



UK: SUBMISSION TO THE INTELLIGENCE AND SECURITY COMMITTEE

THE ADEQUACY OF THE “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”

INTRODUCTION

1. Amnesty International submits the following in response to the Intelligence and Security Committee’s (ISC) call for written evidence issued on 11 September 2014. This submission addresses only the second point in the call for evidence, namely the adequacy of “the 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” (“the Guidance”).
2. Amnesty International has submitted a separate joint statement with eight NGOs on the 27 issues and broader themes raised by the Detainee Inquiry’s report. Some of the 27 issues and themes relate to the Guidance; our evidence here, however, rests on our analysis of the Guidance and related correspondence with the Government setting out our concerns in 2010 and 2011, rather than relying on any rubric set out by the Detainee Inquiry’s report. Copies of our correspondence with Government on the Guidance were shared at the time with the Detainee Inquiry.

PUBLICATION OF THE GUIDANCE

3. Amnesty International welcomed the publication of the Guidance as an important step toward ensuring transparency and accountability in relation to the actions of UK personnel operating overseas and their relationships with foreign intelligence services. The global prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) is absolute and requires governments to take positive steps to prohibit and prevent such abuse. We acknowledge the Guidance’s clear affirmation that the UK will not “participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose” and what we understand to be a prohibition of any intelligence activities of any kind by the UK where it is known or believed that torture will take place.
4. The Guidance nevertheless still gives rise to grave human rights concerns. It remains ambiguous and potentially permissive about situations where there is a serious risk that UK action will result in torture or other ill-treatment and/or where there is knowledge or belief that UK action will definitely result in other cruel, inhuman or degrading treatment. Our correspondence with the Government since the publication of the Guidance have not allayed our concerns.
5. Amnesty International recognizes the UK’s international efforts to eradicate torture. The Government’s failure to date to strengthen the Guidance in any meaningful manner is regrettable.



Until the gaps in the Guidance are addressed, the UK is likely to face criticism of its own torture prevention credentials when participating in international torture prevention programmes.

MINISTERIAL DISCRETION

6. Amnesty International remains concerned that the Guidance implies unbounded discretion at the Ministerial level to instruct officials to proceed with action which they know or believe will result in CIDTP, or in the face of evidence that there is a serious risk that UK action will result in torture. The Guidance is unclear about whether a situation where personnel conclude that it is “more likely than not” that torture will occur in connection with their actions, but are not certain, would fall within the category “If you know or believe torture will take place”, or instead under “all other circumstances”? (Table, page 6) The Guidance states “where, despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, our presumption would be that we will not proceed” (Paragraph 7). However, according to the Guidance, where relevant personnel know or believe that UK action will result in CIDTP, or a risk less than “knowledge or belief” that torture will take place, Ministers must be informed (Table, page 6).
7. The Guidance offers scant detail on the exercise of Ministerial discretion. Several provisions of the Guidance ultimately instruct personnel to consult Ministers on how to proceed. The then National Security Adviser wrote to Amnesty International stating that the Guidance “is not and does not purport to be guidance to Ministers. It does not seek to regulate the details of how Ministers will respond in individual cases where consulted.”
8. A statement on pages 3-4 of the “Note of Additional Information” heightens this. The note invokes the possibility of an “overwhelming imperative for the UK to take action of some sort, e.g. to save life.” We find it difficult to reconcile this statement and its potential implications, especially given the breadth of conduct and abuse apparently covered by the discretion to which it refers, with the earlier acknowledgements that torture and other CIDTP are both absolutely prohibited under international law. This invocation seems to ignore the repeated rejection by the European Court of Human Rights each time it has been presented with similar balancing arguments by the UK.¹
9. Given the wide range of situations in which decision-making about the appropriate action is potentially left to the discretion of the relevant Minister, and the fact that the Guidance provides no detail about the criteria for information which will inform and guide Ministerial decisions, the Guidance remains potentially permissive of action that could lead to torture or CIDTP.
10. Our concern is not about the appropriateness of delegating decision-making to the Ministerial level. It is about the lack of disclosure of the criteria that will inform and guide the Minister’s response, in combination with a failure to rule out conclusively the authorization of action where it is known that the risk of torture or CIDTP could occur. The then National Security Adviser wrote to Amnesty International clarifying it was the UK’s “starting” position not to proceed with any action where there was a serious risk that a detainee would be tortured, but could not “preclude that in circumstances where the risks of inaction to national security are high,” authorization would not be given to proceed with action that was in violation of the UK’s human rights obligations. Insofar as the publication of the Guidance was intended to clarify or reassure the public regarding UK policy on involvement of its agents in torture and other ill-treatment and compliance with its international human rights obligations, the Guidance ultimately fails to (a) address how those decisions are made or (b) offer an unambiguous statement that a breach of international law would not be authorized.



CRIMINAL RESPONSIBILITY

11. Paragraph 13 of the Guidance contains the only express reference to criminal law.²
12. The Guidance must be strengthened by expressly acknowledging, and making agents clearly aware, that where the elements of torture (or other relevant crimes) are established, *international* criminal responsibility can arise even in situations where:
 - a. UK agents are not themselves directly inflicting the pain or suffering in question;
 - b. UK agents do not know the precise crime that is to be committed, but are aware that one of a number of crimes will likely be committed and one of those crimes is in fact committed; or
 - c. UK agents are not physically present at the time and place of the actual commission of the crime³

Indeed, such criminal responsibility could arise in relation to other forms of CIDTP in certain circumstances, for instance, when perpetrated against detainees in situations of armed conflict.

13. The Guidance should make clear that orders from a superior officer or a public authority may not be invoked as a justification or excuse.⁴ The Guidance is potentially misleading in indicating to personnel that if their actions are consistent with the Guidance they will not risk personal liability. The Guidance, however, leaves open the possibility for Ministers to instruct personnel to take actions in the face of a certainty of CIDTP or risks of torture that are short of “knowledge or belief that torture will take place”. In some circumstances this could clearly place those responsible for giving and carrying out the instructions at risk of international criminal responsibility.
14. The Government has refused to address, in our correspondence, the lack of reference to criminal responsibility in the Guidance. While Ministers face the prospect of being held politically accountable, anyone acting on behalf of the UK - including individual agents - may also be held individually criminally responsible for complicity or participation in torture. This could be in the UK under domestic law or elsewhere under universal jurisdiction. The Guidance would be strengthened by expressly acknowledging that where the elements of torture (or other relevant crimes) are established, criminal responsibility can arise even in situations where agents are carrying out orders from a superior officer or a Minister. This can include situations where UK agents are not themselves directly inflicting the pain or suffering in question or when they are not physically present at the time and place of the actual commission of the crime. The amendments of November 2011 regrettably demonstrate no further commitment to strengthening the Guidance on this point.

RELIANCE ON ASSURANCES TO ‘MITIGATE’ RISK OF TORTURE OR OTHER ILL-TREATMENT

15. The Guidance relies throughout on the use of assurances in situations where there is a real risk of torture or other ill-treatment in order “to effectively mitigate that risk to below the threshold of a serious risk”. It specifies that such assurances can be sought in a number of contexts, including:
 - a. when interviewing detainees overseas;
 - b. when seeking intelligence from a detainee in the custody of a foreign intelligence service;
 - c. when soliciting detention by a foreign liaison service; and
 - d. when receiving unsolicited information obtained from a detainee in the custody of a foreign liaison service.



These references imply that assurances from a foreign government, in themselves, can give rise to a reasonable belief that there is no longer a risk of mistreatment where, without the assurances, reason to believe such a risk existed. Based on decades of research and experience about torture and other ill-treatment, Amnesty International considers that promises of humane treatment given by governments that practice torture and cruel, inhuman or degrading treatment simply are not reliable and do not provide an effective safeguard against such abuse.

16. The dynamics that arise in cases of torture and ill-treatment in those states where such practises are systemic or widespread, either in general or against particular categories of detainee, lead to inherent deficiencies in assurances that prevent them from reliably mitigating the risk of torture and ill-treatment. Given the absolute prohibition of torture under international law, its status as a crime under international law and the stigma associated with its use, states that engage in torture and other intentional abuse of detainees routinely deny and conceal its use. Further, in most or all of the circumstances where the Guidance contemplates reliance on assurances, it is difficult to see how the UK would be in a position to verify whether assurances have in fact been fulfilled after the fact, let alone to predict whether they will be respected in advance or paint a true portrait of what is happening at any moment. These difficulties are due in part to: first, the inherent challenges in detecting, documenting and confirming, during ongoing detention, sophisticated torture techniques designed to avoid physical symptoms; and, second, even in the limited circumstances where UK agents or others may in fact be in a position to interview a detainee directly about his treatment, under-reporting arising from the fear of risk of reprisals faced by a person who presumably remains held by those subjecting him/her to torture or other ill-treatment. Additionally, such assurances are not legally binding and lack effective enforcement mechanisms. Where a detainee whose proper treatment is presumed by the UK to be secured by assurances is nevertheless subjected to torture or other abuse, assurances simply do not provide the detainee with access to any legal remedy capable of compelling an end to the abuse. In such cases it is essentially left to the governments involved voluntarily to assume responsibility for investigating the breach and holding the perpetrators to account. The UK's lack of enforceable rights of access to and control over foreign places of detention or prisoners would be a significant if not insurmountable obstacle. It is unlikely that either government will have an incentive to do so in a meaningful fashion, since verifying and acknowledging that the abuse has occurred means an admission by both countries that they are responsible for violations of the international prohibition of torture and other ill-treatment.
17. In contexts where there is sufficient reason to believe that there is a real risk of torture or ill-treatment to a detainee, assurances cannot reliably or verifiably mitigate that risk in a manner that would justify proceeding with intelligence actions that otherwise could not proceed. The fact that the Guidance relies so heavily on assurances in so many areas seriously weakens its potential to ensure UK agents' actions are consistent with the UK's international human rights obligations.
18. In a response to Amnesty International, the then National Security Adviser stated that any such assurances (and caveats) are "rigorously assessed", and that intelligence officers and service personnel receive comprehensive training in order to carry out such assessments, but did not engage further with our substantive concern about the inherent unreliability of assurances.
19. Amnesty International continues to believe that such heavy reliance on assurances throughout the Guidance seriously weakens its potential to ensure that the actions of intelligence agents and security personnel are consistent with the UK's international human rights obligations.



THE SCOPE OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

20. Amnesty International considers that the Guidance does not sufficiently reflect international standards regarding CIDTP. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that CIDTP should be “interpreted so as to extend the widest possible protection against abuses, whether physical or mental.” This principle is not reproduced in the Guidance. The Committee against Torture has emphasized that states’ obligations to prevent torture and CIDTP are “indivisible, interdependent and interrelated”⁵ and the Committee against Torture and Human Rights Committee have both indicated that apart from the distinct regime of obligations to *criminalize* torture, there are few reasons to differentiate between torture and CIDTP when it comes to *state responsibility*. Yet the Guidance appears based in large part on a claim that “it is legitimate to differentiate between torture and CIDT” in a much broader range of aspects (Paragraph 5).
21. While there may be no definition of what constitutes CIDTP that is both *agreed and exhaustive* there are indeed agreed definitions for use in particular contexts. For example, the Elements of Crimes agreed by states under the Rome Statute of the International Criminal Court includes, for the purposes of the Court’s jurisdiction, a definition of “inhuman treatment”, and humiliating or degrading treatment are part of the definition of “outrages upon personal dignity”. There is also a considerable body of jurisprudence from the European Court of Human Rights and other bodies to allow clearer characterization of particular practices. The fact that and the degree to which the Guidance qualifies its characterization of the list of practices in Annex Paragraph d is a matter of serious concern. On the one hand we welcome the express recognition that the list of techniques is not exhaustive. However, instead of simply stating that the listed practices “could constitute” CIDTP, a guidance in line with international law might at the very least say they “should be presumed” to constitute CIDTP, if not simply stating they do “constitute” CIDTP. The word “could” ought only to refer to the fact that “in some cases the following practices could constitute *torture*”. We would urge the ISC to seek public clarification from the Government as to under what circumstances:
- a. it considers the use of stress positions against a prisoner, or physical abuse of a prisoner, not to constitute at least “degrading” treatment, if not “cruel or inhuman” treatment, under the relevant treaties and jurisprudence; and
 - b. conduct might be regarded as “degrading treatment” as listed in Annex d(iv), and yet not constitute “degrading treatment” under the rest of the Guidance.

ADDITIONAL INSTRUCTIONS AND TRAINING

22. The appended “Note on the Text” refers to additional departmental legal, procedural and administrative materials from each organization where “necessary” or “helpful.” Given the ambiguities and omissions identified above, Amnesty International calls on the ISC to urge the Government to recognize publicly that additional materials concerning the prohibition of torture CIDTP will indeed be necessary for personnel subject to the Guidance
23. It remains unclear whether *all* personnel involved in the detention and interrogation of detainees, including *all* members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, including practical methods to prevent torture, with input from international experts on the international prohibition of torture and CIDTP and their obligation to prevent and expose such abuse. To date the Government has confirmed to Amnesty International only that intelligence officers and service personnel receive comprehensive training in making “risk assessments”. The UK’s international law obligations under article 10 of the Convention against Torture require significantly more.



24. Full information and training on these matters are particularly important given the Guidance's implicit reliance on a very wide range of UK personnel having the ability to detect, judge and assess the degree of risk as to whether an individual will be subject to torture or CIDTP *and* whether torture or CIDTP has taken place.
25. We recommend that the ISC seek clarification as to whether relevant personnel also receive training to allow them to appreciate the limitations of techniques for detecting torture or CIDTP. This is of particular relevance in situations where 'non-physical' techniques may be used, such as sensory deprivation, humiliating treatment or threats and intimidation. Even where access exists to places of detention and prisoners to monitor their treatment, detection techniques may be able to uncover some evidence of torture in some cases and establish that it is occurring; but a failure to detect torture does not necessarily prove that no torture is occurring.

UNSOLICITED INTELLIGENCE

26. The Guidance seems to imply that unsolicited intelligence received by the UK government can be used unless there is a good reason presented as to why it should not be used, in which case a number of steps of possible action are provided (Paragraphs 27-28). Amnesty International considers that in relation to those countries where it is already well-established that the intelligence agencies systematically use torture or other ill-treatment to obtain information, whether generally or from particular categories of detainee, (for example Syria or Uzbekistan), the proper approach would be for UK personnel to *presume* that information from such agencies is the product of torture, unless there exists good reason to the contrary.

PUBLICATION OF SUBMISSIONS AND RESPONSES

27. We note that the ISC has received replies from the intelligence agencies to the 27 points raised by the Detainee Inquiry report and the views of the Intelligence Service Commissioner on current compliance with the Guidance. We call on you to make these replies public to the fullest extent possible.
28. We confirm that we have no objection to this document being published by the ISC and note that we intend to make the document publicly available through our website.
29. The principal point of contact for further information about this submission is Kartik Raj, Researcher, EU Team, Amnesty International (Peter Benenson House, 1 Easton Street, London WC1X 0DW, email: UK-SHR@amnesty.org, fax: 020 7956 1157).

NOTES

- ¹ See for instance in the Grand Chamber case *Saadi v Italy*, Application no. 37201/06, judgment of 28 February 2008
- ² "Crown servants should be aware that they are subject to English criminal law in respect of their actions in the course of their duties overseas." (Paragraph 13).
- ³ All of these aspects have been confirmed in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia.
- ⁴ See, e.g., UN Convention against Torture, article 2(3); ICRC Study of Customary International Humanitarian Law, Rules 154 and 155. Human Rights Committee, General Comment no 20 (1992), para 3
- ⁵ Committee against Torture, General Comment Number 2, paragraph 3.