Submission to the

IPCO Consultation on the Consolidated Guidance

29 October 2018

Amnesty International UK is a national section of a global movement of over three million supporters, members and activists. We represent more than 600,000 members, supporters, activists, and active groups across the UK. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

Introduction

1. Amnesty International UK submits the following response to IPCO's review of the 'Consolidated Guidance'. We welcome that a public call for evidence has been made, and look forward to further engagement with the Commissioner as the consultation progresses. We strongly urge that the final proposal is published in full, in accordance with best practice and the particular need for transparency in this area. Given the number of public cases of UK complicity in torture and cruel inhuman and degrading treatment or punishment ('CIDT') revealed by the latest Intelligence and Security Committee ('ISC') Report (and other public sources), and the 35 cases identified by the Intelligence Services Commissioner of the Guidance being wrongly applied, it is essential that the government gets this right and the public can have confidence in its activities going forwards. Sunshine remains the best disinfectant.

2. The first question this consultation asks is whether the Consolidated Guidance is consistent with applicable domestic and international legal principles. Regrettably, Amnesty International UK considers that it is not. That is why we have long called for a full review, and a proper independent assessment of what changes need to be made to ensure that the Guidance is fit for purpose in helping to ensure that the UK is never again involved or perceived to be involved in cases of torture and abuse overseas. If the policy guidance given to officials is inadequate, and does not apply to the right individuals, the chances of unlawful action are far higher. Below, we deal with some of our key concerns in this respect.

3. We do not seek to respond to all the questions raised by IPCO, or all the potential issues with the Guidance, but have selected some of those of particular concern and to which we have previously sought to draw attention. That does not mean that we consider others to be satisfactorily covered as the Guidance stands. Indeed as it currently stands, we consider that there is very little which is satisfactory about the document. The general recommendations of the UN Special Rapporteur on Torture[1] provide that "*governments should scrupulously translate into national guarantees the international standards they have approved*". The Guidance should meet that test. Currently, it does not.

The Guidance itself and who is bound by it (IPCO qu 7, 9, 10, 11)

4. Amnesty International UK strongly recommends that the scope of the Guidance be amended so that it binds all public authorities and officials who may be undertaking relevant activity, rather than the current limited list of agencies. The government will be best placed to consider which bodies these should be, but it would be deeply regrettable if any public official found themselves engaging with a foreign entity where relevant situations arose and was considered any less required to observe the provisions of the Guidance because of their job title or department. Consistency of approach should be a priority, and this requires equal application to all those undertaking comparable work. Any UK body involved with those detained abroad, or the receipt of information from or passing of information which could lead to a detention, must be required to apply it.

[1] E/CN.4/2003/68, para 68

5. Similarly, we consider that it is important to make explicit that the Guidance does not exempt any situation merely because of a technicality around the status of the agency being engaged with, or an element of arms-length engagement. That means including express statements that it applies to the conduct of all foreign state services, not merely foreign liaison services[2], and to other arrangements such as joint units. That is particularly important because SIS appear to take the view that they are not responsible for the actions of foreign services carried out "*independently of SIS direction*"[3]. They maintained this position even in the Case of the abuse of Michael Adebolajo, where they had part-funded and part-tasked the Kenyan counter-terrorism unit which interviewed him[4]. The ISC described that there existed a "*serious problem"*[5] in this area. It is crucial that the UK avoid any complicity of this kind, and any outsourcing (inadvertent or otherwise) of abuse.

6. It should also be required that the Guidance applies where the UK provides information and where intelligence will foreseeably result in a detention, the two situations referred to in Part 4 of the Consultation Document where it is said IPCO's 'understanding is that it is engaged'. There is no sensible reason for creating any doubt at all on the part of those seeking to comply with their obligations. These are both scenarios where the Guidance clearly should apply. It should say so.

7. The ISC in their latest report recommended that the Guidance be renamed. There is some suggestion that they consider its primary function to be to provide a public statement of the government's position on these issues, and to give those it applies to a consistent frame of reference[6]. They refer frequently throughout the report to the 'working level guidance' which the agencies currently use alongside the Consolidated Guidance and which the previous formulation of the ISC recommended be made public. However, other than suggesting some of the information in those documents be made public, they do not repeat their predecessor's calls for transparency.

8. Amnesty International UK takes a different view. While the Guidance is currently inadequate as either a statement of policy or an operational guide to officials, it is essential that such documents exist and exist in the public sphere. That way they can not only reassure the public that the government is acting appropriately, and provide consistent, practical assistance with fulfilling its legal obligations to those operating in its name, but be used to hold it to account where necessary. Whatever format that policy and guidance takes, it should clearly set out exactly what officials and Ministers are and are not permitted to do, and what criteria are applied when considering those decisions.

9. The question of overlap with OSJA raises a number of important issues. Currently, we agree that there exists a level of overlap and duplication between the two policies which may be less than ideal in aiming to ensure consistent decision making which complies with the UK's human rights obligations. In addition, there are weaknesses in the content and application of both. We therefore recognise that there should be further discussion and exploration of the relationship between the two and whether that should be changed and one single policy

[2] And non-state actors, a point expanded on below.
[3] See their evidence to the ISC, Report at [100]
[4] ISC Report at [101 – 1-3]
[5] ISC Recommendation S
[6] see ISC Recommendations O and P

created as the ISC recommended. That discussion should form part of this IPCO review with key stakeholders and public contributors, and include recognition that any single policy would require oversight from a single independent, effective, regulator.

10. We also consider that it would be worthwhile exploring further in this review with civil society and other contributors the question of whether the regime should be place into legislation. The overriding concern must be that those who undertake relevant activity understand that there is a public, clear and binding framework governing what actions they may take and how their decisions should be made.

11. With that in mind, the Guidance should specifically set out that torture and CIDT are prohibited under domestic law, by reference to Article 3 ECHR, and the UK's obligations under UNCAT. Currently, it does not make clear that the prohibition on torture and CIDT is a matter of domestic law, not policy choice, and that the Guidance exists to ensure the law is not broken.

RECCOMENDATIONS

A. **The Guidance should expressly apply to all public agents engaging with those detained abroad, receiving information from such detainees or providing information which could lead to detention.**
B. **The Guidance should expressly apply to engagement with any foreign state service and non-state actor, and to joint units and other situations where the UK has sufficient relationship with foreign entities to engage its responsibility under international law.**
C. **The Guidance should expressly apply to the situations outlined in questions 7 (c) and (d).**
D. **The Guidance, as revised, and any underlying policy or guidance documents, should all be made public.**
E. **The Guidance should expressly state that torture and CIDT are prohibited under domestic law.**

<u>Torture and CIDT: definition and distinction (IPCO Qu: 3.a, 8)</u>

12. The Annex to the Guidance provides the only definition of torture and CIDT in the document, and it is extremely brief. There is no elaboration provided on the elements of the definition of torture, and no guidance as to what those mean. For CIDT, however, a non-exhaustive list of practices which *"could*" constitute CIDT is set-out.

13. As currently presented, that list is misleading. Moreover, it is wholly insufficient to assist officials in understanding what practices are likely to fall within or without prohibited activity.

14. First, while the list is non-exhaustive, which is to be welcomed, the examples of practices given are more accurately described as ones of <u>CIDT which "could" be torture</u>, rather than which "could" be CIDT.

15. Techniques employing sensory deprivation[7], debility, sexual acts and religious/cultural humiliation (into which categories all of those practices listed would fall) were given recent detailed attention from the domestic Courts in the various cases surrounding alleged abuse by the British army in Iraq. It is absolutely clear from just one of those, the decision of the High Court *in R (Ali Zaki Mousa) v Secretary of State for Defence* [2010] EWHC 3304[8] that the government has previously accepted that each of these individual techniques raise at minimum an arguable case of breach of article 3[9]. Some of the listed practices even appear to correlate with the prohibited 'five techniques' that were the subject of the recent request to re-open the judgment of the ECtHR in *Ireland v UK*[10]. There, the Irish government sought to have them recognised as torture (a characterisation which the UK said in that latest case it had not contested before the Commission[11]) rather than CIDT as in the original ruling. This list, if maintained, must thus be properly characterised as setting out some practices which should at least be presumed to be CIDT. If the government considers there is any situation in which the techniques it sets out at Annex (d) would not amount to CIDT, they should explain this to the Commissioner.

16. Second, the reference to CIDT not being defined in UK law is unhelpful and potentially misleading. It creates the impression that CIDT is somehow difficult to define, or deeply subjective. Not only does there exist a considerable body of jurisprudence from the ECtHR that assists in characterising certain practices, but the domestic courts (including in the Iraq litigation) have also frequently considered practices which amounted to CIDT. While there is no agreed and exhaustive definition, there is considerable assistance also to be found in legal sources such as the Geneva Conventions, which prohibit ill treatment of detainees including "*all acts of violence or threats thereof…insults and public curiosity*"[12] and any "*physical or moral coercion…in particular to obtain information from them or from third parties*"[13]. The protections in peacetime cannot sensibly be said to be lower than those during war time. A useful guiding principle is that "*the term cruel inhuman or degrading treatment or punishment should be interpreted so as to extend the widest possible protection against abuses*[14]".

17. It would thus be perfectly possible to provide further detail on the legal definitions of torture and CIDT, and also practical guidance to assist officials in understanding what they are looking for. There is (regrettably) no shortage of real-life examples, including from the detailed accounts of abuses perpetrated by the CIA and other partners (and even where the UK has itself been complicit in abuses) which could be drawn from to provide case studies and (non-

[7] Note that in his Baha Mousa Inquiry Report, Sir William Gage defined stress positions as "*Any physical posture which a captured person is deliberately required to maintain will be a stress position if it becomes painful, extremely uncomfortable or exhausting to maintain*." (1.44 p.10). If the government feels it still lacks sources to assist in understanding how to characterise these techniques, one option would be to pay detailed attention to this Report and its description of their impact on the individual.

[8] Overturned on appeal on the question of independence of the Iraq Historic Allegations Team, but not on this point

[9] *Ali Zaki Mousa* [at 10-14]

[10] *Ireland v UK* (2018) 67 EHRR SE1

[11] Ibid at [46]

[12] Article 13 of the Third Geneva Convention; Article 27 of the Fourth Geneva Convention

[13] Article 31 of the Fourth Geneva convention. See also articles 5, 27, 32 and 37.

[14] See Principle 6 of the Body of Principles

exhaustive) indicators of abuse[15].. If the Guidance is to help discharge the UK's positive obligations in such situations, and avoid breach of the negative obligations, expansion of the Guidance in this respect is a necessary step.

18. Enforced disappearance should also be explicitly included as a form of Torture/CIDT. There is no shortage of international authority on the kind of abuses attendant to the phenomenon of "extraordinary rendition" as practiced by the US government between 2001 and 2007 and the inherent abusive nature of such transfers, including the total absence of procedural safeguards and the real risk of torture[16].

19. It is also necessary to address the concerning distinction made in paragraph 7. This suggests that where there is a serious risk of torture, there is a presumption that the activity in question will not proceed (we deal below with questions of risk and presumption), but that contrastingly "*in the case of CIDT…different considerations and legal principles may apply depending on the facts and circumstances of each case*".

20. This is a dangerous distinction. It is absolutely legitimate (the language used in paragraph 5) to differentiate between torture and CIDT at a conceptual level, and also when dealing with questions around criminal responsibility. However, in the context of state responsibility, of guiding an official as to whether they can 'proceed 'when a serious risk arises, there is simply no difference - whether the serious risk is of torture or CIDT, it would be equally unlawful.

21. There is no lesser obligation on the UK in the case of CIDT. The obligations to prevent torture and CIDT are *"indivisible, interdependent and interrelated*"[17]. However, the distinction in the Guidance as to the relevant obligation then appears to be carried over into the table at paragraph 11, creating confusion. While it refers in its introduction to "*torture or CIDT*", and also in the '*all other circumstances'* column to '*torture or CIDT'*, the '*situation'* relating to

[15] These could be drawn from domestic and international case law, the ISC Report or indeed the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Declassified Executive Summary, (2014). Amnesty International itself has published a wealth of expert information on torture and CIDT, its use, and the difficulties of and barriers to detection.

[16] See, inter alia, CCPR: General Comment No. 31, op. cit., § 18; Chihoub v Algeria, Communication No. 1811/2008, § 8.5; Aboufaied v Libya, Communication No. 1782/2008, § 7.4; Berzig v Algeria, Communication No. 1781/2008, § 8.5; Zarzi v Algeria, Communication No. 1780/2008, § 7.5; El Abani v Libya, Communication No. 1640/2007, § 7.3; Benaziza v Algeria, Communication No. 1588/2007, § 9.3; El Hassy v Libya, Communication No. 1422/2005, § 6.8; Cheraitia and Kimouche v Algeria, Communication No. 1328/2004, § 7.6; Alwani v Libya, Communication No. 1295/2004, § 6.5; Boucherf v Algeria, Communication No. 1196/2003, § 9.6; Bousroual v Algeria, Communication No. 992/2001, § 9.8; Sarma v Sri Lanka, Communication No. 950/2000, § 9.5; Celis Laureano v Peru, Communication No. 540/1993, § 8.5; Rafael Mojica v Dominican Republic, Communication No. 449/1991, § 5.7. See also, inter alia, United Nations' General Assembly resolution 47/133, Declaration on the Protection of all Persons from Enforced Disappearance, article 2; CAT, Concluding observations on the Unites States of America, CAT/C/USA/CO/2, § 18; CAT, Concluding observations on Rwanda,CAT/C/RWA/CO/1, § 14; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report to the UN General Assembly, A/61/259, §§ 55-56. See also, Inter-American Court of Human Rights: Godínez-Cruz v. Honduras, 17 August 1990, C No. 10, §§ 164, 166 and 197; Velasquez Rodriguez v. Honduras, 17 August 1990, C No. 9, §§ 156 and 187. See, African Commission on Human and Peoples' Rights, Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso, 204/97, § 44; Human Rights Chamber for Bosnia and Herzegovina, Palic v Republika Srpska, Case No. CH/99/3196, § 74.

[17] Committee against Torture, General Comment Number 2, paragraph 3.

knowing or believing refers only to torture, and the '*lower than serious risk'* only to CIDT. This is difficult to understand, and deeply confusing to the reader.

22. It is particularly surprising to see this distinction being a core part of UK policy in this area because UK practice in foreign policy has been to treat the two as synonymous. That can be seen from the FCO Strategy for the Prevention of Torture 2011-2015, which explicitly provides that activities it sets out to prevent torture apply equally to CIDT[18]. The reference in the Guidance to the lead the UK has taken in international efforts to eradicate torture (para 7) should be similarly explicit.

23. The Guidance should therefore be amended to make absolutely clear in all sections that in terms of state responsibility and thus an official (or indeed a Minister, as discussed below) deciding whether or not to proceed in any situation, there is no distinction between cases of torture and cases of other ill treatment once the appropriate level of risk of either has been identified.

24. Further, it should also be made explicit that these practices may also be perpetrated by non-state actors[19], and that the guidance must also be applied when dealing with such individuals and groups. Former Intelligence Services Commissioners have expressed concern that the Guidance does not currently explicitly bind officials in these interactions, and the ISC recommended this change be made. MI5 and SIS appear to have opposed such a move in their evidence to the ISC, considering it variously unnecessary or difficult to achieve. We agree with the ISC that difficulty in providing definitions is no reason not to act. State obligations in the field of torture and other ill treatment are not confined to acts of foreign states. The same should be true of this guidance.

25. That is particularly salient in the case of private contractors, such as those placed in charge of detention facilities. The UN Committee Against Torture made clear in its General Comment No.2 that where a state fails "*to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts*"[20]. When dealing with private contractors overseas, the obligations under international and domestic law are no less serious.

RECCOMENDATIONS:

- **F. The Guidance should provide accurate, detailed guidance on the definition of (i) torture and (ii) CIDT and case studies to assist those attempting to understand their obligations.**
- **G. The Guidance should make clear that there is no distinction between torture and CIDT for the purposes of state responsibility and thus officials' decision making in this area.**

[18] "*There is also an absolute prohibition on cruel, inhuman and degrading treatment or punishment ('CIDT') under international law and the Government has consistently made clear its absolute opposition to such practices and its determination to prevent them. The activities proposed in this strategy to prevent torture therefore also apply to tackling CIDT*". (p.13)

[19] See, for example*, A v UK* (1999) 27 EHRR 611

[20] UNCAT General Comment No.2 CAT/C/GC/2 24 January 2008 at [18]

H. The Guidance should provide explicitly that it also applies to interaction with non-state actors, including agents of the state such as private contractors.

Assessing Risk (IPCO Qu 3b, 5)

26. As the former independent reviewer of terrorism legislation, David Anderson, explained in a recent interview on Radio 4, "*the guidance is quite subtle, the only red line is that if an intelligence officer knows or believes that torture will take place he may not proceed*". Other than this, the Guidance table at paragraph 11 provides that if there is a "*lower than serious risk*" the action may proceed, but in all other circumstances the official must consult senior personnel. Should those senior personnel conclude there is "*no serious risk"* or that it exists but they can "*effectively mitigate the risk of mistreatment to below the threshold of a serious risk*" then they may proceed, but otherwise, the situation then has to be referred to "*Ministers*".

27. There is no detail as to what criteria the Ministers must themselves apply to the decision, only reference to them considering whether it is possible to "*mitigate the risk*", and that all details have to be given to them - including "*risks of inaction*" - to enable them to "*look at the full complexities of the case and its legality"* (see also paragraph 14). There is also reference in paragraph 7 to a "*presumption"* that the UK will not proceed where there exists a serious risk of torture, but (as above) this does not apply to CIDT.

28. After setting out this process, the Guidance goes on to provide for "*time sensitive military operational conditions*" (12), where there is 'no opportunity' to refer upwards any "*concerns*" at all. In such a situation, surprisingly, it merely requires personnel to observe the Guidance "*so far as it is practicable"* and then report the circumstances at the earliest opportunity to senior personnel.

29. This gives rise to a number of concerns. First, the absence of any real "*instruction*" (as the ISC called it) as to what is meant by 'serious' risk. Second, the absence of a clear statement that the UK (including Ministers) will not proceed where there exists a serious risk of torture. Third, the absence of any criteria at all to constrain what appears to be unbounded Ministerial discretion or to assist the public in understanding on what basis the decision is made. Fourth, the 'time sensitive' exception placing a considerable burden on the individual official and risking action that leads to prohibited torture or other ill treatment. Further, there is very limited reference to the positive obligation to prevent identified risks from materialising. Taken together, these suggest not only that officials have insufficient assistance when making relevant decisions, but also that <u>Ministers could make a decision to authorise action where there exists a recognised serious risk of torture or CIDT</u>.

30. The ISC drew attention in its latest report to the lack of instruction as to the meaning of 'serious risk' even in the 'working-level' guidance available to officers[21]. It expressed concern that this placed a significant burden on individual officers. We agree. More importantly, however, it raises the possibility that in the absence of any detailed explanation as to the

[21] ISC report at 153

meaning of the threshold and its application, different judgments may be made by different individuals (and even different Ministers).

31. In its judgment on the legal challenge brought by the Equality and Human Rights Commission to the use of the term "serious" rather than "real" risk in 2011[22], the High Court expressed the view that in this context, the two terms were indistinguishable. The Cabinet Office takes the same view, explaining to the ISC that in line with the Divisional Court, it considers a 'serious' risk is "*one that is not just theoretical and fanciful"*[23]*.* That is in line with the considerable wealth of domestic jurisprudence which exists on the meaning of 'real risk'. While Amnesty International UK considers it would be highly preferable to use the more accurate and more easily understood language of 'real' as opposed to 'serious' risk, we accept that the result of the Court's ruling that the two have the same meaning in this context should mean that the 'real risk' threshold is applied. It should therefore be perfectly possible to draw on the wealth of jurisprudence on the meaning of 'real risk' to provide proper working definitions in the Guidance for all those involved, in order to ensure that 'serious' risk in this context is not treated as a probability[24]. Without this kind of language and detail in the guidance, there remains an impermissible ambiguity about what kind of assessment the individual officer or Minister is required to make, and a risk not only of inconsistency, but serious error.

32. What then if such a serious risk is identified, and cannot be 'mitigated'[25] (or rather obviated)? How is the Minister, on referral, to act[26]?

33. It is impossible for the public to understand from the Guidance what will guide Ministerial Discretion, and whether or not they will (or indeed can) authorise action where there is a serious risk of prohibited torture or other ill treatment resulting, or indeed even where they know or believe that will occur. Indeed, there is no reference at all in the Guidance to article 3 of the Human Rights Act 1998, or other international and domestic instruments which constrain the actions of UK state actors or agents. This is entirely unacceptable. It also seems to have given rise to worryingly misguided and varying understanding on the part of different Ministers as to what their obligations are. Evidence given to the ISC suggests that while Boris Johnson MP, then Foreign Secretary, considered there to be an absolute prohibition where torture is a possibility, others took a different view. The Home Secretary Theresa May MP referred to "*balancing risks*", and another Foreign Secretary Philip Hammond MP to the ticking bomb trope and a judgment to be made as to whether "*protection of their human rights outweighed the human rights"* of those at risk from the bomb[27].

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[22] *R (Equality and Human Rights Commission) v Prime Minister and others [2011] EWHC 2401 (Admin) [2012] 1 W.L.R. 1389*

[23] ISC report at 155

[24] In just one such example, Sedley LJ expounded in *Batayav v SSHD* [2003] EWCA Civ 1489 on the care to be taken when approaching these terms, pointing out that "*If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it…There is a danger…of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is*." [38-39]

[25] We deal below with the question of mitigation and assurances

[26] This is not a minor concern. The ISC report makes clear that the SIS refer 17-25% of cases to Ministers.

[27] ISC Report at 179-180

34. Just as concerningly, when asked about CIDT as opposed to torture, Mr Johnson MP felt this was "*less clear*", with Mr Hammond MP echoing that view. In his evidence to the ISC in 2010, the then Foreign Secretary said the government *"cannot preclude that there may be circumstances in which it would be lawful for the UK to proceed with an operation, notwithstanding that serious risk being committed by a third party*". He added "*the case would have to be genuinely exceptional in respect of the serious risk of CIDT"*[28].

35. These "*dangerous ambiguities*[29]", and the indication that the relevant Minister may undertake a balancing exercise which then leads to authorisation of actions even where a serious risk of torture or other ill treatment exists, align with the then National Security Adviser's views as expressed to Amnesty International. He explained] that they could not "*preclude that in circumstances where the risks of inaction to national security are high",* authorisation would not be given to action in violation of the UK's human rights obligations. That is deeply disturbing[30].

36. This attempt at balancing the identified risk of prohibited abuse against the threat to national security (or other harm) of taking a different action, is one that has been repeatedly rejected by the Courts, including in cases brought against the UK[31].

37. The recent decision of the UK Supreme Court in *NIHRC*[32] is particularly helpful on this point. There, Lord Kerr explained:

> "*The focus is directly on the behaviour said to constitute torture or inhuman or degrading treatment rather than on the circumstances in which it occurred or the avowed reasons for it. If the treatment to which an individual is subjected can properly be regarded as torture or inhuman or degrading, it does not matter a whit what the person or agency which is responsible for the perpetration of that treatment considers to be the justification for it. Nor does it matter that it is believed to be necessary to inflict the treatment to protect the interests of others. Torture and inhuman or degrading treatment are forbidden. That is an end of it*." [215]

Similarly, Baroness Hale set out that

> "*the right not to be subjected to torture or inhuman or degrading treatment or punishment is absolute—it is not to be balanced against any other rights, including the right to life of people whose lives might be saved if, for example, a prisoner were tortured in order to discover their whereabouts*." [32]

[28] Annex C: ISC report on the consolidated guidance, p.179 , letter of 12 April 2010 from the ISC to the prime minister

[29] ISC Report p.3

[30] We are also deeply concerned by the reference to authorisations under section 7 of the ISA 1994. These must never be used in a way which places the UK in breach of its human rights obligations. Should litigation proceed on this topic as has been reported, Amnesty International UK will closely scrutinise what information emerges, and what arguments the government makes on this point.

[31] See, for example, the decision in *Saadi v UK* (2008) 47 E.H.R.R. 17 at [137-142], including the clear rejection in [138]: "*The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived*."

[32] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland)* [2018] UKSC 27

38. With this in mind, the Guidance should be amended to (i) make clear what factors guide Ministerial decision making, and (ii) include an express statement that public officials, including Ministers, will not under any circumstances authorise action where there exists a serious risk of torture or CIDT.

39. In respect of the 'time sensitive' exception to the usual process, the ISC recommended[33] that it be made clear that it does not extend to situations where there is a serious risk of torture. If the above recommended prohibition on action in any circumstances where there exists a serious risk of torture or CIDT is made clear[34], that should assist in ensuring that this exception does not lead to abuse. It would mean that individuals would still have to make a time sensitive assessment as to what level of risk exists, but that if they believe it to be serious, they must immediately desist and disengage in the absence of the possibility of referral for further consideration.

40. Finally, we consider that more attention should be paid to the positive obligations on the UK to prevent torture and other ill treatment in the Guidance. The table in paragraph 11 currently refers to raising concerns with liaison authorities "*to try and prevent torture occurring*" where the official knows or believes it will take place. Further consideration should be given to what more can be recommended and in what situations, given the extent of the positive obligation to prevent. This is particularly important in joint unit situations, or where the very fact that the UK has the possibility to interview a detainee or otherwise engage with their situation may mean the UK has power to affect what is happening to them.

RECCOMENDATIONS

- **I. The Guidance should provide further detail and language as to the meaning and application of the 'serious risk' test.**
- **J. The Guidance must include a clear prohibition on any UK action (including Ministerial authorisation) where there is a serious risk of torture or CIDT.**
- **K. The Guidance should set out the criteria to be applied by the Minister in making authorisations.**

<u>Assurances and caveats (IPCO qu 6)</u>

41. The Guidance places significant weight on the use of assurances to 'mitigate' an identified serious risk below that threshold. It provides that assurances can be sought in a wide variety of contexts, including:
    (i) Interviewing detainees overseas
    (ii) Seeking intelligence from a detainee in foreign intelligence service custody
    (iii) Soliciting detention by a foreign liaison service
    (iv) Receiving unsolicited information from a detainee in foreign liaison service custody

    Indeed, such assurances seem to be at the heart of UK practice in this area.

[33] Recommendation X
[34] That should naturally follow from ISC recommendation X, where the Committee goes on to explain that it is recommending the emergency provision not extend to where there is a serious risk of torture because '*no public official should be able to authorise torture*'

42. The ISC report notes that in almost all cases they looked at where assurances had been relied on to mitigate risk, those were verbal rather than written assurances[35]. The Agencies' evidence was that they did not consider that this reduced their value. Notably, however, the ISC further noted that the latest working level guidance had failed to incorporate the recommendation of the former Intelligence Services Commissioner that officials be instructed either to obtain a written assurance or where that was not possible, to send a written record of the verbal assurances to the liaison partner[36].

43. The Committee also noted that there was no routine tracking by the UK of whether assurances were adhered to in the longer term. SIS, for example, did not evaluate individual cases under the Guidance[37]. It is SIS which generally takes the lead in negotiating assurances[38], but the relevant agency which then takes responsibility for decision making on what to do before and after that. The ISC points out that the nuances of a verbal assurance may be difficult for SIS to convey accurately to the Agency seeking it[39].

44. Moreover, the ISC was unable to make as thorough an assessment of assurances as it would have wished, since no statistics have been collected on the number of written assurances obtained or verbal assurances recorded[40].

45. This is a bleak picture. Where there has been judged to exist a serious risk of torture or other ill treatment, verbal promises - unrecorded and generally not evaluated in the longer term - are relied upon as if they are capable of meaning that the identified risk no longer exists.

46. In deciding that assurances have successfully mitigated an otherwise serious risk of abuse, officials are deciding, legally, that there is no longer a real risk – that it is merely fanciful or theoretical. Based on decades of research and experience around torture and other ill treatment, Amnesty International's expert view is that promises of humane treatment (verbal or otherwise) given by governments which carry out these practices are not reliable[41]. They are incapable of providing an effective safeguard against prohibited abuse.

47. Given the absolute nature of the prohibition under international law and stigma associated with its use, as well as the criminal repercussions, states which torture and otherwise ill-treat their detainees routinely conceal and deny its use. Moreover, while the UK claims to follow up on assurances during a case, it is clear that this is not then generally continued afterwards. It is difficult to see how the UK would be in a position to do so. However, even the claim that immediate compliance during the case can reliably be assessed, let alone predicted in advance, is highly suspect. There are inherent serious challenges in detecting, documenting and confirming torture techniques, particularly sophisticated ones, and particularly during

[35] Report at 133
[36] ISC report at 138
[37] ISC report at 56-57, and fn 82
[38] ISC report at 58
[39] ISC Report at 131
[40] Recommendation X
[41] See Amnesty International's report 'Dangerous Deals: Europe's reliance on diplomatic assurances against torture , 2010 EUR 01/012/2010
available at https://www.amnesty.org/download/Documents/36000/eur010122010en.pdf,

detention and where there is an intent to avoid revealing what has happened by causing physical symptoms.

48. Even in the limited cases where the UK may be in a position to interview an individual in private, under-reporting is common owing to the fear of reprisals from the detainee when they are aware they will return to the custody and control of the abusive state or other actor. There is nothing in the ISC report which suggests that the supposedly 'rigorous' assessment carried out by officials is unique in the history of studies of torture in finding a way to surmount these difficulties and ensure assurances cannot be violated without detection.

49. Further, assurances are not legally binding, and do not contain any formal mechanism for enforcement. What legal remedy exists for a detainee who is in fact tortured or subjected to other ill treatment after an assurance has been given? All is left to trust, and when a state is known to systematically abuse and torture its detainees to the extent that a serious risk arises in the case, it is deeply concerning that the UK is in truth basing its entire policy on faith in a "*clear eye to eye understanding*"[42] with an individual torturer, enabler or other senior official who has already failed to ensure a safe system.

50. Not only is it left to the relevant state to hold its abusers to the assurance, but there is no suggestion that the UK has an enforceable and unimpeded right itself to access and control the conditions of detention. Nor does it have any incentive to dig too deeply or seek such access, given that any verification or acknowledgment of abuse having occurred after an assurance was given would amount to an admission that the UK as well as the foreign state is responsible for violation of the international prohibition of torture and other ill treatment.

51. As such, in situations where there exist substantial grounds to believe that a real risk exists of torture or ill treatment of a detainee, assurances cannot reliably or verifiably obviate that risk. They cannot transform an operation which should not proceed into an acceptable one. The fact that the guidance relies so heavily on assurances and caveats in so many areas seriously weakens its effectiveness as a means to ensure the UK does not violate its international human rights obligations

RECCOMENDATION

L. The UK should no longer rely on the use of assurances or caveats as a way to 'mitigate' an otherwise serious risk of torture or CIDT.

<u>Legal protection for personnel, and legal redress for abuse (IPCO qu 2)</u>

52. In this context, it is particularly surprising that the guidance indicates to individual officials that they will be relieved of any personal liability for their actions so long as they act compatibly with the guidance. In fact, since Ministers appear to be able to authorise actions by those individuals in the face of not just a serious risk of torture but even in the knowledge and belief that CIDT will take place, that could clearly in some cases place those who give or carry out the authorised actions at risk. They would be at risk of international and domestic criminal responsibility. International criminal liability can arise even where (i) the officials are

[42] Director General of Mi5, ISC report at 135.

not themselves carrying out the abuse; (ii) they do not know the precise crime that is to be committed but are aware that one of a number is likely to be, and then one of those is committed; or (iii) they are not physically present when the abuse is perpetrated. This should be made clear.

53. There is currently only one express reference to criminal law in the guidance, at paragraph 13, reminding individuals they remain subject to domestic criminal law when acting in the course of their duties overseas. It should also make clear that not only does criminal liability also exist in international law, but that there is no valid excuse or defence that the official was following superior orders[43].

54. Amnesty International UK also notes that currently, there are multiple barriers to individuals seeking justice for UK complicity in torture, including the closed material procedures created by the Justice and Security Act 2013[44]. Moreover, the government has on several occasions attempted to argue that it cannot be held responsible for abuses in the kind of situations mentioned in the Guidance, such as its attempted reliance on the foreign act of state doctrine/state immunity in the *Belhaj* litigation. The culture is therefore too often one of secrecy and denial. This is reflected in the absence of any mechanism for individuals to know when their mistreatment overseas has had a causal link to UK activity, and thus any opportunity to seek justice in accordance with their rights. Attention should be given in this review to that lacunae in the Guidance, and the obligation on states to ensure that effective remedies for human rights violations (and torture and CIDT in particular) are truly meaningful and accessible.

RECCOMENDATION

M. The Guidance should make clear that it cannot shield individuals from individual criminal responsibility, and set out where they may be liable in domestic and international law.

[43] See, inter alia, UNCAT article 2(3), ICRC study of customary international humanitarian law rules 154-155, Human Rights Committee General Comment no.20 (1992) para 3. See also

[44] See Amnesty International report, Left in the Dark: the available at https://www.amnesty.org/download/Documents/20000/eur450142012en.pdf