading treatment or punishment, there is no margin of appreciation available as to the outcome of the absolute prohibition, though there may be some limited margin of appreciation as to how the absolute prohibition is achieved. We do not consider there to be any problem with the way in which domestic courts and tribunals approach issues which the ECtHR determines fall within the margin of appreciation in the context of Article 3.

**Question 1(c): Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?**

14. Formal dialogue between domestic courts and the ECtHR takes place through case law. In the rare circumstances where it has been deemed necessary, the UK courts have shown themselves willing and able to raise concerns as to the application of ECtHR jurisprudence having regard to the particular circumstances of the UK. In such cases, the ECtHR has paid due regard to the analysis of the UK courts.
15. For an instructive example, see the cases of *Al-Khawaja v UK* and *R v Horncastle* relating to the Article 6 compatibility of criminal convictions based on hearsay. In this example, consideration of the UK government's request that the ECtHR Chamber decision in *Al-Khawaja v UK* be referred to the Grand Chamber was adjourned pending the outcome of an appeal to the UK Supreme Court in *R v Horncastle*. In *R v Horncastle*, the UK Supreme Court declined to follow the ECtHR Chamber's reasoning, with Lord Phillips stating:

There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.<sup>9</sup>

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<sup>9</sup> *R v Horncastle and others* [2009] UKSC 14 [2010] 2 AC 373 at para 11.

16. The subsequent Grand Chamber judgment made some concessions to the reasoning of the UK Supreme Court, accepting that hearsay evidence could be relied upon under certain circumstances.<sup>10</sup>
17. One suggestion for facilitating continued constructive dialogue between domestic courts and the ECtHR would be for the UK to become a party to Protocol 16 of the ECHR, enabling the UK Supreme Court to seek advisory opinions from the ECtHR. Aside from providing for the possibility of UK-specific advisory opinions, becoming a party to Protocol 16 could encourage greater dialogue between the courts more generally.
18. It is important to recognise that dialogue between the UK Supreme Court and the ECtHR is not the sole means through which the UK can raise concerns before the ECtHR. The UK government can and does intervene in ECtHR cases to which the UK is not a direct party. In the context of Article 3, see for example *Saadi v Italy*, where the UK government intervened to argue that in deportation cases the risk of contraventions of Article 3 should be balanced against the threat the relevant individual poses to national security. The Grand Chamber of the ECtHR in that case gave careful consideration to the UK government's arguments, responding to them in detail in the judgment in which it reaffirmed the absolute nature of Article 3, ruling that the protection against the risk of ill-treatment being inflicted by authorities of another State cannot be weighed against the interests of the community as a whole.<sup>11</sup>

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<sup>10</sup> *Al-Khawaja and Tahery v the United Kingdom* [GC], Nos. 26766/05 and 22228/06, ECHR 2011.

<sup>11</sup> *Saadi v Italy* [GC], No. 37201/06, ECHR 2008 at paras 117-123 and 137-142.

## THE RELATIONSHIP BETWEEN THE JUDICIARY, THE EXECUTIVE AND PARLIAMENT

19. The roles of the courts, the executive and Parliament are carefully and appropriately balanced under the HRA. The key provisions of the HRA that achieve this balance are sections 3 and 4. With regard to concerns raised in the call for evidence, we do not consider that the current approach risks “over-judicialising” public administration, nor do we consider that it draws domestic courts unduly into questions of policy. On the contrary, the existing HRA framework has had an extremely positive effect on public administration, bringing human rights and consideration of impacts on vulnerable members of society to the centre of public decision making. As to questions of policy, the current approach provides for an efficient means of addressing points of detail via judicial interpretation which, if the courts were to get wrong, could then be clarified by Parliament, whilst also providing for appropriate deference to Parliament in instances of outright incompatibility.

### **Question 2(a): Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:**

- (i) Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?
20. Section 3 is an essential mechanism within the existing framework of the HRA and should not be amended or repealed. Where it is possible to read and give effect to legislation in a manner compatible with the ECHR rights, section 3 enables the courts to dispense justice to individuals whose rights have in some way been contravened by that legislation, without the need for any further intervention by Parliament.
21. Domestic case law has developed to make clear that section 3 does not permit the courts to “adopt a meaning inconsistent with a fundamental feature of legislation.”<sup>12</sup> This clearly articulated boundary ensures that legislation is not interpreted in a manner inconsistent with the intention of Parliament. In the event that, in spite of the clear limits on the courts’ interpretative duty under section 3, Parliament determined that the courts had interpreted some piece of legislation in a manner wholly inconsistent with parliamentary intention, it would be open to Parliament to legislate to override the courts’ interpretation.<sup>13</sup> We have identified no examples where Parliament has found it necessary to do so in practice. The doctrine of parliamentary sovereignty has not been eroded by the existence or operation of section 3.
22. If the section 3 duty was to be diluted or repealed, this would leave the only option available to a judge who identified even a very minor inconsistency between a piece of legislation and the ECHR as being a declaration of incompatibility. This would leave any individual whose rights had been contravened in such a case without a domestic remedy, pending Parliament’s intervention. This would be inconsistent with the UK’s commitment to human rights – a fundamental feature of which is a commitment to the swift remedying of any breaches – and would likely lead to an increase in challenges brought against the UK in the ECtHR.

<sup>12</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557 at para 33.

<sup>13</sup> *Ibid* at para 43.



(ii): If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

23. As noted above, section 3 should not be amended or repealed. Were Parliament to decide to amend or repeal section 3, it is imperative that such a change should not apply to the interpretation of legislation enacted before the amendment or repeal took place. This is on the basis of the principles of legal clarity and non-retroactivity, which are of paramount importance when individuals' fundamental rights are at stake.

(iii): Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

24. Declarations of incompatibility play an important role within the HRA, enabling the courts to bring to the attention of government and Parliament any outright legislative incompatibility with the ECHR.<sup>14</sup> However, they should remain a matter of last resort, used only where an ECHR-compliant interpretation pursuant to section 3 is impossible. Incorporating declarations of incompatibility in some way into the initial process of interpretation risks limiting, or at the very least significantly slowing, the remedying of breaches of ECHR rights in individual cases. It also risks forcing the courts to seek complex solutions – in the form of declarations to Parliament that add to an already full parliamentary agenda – where, often uncontroversial, problems could more simply and efficiently be dealt with through judicial interpretation, which it is open to Parliament to override if deemed erroneous.

**Question 2(b): What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?**

25. All the usual public law remedies should be available (including quashing orders) in order to ensure that the appropriate check exists to prevent the *ultra vires*, irrational or procedurally improper exercise of the derogation power by a Minister in relation to issues affecting fundamental rights.

**Question 2(c): Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?**

26. Under the current framework, where subordinate legislation is incompatible with ECHR rights and the incompatibility is not required by primary legislation, the courts may interpret the subordinate legislation compatibly with the ECHR where possible under section 3 of the HRA or otherwise set aside the subordinate legislation under section 6(1). This is entirely appropriate and no change is required.

**Question 2(d): In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?**

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<sup>14</sup> Since the HRA came into force, there have been two declarations of incompatibility in relation to Article 3, neither of which was upheld on appeal: *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23 [2010] 1 AC 1; and *Re an application by the NIHRC for Judicial Review (NI)* [2018] UKSC 27 [2019] 1 All ER 173.

27. The ECHR rights, incorporated into domestic law via the HRA, generally apply to acts of public authorities taking place outside the territory of the UK where either: the UK exercises effective control over an area outside its territory; or the UK exercises control through its agents over an individual.<sup>15</sup>
28. Following the ECtHR Grand Chamber's very recent judgment in *Georgia v Russia (II)*, ECtHR jurisprudence indicates that the protections of the ECHR may not apply outside the territory of a State to military operations occurring during the "active phase of hostilities" in an international armed conflict. Per paragraph 137 of the judgment in that case:
 

...the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (see paragraph 126 above), but also excludes any form of "State agent authority and control" over individuals.<sup>16</sup>
29. Importantly, the Grand Chamber's judgment in this case found that, if a person has been detained, even during the "active phase" of a conflict, then the situation of "chaos" in relation to that person no longer exists and the ECHR rights once again apply. Indeed, jurisdiction was found with respect to all persons who were being detained by Russian or pro-Russian forces at any stage of the conflict, and the ECtHR found Russia responsible for several ECHR violations, including violations of Article 3 with respect to detainees.<sup>17</sup> Extraterritorial jurisdiction was also found with respect to the procedural duty to investigate ECHR violations, including those committed during the "active phase" of the conflict.<sup>18</sup>
30. By comparison to other international courts and bodies, including those charged with the authoritative interpretation of treaty obligations binding on the UK (such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child), the ECtHR's jurisprudence offers a restrictive view of the extraterritorial applicability of human rights.<sup>19</sup> With regard to the prohibition of torture and inhuman or degrading treatment or punishment, the more expansive approach taken by other international courts and bodies affords greater protection to survivors of torture and ill treatment and provides for a more effective right to a remedy. The extraterritorial application of the ECHR rights under the HRA to the acts of UK public authorities should not be restricted any further than the limits already imposed by the ECtHR's own jurisprudence.
31. With regard to Article 3, any attempt to limit the extraterritorial application of the absolute prohibition of either limb (i.e. torture *and* inhuman or degrading treatment or punishment) would soon put the UK in breach of the ECHR; Article 3 cannot be divided into constituent parts. As has been repeatedly affirmed by the ECtHR, Article 3 makes no provision for exceptions and no derogation from either limb is permissible

<sup>15</sup> *Al-Skeini and Others v the United Kingdom* [GC], No. 55721/07, ECHR 2011; *Al-Jedda v the United Kingdom* [GC], No. 27021/08, ECHR 2011.

<sup>16</sup> *Georgia v Russia (II)* [GC], No. 38263/08 (ECtHR, 21 January 2021) at para 137.

<sup>17</sup> *Ibid* at paras 239 and 269-281.

<sup>18</sup> *Ibid* at paras 331-332.

<sup>19</sup> By way of comparison, see for example: the UN Human Rights Committee's General Comment No. 36 on the right to life, where jurisdiction is derived from the states' direct and foreseeable impact on the right; the African Commission on Human and Peoples' Rights' General Comment No. 3 on the right to life, which determined jurisdiction in broadly similar terms to the UN Human Rights Committee; and the Inter-American Commission on Human Rights' focus for the purposes of jurisdiction on establishing a causal link.

under Article 15, even in the event of a public emergency threatening the life of the nation.<sup>20</sup> If the UK government and Parliament were to seek to limit the extraterritorial application of the absolute prohibition, this would also put the UK in breach of other international legal obligations.<sup>21</sup> Consequently, the failure, or inability as a result of changes to the HRA, of the domestic courts to address instances of torture or ill treatment allegedly committed by UK public authorities overseas would likely result in intervention by the ECtHR and other international human rights mechanisms and procedures. The same can be said of any failures by the UK government to investigate allegations of such Article 3 violations.

**Question 2(e): Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?**

32. The remedial order process provides an important fast-track route to remedying legislative incompatibilities with ECHR rights. This route may only be used if a Minister “considers that there are compelling reasons for proceeding” via such an order rather than via primary legislation.<sup>22</sup> Whether the non-urgent or urgent procedure is pursued for a remedial order, both Houses of Parliament must approve the order for it to become or remain law. The remedial order process should not be modified to limit the availability of a fast-track route to remedying incompatibilities.

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<sup>20</sup> *Ireland v the United Kingdom*, 18 January 1978, Series A no. 25 at para 163; *Chahal v the United Kingdom* [GC], 15 November 1996, Reports of Judgments and Decisions 1996-V at para 79; *Saadi v Italy* [GC], No. 37201/06, ECHR 2008 at para 127.

<sup>21</sup> See, for example, the Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977, Articles 2 and 16 of the UN Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the Universal Declaration of Human Rights, all of which the UK has ratified.

<sup>22</sup> See section 10(2) of the HRA.

Front Cover: the UK Supreme Court, which  
has decided many cases relating to Article  
3. *Photo Credit: Supreme Court.*

**redress.org**

**REDRESS**

87 Vauxhall Walk  
London, SE11 5HJ  
United Kingdom

**REDRESS Nederland**

Laan van Meerdervoort 70  
2517 AN, Den Haag  
Nederland

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