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Response to publication of 'The principles relating to the detention and interviewing of detainees...', replacing the Consolidated Guidance

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19 July 2019

This note sets out our response to the publication of the UK Government's *Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence to detainees* (replacing the Consolidated Guidance from 1 January 2020).¹ Although some amendments have been made, following the review of the Consolidated Guidance conducted by the Investigatory Powers Commissioner (IPC), Sir Adrian Fulford, we continue to have serious concerns that UK personnel risk being complicit in torture and cruel, inhuman and degrading treatment.

Our main concerns are:

1. There is no absolute prohibition on unlawful killing, torture, cruel, inhuman and degrading treatment (CIDT) and extraordinary rendition. Ministers continue to have the authority to permit actions where there is a real risk of such outcomes. Therefore, the revised Principles do not improve on the Consolidated Guidance;
2. The Principles fail to define 'real risk' and offer no adequate risk assessment tool to help guide personnel in determining the level of risk;
3. The provision which extends the Principles to non-state actors is inadequate, since it binds non-state actors to comply with the Principles only 'insofar as possible';
4. UK personnel are still encouraged to secure assurances from third parties that detainees will not be mistreated, even though the assurance process offers little reassurance that assurances actually help prevent abuse. Furthermore, assurances are not a pre-requisite; operations can go ahead even where there is a risk of torture and CIDT without an assurance. There is no clear process for scrutiny and review of compliance with agreed assurances.

Given these concerns about on-going and serious weaknesses in the guidance, and given the overwhelming evidence of extensive UK involvement in torture, CIDT, and extraordinary rendition, as documented by the Intelligence and Security Committee,² it is a real disappointment

¹ HM Government, *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence to detainees*, 18 July 2019. <https://www.therenditionproject.org.uk/documents/RDI/190718-HMG-Principles.pdf>

² Intelligence and Security Committee (ISC), *Detainee Mistreatment and Rendition: 2001-2010*, vol. HC1113 (London: Intelligence and Security Committee of Parliament, 2018).
<https://www.therenditionproject.org.uk/documents/RDI/180628-ISC-Detainee-Mistreatment-Rendition-2001->

that the government has ruled out a judge-led inquiry. Such an investigation is now the only route to full transparency, accountability and redress for victims.

We submitted recommendations³ to the IPC review in October 2019. While a few of our recommendations have been partially addressed in the Principles, the majority of our recommendations have not. We have assessed the revised Principles against our recommendations, and outline our concerns in relation to those in more detail here.

Which of our recommendations have been partially addressed?

Only three of our recommendations have been partially addressed.

R9: The prohibition of extraordinary rendition as a form of CIDT

The Principles do now stipulate that extraordinary rendition is among those actions that UK personnel are prohibited from participating in, as stipulated in paragraph 1 of the Principles:

The UK Government does not participate in, solicit, encourage or condone unlawful killing, the use of torture or cruel inhuman or degrading treatment (“CIDT”), or extraordinary rendition. In no circumstances will UK personnel ever take action amounting to torture, unlawful killing, extraordinary rendition, or CIDT.

It is our view that rendition operations do carry very high risks of torture and CIDT, based on the evidence of how such operations have been conducted previously. This amendment is therefore important and welcome.

R8: Extension of the prohibition of actions where there is a risk of torture or CIDT to all UK authorities as well as to other agencies of foreign states and non-state actors

Whereas the Consolidated Guidance applied only to the UK’s intelligence and security agencies, members of the UK’s Armed Forces and employees of the Ministry of Defence, the Principles have been extended to apply to Office and Staff of SO15, Metropolitan Police Service and Officers of the National Crime Agency. While this extension is welcome, it does not go far enough. Other organisations and individuals continue to fall outside of the remit of the Principles.

As we set out in our recommendations, operations conducted in collaboration with a range of external partners, including non-state actors, failed states, and joint unit operations with third party states, fell outside the scope of the Consolidated Guidance. The Principles do now cover ‘the activities of a unit of a foreign authority (which may be wholly or partly funded or trained by the UK) which engages in overseas operations with and in support of the work of UK personnel [...] acting under UK direction’ (paragraph 9), but that would exclude those collaborating with UK personnel but not under their direction. Furthermore, the Principles only cover work with non-state organisations or groups, ‘insofar as possible’ (paragraph 10). This is at odds with the Minister’s oral statement in the House of Commons on 18 July 2019, when he stated that the Principles do now apply to working with non-state actors.

[2010.pdf](#)

³ Ruth Blakeley and Sam Raphael, *Recommendation for reform of the Consolidated Guidance*, 25 October 2018. <https://www.therenditionproject.org.uk/documents/RDI/181025-TRP-Consolidated-Guidance-Recommendations.pdf>

This leaves considerable latitude for UK personnel to continue collaborating with a range of overseas partners, including partners under the direction of UK personnel, where torture and CIDT are a risk.

R11: The re-naming of the policy

The Consolidated Guidance did not actually offer robust guidance to UK personnel, given that it failed to provide a clear and robust risk assessment framework to guide decisions on when torture and CIDT would be a risk. Neither does the revised version. To that end, the new name, ‘the Principles’, is a more accurate reflection of the nature and content of the previous and new documents.

Why do the Principles fail to address the risk of UK personnel colluding in torture and CIDT?

There is no absolute prohibition on torture or CIDT

While the Principles stipulate that the UK government does not participate in, solicit, encourage or condone unlawful killing, the use of torture or CIDT, or extraordinary rendition, it offers no absolute prohibition. The document states that ‘In circumstances where, despite efforts to mitigate the risk, there are grounds for believing there is a real risk of torture, unlawful killing or extraordinary rendition, the presumption would be not to proceed’ (paragraph 3). This does not constitute an absolute prohibition of actions where there is a real risk of torture. It is also worth noting that CIDT is excluded from this list, even though there is no distinction in law between torture and CIDT - both are at all times and in all circumstances prohibited. Furthermore, although the Principles state that ‘Personnel must not proceed, and Ministers must be informed’ (paragraph 11), Ministers still have the power to weigh the risks and approve the action: ‘Consulting Ministers does not imply that action will or will not be authorised’ (paragraph 16). This of course indicates that Ministers might approve the action even if risks cannot be mitigated.

The failure to prohibit unlawful killing, torture, CIDT and extraordinary rendition in all circumstances gives cause for concern that the government considers there to be some circumstances in which Ministers might authorise actions where there is a real risk, even though to do so is unlawful.

There is no discussion of the inefficacy of torture

As we explained in some detail in our submission to the IPC consultation, by allowing Ministers to approve actions even where there is a ‘serious risk’ of torture or CIDT, the Consolidated Guidance implied that torture or CIDT may serve some useful or necessary purpose in the gathering of critical intelligence. Decades of research, including among torture victims and interrogators alike, has shown that torture and CIDT do not result in the acquisition of reliable intelligence, and more often than not, torture and CIDT have counter-productive effects.⁴ Unfortunately, the Principles continue to allow Ministers to approve action where torture, CIDT

⁴ Cesare Beccaria, *On Crimes and Punishments and Other Writings*, ed. Richard Bellamy, trans. Richard Davies (Cambridge: Cambridge University Press, [1764] 1995); Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz," in *Torture. A Collection*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004); David Sussman, "What's Wrong with Torture?," *Philosophy and Public Affairs* 33, no. 1 (2005); Darius Rejali, *Torture and Democracy* (Princeton and Oxford: Princeton University Press, 2007); Edward Peters, *Torture* (New York: Basil Blackwell Inc, 1985); Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford: Oxford University Press, 2010).

and extraordinary rendition are a risk, and there has been no attempt to provide a clear statement on the inefficacy of torture in the revised document.

The Principles fail to define ‘real risk’ and offer no adequate risk assessment tool

‘Serious risk’ has been replaced in the new document with ‘real risk’. But as with the Consolidated Guidance, ‘real risk’ is not defined, and no robust risk assessment tool has been provided to clearly guide personnel on how to determine the level of risk of unlawful killing, torture, CIDT or extraordinary rendition.

Annex B of the Principles sets out what personnel should be looking for in determining the ‘Standards of Arrest, Detention and Treatment’. However, as with the Consolidated Guidance, it is cursory, fails to refer directly to instruments of international law which define unlawful killing, torture and CIDT, and by no means constitutes a clear set of guidelines on the kinds of evidence that personnel should look for in determining risk.

The list of possible examples of CIDT includes the five prohibited techniques: hooding, stress positions, white noise, sleep deprivation and deprivation of food and water. These are listed as being ‘likely to constitute CIDT’, when they are in fact more likely to constitute torture.

This failure to clearly explain torture and CIDT stems from the lack of engagement with key instruments of international law on torture.

The assurances process continues to be inadequate

Some amendments have been made to the provision of seeking assurances from overseas partners that prisoners will not be unlawfully killed, tortured, subjected to CIDT or extraordinary rendition. The Principles include a list of relevant considerations:

the manner in which the assurance is given, or caveat agreed, for instance whether it is written; the terms and clarity of the assurance or caveat; the credibility of the person or entity giving the assurance or agreeing the caveat; the ability to verify whether the assurance will be kept or whether the caveat will be applied; the ability to verify whether the assurance will be kept or whether the caveat will be applied; the effectiveness of previous assurances given, or caveat agreed, by the person or entity; whether relevant mistreatment has been committed historically by the body or organisation in question; and whether the UK already holds information indicating non-compliance by the body in relevant situations in the past (paragraph 20).

These additions do not offer a great deal of reassurance that assurances provide adequate protection for detainees at risk of torture, CIDT or extraordinary rendition. The Principles continue to allow for verbal rather than written assurances. Personnel are advised that where the assurance or caveat is not made in writing, they must keep adequate records, and ‘whenever feasible, should share it with the foreign authority as a formal note as soon as is practicable’ (paragraph 21). This still allows for confusion and malfeasance. As with the Consolidated Guidance, there is nothing in the Principles that stipulates that assurances are a pre-requisite. Operations where there is a real risk of torture, CIDT, and extraordinary rendition can still go ahead with or without securing assurances. And there continues to be little evidence that such assurances provide grantees of detainee protection.

Regarding the monitoring of assurances, the Principles state that the Investigatory Powers Commissioner (IPC) will review the application of the Principles including through audit,

inspection and investigation. While this oversight is welcome, there is a lack of clarity on how rigorous and robust review of the assurances process is. The Principles say nothing of the obligations on UK agencies themselves to systematically review compliance with agreed assurances, and neither is there any explicit statement on the IPC's role in scrutinising them.

Underlying policy documents of individual agencies remain classified

Documentation from within the agencies covered by the Principles remains classified. As indicated by the MoD's own guidance, dated 2018, and secured through a Freedom of Information request, the MoD's policy is to allow ministers to authorise actions where torture is a risk.⁵

The Principles continue to emphasise mitigation of risk of prosecution of UK personnel, and not the risk to prisoners

The underlying objective behind the Principles continues to be limiting the risk that UK intelligence and service personnel will face prosecution in relation to prisoner mistreatment. It is our contention that any guidance or policy on prisoner mistreatment should instead be underpinned by the moral principle that harming other human beings through torture or cruel, inhuman or degrading treatment can never be justified. While the IPC listed protection of prisoners as one of his three principal objectives behind the Principles,⁶ this is missing entirely from the Principles document.

The difference between the two approaches is subtle but significant. If we begin with the moral principle - that fellow human beings should not be subjected to torture or cruelty - then the risk of any UK intelligence or security personnel facing prosecution is massively reduced. However, if avoidance of prosecution is our starting principle, the guidance that follows tends to focus on how much personnel can get away with before they are in breach of moral and legal obligations. As such, the Principles speak of 'real risk' rather than simply 'risk'. Ministers are also permitted to allow actions even where there may be a 'real risk' of torture or CIDT ensuing from those actions. The Principles, therefore, are far weaker and less likely to help prevent the prosecution of UK personnel than if they began with an absolute prohibition of torture and CIDT.

⁵ <https://www.documentcloud.org/documents/6015916-MOD-Torture-Policy-Nov-2018.html>

⁶ <https://www.ipco.org.uk/docs/20190612%20Letter%20to%20PM%20.pdf>