



Recommendations for reform of the Consolidated Guidance

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Introduction

Following publication of the Intelligence and Security Committee (ISC) report on ‘*Detainee Mistreatment and Rendition 2001-2010*’¹ and ‘*Detainee Mistreatment and Rendition: Current Issues*’² in June 2018, the Prime Minister announced that she had instructed the Investigatory Powers Commissioner to review the UK’s ‘*Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees*’, or ‘*Consolidated Guidance*’.³ The Investigatory Powers Commissioner’s Office (IPCO) launched a public consultation on 20 August 2018, inviting responses by 29 October 2018.⁴ The Consultation document provides a summary of previous recommendations from the Intelligence Services Commissioner and the ISC on reform of the guidance, and invites responses to 11 consultation questions.

Our research over the last ten years has enabled us to provide compelling evidence that UK personnel were complicit in torture and cruel, inhuman or degrading treatment (CIDT) as part of the CIA’s Rendition, Detention and Interrogation (RDI) programme.⁵ Our findings were recently corroborated by the ISC reports, ‘*Detainee Mistreatment and Rendition 2001-2010*’ and ‘*Detainee Mistreatment and Rendition: Current Issues*’. Furthermore, the ISC demonstrated that UK complicity in torture and CIDT was more extensive than previously known. Having long argued that the Consolidated Guidance fails to provide adequate advice to UK intelligence officers and service personnel on preventing torture and CIDT, and that therefore serious risks remain that UK personnel may again collude in torture and CIDT, we welcome this consultation.

We make a number of recommendations. We then elaborate on these by responding in turn to each of the 11 consultation questions.

Recommendations

RI. The Consolidated Guidance should be merged with the policy on Overseas Security and Justice Assistance (OSJA), to create a single overarching human rights policy, overseen by an independent

¹ Intelligence and Security Committee (ISC), *Detainee Mistreatment and Rendition: 2001-2010*, vol. HC1113 (London: Intelligence and Security Committee of Parliament, 2018).

² Intelligence and Security Committee (ISC), *Detainee Mistreatment and Rendition: Current Issues*, vol. HC1114 (London: Intelligence and Security Committee of Parliament, 2018).

³ HM Government, *Consolidated Guidance to Intelligence Offices and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (London: Cabinet Office, 2010).

⁴ <https://www.ipco.org.uk/default.aspx?mid=13.11>

⁵ Ruth Blakeley and Sam Raphael, "British Torture in the War on Terror," *European Journal of International Relations* 23, no. 2 (2016), 243-66.

regulator.

- R2.** *The new policy should establish an absolute prohibition on UK action by all UK personnel where there is a ‘serious risk’ that such action may lead to torture or CIDT;*
- R3.** *The new policy should include a clear statement on the inefficacy of torture and CIDT in line with the scientific record which has long established that torture and CIDT do not result in the acquisition of reliable intelligence;*
- R4.** *The new policy should clarify what constitutes ‘serious risk’;*
- R5.** *The new policy should provide a clear and exhaustive risk assessment framework that: a) more clearly establishes the relationship between non-compliance with international legal standards of arrest and detention and the increased risk of torture and CIDT; b) provides a more extensive set of examples of torture and CIDT, drawing on specific case study examples from the CIA RDI programme; and c) establishes clear guidance on the range of indicators that would suggest prisoners are at risk of torture and CIDT , to replace Annex A of the current Consolidated Guidance;*
- R6.** *The new policy should provide clarity on the use of authorisations under section 7 of the Intelligence Services Act 1994 to ensure that such assurances cannot be used to authorise torture or CIDT;*
- R7.** *The new policy should establish a clear and robust framework for the monitoring of performance when assurances are given by overseas partners;*
- R8.** *The new policy should extend the prohibition on UK action where there is a ‘serious risk’ that such action may lead to torture or CIDT to all UK authorities, as well as to other agencies of foreign states and non-state actors;*
- R9.** *The new policy should explicitly include rendition as a form of CIDT;*
- R10.** *A new system should be established for the post-notification for people subject to intelligence sharing where they may have faced mistreatment resulting from a failure to apply the Guidance or wrongful application of the Guidance;*
- R11.** *The new policy should be re-named: Policy for the Lawful Detention and Interview of Detainees Overseas and Lawful Intelligence Sharing Relating to Detainees.*

Response to Consultation Questions

Q1. Is the Consolidated Guidance consistent with applicable domestic and international legal principles?

The Consolidated Guidance is only partially consistent with applicable domestic and international law.

The ISC described ‘dangerous ambiguities’ in the Guidance. This is most clearly illustrated by the considerable confusion among Ministers about how concerns relating to prisoner abuse should be treated. Ministers were unclear on whether they could lawfully allow operations to go ahead where there was a risk that prisoners would be tortured.⁶ Disturbingly, when giving evidence, senior Ministers including Theresa May, Amber Rudd, Boris Johnson and Philip Hammond all made references to ticking bomb scenarios as potentially

⁶ ISC, *Detainee Mistreatment and Rendition: Current Issues*, HC1114, 77.

justifying operations where torture might be permissible⁷. By allowing Ministers to approve actions even where there is a 'serious risk' of torture or CIDT, the Guidance implies 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.⁸ Torture was outlawed by the CIA at the end of the Cold War for this very reason.⁹ The US Senate Select Committee (SSCI) Study on the CIA's Detention and Interrogation programme also concluded that the CIA's use of so-called 'Enhanced Interrogation Techniques' (EITs) was not an effective means of acquiring intelligence or gaining cooperation from detainees;¹⁰ the CIA's justification for the use of EITs rested on inaccurate claims of their effectiveness;¹¹ and, their use was at odds with the CIA's own prior conclusions that coercive and physical violence and psychological interrogation techniques result in false answers and have proven to be ineffective.¹²

While the Guidance makes clear that Ministers are legally prohibited from authorising action when they know or believe it will contribute to torture or CIDT, the Guidance does not prohibit action when there is a 'serious risk' it may contribute to torture and CIDT. The Guidance also fails to properly define 'serious risk', leading to further confusion about what Ministers should or should not authorise.

The Guidance is also weak on clearly establishing the UK's position in relation to international and domestic law. There is just one vague reference to international law in the Consolidated Guidance (paragraph 5) and no reference to domestic law. The Guidance sets out the UK government's policy (paragraph 6), but there is no explicit statement which clarifies that torture and CIDT are prohibited under domestic law, either with reference to Article 3 of the European Convention on Human Rights or to its obligations as a signatory to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment. This renders the Guidance unnecessarily vague and also suggests that adherence to international law on torture and CIDT is a policy matter, whereas in fact the prohibition of torture and CIDT is enshrined in UK law.

The underlying principle behind both the Consolidated Guidance and the Overseas Security and Justice Assistance (OSJA) policy is to limit 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. 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 service 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 current Consolidated Guidance speaks of 'serious risk' rather than simply 'risk'. It also permits Ministers to allow actions even where there may be a 'serious risk' of torture or CIDT ensuing from those actions. The Guidance, therefore is far weaker and less likely to help prevent the prosecution of UK personnel than if it began with an absolute prohibition of torture and CIDT.

Just as the Consolidated Guidance has been criticised for its failures to articulate a clear set of principles, so too has the OSJA, with the Home Affairs Select Committee, for example, questioning whether it is fit for

⁷ Ibid., 74-77.

⁸ 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; repr., 2010).

⁹ Senate Select Committee on Intelligence (SSCI): *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Declassified Executive Summary, (2014), 49.

¹⁰ Ibid., 2 of Findings and Conclusions.

¹¹ Ibid., 2-3 of Findings and Conclusions.

¹² Ibid., 19 of Executive Summary.

purpose.¹³ The ISC noted that there is significant duplication and overlap between the Consolidated Guidance and the OSJA policy, and questioned whether the use of two parallel frameworks is a practical solution, since it could lead to duplication and inefficiency. The ISC also found that the current approach raised questions about the consistency of decisions being taken. We share the view of the ISC that they should be merged, and should apply to all government departments and agencies that involve policy decisions on UK engagement in justice and security assistance overseas, including where the engagement is undertaken by external agencies on behalf of the UK government. However, their merging is not enough. As we explain in our responses that follow, they need to be replaced with a much more robust central human rights policy aimed at ensuring the protection of human rights in all overseas activities.

We propose that:

R1: The Consolidated Guidance should be merged with the policy on Overseas Security and Justice Assistance (OSJA), to create a single overarching human rights policy, overseen by an independent regulator;

R2: The new policy should establish an absolute prohibition on UK action by all UK personnel where there is a 'serious risk' that such action may lead to torture or CIDT;

R3: The new policy should include a clear statement on the inefficacy of torture and CIDT in line with the scientific record which has long established that torture and CIDT do not result in the acquisition of reliable intelligence.

Q2. Does the Consolidated Guidance provide appropriate legal protection for personnel and officers within the UK and overseas?

In line with our response to Q1, the Consolidated Guidance does not provide any legal protection for personnel and officers within the UK and overseas. The Guidance does not adequately spell out the UK's legal position on torture. It also allows Ministers to permit actions where there is a serious risk that torture and CIDT may ensue. Ministerial approval for such actions would not provide an adequate defence if UK personnel were found to have been complicit in torture or CIDT, which is why establishment of, and compliance with, a clear policy prohibiting torture and CIDT in all circumstances is a necessary step in revising the Guidance.

Q3. The Consolidated Guidance provides a table for officers or service personnel to use when carrying out their duties in considering whether to proceed with action when there is a risk of torture or CIDT occurring at the hands of a third party (see Annex A).

a. Does the Consolidated Guidance sufficiently define and distinguish between: 1) Torture; 2) CIDT; and 3) Standards of arrest, detention and treatment?

b. Specifically in relation to paragraph 7 of the Consolidated Guidance, do you consider the right balance is struck as to when a decision can be made to proceed in circumstances where a serious risk is identified in relation to: 1) Torture? 2) CIDT?

The Annex does not provide an adequate risk assessment tool that would enable UK intelligence or services personnel, or Ministers, to make sound judgements on the treatment of prisoners in line with their obligations under domestic and international law.

A particular weakness of the Guidance is that it fails to explain what is meant by 'serious risk' and offers no advice on how UK intelligence and services personnel go about determining the level of risk.

As it stands, the Annex makes vague references to the sorts of things that personnel might take into consideration, mainly relating to due process, including the standards of arrest and detention. It lists:

¹³ College of Policing: three years on, Fourth Report of Session 2016–17, House of Commons Home Affairs Committee, <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/23/23.pdf>.

incommunicado detention; whether the detainee has been given the reasons for his arrest; whether he will be brought before a judge and when that will occur; whether he can challenge the lawfulness of his detention; the conditions of detention; and whether he will receive a fair trial. In stating that these things ‘might be unacceptable’, the Annex is inconsistent with domestic and international law, specifically the European Convention on Human Rights, because it fails to note that all of these constitute serious breaches of domestic and international law. Furthermore, the Guidance also fails to note that where such obligations are breached, the risk of torture and CIDT is increased. The Guidance should be much clearer that when any such legal obligations in relation to standards of arrest and detention are breached, UK personnel should not be involved in interrogations of those prisoners or intelligence sharing about them, and that these breaches should be reported up the chain of command and to Ministers.

The Annex provides the standard legal definition of torture. It then lists a small number of practices that ‘could constitute cruel, inhuman and degrading treatment or punishment’. Both the SSCI report and the ISC report have provided detailed and harrowing accounts of the very wide range of brutal practices to which prisoners were subjected under the CIA’s RDI programme. These included: confinement in coffin like boxes for hours or even days on end; the use of stress positions for days on end; repeated simulated drowning for hours at a time using a ‘water board’; rectal force feeding which served no justifiable clinical purpose and therefore constituted rape; and psychological torture including mock executions, threats of physical violence and rape of family members and the witnessing of the torture of other prisoners. As it stands, the Annex is woolly on what constitutes torture and CIDT. It would be strengthened greatly if detailed, actual examples were provided, drawing on the SSCI Report, perhaps as case studies. This would provide UK personnel with a clearer picture of those practices that have been used by UK allies in recent history, and which have been clearly established as constituting torture and CIDT by the US SSCI and by the UK ISC.

The Annex fails to explain that certain practices might be considered ‘only’ as cruel or inhuman when used in isolation, but if they are used repeatedly, systematically, and alongside other cruel or inhuman practices, the perpetrators are establishing a regime of torture for the prisoner. The Guidance needs to be much more explicit that rarely do those perpetrating cruelty do so on a one-off basis. Therefore, if there is any evidence of a single incident of cruel treatment, UK intelligence and services personnel should assume that the incident was not isolated. Again, the detailed accounts of the range of cruel practices to which each CIA RDI prisoner was subjected provides solid evidence to support this argument.

To strengthen the Annex, therefore, greater clarity is needed to illustrate that where international legal standards for arrest and detention are not met, the risk of torture and CIDT also increased. The Annex should contain a much more detailed list of the different forms of torture and CIDT that were used as part of the CIA’s RDI programme, including specific case studies, to given personnel clarity on the types of practices they should be looking out for. The Annex should offer a detailed risk assessment matrix which includes a list of indicators that would suggest a prisoner may be being abused. Guidance should be sought from advocates and legal representatives with experience of working with torture victims to help develop a robust risk assessment tool.

Regarding Paragraph 7, we do not accept that there is a balance to be struck between proceeding with actions if there is a serious risk of torture or CIDT. As we have indicated, and as is clearly evident from the abuse of prisoners as part of the CIDT programme, incidents of CIDT rarely happen in isolation. The historical record shows that such acts are almost always part of a regime of abuse that amounts to a regime of torture. Therefore, we reject the presumption that it might be acceptable to proceed with prisoner interrogation or intelligence sharing where there is any suspicion that a cruel act has taken place. Instead, the presumption should be that if there is any evidence of one incident of cruelty, it should be assumed that the incident is not isolated.

We propose that:

R4. The new policy should clarify what constitutes ‘serious risk’;

R5. The new policy should provide a clear and exhaustive risk assessment framework that: a) more clearly establishes the relationship between non-compliance with international legal standards of arrest and detention and the increased risk of torture and CIDT; b) provides a more extensive set of examples of torture and CIDT, drawing on specific case study examples

from the CIA RDI programme; and c) establishes clear guidance on the range of indicators that would suggest prisoners are at risk of torture and CIDT, to replace Annex A of the current Consolidated Guidance.

Q4. With reference to paragraph 10 and page 13 of the Consolidated Guidance, does the document sufficiently capture international standards of due process?

No, see response to Q3.

Q5. Does the Consolidated Guidance provide sufficient assistance when making relevant decisions including when considering an unmitigated risk of torture or CIDT?

No, see response to Q3.

Q6. Is the “assurance process” in the Consolidated Guidance adequate? (see particularly paragraphs 16, 17, 21, 23 – 26 and 28 of the Consolidated Guidance)

We are of the view that the ‘assurance process’ is inadequate. There is considerable reliance on seeking assurances that prisoners will not be abused from overseas partners. As the ISC states, ‘The Agencies cannot assume that an overseas partner - even a trusted one - will abide by international law, and they deal with this by seeking specific assurances.’¹⁴ Several concerns arise. First, the assurances are not a pre-requisite, according to the Guidance, and operations can still go ahead even if assurances cannot be obtained.¹⁵ Second, assurances can be provided orally rather than in writing,¹⁶ with very obvious scope for confusion and malfeasance. Relatedly, the UK Agencies have no real mechanism for following up on those assurances to ensure they are enforced. The ISC stated, ‘Whether assurances were adhered to is not routinely tracked and we were told [by SIS] that it was not seen as the best use of resources to do so’.¹⁷ Last, record keeping on the securing of assurances was poor.¹⁸

In line with our proposal that the merged Consolidated Guidance and OSJA establish a clear policy which prohibits action where there is a risk of torture and CIDT, the policy should be much clearer on the use of authorisations under section 7 of the Intelligence and Services Act 1994. We have no confidence that these authorisations provide the protections they are intended to, i.e. shielding intelligence officers from liability for any breaches of international law in relation to torture or CIDT. The ISC found that they tend to be submitted to ministers in parallel with assessments under the Consolidated Guidance,¹⁹ but given the lack of clarity on what Ministers may and may not authorise, we question that they are fit for purpose. We share the view of the ISC, that there should be greater clarity and transparency about the use of section 7 authorisations, and that the scope and purpose of these should be addressed in the Guidance.²⁰ There must be a clear and unambiguous statement that section 7 authorisations must never involve condoning or allowing any action where there is a risk of torture or CIDT.

We propose that:

R6: The new policy should provide clarity on the use of authorisations under section 7 of the Intelligence Services Act 1994 to ensure that such assurances cannot be used to authorise

¹⁴ ISC, *Detainee Mistreatment and Rendition: Current Issues*, HC1114, 55.

¹⁵ *Ibid.*, 61.

¹⁶ *Ibid.*, 61.

¹⁷ *Ibid.*, 30.

¹⁸ *Ibid.*, 62.

¹⁹ *Ibid.*, 72.

²⁰ *Ibid.*, 3.

torture or CIDT;

R7: The new policy should establish a clear and robust framework for the monitoring of performance when assurances are given by overseas partners

Q7. Is the scope of the Consolidated Guidance appropriate? In particular:

- a. The Consolidated Guidance currently applies to the Intelligence Agencies, the Ministry Of Defence and UK Armed Forces. The National Crime Agency and SO15 are also expected to comply with it. Are there any other UK authorities to which it should apply?**
- b. The Consolidated Guidance applies to detention and mistreatment by foreign security and intelligence agencies (“liaison services”). It does not expressly apply to conduct by (i) other agencies of foreign States or (ii) non-State actors. Should it do so?**
- c. The Consolidated Guidance applies where persons are in the detention of a foreign liaison service or where UK agencies solicit the detention of a person by such an agency. It does not expressly apply where intelligence will foreseeably result in a person’s detention, albeit our understanding is that it is engaged in this situation. Should it state that it covers this scenario?**
- d. The Consolidated Guidance applies where UK agencies seek intelligence from a person detained by a foreign liaison service, or receives unsolicited intelligence, but not expressly where the UK merely provides intelligence, albeit our understanding is that it is engaged in this situation. Should it state that it covers this scenario?**

Operations conducted in collaboration with a range of external partners, including non-state actors, failed states, and joint unit operations with third party states, fall outside the scope of the Guidance. This means that in, theory, prisoner abuse could be outsourced to external partners (a mechanism which the ISC found was used extensively 2001-2010 to hide the UK’s role in abuse). The ISC states:

The Agencies (primarily SIS) maintain close relationships with overseas partners with whom they engage in doing counter-terrorism operations: [material redacted]. In the counter-terrorism context, these may be referred to as ‘partner counter-terrorism units overseas’ but can be more commonly referred to as ‘join units’. The Consolidated Guidance does not explicitly refer to such joint units; however, it is arguable that if the Agencies are [material redacted], then the obligations under which the Agency itself operates must then extend to that body. If those obligations are not carried over, then in effect the Agency could outsource action it is not allowed to take itself. Where HMG has financial and/or operations authority, it clearly must also carry ethical and moral responsibility.²¹

Nevertheless, in its evidence to the ISC, SIS [MI6] insisted that it ‘cannot be responsible for operations carried out by a foreign service unit independently of SIS direction’. The ISC discussed the case of Michael Adebolajo with SIS. He had been arrested in Kenya in relation to the murder of Lee Rigby and was interviewed by the Kenyan Anti Terrorism Police Unit (ATPU) and a Kenyan counter-terrorism unit which had a close relationship with the UK government known as ARCTIC. He alleged he was mistreated. SIS insisted that the Consolidated Guidance did not apply in this case, since it had not been involved in Adebolajo’s arrest, did not interview him, was not involved in his passage and did not receive intelligence relating to him. ISC took a contrary view - that because SIS part-funded and part-tasked ARCTIC, SIS’s responsibilities were engaged when ACTIC interviewed him.²² The case provides a very clear example of the limitations of the Guidance, and the potential for UK agencies to circumvent it, absolving themselves of responsibility in cases where their overseas partners torture and abuse prisoners. Such overseas partners are not limited to states, as the ISC shows, but also include failed states and non-state actors.²³ We also know that key aspects of the CIA’s RDI programme, including the design and implementation of the so-called ‘Enhanced Interrogation Techniques’

²¹ Ibid., 49.

²² Ibid.

²³ Ibid., 69.

were largely outsourced to two private contractors, psychologists James Mitchell and John 'Bruce' Jessen²⁴, who oversaw the torture and CIDT. The Guidance must, therefore, apply to non-state actors, especially as liaison services increasingly contract private actors, precisely to shield themselves from scrutiny.

The Guidance should explicitly state that it applies to foreign security and intelligence agencies (liaison services), as well as to other agencies of foreign states and to non-state actors. The Guidance should clearly state that it covers the scenarios set out in Q7 c) and d).

We propose that:

R8: The new policy should extend the prohibition on UK action where there is a 'serious risk' that such action may lead to torture or CIDT to all UK authorities, as well as to other agencies of foreign states and non-state actors.

Q8. Although there is no universally agreed definition of rendition, the term is commonly used to cover the extra-judicial transfer of an individual from one state to another. Should the Consolidated Guidance apply to rendition?

The ISC found that the UK government has no clear policy on rendition.²⁵ In *R v. Mullen* the Court of Appeal ruled in February 1999 that the facilitation by MI6 of a transfer of Nicholas Mullen from Zimbabwe to the UK to stand trial on charges related to Irish republican terrorism represented an extremely serious failure to adhere to the rule of law and involved a clear abuse of process. As the ISC shows, this case provides the basis for the UK's legal position on rendition, and the UK has not itself sought to conduct such renditions to the UK since then.²⁶

However, there is insufficient clarity on what the UK government's position is on enabling or supporting others to conduct a rendition, and what the circumstances would be in which it would consider this acceptable. This led the ISC to conclude that the government 'has failed to introduce any policy or process that will ensure that allies will not use UK territory for rendition purposes without prior permission'.²⁷ Furthermore, although the Foreign and Commonwealth Office supposedly has government oversight, it has failed to regularly review policy and was unable to provide a comprehensive picture of its areas of responsibility.²⁸

We are of the view that in any instance where UK personnel would consider condoning a rendition operation by overseas partners, a full risk assessment must be undertaken in line with our recommendations already set out. Where such a risk assessment concludes that there is a risk of torture or CIDT, the operation should not be condoned or supported and UK personnel should not in any way engage. 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.

The government has resisted including rendition as a form of CIDT in the Guidance, arguing that the absence of a clear definition is grounds for its exclusion.²⁹ With the ISC, we share the view that this is unacceptable, not least because there is excellent academic work that provides clarity on the violations of human rights that rendition operations have entailed, including: kidnap, often involving stripping naked, sensory deprivation, and forced administration of drugs orally and rectally; incommunicado detention; and denial of due process.³⁰

²⁴ SSCI, 10-11 of Findings and Conclusions.

²⁵ ISC, *Detainee Mistreatment and Rendition: Current Issues*, HC1114, 87.

²⁶ *Ibid.*, 80.

²⁷ *Ibid.*, 8-81.

²⁸ *Ibid.*, 87.

²⁹ *Ibid.*, 3.

³⁰ Margaret Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law," *George Washington Law Review*, Public Law Research Paper No. 06-36 75 (2007), <http://ssrn.com/abstract=945711>; "What's Wrong with Rendition?," *American Bar Association, National Security Law Report* 29, no. 4 (2007), http://www.abanet.org/natsecurity/nslr/2007/API_ABA_National_Security_Newsletter_68384.pdf; "Extraordinary Rendition and

We propose that:

R9: The new policy should explicitly include rendition as a form of CIDT.

Q9. Is the relationship between the Consolidated Guidance and the OSJA35 satisfactory?

As set out in our response to Q1, the Consolidated Guidance and OSJA35 should be combined into a single policy.

Q10. Should the Consolidated Guidance regime be the subject of legislation rather than set out in a policy document?

The ISC has provided detailed evidence that UK personnel were complicit in torture and CIDT, as well as in the incommunicado detention of a number of prisoners, as part of the CIA's RDI programme. Despite prior reckonings with their torturous past, including the CIA concluding in the latter years of the Cold War that torture was neither useful or effective, and the then-British Prime Minister Ted Heath outlawing it in response to the use of the so-called 'Five Techniques' in Northern Ireland in 1972, both the US and UK have reneged on these commitments to a disturbing degree.

It is our view that the Guidance is wholly insufficient in deterring collusion in torture, and a much more robust policy is needed. We also think there are compelling grounds for legislation which enshrines into law the prohibition of any action by any member of any UK government agency where torture and CIDT are a risk. The case against torture and CIDT as useful or necessary for the acquisition of intelligence has long been proven, and it is time that all UK agencies were adequately constrained by law to uphold the prohibition against torture and CIDT without exception.

The Intelligence Services Commissioner released information in December 2017 that indicated that GCHQ had wrongly applied the Consolidated Guidance in 35 cases. In eight of those, had the Guidance been properly adhered to, the sharing of information would have been prohibited. It is not clear what the reasons were, but we assume this was because there was a 'serious risk' of torture or CIDT.³¹ No data has been shared on potential breaches by the Secret Intelligence Service (SIS) or the Security Service (SyS).

It is highly likely, therefore, that individuals who were the subject of such information sharing were subjected to torture or CIDT. They have the right to remedy, but there are no procedures in place that require the relevant parties to notify them of the breach, or to inform them that any violations of their rights resulted from UK action.

There are strong grounds for the IPCO to conduct regular reviews of compliance by the various agencies with the Consolidated Guidance, and of ministerial authorisations granted. If the IPCO finds failings in applying the Consolidated Guidance, it should notify the subject, or an appropriate representative, of the intelligence sharing.

There has been a tendency for the UK government to try and block the release of information pertaining to UK involvement in the unlawful treatment of prisoners overseas, and to prevent litigation on their behalf. In some cases, the government has attempted to withhold the publication of key documents in open court, such as those which demonstrate that British intelligence knew about the torture of prisoners by the CIA before participating directly in their interrogation. Where UK courts have refused to accept government attempts to hold hearings

Disappearances in the "War on Terror", Gonzaga Journal of International Law 10, no. 1 (2006), <http://www.gonzagajil.org/pdf/volume10/Satterthwaite/Satterthwaite.pdf>; Margaret Satterthwaite and Angelina Fisher, "Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law," The Long Term View 6, no. 4 (2006), <http://www.mslaw.edu/MSLMedia/LTV/6.4.pdf>.

³¹ Jamie Doward, 'UK spies "still share intelligence gained abroad by torture"', *The Observer*, (3 June 2018), <https://www.theguardian.com/uk-news/2018/jun/02/uk-spies-breaching-rules-sharing-intelligence-gained-torture-mi5-mi6>

in camera, such as in the case brought by five former Guantánamo Bay prisoners alleging British involvement in their unlawful imprisonment and treatment, the government has offered substantial payouts without any admission of liability on behalf of the British authorities.³² The recent passage of the Justice and Security Act in April 2013, with its introduction of so-called ‘closed material procedures’ into the main civil courts, was motivated largely by a desire to embed in law the executive’s ability to keep details regarding UK involvement in torture from reaching the public record. Similarly, in the case of the rendition of Abdel Hakim Belhadj and Fatima Boucher to Libya, the UK government argued that either the foreign act of state doctrine or the doctrine of state immunity barred the courts from hearing the case.³³ This was despite clear and unambiguous evidence of SIS’s role in their rendition to Libya, revealed when secret memos exchanged between SIS and the Head of Libyan intelligence were discovered after the fall of Colonel Ghaddafi in 2011.

The UN Special Rapporteur on Torture, in an interim report to mark the seventieth anniversary of the Universal Declaration of Human Rights, re-stated the case for robust mechanisms for remedy when torture and CIDT take place:

Effective and independent complaints and investigation mechanisms, including prosecutorial and judicial authorities able to adjudicate violations and prosecute and punish perpetrators, are vital. In practice, non-judicial complaints mechanisms often are the weakest link in the institutional framework.³⁴

We agree that the UK must allow for much greater transparency when UK officials fail in their duties to prevent torture and CIDT, and the culture of obstructing appropriate remedy for victims must end.

We propose that:

R10. A new system should be established for the post-notification for people subject to intelligence sharing where they may have faced mistreatment resulting from a failure to apply the Guidance or wrongful application of the Guidance.

Q11. Should the Consolidated Guidance be renamed?

In line with our response to Q10, we propose that:

R11: The new policy should be re-named: Policy for the Lawful Detention and Interview of Detainees Overseas and Lawful Intelligence Sharing Relating to Detainees.

³² BBC (2010) Government to compensate ex-Guantánamo Bay detainees. BBC News Online, 16 November. <http://www.bbc.co.uk/news/uk-11762636>

³³ UK Supreme Court, *Belhaj and another (respondents) v Straw and others (appellants)*, UKSC 2014/0246, (2014), <https://www.supremecourt.uk/cases/uksc-2014-0264.html>

³⁴ UN Special Rapporteur on Torture, ‘Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’, UN General Assembly, 73rd Session, A/73/207, (20 July 2018). <http://undocs.org/A/73/207>