



IPCO CONSULTATION ON THE CONSOLIDATED GUIDANCE

Submission from REDRESS

29 October 2018

1. REDRESS is an international human rights organisation that represents victims of torture to obtain justice and reparations. We bring legal cases on behalf of individual survivors, and advocate for better laws to provide effective reparations. Our cases respond to torture as an individual crime in domestic and international law, as a civil wrong with individual responsibility, and as a human rights violation with state responsibility. Through our victim-centred approach to strategic litigation we can have an impact beyond the individual case to address the root causes of torture and to challenge impunity. We apply our expertise in the law of torture, reparations, and the rights of victims, to conduct research and advocacy to identify the necessary changes in law, policy, and practice. We work collaboratively with international and national organisations and grassroots victims' groups.
2. REDRESS makes this submission to the Investigatory Powers Commissioner's Office (IPCO) in response to the decision to launch a public consultation on 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 (Consolidated Guidance or Guidance).
3. REDRESS intends to release an in-depth report into some of the issues related to this consultation process later this year.
4. This submission addresses the following consultation questions provided by IPCO:
 - Is the Consolidated Guidance consistent with applicable domestic and international legal principles? (Question 1)
 - 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 cruel, inhuman or degrading treatment (CIDT) occurring at the hands of a third party (see Annex A). (Question 3)
 - a) Does the Consolidated Guidance sufficiently define and distinguish between:
 - Torture;
 - Ill-treatment (CIDT); and
 - 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:
 - Torture?
 - Ill-treatment (CIDT)?

- 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? (Question 8)
- Should the Consolidated Guidance regime be the subject of legislation rather than set out in a policy document? (Question 10)
- Should the Consolidated Guidance be renamed? (Question 11)

Recommendations

5. Redress makes the following recommendations.

- Recommendation 1: The definition contained within the Annex should be amended to accurately reflect the definition of torture under international law and associated standards.
- Recommendation 2: The list of practices which may constitute ill-treatment should be expanded and updated to include actual case studies and practices which have been recognised to constitute ill-treatment.
- Recommendation 3: Detailed guidance should be given on how to recognise torture or ill-treatment according to the circumstance of each case.
- Recommendation 4: The Guidance should explicitly recognise that that severity of the conduct depends on the individual circumstances of the detainee.
- Recommendation 5: The Guidance should be amended to apply to rendition.
- Recommendation 6: The Guidance should make clear that a Minister who is consulted pursuant to the Guidance cannot authorise action which will or may result, given substantially grounded belief or knowledge, in torture or ill-treatment, or complicity in such action, under any circumstances.
- Recommendation 7: The Guidance should clarify what constitutes “serious risk”.
- Recommendation 8: There should be a system of post-notification for people subject to intelligence sharing where there has been a failure to apply the Guidance.
- Recommendation 9: The Consolidated Guidance should be renamed to reflect the fact that it sets out a policy and provides workers with little actual guidance.

International legal principles regarding the prohibition of torture and ill-treatment

6. The absolute prohibition against torture and other forms of ill-treatment is a fundamental human rights obligation and is reflected in numerous international and regional treaties to which the United Kingdom is a State Party. This includes the Universal Declaration on Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 3), the United Nations Convention against Torture (UNCAT) and the European Convention on Human Rights (Article 3).¹ Torture is also a crime

¹ Other treaties prohibiting torture, to which the UK is a State Party, include the Convention on the Rights of the Child (Article 37(a)) and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. Other relevant international and regional treaties and declarations include the American Convention on Human Rights (Article 5), the African Charter on

against humanity under article 7(1)(f) and a war crime under articles 8(2)(a)(ii) and (c)(i) of the Rome Statute of the International Criminal Court. There is no single definition of torture under international law. Although Article 1 of the UNCAT is generally considered to be the internationally agreed definition, it contains a fairly narrow interpretation of what treatment amounts to torture.²

7. The Guidance is weak on establishing the UK's position under international law and the absolute prohibition against torture, providing one vague reference to the prohibition of torture under international law.³ The guidance does not make clear that torture is a serious crime punishable under UK domestic law under section 134 of the Criminal Justice Act 1988 and the International Criminal Court Act 2001.⁴ Instead, the issues contained in the Guidance are framed as policy issues, making clear that the standards outlined in the Annex are not "descriptive of any legal term", regardless of international and domestic law.⁵ As currently drafted, the Guidance understates the universality of the prohibition of torture and the legal consequences of violating it. If personnel misunderstand that torture is a prosecutable offence, there is a risk they will apply the Guidance too narrowly.
8. The Consolidated Guidance devotes considerable effort to distinguishing between torture and ill-treatment, even though both practices are prohibited under international law. In the past, States sought to rely on such a distinction to justify using coercive interrogation practices in the context of counter-terrorism investigations. In July this year, the United Nations Special Rapporteur on Torture (SRT) highlighted this point clearly, noting that "any cruel, inhuman or degrading treatment or punishment, whether or not that treatment may be formally qualified as torture, is unlawful and cannot be justified under any circumstances".⁶

Human and Peoples' Rights (Article 5) and the Inter-American Convention to Prevent and Punish Torture.

² Article 1 UNCAT reads "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

³ Paragraph 5 of the Consolidated Guidance states that "There is an absolute prohibition of torture in international law and a clear definition of what constitutes torture. There is also an absolute prohibition on CIDT, but there is no agreed or exhaustive definition on what constitutes CIDT".

⁴ The definition within the Annex of the Consolidated Guidance is limited to action by a "public official" whereas section 134(2)(a) includes the intentional infliction of pain or suffering by a person who is acting "at the instigation or with the consent or acquiescence" of a public official. We note, however, that the definition of torture under section 134 of the *Criminal Justice Act 1988* itself is problematic and inconsistent with international legal standards, in particular regarding the inclusion of a defence to the offence of torture under section 134(4), where a person was acting with 'lawful authority, justification or excuse', is problematic and inconsistent with international legal standards. REDRESS has previously called for the repeal of this defence (See, REDRESS, Submission to the UN Human Rights Committee: International Covenant on Civil and Political Rights: response to the United Kingdom's 7th Period Report (December 2012), 5 June 2015, p. 10).

⁵ Consolidated Guidance, p. 10.

⁶ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, July 2018, A/73/207, <https://undocs.org/en/A/73/207>, p.46.

9. In the Annex, following a brief definition of torture, the Guidance lists a small number of practices that the UK Government considers “*could* constitute cruel, inhuman, or degrading treatment or punishment” (emphasis added).⁷ The list does not purport to be exhaustive, but it remains vague and insufficient, and does not provide clear guidance on what treatment amounts to torture or ill-treatment. As the SRT has recently posited, “it is difficult to envisage any realistic scenario of the intentional and purposeful infliction of pain and suffering on a powerless person that would not amount to torture”.⁸ The Guidance does not make clear that the conditions which give rise to ill-treatment often facilitate torture, or that certain practices may amount to torture if used repeatedly and systematically.
10. In addition, the Annex does not take into account the individual circumstances of the detainee. In the *Selmouni* case the ECtHR explained that the severity of conduct “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”.⁹ In *Aydin* that the rape of someone who is a detainee of the State must be “considered especially grave and abhorrent” considering the exploitation of the “vulnerability and weakened resistance of the victim”.¹⁰
11. The list of practices contained in the Annex which *could* constitute ill-treatment in the Annex of the Consolidated Guidance is not consistent with increasing standards as demonstrated in recent UK and European Court of Human Rights (ECtHR) caselaw. Some recent examples include:
 - In the December 2017 case of *Alseran*, the High Court confirmed that hooding is inhuman and degrading.¹¹ In giving his judgment Mr Justice Leggatt stated that “...The court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention.”¹²
 - The ECtHR has similarly suggested that hooding alone amounted to a breach of the European Convention in the case of *El-Masri v Former Yugoslav Republic of Macedonia* (2013).¹³
 - In the 2016 case of *Bouyid*, the ECtHR found that a slap to the face inflicted by a police officer to a person in police custody constituted inhuman and degrading

⁷ This includes (i) use of stress positions; (ii) sleep deprivation; (iii) methods of obscuring vision (with an exception where these do not pose a risk to the detainee’s physical or mental health and is necessary for security reasons during arrest or transit. Emphasis in original), (iv) physical abuse or punishment of any sort; (v) withdrawal of food, water or medical help; (vi) degrading treatment, including sexual embarrassment or religious taunting; and (vii) deliberate use of white or other noise.

⁸ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, July 2017, A/73/207, <https://undocs.org/en/A/73/207>, at [46].

⁹ *Selmouni v France*, ECtHR, Judgment of 28 July 1999, at [100].

¹⁰ *Aydin v Turkey*, ECtHR, Judgment of 25 September 1997, at [83].

¹¹ *Kamil Najim, Abdullah Alseran. Abd Ali, Hameed Ali. Al-Waheed, MRE, KSU v Ministry of Defence*, [2017] EWHC 3289, at [495].

¹² *Ibid*, p. 495.

¹³ *El-Masri v Former Yugoslav Republic of Macedonia*, ECtHR (GC), Judgment of 13 December 2012, para 209.

treatment, particularly considering the duty of the public official to protect the person in their custody.¹⁴

12. The Guidance does not explicitly mention the relationship between torture and ill-treatment and coercive interrogation techniques. The SRT in his most recent annual report has cautioned against increasing attempts by States to reinterpret some coercive interrogation techniques as not violating the absolute prohibition of torture and ill-treatment. He noted a trend of overemphasizing the criterion of ‘severity’ in relation to pain and suffering being inflicted, the increasing use of techniques which leave no physical marks, euphemistic terminology such as ‘enhanced interrogation’, as well as the argument that the effects of the practice must result in serious injury or long-term harm in order to violate the prohibition.¹⁵
- Recommendation 1: The definition contained within the Annex should be amended to accurately reflect the definition of torture under international law and associated standards.
 - Recommendation 2: The list of practices which may constitute ill-treatment should be expanded and updated to include actual case studies and practices which have been recognised to constitute ill-treatment.
 - Recommendation 3: Detailed guidance should be given on how to recognise torture or ill-treatment according to the circumstance of each case.
 - Recommendation 4: The Guidance should explicitly recognise that that severity of the conduct depends on the individual circumstances of the detainee.
13. The practice of extraordinary rendition, by which States collaborate and assist one another in contravention of established international human rights by abducting, transferring, extrajudicially detaining, and subjecting individuals torture, is a notable omission within the Guidance. Extraordinary rendition has been the subject of considerable analysis by the SRT, who has noted that the legal prohibition against torture and ill-treatment would be meaningless if States could simply abuse victims outside their jurisdiction and evade responsibility on technical grounds.¹⁶ REDRESS agrees with the recommendation put forward by the Intelligence and Security Committee of Parliament (ISC), which recommended in its recent report that rendition be mentioned under the non-exhaustive list of types of ill-treatment.¹⁷
- Recommendation 5: The Guidance should be amended to apply to extraordinary rendition.

Discretionary power given to Ministers to approve action even where there is a “serious risk” of torture or ill-treatment

14. The Guidance does not properly define “serious risk” which leaves the Guidance vague and ineffective for those using it. Paragraph 7 of the Guidance, states that “In circumstances where, despite efforts to mitigate the risk, a *serious risk* of torture at the

¹⁴ *Bouyid v Belgium*, ECtHR (GC), Judgment of 28 September 2015, para.108.

¹⁵ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, July 2017, A/73/207, <https://undocs.org/en/A/73/207>, p. 45.

¹⁶ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Seventieth session of the United Nations General Assembly, 7 August 2015, A/70/303, at para 23.

¹⁷ ISC, *Detainee Mistreatment and Rendition: Current Issues*, June 2018, p. 102.

hands of a third party remains, our presumption would be that we will not proceed” (emphasis added). The concept of “serious risk” in relation to torture and ill-treatment is repeated in the risk assessment table to consider whether to proceed with action at paragraph 11 of the Guidance, but again without definition or further guidance.

15. Under the Guidance, personnel may continue to cooperate with the foreign agencies responsible in cases where there may be a risk of torture or ill-treatment under the apparent discretionary power given to Ministers.¹⁸ The evidence presented to the ISC by several Ministers indicates that several believed they not only had the power to authorise action which would result in torture or ill-treatment, but also that doing so would be justifiable.¹⁹ The Guidance should make clear that UK Ministers have no discretion to authorise action where they know or believe that torture or ill-treatment will take place, and should clarify that the purpose of escalating particular cases to the relevant Minister pursuant to the Guidelines is not to permit a circumvention of the absolute prohibition against torture and ill-treatment.
16. As REDRESS has previously noted,²⁰ the requirement within the table under paragraph 11 of the Guidance that UK personnel must not proceed (without Ministerial authorization) where they “know or believe” that torture will occur is inconsistent with its obligations under the UNCAT. States cannot extradite a person “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture”, according to Article 3 (1) of the UNCAT and the European Court of Human Rights.²¹ The UNCAT has made clear in General Comment No.2 of 2008 that the same obligations to prevent torture under Article 2 UNCAT also apply to prevent ill—treatment. The Guidance should explicitly prohibit an officer from proceeding where there is a real risk of torture or ill-treatment, in line with the absolute prohibition.
 - Recommendation 6: The Guidance should make clear that a Minister who is consulted pursuant to the Guidance cannot authorise action which will or may result in torture or ill-treatment, or complicity in such action, under any circumstances.
 - Recommendation 7: The Guidance should clarify what constitutes “serious risk”.

Meeting the responsibility to ensure redress

17. The UK is obliged to provide survivors of torture and ill-treatment with redress under Article 14 of UNCAT. REDRESS supports the recommendation put forward by Reprieve for the establishment of a system of post-notification for people subject to intelligence sharing where there has been a failure to apply the Guidance in order to allow them to

¹⁸ Paragraphs 11 and 14 of the Guidance.

¹⁹ See, *Detainee Mistreatment and Rendition: Current Issues*, June 2018, pp. 74-77.

²⁰ See, for example, submission by REDRESS, Universal Periodic Review, United Kingdom, 13th Session, May-June 2012, at p. 7.

²¹ In *Soering v The United Kingdom*, [ECtHR, Judgment of 7 July 1989](#), at para. 88, the ECtHR found that “an essentially similar obligation [as in Article 3(1) of the UNCAT] is ... already inherent in the general terms of Article 3 (art. 3) of the European Convention [on Human Rights]. It would hardly be compatible with the underlying values of the Convention... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture... Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article[.]”.

access a remedy in UK courts. Launching this system would be an important step towards the UK realizing its obligations to facilitate the “verification of the facts and full and public disclosure of the truth” in the interest of the victim, “undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that an act of torture has been committed...”, and “ensure that impartial and effective complaints mechanisms are established.”²²

- Recommendation 8: There should be a system of post-notification for people subject to intelligence sharing where there has been a failure to apply the Guidance.

Renaming the Consolidated Guidance

18. As it currently stands, the Guidance is not in fact a guiding document. It is primarily a collection of policy statements regarding “the principles...which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees”.²³ Where the Guidance does purport to provide actual guidance to relevant personnel, the guidance is vague.

- Recommendation 9: The Consolidated Guidance should be renamed to reflect the fact that it sets out a policy and provides workers with little actual guidance.

²² Committee Against Torture, [General Comment No 3](#), November 2012, CAT/C/GC/3 at para. 16 & 23.

²³ Consolidated Guidance, p. 1.