



## 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 (“The Consolidated Guidance”)<sup>1</sup>

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### Submission by Fair Trials<sup>2</sup>

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Fair Trials’ work is premised on the belief that fair trials are one of the cornerstones of a just society. Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

### Introduction

1. The Consolidated Guidance sets out principles to govern the detention and interviewing of detainees overseas, as well as the passing and receipt of intelligence relating to detainees. The underlying purpose of the Consolidated Guidance is to ensure that the actions and decisions of UK personnel are in line with the UK policy not to *“participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose”*.<sup>3</sup> As well as reflecting the UK Government’s categorical opposition to the use of torture, providing guidance on this issue is also consistent with the UK’s domestic and international legal obligations.
2. Unfortunately, recent revelations, particularly the reports published by the Parliament’s Intelligence and Security Committee (ISC), reveal systemic and large-scale failings in the application of the Consolidated Guidance in numerous cases where the UK was implicated in the torture and mistreatment of detainees.<sup>4</sup> In light of this, it is clear that significant change is needed.
3. Fair Trials welcomes the review of the Consolidated Guidance, as well as the opportunity to make a submission to the public consultation being conducted by the Investigatory Powers Commissioner’s Office.<sup>5</sup> It is, however, impossible to give a complete response due to the failure of the relevant agencies to publish related guidance which serves as a supplement to the Consolidated Guidance. Fair Trials notes that the recommendation to publish additional guidance has also been made by Reprieve in its submission to this public consultation, and we support their call for the agencies to publish all internal agency guidance which serves as a supplement to the Consolidated Guidance, as has also been recommended by the ISC.<sup>6</sup>

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<sup>1</sup> 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, 2010

<sup>2</sup> Historically, Fair Trials has provided assistance to British citizens arrested abroad, including those who have faced torture and other cruel inhuman or degrading treatment.

<sup>3</sup> 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, 2010, p.3 para 6

<sup>4</sup> Intelligence and Security Committee, Detainee Mistreatment and Rendition: 2001–2010, 28 June 2018

<sup>5</sup> Investigatory Powers Commissioner’s Office, Consultation on the Consolidated Guidance, August 2018

<sup>6</sup> Reprieve Submission to the Investigatory Powers Commissioner’s Consultation on the Consolidated Guidance, October 2018, Recommendation 4.

4. In this submission, Fair Trials focuses on Question 4:

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

#### *1. Why due process is relevant to the aims of the Consolidated Guidance*

5. Fair Trials welcomes the consideration of due process rights and the lawfulness of detention in the prevention of torture and cruel, inhuman or degrading treatment (“CIDT”). However, we have concerns that the Consolidated Guidance does not make clear the crucial link between access to due process and the prevention of torture and CIDT. The Consolidated Guidance simply sets out a non-exhaustive list of issues which should be taken into account when considering whether standards of detention and treatment of detainees are acceptable, rather than listing them as clear indications that a detainee is at serious risk of being subject to torture and CIDT.

*“When considering what might be unacceptable, personnel should take account of*

*a. The lawfulness of arrest (under local law).*

*b. The lawfulness of detention (under local and international law) and access to due process. Considerations here may include:*

- (i) Incommunicado detention (denial of access to family or legal representation, where this is incompatible with international law);*
- (ii) Whether the detainee has been given the reasons for his arrest;*
- (iii) Whether he will be brought before a judge and when that will occur;*
- (iv) Whether he can challenge the lawfulness of his detention;*
- (v) The conditions of detention; and*
- (vi) Whether he will receive a fair trial<sup>7</sup>*

6. The link between due process rights, such as access to a lawyer, and the prevention of torture and CIDT is well established<sup>8</sup> and will be further discussed in detail below. Rather than simply being listed as considerations of the lawfulness or ‘unacceptability’ of detention, it should be made clear in the Consolidated Guidance that due process rights are key indicators of whether a detainee is at a serious risk of being subject to torture or CIDT. Furthermore, the violation of some of these rights can in itself constitute CIDT or arbitrary detention. For instance, prolonged incommunicado detention,<sup>9</sup> or unacceptable prison conditions<sup>10</sup> can both constitute CIDT.

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<sup>7</sup> HM Government, 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, July 2010 p.13

<sup>8</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 10

<sup>9</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11

<sup>10</sup> See, for example, European Court of Human Rights [Factsheet on Detention conditions and treatment of prisoners](#), September 2018, which outlines numerous cases where detention conditions have constituted a breach of the prohibition on torture and CIDT.

7. Whilst there are steps within the Consolidated Guidance on what personnel should do where there is a risk of torture or CIDT, there is no clear action provided for personnel where they deem the standards of arrest and detention to be unacceptable or unlawful. There is simply a paragraph which states that if in doubt, *'personnel should seek guidance from senior personnel.'*<sup>11</sup> Given that these considerations are actually factors that indicate a serious risk of torture and CIDT, these risk factors should be treated with the same course of action as any other situation in the Consolidated Guidance where there is a serious risk of torture or CIDT occurring. Other organisations contributing to this review will undoubtedly assess whether the action prescribed in the Consolidated Guidance where there is a risk of torture or CIDT occurring is appropriate, but it is necessary for the Consolidated Guidance to make clear that denial of these due process rights should trigger the same action as that required where there is a serious risk of torture or CIDT.
8. **Recommendations:**
  - It should be clearly articulated in the Consolidated Guidance that the denial of due process rights are indicators of a serious risk of torture or CIDT occurring;
  - Where detention is deemed to be unacceptable and/or these rights are violated, this indicates a serious risk of torture or CIDT occurring, and appropriate action should be prescribed by the Consolidated Guidance that is appropriate to this risk.

## **II. Due process standards currently missing in the Consolidated Guidance**

9. A number of important due process standards (of significant relevance to the risk of torture and CIDT) are missing from the Consolidated Guidance:

### **Access to medical examinations**

10. Fair Trials is concerned by the lack of consideration given to independent medical examinations in a document intended to prevent involvement in torture and CIDT. Whilst it is not a traditional 'due process' right, access to an independent medical examination is an internationally recognised standard for people who have been detained,<sup>12</sup> as well as an important safeguard against the use of torture and CIDT.<sup>13</sup> The UN Committee Against Torture has explicitly highlighted *"the need to allow suspects ... to be examined by an independent doctor immediately upon their arrest, or after each session of questioning, and before they are brought before an examining magistrate or released"*.<sup>14</sup>
11. There is no consideration given anywhere in the Consolidated Guidance to the role medical examinations play both in safeguarding against torture and CIDT, as well as in establishing that torture has occurred. Medical examinations play a crucial role in proving that torture has

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<sup>11</sup> HM Government, 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, July 2010 p.14

<sup>12</sup> Principle 24, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Resolution 43/173 (9 December 1988)

<sup>13</sup> Convention Against Torture Initiative, UNCAT Implementation Tool 2/2017, [Safeguards in the first hours of police detention](#), p.5

<sup>14</sup> UN COMMITTEE AGAINST TORTURE CAT/C/55/Add.9 2 July 2004 p.26

occurred, as demonstrated by the development of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“**Istanbul Protocol**”).<sup>15</sup> Establishing that torture has occurred in turn allows victims of torture to seek redress, as well as the exclusion of evidence obtained by torture during the trial process, crucial for ensuring the right to a fair trial. Personnel are asked to assess (v) *The conditions of detention* and (vi) *Whether he will receive a fair trial*. Considering whether a detainee has had access to a medical examination goes to both of these points, as well as in itself acting as a key consideration that a detainee may be at risk of torture or CIDT.

**12. Recommendation:**

- We recommend that the Consolidated Guidance contain an explicit consideration of whether detainees have access to independent medical examinations.

**Notification of rights**

13. None of the due process rights covered in the Consolidated Guidance can be effectively exercised if detainees are not properly informed of them. Under international human rights standards, people taken into the custody of the state must be informed of their rights in a language that they understand.<sup>16</sup> Upon being detained, detainees should be informed of their rights under the applicable law. Given the crucial role that pre-trial procedural rights, such as access to a lawyer, play in the prevention of torture, it is crucial that detainees be informed of these rights and allowed to exercise them accordingly.

**14. Recommendation:**

- We recommend that the Consolidated Guidance contain an explicit consideration of whether detainees have been informed of their due process rights.

**The exclusionary rule**

15. Whilst the Consolidated Guidance is intended, for the most part, to be a preventive document, the document does not make it clear that where information from liaison services is received or solicited and there is a serious risk that torture or CIDT has occurred, the use or reliance on such information is a violation of international law and is prohibited. Where Ministers and personnel continue to solicit, receive, and rely on intelligence from liaison services where there is a serious risk that torture or CIDT has occurred, they are in violation of their international and domestic legal obligations.<sup>17</sup>

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<sup>15</sup> UN Office of the High Commissioner for Human Rights, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘Istanbul Protocol’), 2004, HR/P/PT/8/Rev.1

<sup>16</sup> Principles 13 and 14, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988); Committee against Torture, General Comment 2 (2007), UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paragraph 13

<sup>17</sup> Articles 2 and 15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465; Article 3 United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998

16. The absolute prohibition or ‘exclusionary rule’ on the use of evidence or information obtained by torture (except to prove that torture occurred) is contained in Article 15 of the UN Convention Against Torture.<sup>18</sup> It is a norm of customary international law, and as an extension of the universal prohibition on torture itself, it is non-derogable.<sup>19</sup>
17. In his most recent interim report to the General Assembly, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, specifically noted the damage done to the prohibition on torture by intelligence exchanges.<sup>20</sup> He also noted that *“any good faith interpretation of the exclusionary rule in line with its object and purpose necessarily must entail its applicability not only to judicial and administrative proceedings, but also to intelligence and executive decisions of any kind.”*<sup>21</sup>
18. The failure of states to recognise this has led to a number of highly concerning cases since the so-called ‘war on terror’ began, where evidence that may have been obtained by torture and CIDT at the hands of third parties abroad has been used as evidence in criminal and immigration proceedings of national courts.<sup>22</sup> The admittance of evidence obtained by torture in proceedings constitutes a flagrant denial of justice under the right to a fair trial,<sup>23</sup> as well as a violation on the prohibition on torture and CIDT itself.
19. **Recommendation:**
  - The Consolidated Guidance must make it clear that where there is a serious risk that intelligence has been obtained by torture or CIDT, it is absolutely prohibited under international and domestic law to continue to rely on, solicit or use such intelligence.

### *III. Sections of the Consolidated Guidance that need further clarification and/or definition*

#### **Access to a lawyer**

20. Legal assistance is briefly mentioned under the first consideration (i) *Incommunicado detention (denial of access to family or legal representation, where this is incompatible with international law*. Denial of legal assistance is not, however, merely an indication that a detainee is being held in incommunicado detention. It is also an essential element of due process and a well-established

<sup>18</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465

<sup>19</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Human Rights Council, 25<sup>th</sup> Session, 10 April 2014, A/HRC/25/60, para. 22

<sup>20</sup> Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, A/73/207 para. 57

<sup>21</sup> Ibid.

<sup>22</sup> See, for example, *A and Others v Secretary of State for the Home Department* (No 2) [2005] 1 WLR 414; *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012); and *El Motassadeq* (OLG Hamburg, 4. Strafsenat, Urteil, 2 StE 4/02-5)

<sup>23</sup> *Othman (Abu Qatada) v The United Kingdom*, App no. 8139/09 (ECtHR, 17 January 2012)

right under international law<sup>24</sup> and is provided for ‘*regardless of the type of detention involved*’.<sup>25</sup> It arises once someone is taken into custody and questioned as a suspect, notwithstanding whether that status has been formally assigned to them.<sup>26</sup>

21. Denial of access to a lawyer significantly increases the risk that a person will be subjected to torture and CIDT and makes it much less likely that mistreatment will be identified and reported.<sup>27</sup> Access to legal advice is a gateway right: in addition to being a right in itself, it allows the effective exercise of other due process rights. Therefore, as well as being an essential human right, consideration of whether a detainee has access to a lawyer is crucial to assessments of the risk of violations of other due process rights, torture and CIDT.
22. **Recommendations:**
  - As an internationally recognised safeguard against the use of torture and CIDT and a right under international law, access to independent legal advice should be listed as a stand-alone consideration of due process in the Consolidated Guidance;
  - The Consolidated Guidance should state (or any additional training or guidance given to personnel should be published on) the assessment made regarding the compatibility with international law on the restriction of the right to a lawyer.

### **Incommunicado Detention**

23. The Former UN Special Rapporteur on Torture stated that “*Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal*”.<sup>28</sup> Fair Trials welcomes the fact that the Consolidated Guidance recognises the severe risk that incommunicado detention poses regarding unlawful detention, torture and CIDT.
24. Further definition and clarification of “incommunicado detention” is, however, needed. The circumstances described as “*denial of access to family or legal representation where this is incompatible with international law*” do not encompass the many and varied different forms of

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<sup>24</sup> Article 14(3)(b and d) of the International Covenant on Civil and Political Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(2)(d) of the Inter-American Convention on Human Rights, and Article 7(1)(c) of the African Charter on Human and Peoples Rights.

<sup>25</sup> Jelena Pejic International Committee of the Red Cross, Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence, International Review of the Red Cross, Volume 87 Number 858 June 2005, p.388

<sup>26</sup> European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb) p.70 paras 393-394.

<sup>27</sup> The crucial role of legal assistance in preventing torture during interrogations has been specifically emphasised by numerous regional human rights bodies, the UN General Assembly, the UN Subcommittee for the Prevention of Torture and the UN special Rapporteur on Torture. See, for example, Inter-American Commission: Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin; UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11. Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, (CAT/OP/MDV/1, 26 February 2009), at para 62.

<sup>28</sup> Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32E/CN.4/1995/34, 12 January 1995, p.173 para. d)

incommunicado detention. There is no attempt, for instance, to differentiate between secret detention, enforced disappearances, unacknowledged or unannounced detention, and announced incommunicado detention. While these different forms of detention may be referred to as 'incommunicado detention', there are significant and important differences in the legality of these types of detention under international law.<sup>29</sup>

25. The lack of definition also entails a lack of mention of the duration of incommunicado detention, which can also affect its legality under international law. Even under the extremely limited circumstances where incommunicado detention may be permitted under international law, the prolonged use of incommunicado detention can in itself constitute CIDT.<sup>30</sup> There is no mention of this in the Consolidated Guidance, including no mention of this under the non-exhaustive list of CIDT provided.
26. Without clarification or provision of any further guidance that personnel are given regarding what constitutes incommunicado detention, UK personnel could seemingly end up being complicit in arbitrary detention, enforced disappearances and CIDT, all of which are violations of international law.
27. **Recommendations:**
  - An adequate definition of incommunicado detention should be provided in the Consolidated Guidance;
  - Training and guidance on the different forms of incommunicado detention should be provided to UK personnel, if it is not done so already, and that guidance should be published;
  - Unlawful incommunicado detention should be listed as an example of CIDT.

### Challenging the lawfulness of detention

28. Fair Trials welcomes the recognition of the non-derogable right to challenge the lawfulness of detention. However, the Consolidated Guidance makes no mention of the time frame under which a detainee should have the opportunity to challenge the lawfulness of detention, nor does it take account of the numerous other circumstances required to allow detainees to exercise this right in practice. The Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court (the "**Basic Principles**") establish the right to challenge the lawfulness of detention '*without delay*' and that this right '*applies from the moment of apprehension*'.<sup>31</sup> It is unclear what guidance, if any, is provided to personnel on these issues that constitute the overall due process right to challenge the lawfulness of detention.

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<sup>29</sup> For more information, see Association for the Prevention of Torture, Incommunicado, Secret and Unacknowledged under International Law, 2 March 2006

<sup>30</sup> UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11; UN Commission on Human Rights, UN Doc. E/CN.4/RES/2005/39, 19 April 2005, article 9.

<sup>31</sup> Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court UN Doc A/HRC/30/37 (2015), Principle 8

29. **Recommendations:**

- The Consolidated Guidance should ensure that it adheres to the principle that a detainee should be able to challenge the lawfulness of detention without delay and periodically;
- Training and guidance on international standards in this area should be provided to UK personnel if it is not done so already, and that guidance should be published;

**Whether a detainee will receive a fair trial**

30. The consideration of *(vi) Whether he will receive a fair trial* is a welcome consideration, but the lack of clarity on what is understood to be a 'fair trial', and how personnel are expected to ascertain whether an individual will receive a fair trial makes it questionable how effectively this guidance will be applied in practice. Ascertaining whether a detainee will receive a fair trial is not a binary question. The range of standards required by international law cannot be guaranteed by a simple assurance that someone will receive a fair trial. It is necessary to know what guidance and training is provided to personnel on the right to a fair trial and the standards encompassed within this right.

31. **Recommendation:**

- We would recommend that any additional guidance given to personnel on the right to a fair trial be published, accompanied by better training for personnel.