

The Prohibition against Torture: Why the UK Government is Falling Short and the Risks that Remain

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Abstract

While the UK's official position is that it neither uses nor condones torture or cruel, inhuman and degrading treatment (CIDT), it is now a matter of public and parliamentary record that UK security services and military personnel colluded in rendition, torture, and cruel, inhuman and degrading treatment, both as part of the CIA's Rendition, Detention and Interrogation (RDI) programme, at military detention facilities in Afghanistan and Iraq, and through involvement in the detention and interrogation of prisoners by allied security forces. This paper will explain why the government is falling short of its obligations under international law, and why considerable risks remain that UK intelligence and security services will continue to collude in torture and CIDT.

Keywords: torture, CIDT, rendition, UDHR, human rights abuses

Introduction

FOLLOWING the extreme brutality of World War II, the international community committed itself to ensuring an absolute prohibition on torture and cruel, inhuman and degrading treatment (CIDT). Article 5 of the Universal Declaration (UDHR) states: 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'. Article 8 of the UDHR establishes the right to an effective remedy when another right has been violated. This protection is also contained in binding human rights treaties ratified by the UK, including the International Covenant on Civil and Political Rights (Article 2:3). The prohibition against torture and CIDT was a directive as well as a universal aspiration (no one shall be subjected). There have been various initiatives following the UDHR that reinforce both the normative commitment and the legal obligation not to torture or commit CIDT, the most prominent of which are the Convention Against Torture, and in the context of the UK, the European Convention on Human Rights. However, the reality on the ground is that torture and CIDT are regularly perpetrated

by states. There have been widespread failings to give effect to Article 5, including in the case of the UK.

While the UK's official position is that it neither uses nor condones torture or cruel, inhuman and degrading treatment (CIDT), credible evidence shows otherwise. It is now a matter of public and parliamentary record that UK security services and military personnel colluded in rendition, torture, and CIDT, both as part of the CIA's rendition, detention and interrogation (RDI) programme, and at military detention facilities in Afghanistan and Iraq.

The UK parliament's Intelligence and Security Committee (ISC) published two reports following its investigation into detainee mistreatment and rendition in June 2018.¹ The investigation, chaired by MP and QC Dominic Grieve, has revealed that the UK's role in prisoner abuse was even more extensive than academic research had previously found.² Yet officials have been slow to investigate fully, reticent about holding anyone to account, and have done very little to offer meaningful redress.

This article will outline the evidence that has recently emerged showing the UK

government's use of torture and CIDT. It will also explain why considerable risks remain that UK intelligence and security services will continue to collude in torture and CIDT. There are several reasons why such risks remain. First, while numerous members of parliament and of the Intelligence and Security Committee (ISC) take these matters seriously, successive governments have been unwilling to come clean about the full extent of British collusion. Second, when the government has eventually acquiesced to calls to investigate, it has placed considerable constraints on what can be investigated and who can give evidence. It has also resisted calls for due process against individuals where evidence emerges that they were complicit in torture.

Third, UK government policy on torture and CIDT has failed to uphold the absolute prohibition in all circumstances, resulting in a lack of rigour in the guidance and training provided to UK personnel. Finally, the government has refused to offer any meaningful redress for victims. Taken together, these amount to significant failures by the UK government to uphold its commitments, as set out in the Universal Declaration of Human Rights and related international treaties and conventions.

British collusion in torture: limiting transparency and accountability

At least 119 prisoners were held in CIA secret prisons as part of the RDI programme between 2001 and 2008. They were held incommunicado for months or years on end and subjected to torture and CIDT. The extent of the torture was documented in distressing detail in December 2014 with the publication of the heavily redacted 499-page executive summary of the US Senate Select Committee on Intelligence study into CIA prisoner abuse (hereafter SSCI report).³

The torture was sustained and brutal, and 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. None of the prisoners were provided with adequate legal representation or the opportunity to contest the allegations against them in an independent and impartial tribunal. The SSCI's findings corroborated the work of litigators, human rights NGOs, and academics who for years had assembled compelling evidence of the details of the torture and the reach of the CIA's network of secret prisons.

Over the last decade, thanks to mounting testimony from victims, the sharing of information by UK security personnel off the record, sustained investigation by NGOs and a handful of journalists and academics, and litigation in the UK courts and on behalf of specific victims, it became increasingly clear that the UK had colluded in torture. Yet there is almost no reference to Britain's role in the SSCI report. It has been suggested that this is because, from 2009 onwards, UK government officials made regular representation to the SSCI to ensure that mentions of the UK were redacted, although officials have denied this.⁴

Meanwhile, the incoming UK coalition government finally launched a judge-led inquiry, the Gibson Inquiry, in 2010, the purpose of which was to examine whether Britain was implicated in the improper treatment of detainees. It was closed down before witnesses were even called, mainly because of the ongoing police investigation into the rendition and torture of Abdelhakim Belhaj, which meant that the Inquiry could not proceed until police investigations were complete. Since there was no end in sight to those investigations, Gibson was forced to abandon his investigations. Leading human rights organisations and litigators boycotted the inquiry because of concerns about transparency. In particular, victims and their lawyers were to be denied the right to question intelligence officials about their mistreatment. Nevertheless, Gibson did obtain over 20,000 documents from UK intelligence agencies and government departments, and issued a report indicating that those documents provided evidence of UK complicity in prisoner abuse.⁵

After the Gibson Inquiry was aborted, then Prime Minister David Cameron passed

responsibility for the investigation to the ISC. Again, considerable constraints were placed on the scope of the investigation, with access denied to key intelligence officers with knowledge of British involvement. After delays brought about by under-resourcing, and changes of government following the 2015 and 2017 general elections, the ISC finally published its reports in June 2018. Despite government attempts to hamstring the investigation, the reports were hard-hitting. The first report documents British involvement in torture in the early years of the 'war on terror', and renders previous UK governments' denials of involvement untenable. The second report catalogues a series of failures in government policy and guidance to UK security services.⁶

Thanks to the work of the ISC, we now have overwhelming evidence that British intelligence services knew about, suggested, planned, agreed to, or paid for others to conduct rendition operations in more than seventy cases, and colluded in the detention and abuse of prisoners in numerous ways. The details are harrowing—one MI6 officer was present while a prisoner was transferred in a coffin-sized box which was sealed and then loaded onto a truck to a waiting US aircraft. It has been reported that this prisoner, codenamed Cuckoo in the ISC report, was Ibn al-Sheikh al-Libi, who was transferred by the CIA from Bagram Airbase in Afghanistan to Egypt.⁷ Under torture in Egypt, he told his interrogators that there were links between al-Qaeda and Saddam Hussein's nuclear weapons programme, and that Saddam Hussein was assisting al-Qaeda with chemical and biological weapons. On his return to CIA custody he recanted these claims and said he had fabricated the story in the hope of making the torture stop. By then, however, his claims had been cited in the justifications for the 2003 invasion of Iraq.

In hundreds of further cases, UK officials were aware of detainees being severely mistreated by their allies, including on at least thirteen occasions directly witnessing it, and twenty-five incidents in which detainees reported abuse to UK officials. While this was sometimes reported, the ISC found no evidence that UK personnel ever intervened directly to prevent the abuse. Indeed, the

ISC concluded that there seemed to be a concern not to upset the US. The ISC found a further 232 cases 'where it appears that UK personnel continued to supply questions or intelligence to liaison services after they knew or suspected (or, in our view, should have suspected) that a detainee had been or was being mistreated'.

This brief account of UK collusion in torture and CIDT, and the response of successive UK governments to allegations, demonstrates a culture of denial and complacency about the scale of the problem. It also shows that while successive UK governments reluctantly agreed to some limited processes to investigate the extent of British involvement, behind the scenes officials were going to extraordinary lengths to suppress the evidence and limit what could be uncovered. These attempts to limit transparency and accountability mirror government policy on torture. UK policy is ambiguous and, as such, while the public narrative is one of prohibition, the guidance given to UK personnel gives considerable latitude to government ministers and security personnel which is likely to result in further collusion in torture and CIDT.

Policy ambiguities and inadequate guidance and training

The second of the 2018 ISC reports focusses on the so-called 'Consolidated Guidance',⁸ issued to all security agencies and the military from 2010 onwards. The guidance is intended to assist UK personnel in their dealings with overseas partners, and to protect them from personal liability if abuse of prisoners occurs.

In January 2017 we gave evidence to the ISC investigation. We encouraged the Committee to scrutinise the Consolidated Guidance, since we have long argued that it is little more than a rhetorical, legal and policy scaffold which enables the UK government to demonstrate a minimum procedural adherence to human rights commitments. The ISC drew much the same conclusion, arguing that urgent review is needed. A public consultation has now been launched by the Investigatory Powers Commissioner (IPCO) on reform of the guidance, and we await publication of the Commissioner's

findings. The comments that follow are reflected in the submission we made to the IPCO consultation in November 2018.

Current UK policy fails to uphold the absolute prohibition on torture

The ISC described ‘dangerous ambiguities’ in the guidance. This is clearly illustrated by the 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 mistreated. 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 justifying operations where torture might be used.

This confusion is not surprising given that, in its current form, the guidance instructs that where there is a serious risk of torture or CIDT which cannot be mitigated, the case should be referred to ministers, and where officers know or believe torture will take place, they must inform ministers. Ministers are expected to assess the circumstances and decide whether the operations can proceed. Although the guidance suggests there is a ‘presumption’ against UK action where a risk of torture or CIDT remains, it still leaves scope for ministers to ‘look at the full complexities of the cases and its legality’. This implies that ministers can and may authorise actions where there is a serious risk of torture and CIDT that cannot be mitigated. At no point does the guidance state that ministers are prohibited from authorising operations where there is a serious risk that an individual being detained or interviewed overseas will be subjected to torture or CIDT. Instead, it grants discretion to ministers. The guidance, therefore, clearly falls short of the absolute prohibition. Furthermore, 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 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.⁹ The SSCI concluded that the CIA’s use of so-called ‘enhanced interrogation techniques’ (EITs) was not an effective means of acquiring intelligence or gaining cooperation. The study stated that the use of EITs 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.

The guidance is also weak on 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 and no reference to domestic law. The guidance sets out the UK government’s policy, 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. Any guidance or policy on prisoner mistreatment should instead be underpinned by the moral principle that harming other human beings through torture or CIDT 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. The guidance, therefore, is

far weaker and less likely to help prevent the prosecution of UK personnel than if it began by stating the absolute prohibition of torture and CIDT contained in Article 5 of the UDHR and now enshrined in international and domestic law.

Assessment of risk is flimsy

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 service personnel go about determining the level of risk. The guidance contains an annex that sets out some of the things that might be unacceptable: 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, because it fails to note that all of these constitute serious breaches of domestic and international law. Furthermore, the guidance fails to note that where such obligations are breached, the risk of torture and CIDT is increased.

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'. The guidance would be strengthened considerably if detailed, actual examples were provided, drawing on specific cases from the SSCI report and elsewhere. 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 SSCI and the ISC, as well as the UN Special Rapporteur on Torture, the International Committee of the Red Cross, and numerous human rights litigators and NGOs.

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 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 service personnel should assume that the incident was not isolated. Again, the detailed accounts of the range of cruel practices to which CIA prisoners were 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 is also increased. 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.

Assurances from overseas partners cannot be relied on

The ISC report demonstrates that there is considerable reliance on seeking assurances from overseas partners that prisoners will not be abused. 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. Second, assurances can be provided orally rather than in writing, with very obvious scope for confusion and malfeasance. Relatedly, the UK intelligence and security 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'. Finally, record keeping on the securing of assurances was poor. Furthermore, human rights investigators have long argued that assurances are inherently unreliable and fail to mitigate the risk of torture and CIDT.¹⁰

The scope of the guidance needs to be broadened

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. Yet the outsourcing of torture and CIDT is a mechanism which the ISC found was used extensively between 2001–2010 to hide the UK's role in abuse. Similarly, key aspects of the CIA's RDI programme, including the design and implementation of the so-called 'enhanced interrogation techniques' were largely outsourced to two private contractors, psychologists James Mitchell and John 'Bruce' Jessen, 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.

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 (ARCTIC) which had a close relationship with the UK government. Adebolajo 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 ARCTIC interviewed him.

The case provides a 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.

Rendition should be categorised as a form of CIDT

The ISC found that the UK government has no clear policy on rendition. In *R v Mullen* the Court of Appeal ruled in February 1999 that the facilitation by MI6 of the 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. 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.

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'. Furthermore, although the Foreign and Commonwealth Office supposedly has government oversight, it has failed to review policy regularly and was unable to provide to the ISC a comprehensive picture of its areas of responsibility.

In any instance where UK personnel would consider condoning a rendition operation by overseas partners, a full risk assessment must be undertaken. 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. Rendition operations clearly 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. 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.¹¹

Denying the right to redress

Article 8 of the UDHR states that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the

constitution or by law'. This protection is also contained in various international human rights treaties, the Human Rights Act 1998 and has long been a part of the UK domestic law. Despite this fundamental legal protection, there has been a reluctance by the UK government fully to investigate credible evidence of complicity in torture and CIDR and little has been done to offer meaningful redress.

The Intelligence Services Commissioner released information in December 2017 that indicated that GCHQ had wrongly applied the Consolidated Guidance in thirty-five 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 it is reasonable to assume this was because there was a 'serious risk' of torture or CIDT.¹² No data has been shared on potential breaches by the 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 regular review of compliance by the various agencies with the Consolidated Guidance, and of ministerial authorisations granted. If failings in applying the Consolidated Guidance are identified, subjects should be notified 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 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.

The 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 Boudchar 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. 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.¹³

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.

Conclusion

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.

Current UK policy on torture, and the pursuant guidance it issues to UK intelligence and security personnel, is wholly insufficient in deterring collusion in torture. A much more robust policy is needed. 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 fact that numerous government ministers were seduced by fallacious claims that torture is effective should give all parliamentarians and members of the public pause for thought.

The facts of UK collusion in torture and CIDT paint a very dark picture for a country that prides itself on its liberal democratic values. UK hypocrisy has been laid bare, and through foolish and needless acts, successive UK governments have eroded any legitimacy the UK had in holding other states to account for human rights violations. Only a proper reckoning for wrongdoing will begin to undo the damage. This means taking seriously UK obligations to implement proper and effective remedy, including through prosecution of those individuals who colluded in torture and CIDT.

Notes

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