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Reserving the right to torture

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Introduction

The US, UK and other liberal democracies are signatories to the Convention Against Torture. They are quick to single out other states for human rights abuses, and their overseas aid is often said to be conditional on strengthening protections abroad. Yet liberal democracies have their own dark histories of complicity in torture. Following revelations of the extent of torture by the CIA and US military following 9/11, and of collusion by UK intelligence services, pressure mounted for a public inquiry in the UK. The aborted Gibson Inquiry and subsequent Intelligence and Security Committee (ISC) Inquiry were ostensibly aimed at accountability. Key findings were that: British collusion was far more extensive than previously known; there are considerable weaknesses in training guidance and policy; and there is little political will to address these matters, a point illustrated by the constraints the government placed on the investigation, and its subsequent decision to refuse to conduct a judge-led inquiry into UK complicity in torture. This chapter will explore the weaknesses in training, guidance, policy, and accountability, and will argue that these arise from a long history of attempting to carve out spaces in which certain actors are exempted from the anti-torture norm. Counterintuitively, this is, in part, achieved because of the UK's self-appointed role as champion of human rights elsewhere.

The CIA RDI programme and Britain's role

This chapter is based on our experience of many years researching the CIA's programme for the Rendition, Detention and Interrogation (RDI) of terror suspects, which operated from 2001 to 2010, as well as the UK's complicity in this. Working closely with a range of human rights litigators, advocates and investigative journalists over the last decade, we have provided the most comprehensive account to date of the workings of the RDI programme, including documenting the fate and whereabouts of the 119 prisoners targeted by the CIA. This research has culminated in our extensive report, published in 2019 (Raphael et al. 2019). Our report uncovers many of the details that were redacted from the published 500-page Executive Summary of the US Senate Select

Committee on Intelligence (SSCI) study into CIA prisoner abuse (SSCI 2014). The full SSCI report runs to 6,000 pages but remains classified. The Executive Summary corroborated many of our earlier findings on how the RDI programme operated, and revealed in distressing detail the brutality of the torture, not previously confirmed officially. The torture included: confinement in coffin-like boxes for hours or 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 clinical purpose and was, therefore, rape; and psychological torture including mock executions, threats of physical violence and rape of family members and the witnessing of torture of other prisoners.

Our work to 'un-redact' the SSCI report's Executive Summary depended on securing access to air traffic control data relating to thousands of journeys made by aircraft owned or contracted by the CIA to undertake the kidnap and transfer of prisoners between the secret prisons established to secretly detain and torture them, in some cases, over many years (Raphael et al. 2015). It also depended on the analysis of thousands of CIA cables and hundreds of declassified documents. Through triangulation of the air traffic control and cable data with prisoner testimonies and investigative work by lawyers, journalists and human rights NGOs, we have been able to prove that many rendition operations involving specific prisoners took place. This work has been used in litigation on behalf of victims in cases before the European Court of Human Rights, and in the ongoing military tribunals against prisoners in the Guantánamo Bay detention facility.

Our work has also involved investigating the extent of UK involvement in the RDI programme. Successive UK governments consistently and categorically denied involvement in torture and other prisoner mistreatment as part of the CIA's RDI programme. Successive governments also went to considerable lengths to prevent relevant evidence from being released publicly. It is now a matter of public record, however, that British intelligence agencies were deeply and directly involved in operations that resulted in the abuse of prisoners, including torture, during the early years of the 'War on Terror'. Our research has demonstrated UK involvement in many instances (Blakeley and Raphael 2016), and this work informed the UK Intelligence and Security Committee's (ISC) four-year inquiry, resulting in the publication of two reports in June 2018. Having taken evidence, including engaging with our research and taking oral evidence from us, the ISC reviewed over 40,000 documents (many of which remain classified) and provided devastating evidence which rendered previous government denials untenable.

In the first of its reports, the ISC concluded that British intelligence services knew about, suggested, planned, agreed to, or paid for others to conduct rendition operations in more than 70 cases. It concluded that the agencies, 'tolerated actions, and took others, that we regard as inexcusable' (ISC 2018b, 5). The ISC found at least 232 cases in which UK officials supplied questions to intelligence to partners after they became aware, or suspected, that the prisoners were being ill-treated. For example, both the Security Service (MI5) and the Secret Intelligence Service (MI6), supplied questions for the interrogation of Khaled Sheikh Mohammed while he was tortured in a secret prison in Poland in 2003, and the Government Communications Headquarters (GCHQ) approved the use of its intelligence for questioning him, all despite knowing he was being held in a secret prison and was being mistreated (ISC 2018b, 54). In a further 198 cases, British officials received intelligence from partners when it knew or suspected that it was derived from interrogations where torture was used.

In a harrowing case with enormous global repercussions, the ISC found that an MI6 officer was present when a prisoner was transferred from Bagram Airbase in Afghanistan in a coffin-sized box, which was sealed and then loaded onto a truck to be taken to a waiting US aircraft (ISC 2018b, 32). It has since 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 to Egypt, where he was severely tortured (Cobain and Usiskin 2018). While subjected to torture in Egypt, he told the interrogators that there were links between Al-Qaeda and Saddam Hussein's nuclear weapons programme, and that Hussein was assisting Al-Qaeda with chemical and biological weapons manufacture. On return to CIA custody, he recanted these claims, saying he had fabricated the story to make the torture stop. By then, however, those claims had been cited in justifications for the 2003 US invasion of Iraq.

The second of the ISC reports focuses on weaknesses in the UK government's guidance, issued to the military and the intelligence services from 2010 onwards: the *Consolidated guidance to intelligence and service personnel on the detention and interviewing of detainees overseas, and on the passing and receipt of intelligence relating to detainees* (HMGovernment 2010). The *Consolidated Guidance* was intended to assist UK personnel in their dealings with overseas partners, and to protect them from personal liability if prisoners are abused. In our testimony to the ISC, we encouraged scrutiny of the *Consolidated Guidance*, on the grounds that it contains significant weaknesses that in fact make collusion in torture more, not less, likely. The ISC drew much the same conclusion, arguing that urgent review was needed, for several reasons. First, there is ambiguity in how agencies interpret 'serious risk'

and what threshold should be used to determine this. Second, rendition is excluded as a form of Cruel, Inhuman and Degrading Treatment, even though it should be specifically mentioned. Third, the *Consolidated Guidance* does not explicitly apply to non-state actors and failed states. Fourth, the *Consolidated Guidance* does not actually offer legal protection to officers. Fifth, and perhaps most important, the *Consolidated Guidance* is insufficiently clear on the role of Ministers, and what forms of intelligence sharing they can and cannot authorise (ISC 2018a, 65-77). These matters are discussed in more detail below.

Weaknesses in training and guidance on torture

We turn now to discuss the weaknesses in training, guidance, policy, and accountability in a UK context. First, we provide a brief overview of the weaknesses in UK guidance to intelligence services and military personnel. We then discuss why these weaknesses arise from much more deeply rooted and deliberate flaws in UK policy and accountability processes. Drawing on our experiences of collaborating with a range of human rights advocates and litigators to influence policy, we show that the contest over torture is a highly asymmetric one. This is because failures in training, guidance, policy, and accountability arise from deliberate efforts by successive UK governments to present the UK as a law-abiding, global champion of human rights, while at the same time ensuring a right to resort to torture is retained. Furthermore, there is evidence that these weaknesses arise from Britain's long history of colonialism that is baked into policymaking and practice in relation to torture. These deeply rooted structural factors mitigate against the radical changes that are required if we are to ensure that the prohibition against torture is at all times upheld.

After the ISC published its findings in 2018, the UK government instructed the Investigatory Powers Commissioner (IPCO) to review the *Consolidated Guidance*. A public consultation was launched, to which we made a written submission (Blakeley and Raphael 2018), and a closed roundtable was held with civil society partners in December 2018, which Blakeley attended. As a result of this review, the government accepted a series of IPCO recommendations,[1] and, subsequently, published an updated framework that came into force in January 2020 under the new title: *The principles relating to the detention and interviewing of detainees overseas and the passing and receive*

[1] These recommendations were: including rendition as a form of CIDT in the framework; adopting the term 'real risk' instead of 'serious risk'; extending the scope of the guidance so that it applies to non-state actors and joint-working with partners where stable and effective government has broken down; changing the title of the document. See https://www.ipco.org.uk/docs/20190612%20Letter%20to%20PM%20.pdf

to intelligence relating to detainees (HMGovernment 2019). The changes are relatively minor (see footnote 1) and, while they are welcome, very few of the recommendations we and a range of human rights advocates and litigators made were taken on board. Our main achievement was perhaps to force the acceptance that rendition is a form of torture and cruel, inhuman and degrading treatment (CIDT), involving as it does, kidnap, arbitrary arrest and detention with no recourse to legal representation or *habeas corpus,* and physical and psychological abuse. The scope of the guidance was also extended to a broader range of UK agencies involved in intelligence gathering and counter-terrorism, including SO15 (the Metropolitan Police's Counter-Terrorism Command), and joint units composed of overseas personnel acting under UK direction.

However, neither the *Consolidated Guidance* nor the revised *Principles* are adequate in preventing UK collusion in torture and CIDT. Underlying the *Consolidated Guidance* and the *Principles* is the requirement for UK personnel to make a judgement on the risk that participation by UK personnel in the location, capture, detention or interrogation of prisoners held by partner agencies would lead to unlawful killing, torture, CIDT, rendition or other unacceptable standards of arrest and detention. Where personnel 'know or believe' that such participation, including intelligence sharing, would lead to unlawful killing, torture or rendition, such action is expressly prohibited. However, and significantly, similar action which is judged as leading to a 'real risk' of such consequences is not so prohibited. Instead, personnel need either to introduce mechanisms to effectively mitigate the risk to below the threshold of 'real risk' through reliable caveats or assurances, or should consult with ministers. Importantly, there is little in the way to dictate the form that these caveats or assurances should take. There is no standard form or procedure for requesting, acquiring and record-keeping in relation to agreements from third parties, and indeed the *Principles* framework is keen to 'stress that it is not a prerequisite that they are in writing' (para. 20).

Two significant issues arise here. First, as Jamal Barnes highlights in his chapter, 'Diplomatic Assurances and Re-Writing the Rules of the Game', diplomatic assurances remain deeply problematic, and the assurances referred to in the *Principles* are incredibly flimsy. There is no risk assessment tool attached to the *Principles,* and it is unclear what guidance intelligence personnel have access to that would facilitate judgements on the level of risk, and therefore the need for assurances. Details of the external oversight process have not been made public, although a summary recently published by IPCO indicates that the agencies do not have a thorough and consistent approach to record keeping, and do not record full details of the underlying basis for

the safeguards they rely on (IPCO 2017, 82). The fact that assurances can be sought, and provided, *verbally* is also deeply problematic: there exists the clear scope for a series of 'gentleman's agreements' to exist, with intelligence and security agencies known to systematically torture prisoners (in contravention of their publicly-stated commitments). This is more than a hypothetical risk, as the director-general of MI5 made clear to the ISC (ISC 2018a, 60).

Second, the *Consolidated Guidance* and the *Principles* give discretion to Ministers to approve operations where torture and CIDT are a real risk, where assurances cannot be obtained (HMGovernment 2018, 6). Again, the room for manoeuvre provided here is more than hypothetical. In evidence to the ISC, UK Ministers including Theresa May, Amber Rudd, Boris Johnson and Philip Hammond all made references to the 'ticking bomb' scenario as potentially justifying operations where torture might occur (ISC 2018a, 74-7). May, then Home Secretary, stated, 'What I am saying is that you're always balancing risks and that's why the circumstances in which something occurs in that sense is - it's a difficult judgement. It's a difficult balance' (ISC 2018a, 75). Hammond, then Foreign Secretary, stated, 'I'd have to make a judgement about whether the protection of [a terrorist's] human rights outweighed the human rights of the possibly thousands of people that would be killed or injured as a consequence of [the act of terrorism]' (ISC 2018a, 74). This weighing of the benefits and risks leaves the door wide open for continued collusion in torture, on the assumption of operational necessity. Indeed, secret Ministry of Defence policy relating to the Consolidated Guidance, to which we secured access in 2019, made clear that in situations where torture was a serious risk Ministers can approve such action – despite the unlawfulness of such action – if they 'agree that the potential benefits justify accepting the risk [of torture] and the legal consequences that may follow' (MOD 2018, para 15).[2] Exactly how many times overall Ministers have authorised such action in the face of legal prohibitions has not yet been disclosed, although at the time of writing we are challenging this refusal in the UK courts. Partial figures have been disclosed to us, however, making clear that – in two years alone – Ministers approved all requests laid before them (at least 29) (MOD 2014).[3]

Failures of policy and accountability in historical context

The UK's handling of its collusion in torture in the 'War on Terror' should not be understood

[2] https://beta.documentcloud.org/documents/6941120-181100-MOD-Consolidated-Guidance-Policy
[3] https://beta.documentcloud.org/documents/20460536-mod-foi-consolidated-guidance

without reference to historical attitudes and patterns of behaviour. The use of torture by UK state-sponsored actors is not new, and neither are the UK's efforts to deny its involvement, while at the same time protecting the freedom to collude in torture where necessary. The UK's historic collusion in torture has tended to feature within contexts of both imperial expansion and resistance to anti-imperialistic struggles. Caroline Elkins, for example, provides detailed accounts of the extensive use of torture by British officials and colonial agents acting for the British state to crush the 'Mau Mau' insurgency in Kenya in the 1950s (Elkins 2014). Torture was also used to deter independence in Malaya (1948-60), in Cyprus (1955-59), and in Aden (1963-7) (Curtis 2003, 334-9). Internment without trial and the development and use of the so-called 'Five Techniques' - hooding, sleep deprivation, subjecting to noise, food and drink deprivation, and stress positions - by British personnel in Northern Ireland in 1971 is also now well-documented (Cobain 2012). Indeed, this laid the ground for contemporary policy and legal constraints on the use of violence by UK officials outside military theatres of war. As we have argued previously, new guidelines issued by the Joint Intelligence Committee in June 1972, and authorised by then Prime Minister Edward Heath, provides the basis for the UK's declared position on the treatment of prisoners: namely, that the UK neither tortures nor facilitates torture (Blakeley and Raphael 2020).

There are striking parallels between the UK government's response to allegations of collusion in CIA torture in the early 2000s, and to allegations of torture and massacres in British-ruled Kenya nearly 50 years previously. In both cases, there is a pattern of denial, attempts to cover up the facts and mislead the public, and refusals to investigate, while at the same time insisting on Britain's leadership in championing human rights. And, in both cases, we see the asymmetric power relations at play between those resisting torture and seeking accountability for its use, and those covering up and defending it.

'Mau Mau' was the name given by white settlers in Kenya to the revolutionary movement that emerged in Kenya in the late 1940s, in the face of extreme economic insecurity faced by the Kikuyu peasantry following years of colonial settlement.[4] Such encroachment had displaced some 120,000 Kikuyu, leading them to settle as squatters on European farms, where they were allocated a small patch of land for themselves in return for their labour. Labour rents were extracted, and whereas these amounted to 90 days a year for 5-6 acres of land before World War II, by 1946, 240-270 days was being demanded for one and a half acres of land. The East Africa Royal Commissions

[4] As Newsinger argues, 'It is a tribute to the effectiveness of British propaganda that a revolt in which thousands of Africans were killed still bears the bastardized name coined for it by the British' (Newsinger 1981, 163).

concluded in 1955 that Africans in Kenya were paid too little to obtain adequate accommodation or to meet the essential basic needs of an individual, let alone to support a family (Newsinger 1981, 161). As Elkins shows in her detailed history of Britain's attempts to quash the 'Mau Mau' struggle against colonial rule, Britain's official history of the 'Mau Mau' insurgency of the early 1950s portrays the 'Mau Mau' as a 'barbaric, anti-European, and anti-Christian sect that had reverted to tactics of primitive terror to interrupt the civilising mission in Kenya' (Elkins 2014, p. ix), rather than as a labour movement seeking redress for the extensive privations suffered as a result of colonial rule. Britain mounted two parallel responses: the first, a counter-insurgency campaign against around 20,000 guerrillas in the mountain forests of Kenya; the second, and much longer campaign, was directed at the civilian population of around 1.5 million Kikuyu who 'were believed to have taken the "Mau Mau" oath and had pledged themselves to fight for land and freedom' (Elkins 2014, p. x). Britain established a vast network of detention camps. Official accounts suggest that the numbers detained amounted to some 80,000 insurgents (Elkins 2014, p. x). Through her detailed archival work, however, Elkins found concluded that 'the number of Africans detained was at least two times and more likely four times the official figure, or somewhere between 160,000 and 320,000' (Elkins 2014, p. xi). Except for a few thousand, Britain did not detain women and children in the camps, but in around 800 enclosed villages scattered through the Kikuyu countryside., Surrounded by 'spiked trenches, barbed wire, and watchtowers', and heavily patrolled by armed guards, they were, Elkins argues, 'detention camps in all but name'. In light of this, she argues that the British had actually detained some 1.5 million people, or nearly the entire Kikuyu population (Elkins 2014, p. xii).

Historians have drawn different conclusions on some aspects of Britain's response to the insurgency, including the scale of internment. These differences can largely be explained by differences in methodology, as Elkins explains in her account of expert testimony given to the British High Court of Justice by several historians, in litigation on behalf of Kikuyu victims of British torture (Elkins 2011, 731-748). What unites their accounts, however, is the conclusion that extreme repression and violence 'had been thoroughly institutionalised as a system of control' both in the reserves and the detention camps and prisons (Anderson 2005, 311), and that torture was 'particularly widespread, almost routine' (Newsinger 1981, 179). Extremely harsh living conditions in the camps and prisons, with very poor sanitation, healthcare and nutrition, were exacerbated by the extreme dehumanizing treatment, beatings, sexual assault, and torture (Anderson 2005, 315-20).

Revelations about the extent of the brutality against the 'Mau Mau' trickled out over the years, but they were met with persistent denial and playing down of the seriousness of the situation. In particular, the dogged efforts of Labour MP, Barbara Castle, forced several debates in the House of Commons. In response, however, the government went to considerable lengths to thwart meaningful investigation. In February 1959, Castle proposed a motion for an independent inquiry into prison conditions following various allegations of prisoner mistreatment. While she was a fierce defender of human rights, and persisted with her campaign for several years, Castle was a backbencher with very little influence on the centre of power. She was also cast as a communist (Elkins 2014, 309). Furthermore, as one of very few women MPs, she was also a victim of widespread misogyny. By contrast, the government could marshal considerable power and resources to suppress the allegations. The government's response to Castle was that the Governor of Kenya was already investigating the issues, that appropriate mechanisms of investigation were in place, and that there was no need for any special investigation. MP Bernard Braine, for example, stated:

> The machinery exists to examine these charges, and that facts have been established shows that effective machinery does exist. One would think from what she said that there was not any machinery and that, therefore, this House must promote a special inquiry. That is not the case. First of all, there is the normal review and appeal procedure. I am told that the reviewing committee is at present looking into appeal cases that were previously dismissed. Secondly, as the right hon. Gentleman well knows, there is the advisory committee, presided over by a judge of the Supreme Court to hear appeals against detention. A great deal of what has been said casts the gravest reflection on the integrity and professional honesty of these men. Thirdly, since 1956, all camps have been inspected by Ministers, by heads of Departments and by district officers, and the Governor has set up an inspecting committee for each camp (HC Deb 24 February 1959 vol 600 c1049).

For the government, Under-Secretary of State for the Colonies, MP Julian Amery insisted that 'the Government of Kenya and the prison service in Kenya is perfectly capable of keeping its own house in order and is doing so' (HC Deb 24 February 1959 vol 600 c1070). He also defended the reputation of British people overseas:

> I for one—though I speak here for myself alone, I suspect that I speak for a very large number of people in the country—deeply resent the inference behind

> all this that Britons, once they leave our shores, abandon their attachment to the principles of freedom, decency and fair play. Everything which has happened in Kenya in the last few years proclaims the contrary. But some of the mud sticks (HC Deb 24 February 1959 vol 600 c1052).

The government also defended the detention programme, including detention without trial, for 'Mau Mau' insurgents as a great success in terms of its capacity to rehabilitate insurgents so that they can, in the words of Lord Balniel, 'once again take their place in civilised society' having 'reached almost the absolute extremities of human degradation' (HC Deb 24 February 1959 vol 600 c1031). MP Bernard Braine's words invoke the civilising mission, which lay at the heart of the internment programme:

> Yet, looking back over that short period of five years, one can see now that without the use of these powers of detention, of intensified interrogation, of redemption through confession and work, it would have been quite impossible to have turned tens of thousands of sullen, fanatical Mau Mau terrorists into decent citizens. Now, 75,000 of them have returned to normal life. I met many of them on my last visit. What a different people they are (HC Deb 24 February 1959 vol 600 c1045).

'Intensified interrogation' was a euphemism for the violent logic of the camps. As Anderson explains, 'the intention was to first break the spirit of the prisoners, and then to encourage them to move through a process of "rehabilitation" that began with a confession of their wrongdoing' (Anderson 2005, 314). The route to breaking the prisoners' spirits was through violence, 'both routine and random', but it also had purpose. Regimes of violence differed between camps, and even within different compounds, and they reflected the category of prisoners or their place along the pipeline towards rehabilitation (Anderson 2005, 315). As Anderson concludes, 'Violence was not exceptional', as the British government repeatedly tried to claim, 'but intrinsic to the system, and the use of force to compel obedience was sanctioned at the highest level' (Anderson 2005, 316).

The motion for an independent inquiry was lost, by 232-288 votes (HC Deb 24 February 1959 vol 600 c1076). The issue did not, however, go away. Matters came to a head in the summer of 1959, with the massacre of 11 prisoners and the brutalisation of dozens more at the Hola prison on 3 March. Initially, the local authorities attempted to cover it up. Details of the massacre were first reported in the East African Standard on 5 March 1959. In an attempt to control the facts, the

colonial government launched an internal investigation. The investigation found enough evidence that prisoners had been severely beaten by the guards, and that the Commandant, G. M. Sullivan, had failed to intervene (Elkins 2014, 346-7). But the findings also equivocated over where blame lay, stating that: 'It is impossible to determine beyond reasonable doubt which injuries on the deceased were caused by justifiable and which by unjustifiable blows, and which injury or combination of injuries resulted in the shock and haemorrhage causing death. It is impossible to say with any degree of certainty which particular person struck the blows, whether justifiable or not' (Elkins 2014, 348). On 9 April, Barbara Castle and MP Kenneth Robinson again requested an independent inquiry, and a debate was set for mid-June but Secretary of State for the Colonies, Lennox-Boyd, continued to insist there was no need for an independent inquiry
(HC Deb 9 April 1959 vol 603 c357).

Behind the scenes, Prime Minister Harold MacMillan was working with Alan Lennox-Boyd and others to control the damage, including inviting newspaper reporters to highly sanitised tours of Hola, internal and light touch disciplinary proceedings against Sullivan and a handful of lieutenants, and a decision that MacMillan, Lennox-Boyd, and Lord Perth would take the lead in stressing the government's success in winning the war against terrorism in Kenya. They would concede that a handful of unfortunate events had taken place, but would insist that these should be understood in the context of Mau Mau savagery (Elkins 2014, 349).

In the Commons debate in June 1959, Lennox-Boyd spoke at great length of the barbarity of the 'Mau Mau', repeating the false claim often made by defendants of internment that the 'Mau Mau' engaged in cannibalism (HC Deb 9 April 1959 vol 603 c357). He also spoke of the supposed successes of internment, arguing that the released of 78,000 detainees, and the willingness of some of them to assist in capturing and rehabilitating others, justified internment (HC Deb 16 June 1959 vol 607 c266).

The final showdown came in a second debate in the Commons in July. The Hola Massacre and the State of Emergency in Nyasaland were both up for debate, after Britain's commission in Nyasaland had found that illegal force had been used and the territory was operating temporarily 'as a police state'. These debates were perceived as a referendum on Britain's colonial mission more broadly, and indeed would pave the way for the decolonisation of Kenya (Elkins 2014, 351).

Castle spoke at length, cataloguing the torture and abuses against prisoners for years prior to Hola,

as well as the deceptions and lies of the colonial and British governments. Enoch Powell followed, calling the whole debacle 'a great administrative disaster', and concluding:

> We cannot say, 'We will have African standards in Africa, Asian standards in Asia and perhaps British standards here at home.' We have not that choice to make. We must be consistent with ourselves everywhere. All Government, all influence of man upon man, rests upon opinion. What we can do in Africa, where we still govern and where we no longer govern, depends upon the opinion which is entertained of the way in which this country acts and the way in which Englishmen act. We cannot, we dare not, in Africa of all places, fall below our own highest standards in the acceptance of responsibility (HC Deb 27 July 1959 vol 610 c237).

But as Elkins argues, this double standard is precisely what had guided British policy in Kenya and elsewhere in the empire:

> In the end, few of the high-ranking officials in the British colonial government actually believed that the standards of British law applied to Africa, or most parts of Asia for that matter, and particularly not while they were fighting a war against savagery (Elkins 2014, 352).

Yet there would be no owning up to this. Illegal detention, torture and murder on an industrial scale would persistently be denied because the image of British imperialism was at stake. As Elkins argues, Britain had spent decades constructing an image of Britain's imperialist endeavours as contrasting sharply with the conduct of other European empires in Africa. Liberals and conservatives alike bought into the superiority of British colonial rule and avoided 'the corruptive effects of absolute power in its colonies because of its higher Christian moral principles and economic know-how'. (Elkins 2014, 306).

Notions of the UK as honourable, decent, and as a champion of human rights live on and continue to shape how the UK reacts when allegations of collusion in human rights abuses arise. Successive UK government responses to evidence of UK torture in the 'War on Terror' are striking in their similarities to the Kenya case fifty years ago. For more than 15 years, senior intelligence officials and government ministers have refused to acknowledge any involvement of British personnel in torture, despite mounting and demonstrable evidence to the contrary. In 2005, when confronted with allegations of UK collusion in rendition and torture, Prime Minister Tony Blair insisted that:

> The notion on that I, or the Americans, or anybody else approve or condone

> torture, or ill-treatment, or degrading treatment, that is completely and totally out of order in any set of circumstances … I have absolutely no evidence to suggest that anything illegal has been happening here at all, and I am not going to start ordering inquiries into this, that, and the next thing (BBC 2005).

Also in 2005, when asked by the Select Committee on Foreign Affairs about allegations of UK involvement in CIA rendition operations, Foreign Secretary Jack Straw was asked to give a categorical statement that the government was 'not assisting, with the Americans, in rendition of their suspects or their personnel and that we are definitely not involved in any rendition of anyone for the purposes of being taken to another country to a secret site, or whatever, for the purposes of torture?' Straw denied any involvement, but as with Blair, also sought to thwart any official inquiry into the allegations:

> First of all on your last point [involvement in rendition for torture], Eric, yes, I absolutely categorically can give you that undertaking … Unless we all start to believe in conspiracy theories and that the officials are lying, that I am lying, that behind this there is some kind of secret state which is in league with some dark forces in the United States…there simply is no truth in the claims that the United Kingdom has been involved in rendition full stop, because we have not been, and so what on earth a judicial inquiry would start to do I have no idea. I do not think it would be justified (Straw 2005).

It is now clear that by this point, Straw had personally authorised involvement of MI6 in numerous rendition operations to countries where the risk or torture or CIDT was significant (Gibson 2013, 34-6).Given the (criminal) prohibition against lying to a select committee in this way, serious questions remain unanswered concerning individual and institutional accountability in this case.

Such denials were repeated by MI6, again to parliament and again in contravention of what we now know were the clear facts on the ground. In oral testimony to an earlier configuration of the ISC, Chief of MI6, Sir John Scarlett, admitted in November 2006 that the agency had directly assisted 'a very small number of renditions where we were certain that there was no risk of torture or CIDT, and where the circumstances would permit this assistance without the breach of our country's obligations.' However, Scarlett insisted that MI6 had never assisted in any renditions into so-called black sites, nor renditions to third part countries other than the USA or the prisoner's country of origin, nor in renditions to the prisoner's country of origin where there was a real risk of CIDT or torture, or where the UK's international obligations would be breached (ISC 2007,

51-2). As a result of this misleading information, the ISC was able to conclude in 2007 that there was no evidence of UK agencies being complicit in Extraordinary Rendition operations where there was a real risk of torture or CIDT (ISC 2007, 64). The ISC also accepted claims, now proven to be entirely false, that robust safeguards were in place to govern intelligence sharing with overseas partners where there was a risk such intelligence could be used in torture or mistreatment (ISC 2007, 13).

UK officials did not stop at simply denying the involvement of UK agencies. They actively sought to limit oversight and accountability. The ISC found that intelligence officers failed to produce or altered the documentary records relating to the mistreatment of prisoners. Many of MI5's 'prisoner interview reports', initiated in January 2002, were misplaced or had not been completed in the first place. MI6 did not maintain formal records until April 2005, and even after that date, 'detainee contact reports' were only partially completed, or not at all (ISC 2018b, 21). Rather than resulting from administrative errors, this was deliberate. As one MI6 officer testified to the ISC, there:

> Was quite an emphasis then on not putting things in writing…Because presumably they didn't want the ISC to read the documents later…It wasn't as if the basic attitude to record-keeping had been abandoned; it was more that the more complicated stuff that was at the fringes of normal was not being recorded (ISC 2018b, 34).

There was also evidence of reports systematically recording a 'no' against the list of mistreatment concerns in the template, and of reports from field officers being altered where incidents of abuse had been recorded, before being passed to the ISC (ISC 2018b, 26-7).

We have established that the use of UK territory for rendition operations was much more extensive than previously thought even by the ISC, and included the use of British overseas territory, Diego Garcia (Cobain 2013; Raphael et al. 2019). Yet, flight records of aircraft used by the CIA and landing on Diego Garcia went missing before the ISC could review the material, including during crucial periods when there is extensive evidence of the territory's use for rendition operations. The Foreign and Commonwealth Office (FCO) initially claimed that the records were incomplete because of water damage, but later reversed this when challenged, saying that they had dried out (ISC 2018b, 95). Officials have also refused to gather evidence about the use of Diego Garcia, with Foreign Secretary David Miliband insisting in May 2008 that 'we do not consider that a flight transiting our territory or airspace on its way to or from a possible rendition operation constitutes

rendition', which means that the UK government only sought assurances from the US that prisoners were not on board when rendition aircraft landed on UK soil, and refused to expand their investigations. Officials also persistently refused to investigate or block aircraft that have been shown to have been used in rendition operations, citing the risk of undermining 'key areas of cooperation' with overseas partners (ISC 2018b, 82).

Successive UK governments have also gone to considerable lengths to prevent or limit investigation. Civil actions have been brought against the British government, but it has made various attempts to prevent key aspects of those cases from being heard in open court, or to have them deemed non-justiciable in their entirety. The government has also attempted to prevent the publication of key documents, including those which show that British intelligence personnel knew about the torture of prisoners held by the CIA. This includes the case of Binyam Mohamed (UKCoA 2010). Where the UK courts have refused to hold proceedings in secret, the government offered substantial pay-outs but refused to admit liability, as with the case brought by five former prisoners held at Guantánamo Bay (Casciani 2012), and the case of Hakim Belhadj, whose rendition was orchestrated by MI6 and signed off by Jack Straw. It cost the UK government £11 million to keep the litigation out of the courts, but the Supreme Court found the UK's position - that the case was non-justiciable because it turned on actions of a foreign state - untenable. The UK government issued a full apology to Belhadj and his wife, Fatima Boudchar, without admission of liability, to minimise public exposure of additional details of UK involvement (HC Deb 10 May 2018 c926-7).

Attempts have also been made by successive governments to limit exposure of UK involvement through parliamentary and US congressional investigations. It seems that from 2009 onwards, UK officials made representation to the US Senate Select Committee on Intelligence to redact mentions of the UK from its final report (Mason 2014). The ISC investigation was also significantly constrained by government, which refused to provide access to intelligence service personnel who had been on the ground at the time of operations where prisoner abuse occurred. This meant that the list of potential witnesses was reduced to just four people from the inside. The ISC stated the 'the terms and conditions imposed were such that we would be unable to conduct an authoritative inquiry and produce a credible report', and that its findings, therefore, where 'not, and must not be taken to be, a definitive account' (ISC 2018b, 1).

Even after the ISC published its devastating findings in 2018, the government continued to deny

the scale of the problem and insisted on the UK's commitments to its human rights obligations and global leadership. Prime Minster Theresa May, in her written statement, asserted: 'UK personnel are bound by applicable principles of domestic and international law. The government do not participate in, solicit, encourage or condone the use of torture or CIDT for any purpose' (HC Deb 28 June 2018 c41WS). Foreign Office Minister, MP Sir Alan Duncan, made the same claims in the ensuing House of Commons Debate, insisting that 'we can and should be proud of the work done by our intelligence and service personnel', and that as a country we can feel confident in being able to 'maintain our global reputation as a champion for human rights across the world' (HC Deb 28 June 2018 c28). He also took issue with MP Emily Thornberry, who had referred to UK agencies being 'involved in torture', arguing, 'I think it is honest to say that the ISC found no evidence that the agencies had deliberately turned a blind eye to torture', and that 'they were not involved in torture' (HC Deb 28 June 2018 c28).

We have argued before that the lengths to which successive governments have gone in preventing access to the documentary evidence of UK collusion in torture enables a broader narrative of denial to be sustained (Blakeley and Raphael 2020, 14). By maintaining a narrative of the UK as a world leader and champion of human rights, ministers have implied that collusion in torture arose because of the 'new and challenging operating environment for which, in some cases, they were not prepared', and in which intelligence agencies 'took too long to recognise that guidance and training for staff was inadequate, and too long to understand fully and take appropriate action on the risks arising from our engagement with international partners on detainee issues' (HC Deb 28 June 2018 c41WS). In other words, lessons have been learned and the UK's current guidance 'provides clear direction for UK personnel', coupled with 'world-leading and independent oversight' (HC Deb 2 July 2018 c25; 10 May 2018 c927). Yet we are left wondering how genuine these claims to have learned lessons really are. In the concluding remarks that follow, we offer some reflections on the stubborn attitudes and behaviours that persist at the heart of UK government in relation to torture. We suggest these are a legacy of a disingenuous reading of British conduct over many decades, and an unwillingness to address the structural logics that have facilitated torture and continue to leave the door open for further collusion. We also reflect briefly on the challenges we face in holding governments to account.

Conclusion

For decades the UK has projected a narrative of itself as a leading champion of human rights, and

as a force for good overseas. Just half a century ago, the British government colluded in and tried to cover up internment, torture and murder on an industrial scale as it attempted to crush the 'Mau Mau' rebellion in Kenya. Even as evidence of the scale of the abuses mounted, Britain continued to insist that it occupied the moral high ground, since the exaggerated practices of its enemies were far more barbaric, and its own behaviour was somehow not as bad as that of other Western powers. Meanwhile, the MacMillan government used all available resources to prevent the truth from coming out through denial, destruction of evidence, and machinations at the highest level of government to thwart any proper investigation.

The scale of UK collusion in torture, both during the Troubles in Northern Ireland, and during the 'War on Terror', is not comparable with the industrialised violence perpetrated against hundreds of thousands of Kenyans in the 1950s. But the justifications, the denials, the attempts to cover up, and the efforts to evade accountability are persistently familiar across all three cases. There is little evidence that any cultural transformation has taken place: mistaken beliefs about torture's supposed efficiency persist within the intelligence services and at the highest levels of government, as does the view that certain individuals or groups are so barbaric in their own intent and practices, that they are deserving of torture. The very real risks of torturing innocents barely enters into it, and neither do considerations of torture's corrosive effects, whether that be the tainting of evidence rendering it useless in any fair judicial process, or the blowback effects of torture which throws increasing numbers of adherents into the arms of those that counter-terror operations are aimed at defeating in the first place.

Two contradictory versions of Britain's intelligence services sit side-by-side. The first presents them as highly competent with the capacity to develop and implement robust policies for exercising sound judgment in line with strict legal and ethical rules. The other presents the intelligence agencies as a flawed bureaucracy that struggled with the new realities of the post-9/11 world. The latter seems to provide a diversion strategy, enabling flawed oversight of contemporary practices as a foil for any specific policy. As our scrutiny of the *Consolidated Guidance* and the *Principles* shows, there is a clear policy. The UK government refuses to outlaw torture. Instead, it retains the right to sanction operations where there is a real risk of torture, permitting Ministers the right to make that call. Justification is provided by the very guidance and principles that the government insists are demonstrative of its anti-torture commitments. Furthermore, the presentation of the updated *Principles* as more robust than previous versions further delays any serious reckoning with the past. Directly echoing the MacMillan government's assertions quoted

above, that 'the machinery exists to examine the charges, and that facts have been established that show that effective machinery does exist', the UK government asserted in July 2019, that a full judge-led inquiry was not necessary, given:

> the extensive work already undertaken to improve policies and practices in this area…Parliament and the public can have confidence in the effectiveness of measures taken since 2010 and the new principles announced by the Government today to strengthen accountability and oversight by Ministers, Parliament, and the independent commissioners of the vital work of our security and intelligence agencies (HC Deb 18 July 2019, c974-5).

Torture is contested. But for those of us engaged in struggles to contest government positions on torture, we must be cognisant of the asymmetric nature of the contest. Governments have access to much of the evidence of collusion in torture. We are denied that access. Governments have the power and resources to thwart investigations, and the wherewithal to present the struggle as a level playing field. It is not.

Our experience of contesting the *Consolidated Guidance* is instructive here. Civil society organisations were invited to make written submissions. Hand-picked representatives from civil society organisations were invited to a closed roundtable over the course of an afternoon, conducted under Chatham House rules. This was not a free and open discussion directly between the Investigatory Powers Commissioner and those invited civil society representatives. Its parameters were highly orchestrated, constrained and mediated by the presence of other parties in the room including representatives of several government departments and other actors with close ties to the intelligence services, all of whom were invited to participate in the 'discussions' and 'debate'. Those on the inside also had ample opportunity and access to the IPCO outside of this one-off meeting to influence and shape the emergent revisions to the *Consolidated Guidance*. As we seek to influence policy and have impact through our research, therefore, we must resist the seductions of access to power, and we must always be mindful of the larger agendas and power relations at play. Engagement at this level will rarely achieve more than cosmetic and limited changes to policy that is already highly contingent on actors and factors well beyond our reach. Transformative change is likely to require more radical action as part of wider social and political projects aimed at reckoning with Britain's long history of exploitation and abuse as part of its imperial and neo-imperial foreign policies.

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