Law, non-law, and torture: from the *Consolidated Guidance* to the *Principles*

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1. Introduction

The document called *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*[1] attempts to address a possibility that is ever-present in the modern national security landscape: that the United Kingdom and its agents become indirectly complicit in the mistreatment of those detained by its allies or partners abroad, whether that mistreatment amounts to torture, or to the lower category of 'cruel, inhuman and degrading treatment'. First made public in 2010, the *Principles* has recently been revised (and renamed)[2] in order to reflect some of the lessons learned from what has emerged since then about the UK's indirect (but sometimes also direct) involvement in the mistreatment of persons detained abroad by its allies and/or rendered by them from one jurisdiction to another. This article offers a critique of the *Principles* against the background of the document's evolution over time, arguing that it reflects many of the same flaws which characterise more generally oversight in the national security domain. The *Principles* is a public document, applied mostly in secret. It originally represented a bare minimum, originating in response to actions whose inappropriateness was manifest quite apart from the question of any guidance which was or was not available. It has been specifically identified as having as part of its purpose the communication to the public the impression that the United Kingdom's government takes seriously the possibility of mistreatment and is appropriately opposed to it, and yet for many years contained a number of lacunae which prevented it from fulfilling that role convincingly. Others remain. Oversight of compliance with the document has been at times informal, and often too weak; oversight of the document itself has been ad hoc and belated.

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[1] HM Government, *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (July 2019) ('*Principles*').

[2] Formerly, the document was 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) ('*Consolidated Guidance*'). See the letter from Sir Adrian Fulford, the Investigatory Powers Commissioner, to the Prime Minister (12 July 2019): '…the Consolidated Guidance did not provide guidance. Instead, it set out principles that are to be applied in a range of differing circumstances. Furthermore, the title "Consolidated Guidance" will henceforth be significantly misleading, given this new draft cannot sensibly be viewed as a "consolidation" of other documents, which in any event are largely now forgotten.'

Though the recent round of reforms has addressed some of the substantive problems, it did not – because it could not – alter the fundamental status of the document and the difficulties which flow from that. That is, the *Principles* is a constitutional oddity. Though public lawyers are well accustomed to non-legal rules (whether soft law, or convention, or something else)[3] which seek either to fill the gaps in the body of formal legal rules or to guide the exercise of legal powers, the *Principles* does neither of these things. Instead, it sits on top of the law, allegedly replicating its content, but in fact distracting from and potentially distorting it. In this sense, the document demonstrates some of the dangers inherent in the preference for non-legal over legal regulation, and in turn the limitations of the project of rationalisation and codification which has been carried out in the constitutional order in recent decades.

2. The legal context

The UK is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT'), Article 2 of which requires those states party to it to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'[4] In pursuance of the UK's duties under the Convention, section 134 of the Criminal Justice Act 1988 provides that a 'public official or person acting in an official capacity' commits the offence of torture if 'in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.'[5] For the purpose of this offence, it does not matter 'whether the pain or suffering is physical or mental and whether it is caused by an act or an omission'.[6] Perhaps crucially, the 1988 Act makes it a defence 'for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct'.[7] This provision may result in legal liability even where the pain or suffering in question is inflicted by an agent of a foreign service. First of all, the

[3] See Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 *Modern Law Review* 853.

[4] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2(1). Torture is defined by the Convention as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.': UNCAT, Article 1(1).

[5] Criminal Justice Act 1988, s 134(1).

[6] CJA 1988, s 134(1).

[7] CJA 1988, s 134(4).

Accessories and Abettors Act 1861 provides that '[w]hosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.'[8] Moreover, the Serious Crime Act 2007 creates a range of offences relating to assisting or encouraging primary offences, which can be committed by a person 'whether or not any offence capable of being encouraged or assisted by his act is committed.'[9] States party to UNCAT also undertake to prevent within their jurisdiction 'acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' ('CIDT'), but CIDT is not defined in the Convention. Though it has no authoritative definition in UK law,[10] many forms of CIDT will be contrary to, for example, the Offences Against the Person Act 1861.

Alongside UNCAT, the International Covenant on Civil and Political Rights ('ICCPR') and the European Convention on Human Rights ('ECHR') both prohibit torture, with the latter – due to its incorporation into domestic law – being the more significant of the two. Article 3 of the Convention provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[11] In an important line of case law, the Court of Human Rights has held that Article 3 prevents the extradition or deportation of a person to a third state where 'substantial grounds have been shown for believing that the person concerned… faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'[12] The effect is that the bar upon the torture (and CIDT) acts as a limit not only upon how agents of the state can treat those in their custody, but also upon their options for transferring them into the custody of other states. No derogation is possible from the provisions of Article 3. One response to these facts has been the emergence of the practice of 'deportation with assurances', under which the UK seeks 'assurances from the government of the receiving state which are sufficiently credible to allow deportation to take place without infringing the human rights of the deportee or the obligations of the state under international law.'[13] Though the Court of Human Rights has held that this process is capable of operating

[8] Accessories and Abettors Act 1861, s 8.
[9] Serious Crime Act 2007, s 49(1).
[10] For an American perspective, see David Weissbrodtt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality* 343.
[11] European Convention on Human Rights, Article 3.
[12] *Soering v United Kingdom* (1989) 11 EHRR 439, [91]. See also, in the context of deportation rather than extradition, *Chahal v. United Kingdom* (1996) 23 EHRR 413.
[13] David Anderson QC (with Clive Walker QC), *Deportation with Assurances*, Cm 9462 (July 2017), [1.2].

compatibly with the Convention,[14] difficulties in acquiring suitably reliable assurances have meant that relatively limited use of the practice has been made.[15]

Moreover, the application of the ECHR is limited by the terms of Article 1, which requires Contracting Parties to 'secure to everyone *within their jurisdiction'* the rights in question. Though the decision of the Strasbourg Court in *Al-Skeini*[16] has increased the range of situations in which jurisdiction might be held to exist outside of the territory of the state,[17] this remains exceptional, and there will be no jurisdiction in the majority of cases to which the *Principles* applies. One point causes particular difficulty: how does the Convention treat the situation in which a British citizen is outside the jurisdiction of the United Kingdom and is, by virtue of being deprived of his or her citizenship, put beyond the reach of the Convention and (perhaps) at risk of torture or CIDT? At the moment no answer is available,[18] and the government has argued that the deprivation of the citizenship of a person outside its territory does not, under the principles so far elaborated by the Strasbourg Court, engage the Convention;[19] that the mere fact of nationality creates no jurisdictional link. If this is correct, then in circumstances in which the United Kingdom could not and would not extradite a person to a foreign jurisdiction, it could nevertheless lawfully divest itself of responsibility for the treatment of such persons by removing their citizenship while they are already in the custody of the foreign power, renouncing any sort of duty of protection to those persons.[20] This is a troubling conclusion, but one which is consistent with the manner in which jurisdiction under the ECHR has so far been unpacked. Moreover, UK authorities could do so consistently with the *Principles*, which applies – as we shall see – to a limited range of forms of collaboration or interaction, some of them significantly less direct than is this legal, if not physical, release into the jurisdiction of a foreign state.

3. Evolution

[14] *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1.
[15] See Anderson (n 13) [3.33]-[3.50].
[16] *Al-Skeini v United Kingdom* [2011] ECHR 1093.
[17] See *Smith v Secretary of State for Defence* [2013] UKSC 41 and, considering the outer limits of the extraterritorial jurisdiction of the EHCR, *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811.
[18] The point is not considered in, for example, the admissibility decision in *K2 v United Kingdom* (2017) 64 EHRR SE18.
[19] Home Office, *Immigration Bill - European Convention on Human Rights - Supplementary Memorandum* (January 2014) [16].
[20] Though see Home Office (n 19) [16]: 'the Home Secretary has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of Articles 2 or 3 if they were within the UK's jurisdiction and those articles were engaged.'

The years since 2001 have seen a number of inquiries take place into the treatment by the UK of detainees in the early years of the Global War on Terror and.[21] Two reports were published by the Intelligence and Security Committee in 2005 and 2007,[22] though are widely recognised – including by the Committee itself – to have been inadequate in a number of respects. A judge-led inquiry, the Gibson inquiry, was set up in 2010 but brought to a premature end while criminal inquiries into related issues were ongoing.[23] On the same day the Gibson inquiry was announced, the Government published for the first time the *Consolidated Guidance*, publication of which had been taken place a year earlier.[24] By the time it was determined, however, that no criminal charges would be brought in the most prominent of the cases – relating to the UK's involvement in the kidnap and rendition of Abdelhakim Belhaj and his wife to Libya in 2004[25] – the matters had been handed (back) over instead to the ISC, albeit a long with a loose commitment to having a full judge-led inquiry at some future time.[26]

In the intervening period, further attention had been paid as a result of the killing of Fusilier Lee Rigby, and a report – also by the ISC – on issues around intelligence relating to that murder.[27] One of the killers, Michael Adebolajo, claimed to have been mistreated while detained in Kenya but the security and intelligence agencies ('SIAs') strongly rejected the suggestion that the *Guidance* applied to his circumstances.[28] Though the ISC felt that position to be 'arguable' given that the *Guidance* was 'tightly drawn', it noted that Adebolajo had been interviewed not only by Kenyan police but also by 'a counter-terrorism unit' with 'a close working relationship' with

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[21] On which see Ruth Blakeley and Sam Raphael, 'British Torture in the "War on Terror"' (2017) 23 *European Journal of International Relation* 243.

[22] Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, Cm 6469 (2005); Intelligence and Security Committee, *Rendition*, Cm 7171 (2007).

[23] HC Deb 18 January 2012, vol 538 cols 751-2 and the Detainee Inquiry, *The Report of the Detainee Inquiry* (December 2013).

[24] See the timeline at Detainee Inquiry (n 23) 10-21.

[25] See Crown Prosecution Service statement: 'Operation Lydd' (9 June 2016). The matter was considered twice – from very different angles – by the Supreme Court: *Belhaj v Straw* [2017] UKSC 3 and *Belhaj v Director of Public Prosecutions* [2018] UKSC 33.

[26] 'The Government fully intend to hold a judge-led inquiry into these issues, once it is possible to do so and all related police investigations have been concluded.' HC Deb 18 January 2012, vol 538 col 752 (Ken Clarke).

[27] Intelligence and Security Committee of Parliament, *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (HC 2014-15, 795). For the government's response see *Government Response to the Intelligence and Security Committee of Parliament Report on the Intelligence Relating to the Murder of Fusilier Lee Rigby*, Cm 9012 (February 2015).

[28] 'SIS had no prior knowledge of plans to detain Adebolajo, or that the detention was about to take place, nor had SIS ever previously discussed this individual with the Kenyans… once SIS learned of his arrest and the immediate plans to deport him SIS did not seek to interview Adebolajo, feed in questions or seek intelligence information.' ISC (n 27) [466].

the UK Government, though the significant redaction typical of an ISC report makes it difficult for the outsider know exactly what the nature of that relationship is.[29] Regardless, it is clear that the relationship was a sufficiently close one that the ISC would have expected MI6 to attempt to ascertain against whom the complaint was being made.[30] Beyond that specific case, the Committee expressed more general concern about the handling of such allegations by UK authorities.[31] There followed from this report a supplement by the Intelligence Services Commissioner to his annual report, focussing on the ISC's concerns about the government's responsibilities as regards foreign counter-terrorism units with which it partners.[32] Amongst the Commissioner's recommendations was that 'the Cabinet Office reviews the Consolidated Guidance in consultation with the ISC, the intelligence services, MOD, FCO and the Home Office and (subject to what follows) also with SO15.'[33]

This recommendation was reaffirmed by the Intelligence and Security Committee, which issued two linked reports in 2018. One, focusing upon the events was stymied by the refusal of the SIAs to provide the Committee with access to officers who had been 'on the ground'.[34] The other report, a forward-looking treatment, contained a number of conclusions about the *Consolidated Guidance* and the need for its reform:

> The document that we have been given provides a useful guide to the policy framework within which the UK intelligence and security Agencies and MoD personnel operate… However, the real detail is in the lower-level guidance to staff, which the Government does not intend to publish. The title "Consolidated Guidance" is therefore a misnomer. That being the case, we consider that the document should be published, but that it should be clearly presented as policy, not guidance.[35]

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[29] ISC (n 27) [467].

[30] 'When Adebolajo reported his mistreatment, it was not clear whether he was referring to his treatment by the Kenyan police, by ARCTIC, or by both… SIS did not try to establish which unit Adebolajo's allegations of mistreatment referred to… This is surprising: if Adebolajo's allegations of mistreatment did refer to his interview by ARCTIC then HMG could be said to have had some involvement – whether or not UK personnel were present in the room.' ISC (n 27) [468].

[31] ISC (n 27) [488]-[499].

[32] The Rt Hon Sir Mark Waller, *Report of the Intelligence Services Commissioner - Supplementary to the Annual Report for 2015* (HC 2015-16, 458).

[33] Waller (n 32) [21.1].

[34] Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001–2010*, (HC 2017-19, 1113).

[35] Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: Current Issues*, (HC 2017-19, 1114). For a discussion of the shortcomings of the *Guidance* against the background of these reports, see Ruth Blakeley and Sam Raphael, 'The Prohibition against Torture: Why the UK Government is Falling Short and the Risks that Remain' (2019) *The Political Quarterly* (forthcoming).

On the day these reports were issued, the Prime Minister acknowledged, in a written statement, that the SIAs had made errors in their response to evidence of mistreatment by foreign partners:

> With the benefit of hindsight, it is clear that UK personnel were working within a new and challenging operating environment for which, in some cases, they were not prepared. It 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. The Agencies responded to what they thought were isolated allegations and incidents of mistreatment, but the ISC concludes that they should have realised the extent to which others were using unacceptable practices as part of a systematic programme. The Agencies acknowledge that they did not fully understand this quickly enough and they regret not doing so.[36]

She therefore requested that the new Investigatory Powers Commissioner 'to consider how the Consolidated Guidance could be improved, taking account of the [ISC's] views and those of civil society.'[37] The IPC's recommendations were accepted in full and the new *Principles* were issued the following year; on the same day, the Government resiled from its prior commitment to hold a judge-led inquiry on British involvement in the events that had been considered by the Gibson Inquiry and the ISC.[38]

4. Substance

The *Principles* reflects (though, as discussed below, imperfectly) this legal background, starting from the position that the UK 'does not participate in, solicit, encourage or condone unlawful killing, the use of torture or cruel, inhuman or degrading treatment ("CIDT"), or extraordinary rendition' and that '[i]n no circumstance will UK personnel ever take action amounting to torture, unlawful killing, extraordinary rendition, or CIDT.'[39] It then identifies a number of situations to the *Principles* applies and sets out, with a greater or lesser degree of detail, the

[36] HC Deb 28 June 2018, vol 643 cols 40-42WS. Also announced was the payment – without admission of liability – to Fatima Boudchar, Belhaj's wife.
[37] HC Deb 22 November 2018, vol 649, col 30-1WS.
[38] HC Deb 18 July 2019, vol 663 col 974: 'the Government have decided that it is not necessary to establish a further inquiry. There is no policy reason to do so, given the extensive work already undertaken to improve policies and practices in this area. The Government's position is also that there is no legal obligation.'
[39] *Principles* (n 1) [1].

procedures to be adopted in such scenarios. These situations encompass a wider range of what are (rather euphemistically) called 'outcomes'[40] than was the case under the *Consolidated Guidance*. That is, the *Guidance* referred only to torture, CIDT and detention, and so applied where the UK solicited detention by a foreign partner but not where information was provided which was intended to result in mistreatment outside of or unrelated to detention, where rendition would follow, or indeed where information was passed to a foreign partner in the knowledge or belief that it would result in unlawful killing. This was an indefensible position: however concerning is torture or mistreatment (and UK involvement therein), such actions are similarly concerning and in some cases more so.

Now, however, the *Principles* – as well as applying to a wider range of domestic actors,[41] and in their interactions with a wider range of foreign actors[42] – include a wider range of 'outcomes', applying where UK personnel 'know or believe i) unlawful killing ii) torture, or iii) extraordinary rendition will result from the passing or receipt of intelligence or in interviewing detainees' or 'a real risk i) unlawful killing ii) torture iii) cruel, inhuman and degrading treatment iv) extraordinary rendition or rendition or v) unacceptable standards of arrest and detention will result from the passing or receipt of intelligence or in interviewing detainees.'[43] Though these formulations extend the application of the new document in important ways, however, an intolerable gap remains. The *Principles*, that is, does not apply to the passing and receipt of intelligence wherever and whenever one of these outcomes might result. Rather, it applies only where one of these outcomes might result and one of a number of prior conditions is met. All of the conditions in question refer to detention, either actual or anticipated.[44] Where there is no detention or prospect of detention, the *Principles* does not, and cannot, apply,[45] and so the expansion of its scope to include, for example, unlawful killing, is far less significant than it at first seems.

The effect of this limitation is best illustrated by one of these conditions, which provides that the *Principles* apply where UK personnel are '[p]assing intelligence to a foreign authority

[40] Investigatory Powers Commissioner (n 2)
[41] *Principles* (n 1) [5]: included now are 'Officers and staff of SO15, Metropolitan Police Service' and 'Officers of the National Crime Agency'.
[42] *Principles* (n 1) [10]: 'There may be occasions when UK personnel will work with non-state organisations or groups, where the UK's obligations and liabilities may be different. In those circumstances, these Principles should apply insofar as possible.' See Investigatory Powers Commissioner (n 2): 'I understand why, in such circumstances, it might be difficult for all aspects of the Principles fully to be applied.'
[43] *Principles* (n 1) [6].
[44] *Principles* (n 1) [6].
[45] *Principles* (n 1) [6].

concerning an individual when detention is sought and there is a real risk that the foreign authority will unlawfully kill the individual in an extra-judicial killing rather than the individual being taken into custody.'[46] By very clear, very deliberate implication, a real risk of extra-judicial killing is in itself insufficient to bring the *Principles* into play, and so a foreign partner which solicits information about an individual with the stated intention of killing him escapes the scrutiny of the *Principles* where one which floats the possibility that the individual might merely be detained is, if the relevant risks exists, caught by them. It is striking that the Investigatory Powers Commissioner, in the letter to the Prime Minister in which he set out the conclusions of his inquiry into the *Consolidated Guidance* said no more on this most crucial point than that he had 'determined that for the purposes of the present review the current link with detention ought to remain',[47] far less explanation than was offered for – for example – changing the document's name. This position, and the process which led to it, is, with respect to the IPC, wholly inadequate, and must work to undermine the intention that the *Principles* operate so as to 'protect British officials from legal liability and to ensure that all conduct of British officials is lawful as a matter of both domestic and international law.' To explain: the passing of intelligence to foreign partners in the knowledge that it will be used to inform a targeted killing at the very least risks creating criminal liability for those who do so (a point previously made by the Joint Committee on Human Rights),[48] just as when passing that information results in the killing of that person while he or she is in detention. And yet though the latter is caught by the *Principles*, the former is not: legal liability may arise notwithstanding compliance with the document. E

A second difficulty with the *Consolidated Guidance* related to its ability to usefully guide the actions of those to whom it applied in those contexts in which it does apply. Amongst the issue which arose were that, firstly, of whether the language of 'serious risk' which the *Guidance* repeatedly used – in, for example, setting the threshold to escalate matters to senior staff or Ministers – accurately reflected the applicable legal test? The question was considered by the High Court in a judicial review brought by the Equalities and Human Rights Commission shortly after the *Guidance* was first published. There, it was argued that the appropriate test was in fact 'real risk', and that by using the language of 'serious risk' the *Guidance* left open the possibility both that the UK would breach its international obligations and that an individual intelligence

[46] *Principles* (n 1) [6(d)].
[47] Investigatory Powers Commissioner (n 2).
[48] Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing* (2015-16, HL 141, HC 574), [24]-[25].

officer would commit an offence under domestic law.[49] This was rejected by the Divisional Court, two of whose reasons for that conclusion are of note. First, it said, the *Guidance* was 'intended to give practical guidance to intelligence officers on the ground':

> It is not a treatise on English criminal law. What matters is how the document would be read and applied by individual intelligence officers, not how it would fare at the Law Commission or in a University Graduate Law School.[50]

Moreover, 'the Guidance does not promise that officers whose actions are consistent with the Guidance will be immune from personal liability.' Rather:

> It says that they have good reason to be confident. And, although the Guidance claims to set out principles which are consistent with UK domestic law, it is not a legal treatise nor a judgment of the Court of Appeal Criminal Division on particular facts. It is entitled to convey the sense of the relevant principles (which it does) in language suitable to its purpose… That said, we are confident that no individual officer would be successfully prosecuted, in this jurisdiction at least, because he judged that a risk of torture or CIDT was not serious, but when he would have judged that the same risk was real.[51]

Nevertheless, the revised document makes the change argued for, using the threshold of 'real risk' rather than 'serious risk', because – as the Investigatory Powers Commissioner said upon its publication – '[t]his is the test which is generally applied in equivalent contexts and, in my view, ensures that the document aligns with international law'.[52] Though this change of language might close the gap identified between law and non-law, the *Principles* remains underdetermined. The *Consolidated Guidance* was supplemented by a range of more detailed material specific to each of the relevant bodies, and which was not made publicly available. The existence and secrecy of that supplementary material, however, not only prevented the Guidance fulfilling its secondary aim – that of promoting public confidence – but may also, depending on its content, have prevented it from fulfilling its primary aim of ensuring UK personnel do not act unlawfully. This relative indeterminacy continues even after the revision of the document: *The Principles* provides that 'each organisation to whom these Principles apply will continue to provide more detailed advice

[49] *Equality and Human Rights Commission v Prime Minister & Ors* [2011] EWHC 2401 (Admin).
[50] [2011] EWHC 2401 (Admin), [61].
[51] [2011] EWHC 2401 (Admin), [64].
[52] Investigatory Powers Commissioner, 'Review of Consolidated Guidance' (18 July 2019) at https://www.ipco.org.uk/Default.aspx?mid=4.29

and guidance to their personnel where such material is necessary to describe precisely how the principles and requirements set out in this document should operate within their individual organisation' but that 'such advice and guidance shall not qualify these Principles'.[53]

Related to this difficulty with identifying the point at which one could proceed compatibly with the *Consolidated Guidance* was the room which the *Guidance* made for attempting to reduce the risk of torture and mistreatment via the seeking of assurances from foreign partners about how they will and will not treat those in their custody. Reliance on such assurances has caused problems in the past: in its report on Michael Adebolajo, the Intelligence and Security Committee accused the SIAs of not responding properly to his allegations of mistreatment, having viewed them 'in the context of assurances given before the allegations were made and by an organisation whose credibility they were not in a position to evaluate.'[54] Even this was called into doubt by the Intelligence Services Commissioner's report on the same matter:

> Although SIS claimed to the ISC and me that Intelligence Officers 1-2 sought and obtained assurances from the Kenyans as to the treatment of Mr Adebolajo while he was in custody, I am not satisfied that they did this, although I cannot rule it out. There is no contemporaneous documentary evidence to support this claim and SIS made it without consulting Intelligence Officer 1 at all and after consulting Intelligence Officer 2 only "briefly". I interviewed both officers and, although they both thought they should and would have sought such assurances, neither had any recollection of doing so or telling SIS that they did.[55]

He therefore recommended that 'thought be given to' a number of points, including 'documentation of and language used in assurances, differentiation of different liaison services involved in relevant operations anad recognition that separate assessments of risk and assurances may be appropriate.'[56] The Commissioner also noted that in 'confidential reports to the Prime Minister and discussions with the intelligence services' he had previously emphasised 'the

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[53] *Principles* (n 1) Foreword. See also Investigatory Powers Commissioner (n 2): 'Although I am strongly supportive of transparency and I encourage public bodies to make as much information available as they are able… I consider that this should be achieved voluntarily rather than by way of a formal requirement. I recognise that there are significant operational sensitivities that make a blanket obligation in this area undesirable and possibly unworkable.'

[54] ISC (n 27) [BBB].

[55] Waller (n 32) [6.5(2)].

[56] Waller (n 32) [21.3(1)].

importance of recording assurances in writing if they are to be relied upon and of undertaking and recording a considered assessment of such assurances and compliance with them.'[57]

This point about the status of assurances is important: the ISC has noted that though '[f]rom the way in which assurances are referred to in the Consolidated Guidance, it might reasonably be assumed that these are formal written agreements' – of a sort familiar from the context of deportation with assurances – that is in fact rarely the case.[58] Mostly the assurances are verbal, with the SIAs arguing that written assurances are often no more reliable than are verbal assurances, and that to seek the former indicates a lack of trust in overseas partners which may undermine cooperation. The ISC accepted these points, reaffirming the Commissioner's recommendation that 'where it is not possible to obtain a written assurance from a liaison partner, a written record of the oral assurance should be produced and sent to the liaison partner so that there is a shared understanding of expectations.'[59] The *Principles*, in outlining the matters to consider when determining the value of assurances, identifies '[t]he manner in which the assurance is given, or caveat is agreed, for instance whether it is written' but nevertheless stresses that 'it is not a prerequisite that they are in writing.'[60] It further provides that if an assurance is not given in writing 'personnel must keep an accurate record of any discussions and, whenever feasible, should share it with the foreign authority as a formal note as soon as is practicable.'[61] Though the very idea of relying upon assurances might be called into question for the reason noted by Lord Phillips in the context of 'deportation with assurances' – 'if you need to ask for assurances you cannot rely on them'[62] – the revised document is a clear improvement over its predecessor in terms of how it treats such assurances.

A final, but crucial, issue related to the point at which the *Guidance*, as it were, wan out. The crucial paragraph of the *Guidance* as published in 2010 left this point ambiguous, and has been the source of much of the confusion and suspicion with which the *Guidance* was treated. It is therefore worth quoting in full:

> We take great care to assess whether there is a risk that a detainee will be subjected to mistreatment and consider whether it is possible to mitigate any such risk. In

[57] Waller (n 32) [22.3].
[58] ISC (n 35) [133].
[59] ISC (n 35) [V].
[60] *Principles* (n 1) [20(a)].
[61] *Principles* (n 1) [21].
[62] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [115].

> circumstances where, despite efforts to mitigate the risk, a serious risk of torture at the hands of a third party remains, our presumption would be that we will not proceed.[63]

The key question here related to what happened in the gap left by the presumption noted. In the different scenarios to which the *Guidance* applied, the basic principle in each case was that where there was a serious risk of torture – and in some situations, also of CIDT – the relevant Minister (probably in most if not all cases the Foreign Secretary) was to be notified or consulted. What the *Guidance* did not make clear was whether it was open to the Minister to decide that the relevant agency should proceed in its interactions (of whatever sort) with the partner agency where such a risk existed.[64] The ISC has noted that different Foreign Secretaries have different understandings of their role in this context. Though MI6 had stated to the Committee that cases in which there a serious risk of torture 'would not have got anywhere near' Ministers,[65] Boris Johnson offered an absolutist understanding of the prohibition that was not shared by Theresa May and Amber Rudd (both of whom have been Home Secretary) or Philip Hammond (Johnson's predecessor as Foreign Secretary).[66] The latter accepted that the *Guidance* left it open to him to authorise torture in extreme circumstances:

> [I]f I became aware of the presence of a weapon of mass destruction in the capital city of a power that is known to regularly use torture and have reason to believe that it's about to detonate and can disclose to that power the location, whereabouts of the individuals, clearly I'd have to make a judgement about whether the protection of their human rights outweighed the human rights of the possibly thousands of people that could be killed or injured as a consequence of the explosion occurring.[67]

This is, with respect to Johnson, clearly a better reading of the terms of the *Guidance*: the fact that not proceeding was designated a mere presumption rather than a rule implied beyond any conceivable doubt that it was open to a Minister to whom a case was brought to order that cooperation continue notwithstanding that it had been assessed that there was a serious risk of torture resulting. This reading was confirmed by an internal MI5 policy note obtained by the Rendition Project, which made clear that intelligence sharing could take place even where there

[63] *Consolidated Guidance* (n 2) [7].
[64] [2011] EWHC 2401 (Admin), [33]: 'it is now accepted that the Guidance does not purport to be guidance as to what Ministers might do.'
[65] ISC (n 35) [178].
[66] ISC (n 35) [179].
[67] ISC (n 35) [179].

exists a serious risk of torture which cannot be mitigated, if the relevant Minister agrees that 'the potential benefits justify accepting the risk and the legal consequences which may follow'.[68]

This possibility is similarly left open by the revised *Principles*, with the document now distinguishing the two situations noted above: where, on one hand, personnel know or believe that unlawful killing, torture, or extraordinary rendition will take place and, on the other, where there is a 'real risk' of a wider category of events, including not only unlawful killing, torture and extraordinary rendition, but also 'ordinary' rendition, cruel, inhuman and degrading treatment, unacceptable standards of arrest and detention. In the former case, the *Principles* require that personnel not proceed and that Ministers be informed.[69] In the latter case, however, personnel may still proceed if one of two conditions are met: either their judgment has been overruled by more senior actors, or the real risk has been mitigated below that threshold by the sorts of caveats and assurances referenced above.[70] If neither condition is met, the result is not that no action must be taken, but rather that the matter must be referred to Ministers. Though the *Principles* outlines at length the considerations that Ministers will take into account in deciding whether or not to proceed,[71] doing so only underlines the fact that Ministers might – compatibly with the revised document, as with its predecessor – authorise conduct which brings with it a real risk of, amongst other things, torture and unlawful killing.[72]

This fact has implications for the liability both of those who carry out the actual cooperation, be it the passing of intelligence or of questions for interrogators, and the Minister themselves. These issues as they are dealt with in domestic law will be discussed further below. Given that the prohibition on torture is absolute, however, it is necessary to note at this stage that Ministerial authorisation cannot by itself negate any violation of international law which may result from it. What may save a Minister, though, is that UNCAT does not itself make complicity in torture unlawful, while the sort of complicity in torture foreseen, however obliquely, by the *Guidance* and now the *Principles* are not, as a result of the jurisdiction point considered above, likely to be incompatible with the ECHR. It is nevertheless notable that while the Ministerial Code – which within the UK constitutional order acts as a conventional limit upon the deeds of

[68] Lucy Fisher, 'Torture: Britain breaks law in Ministry of Defence secret policy' *The Times* (20 May 2019).
[69] *Principles* (n 1) [11].
[70] *Principles* (n 1) [13].
[71] *Principles* (n 1) [15].
[72] See IPC (n 53): 'I trust the revised document will assist Ministers when considering cases in this context, but given they remain accountable to Parliament rather than to an oversight body such as IPCO, I have concluded that the Principles should not be used to create an additional framework that seeks to govern their activity.'

Ministers – previously contained the reference to 'the overarching duty on Ministers to comply with the law including international law and treaty obligations', it was revised in late 2015 to refer instead, more narrowly, to 'the overarching duty on Ministers to comply with the law'.[73] Permission to bring a judicial review of the amendment was refused both at first instance and by the Court of Appeal,[74] in part because the change of wording was considered (unconvincingly) not to have altered the underlying position whereby 'the law' by which Ministers must abide includes international law. Nevertheless, the underlying issue remains: the *Principles* appears to accommodate circumstances in which UK personnel will be complicit, morally and perhaps legally, in torture. Though the *Principles* is an improvement on the *Consolidated Guidance* in that it seeks to guide how Ministers make the ultimate decisions in this area and so comes much closer to a clear recognition of the fact that such decisions will at times be made, the bare problem remains.

5. Oversight and compliance

Oversight of the *Consolidated Guidance/Principles* is carried out (now) by the Investigatory Powers Commissioner, to whom a direction was given under the Investigatory Powers Act 2016 in August 2017,[75] and as we have seen above the IPC was charged with reviewing the *Consolidated Guidance* as part of the process by which it became the *Principles*. One result of that process is worth noting. The Government, in its announcement of the result of the revision process, was able to bat away criticism that it had ignored the views of civil society actors by saying – reasonably – that it was not it that had ignored those views but the IPC:

> If Sir Adrian, in his recommendations, chose not to reflect everything that particular civil society organisations wished to see, that was a judgment by Sir Adrian, and it was right for the Government to rely on the independent commissioner to be the prime source of advice to us on these matters.[76]

[73] See now, Cabinet Office, *Ministerial Code* (January 2018) [1.3].
[74] *R (Gulf Centre for Human Rights) v The Prime Minister* [2018] EWCA Civ 1855.
[75] Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Consolidated Guidance) Direction 2017 (22 August 2017). The question of oversight by the IPC had been raised in Parliament by the former Justice Secretary, Ken Clarke: see written question 113216, asked 15 November 2017, answered 30 January 2018.
[76] HC Deb 18 July 2019, vol 663 col 977.

The independent national security actor was in this way used as a shield by the Government against criticism of the result. Previously oversight of the *Guidance* had been carried out by the Intelligence Services Commissioner – since 2009 on a non-statutory basis and since November 2014 in accordance with a direction made under powers introduced by the Justice and Security Act 2013.[77] Though the Commissioner's final report noted that both the SIAs and the Ministry of Defence have 'consistently shown that the Consolidated Guidance is being applied thoughtfully and that there is a general commitment to continual improvement of process to support officers taking decisions in this area',[78] this oversight process has given reason for concern. There were reported to the Commissioner 921 cases where the Guidance was considered in 2016 (including 'all recorded cases where the Consolidated Guidance was considered, including where the decision was taken that the Guidance did not apply and cases where a judgement was made that there was a less than serious risk of CIDT').[79] In isolation, it is impossible to know whether this figure is worrying or not. What can be said, however, is that the number of errors identified is problematic regardless of the context. The Commissioner observed that in the course of his inspections, 'GCHQ flagged for my attention that they had identified a total of 35 instances where [its] response team had not successfully identified that the Consolidated Guidance review process should have been followed' and that further investigation had 'suggested that in eight of these cases, the intelligence should not have been shared.'[80]

Though voluntary reporting of errors is of course welcome, it is no panacea. First of all, there is no way of knowing how many other situations were not subject to the review process in question – 35 is a high number of mistakes to be made in a single year. Second, these are not merely inconsequential errors of process, but also of substance: the figure of 8 refers to the number of occasions on which there was a serious risk of mistreatment and yet, because of the procedural failing, intelligence was shared. In each of those cases, the effect of the failure may have been to leave SIA officers open to criminal liability. The first report of the Commissioner's successor, the Investigatory Powers Commissioner, identified – across all the relevant agencies – no cases in which the *Guidance* was not properly applied.[81] The *Principles* imposes for the first time a requirement to report non-compliance with the principles to the Investigatory Powers Commissioner, who is charged with determining whether such non-compliance has taken place

[77] See the framework discussed in Paul F Scott, *Hybrid institutions in the national security constitution: the case of the Commissioners* (2019) *Legal Studies* 432.
[78] Sir Mark Waller, *Report of the Intelligence Services Commissioner for 2016* (HC 2017-19, 298), 32-3.
[79] Waller (n 78) 33.
[80] Waller (n 78) 34.
[81] Investigatory Powers Commissioner's Office, *Annual Report 2017* (HC 2017-19, 1780), [12.130].

and assess the seriousness of any non-compliance.[82] The Commissioner is permitted – but not obliged – by the *Principles* to refer the matter to the 'relevant UK authorities' (and not, by implication, foreign or international authorities) where he has 'concerns' that criminal conduct may have taken place.[83] The *Principles* also includes – where the *Guidance* did not – a weak imploration to UK personnel to 'whistleblow' as regards non-compliance with the *Principles*, either internally or directly to the Commissioner, but stops far short of making such action mandatory.[84]

6. The *Principles* and the law

Though the revision of the *Consolidated Guidance* goes some way to addressing some of the difficulties of its predecessor it does not and could not have, addressed the most objectionable, and yet most fundamental, feature of the Guidance: that is, its fundamental status. It was noted above that the *Principles* exist against – and can only be understood in light of – a detailed background of both domestic and international law. That is, the *Principles*, like the *Guidance* before it, is a non-legal document. This in itself is hardly unusual. The UK's constitutional order relies upon non-legal rules to an unusual extent. Some of these are constitutional conventions, whether unwritten (and the content of which is therefore subject to dispute) or more or less authoritatively codified. Others do not yet have that status, but might one day acquire it. But though these non-legal rules, whether or not constitutional conventions, are legion, they differ significantly from the *Principles* in their relationship to law. That is, many of the non-conventional non-legal rules have no inherent relationship to law: any substantive overlap is fortuitous and contingent. Conventional rules, however, in many cases do not merely overlap with legal rules but in fact interact with them. That is, though the courts may not enforce them, key constitutional conventions often prescribe how legal powers should be exercised, often working so as to bridge the gap between the undemocratic nature of the formal powers (to appoint a Prime Minister, say, or grant Royal Assent) and the exigencies of a modern democratic order. Others – such as the Ministerial Code and its rules of individual responsibility – consciously regulate where the law does not, doing what the law is felt to be ill-suited to doing. The *Principles*, however, do neither of these things. Instead, the document sits atop a legal layer and for all that has changed in recent times, this fundamental points remains as it was, and certain difficulties

[82] *Principles* (n 1) [23]-[24].
[83] *Principles* (n 1) [26].
[84] *Principles* (n 1) [29].

follow from it. Though the *Principles* purport both to reflect and augment the underlying law, it in fact potentially distorts the legal position.

The *Principles* declares itself to have been 'designed by reference both to UK domestic and international law' and states that UK personnel 'whose actions are consistent with these Principles have good reason to be confident that they will not risk personal liability in the future.'[85] Therefore, though it is not law, it nevertheless purports to be compatible with the law. As we have seen above, certain of the gaps in the *Guidance* made that claim difficult to sustain; some of those gaps remain in its successor. In the most recent round of reports issued by the ISC, however, some further context was offered to the claim regarding legal liability. '[W]hen SIS or GCHQ refer a Consolidated Guidance case to Ministers', the Committee noted, 'they routinely seek, in parallel, an authorisation under section 7 of the Intelligence Services Act 1994, which can provide protection for their officers from domestic civil and criminal liability as set out above'.[86] It quoted evidence given to the Committee by SIS:

> [W]e are … always going to go for a section 7 authorisation. Because, you know, why should my officers carry the risks on behalf of the Government personally? Why should they? So, you know, as we have already discussed, serious risk is ultimately a subjective judgement. So we will go for belt and braces on this.[87]

In response to suggestions that the link – which as a matter of practice we now know to exist – between the Guidance and section 7 authorisations be made explicit, the Service expressed concern, on the basis that '[i]f you were to refer explicitly to section 7 authorisation in the Consolidated Guidance, it would raise the misguided understanding that section 7 authorises SIS to carry out CIDT and torture.'[88] Three points might be made in response. First, though it is true that section 7 bears no necessary connection to torture, and though it can be used to authorise all manner of (less appalling) conduct, it nevertheless must be the case that section 7 could be used in such a fashion – certainly, nothing in the language of section 7 excludes it. Indeed, and this is the second point, the practice of seeking a section 7 authorisation where referring a matter to a Minister in accordance with the *Guidance* suggests that though the provision may well not be used in practice to authorise torture, it is used so as to exclude the possibility of liability for secondary

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[85] *Principles* (n 1) Foreword.
[86] ISC (n 35) [169].
[87] ISC (n 35) [169].
[88] ISC (n 35) [169].

offences in relation to which torture is the primary offence. It is not clear that the moral divide between the two things is quite as stark as MI6's protestations would seem to imply. Third, the implication of this claim is that what are effectively PR concerns should be allowed to triumph over the creation of conditions in which the public can have an accurate knowledge of what is, or might be, done in their name. That is, with respect to those charged with keeping the United Kingdom safe, a weak argument. Indeed, it seems not at all implausible that the public would not only not object to this use of section 7 authorisations but in fact approve of it strongly, together with all it implies: careful decision-making, a utilitarian culture in which public safety is given priority over an indirect risk of wrongful action, and a willingness of political figures to take – in law and in politics – responsibility for what is done by those on the front line.

The secrecy surrounding this use of section 7 authorisations is in keeping with the broader situation where there is relatively little in the public domain about such 7 authorisations and their use, and no case law to speak of. In its *Privacy and Security* report in advance of the enactment of the Investigatory Powers Act 2016, the ISC noted that MI6 had at that time 'eight class-based Authorisations under Section 7 of the Intelligence Services Act':

> These remove liability under UK law for day-to-day activity undertaken in pursuit of SIS's statutory functions, such as the identification and use of Covert Human Intelligence Sources, Directed Surveillance and interference with, and receipt of, property and documents.[89]

In addition to this, MI6 would seek additional and specific authorisations in circumstances where 'where an operation may be particularly contentious, pose specific legal issues or else carries significant political risks (including through the risk of discovery or attribution)' or 'where an operation involves the use of a new capability, or where an existing technique is deployed against a new set of targets.'[90] It is into the first of these two categories, one would presume, that authorisations related to activity within the scope of the Consolidated Guidance would fall. GCHQ, at the same time, had 5 such class-based authorisations, which 'remove liability under UK law for some activities, including those associated with certain types of intelligence gathering and interference with computers, mobile phones and other electronic equipment.'[91] In that

[89] Intelligence and Security Committee, *Privacy and Security: A modern and transparent legal framework* (HC 2015, 1075), [232].
[90] ISC (n 89) [233].
[91] ISC (n 89) [234].

report, the ISC declared itself satisfied that the various class-based authorisations were 'required in order to allow the Agencies to conduct essential work' but recommended that, in light of their implications for privacy, 'consideration should therefore be given to greater transparency around the number and nature of Section 7 Authorisations.'[92]

In the report, unpublished for many years, on the *Draft Consolidated Guidance*, the ISC had considered the absence of any reference to section 7 from the Guidance:

> When we asked why there was no mention of this clause in the Consolidated Policy, the Home Office told us that that it "isn't a Section 7 document. This is guidance. It doesn't give [officers] exemption from the criminal and civil law. It is purely guidance". Similarly, the Attorney General told us that Section 7 is not mentioned and that "we shouldn't trouble anyone about it". SIS expressed concern about the handling of issues relating to Section 7 because: If you were to refer explicitly to Section 7 authorisations in the Consolidated Guidance, it would raise the misguided understanding that Section 7 authorises SIS to carry out CIDT and torture.[93]

In its consideration of this point, the ISC linked it to its own previous recommendation about the need for greater transparency as to the use of section 7:

> [W]e have previously recommended that there should be greater transparency around the use of section 7 authorisations and that the scope and purpose of section 7 authorisations should explicitly be addressed in the Consolidated Guidance, and we strongly urge the Government to reconsider this recommendation.[94]

The *Principles* furthers our understanding of this matter only minimally. It acknowledges the existence of section 7, stating that the procedures laid out there 'should be followed notwithstanding the fact that an authorisation under section 7 of the Intelligence Services Act 1994 may be granted.'[95] That is, the *Principles* supplements, rather than merely reflecting, the underlying law, and so continues to apply even where there is no possibility of legal liability, and so no contribution to be made to the task of avoiding it.

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[92] ISC (n 89) 89.
[93] Intelligence and Security Committee of Parliament, *Report on the Draft Consolidated Guidance* (2010), published as Appendix C to ISC (n 35) [95] (references omitted).
[94] ISC (n 35) 73.
[95] *Principles* (n 1) [22].

Section 7 of the 1994 Act has a number of possible counterparts at common law, chief amongst them the doctrines of Crown and Foreign act of state. The former renders non-justiciable in domestic courts acts which are 'an exercise of sovereign power, inherently governmental in nature' which are 'done outside the United Kingdom';[96] the latter the acts of state of foreign states under certain circumstances.[97] Each, however, has features which renders it of dubious utility to those concerned about incurring legal liability due to direct or indirect involvement in mistreatment of detainees or others. Like section 7, the doctrine of Crown act of state applies only, the leading case makes clear, to acts done abroad and only do those done with the authorisation of (or subsequently adopted by) the government of the day, such that the act belongs to the state rather than to the individual who does it.[98] However, in that case – relating to alleged British involvement in the rendition and mistreatment of a Libyan dissident and his wife – the Government accepted that 'it cannot apply to acts of torture, even supposing that the Government of the United Kingdom would ever authorise or ratify such acts.'[99] The judgments of the Supreme Court varied in the explanation they offered for this fact. On one hand, Lady Hale, read this as 'an acknowledgement that such acts are not inherently governmental' and so could not fall within the scope of the doctrine.[100] Without having to decide the point, Lord Sumption expressed reservations as to this reading, for, both as an 'international crime and a statutory offence in the United Kingdom, torture is by definition a governmental act.' He therefore preferred to explain the point by reference to the domestic legality:

> Given the strength of the English public policy on the subject, a decision by the United Kingdom government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the royal prerogative. It could not therefore be an act of state. Nor would there be any inconsistency with the proper functions of the executive in treating it as giving rise to civil liability.[101]

Regardless of which explanation is preferred, however, it is clear that many acts which fall short of torture are nevertheless both unlawful and potentially will result in a breach of the *Principles*, and so a gap is left through which Crown act of state might yet prove of some value to the

[96] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [81] (Lord Sumption).
[97] *Belhaj v Straw* [2017] UKSC 3.
[98] [2017] UKSC 1, [81].
[99] [2017] UKSC 1, [36] (Lady Hale).
[100] [2017] UKSC 1, [36] (Lady Hale).
[101] [2017] UKSC 1, [96] (Lord Sumption).

government here. A further issue therefore arises: Crown act of state has in the past been applied principally, perhaps exclusively, to acts whose wrongfulness is a matter of private law. Can it also apply in the criminal context, as it would need to do if any useful reliance is to be placed upon it in this context? Notwithstanding certain dicta of Lady Hale in *Rahmatullah*,[102] the better answer must be no: there is no clear authority for the existence of Crown act of state in the criminal sphere, and for the courts to extend it thereto would be inappropriate.[103]

What, more briefly, of Foreign Act of State? Efforts to seek legal accountability for UK involvement in drone strikes carried out by foreign partners have been stymied by the fact that for the courts to pronounce of the legality of information sharing in this context will inevitably involve a simultaneous condemnation of the act of killing itself – a fact which brings into play the doctrine of foreign act of state, which is in practice likely to obstruct litigation on the point.[104] Here too, however, the courts have recognised a broad, and growing, public policy exception which would seem to encompass both *jus cogen* norms of international law (amongst them the prohibition on torture) as well as breaches of fundamental rights.[105] The effect is that, as proved to be the case in *Behlaj*, it should not be possible to use the doctrine to exclude legal liability that would arise as a result of complicity in the torture or mistreatment (at least if significant) of detainees or others. These doctrines are all rules of domestic law. There is also an international law dimension, which can be discussed more briefly. Though there exists the possibility of derogating from the Convention on Human Rights, it is not possible to derogate from Article 3, which prohibits both torture and inhuman and degrading treatment.

The effect of these various points is that the relationship between the *Principles* and the law must be adjudged to be problematic. There were a number of points at which the *Consolidated Guidance* appears to distort – perhaps even to misrepresent – the underlying legal rules. Which is not of course to suggest bad faith: any form of proxy for the legal rules is likely to do so to a greater or lesser degree, and – all things told – the *Guidance* perhaps did so rather less than might have been the case. And one of the key problems of the document – the formulation of the relevant legal test – has been addressed in its revision. Nevertheless, these points call into question the very nature of the *Principles*, for it means that in trying to adhere to the document

[102] [2017] UKSC 1, [32].
[103] See Paul F Scott, *The National Security Constitution*, Hart Publishing (2018), 263-75.
[104] See *R (Khan) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24. Note though that the terms of the judgment in *Belhaj v Straw* [2017] UKSC 3 call into question certain aspects of *Khan*.
[105] See *Belhaj v Straw* [2017] UKSC 3.

there is the possibility, first, that the law is nevertheless broken, or, secondly but more generally, that the legal rules come to be overlooked, with the law's proxy coming to take the place of law. In this way, the nature and status of the law – the fact that, as law, it has a normativity which is distinct from, and higher than, mere 'guidance' or even 'principles' – is implicitly diminished by the document, not only by the fact that is bears an occasionally loose a relationship to the applicable legal rules but also by its very existence. The *Principles* potentially works to discourage a close focus on the relevant legal rules, their content and their evolution over time, which is not – because it cannot be – automatically reflected in the content of the overlaying document. As such, though the efforts made to update the *Guidance* are of course welcome, even if the process by which that updating took place was often not, the fundamental difficulty remains. Not only does the *Principles* fall short in making sure that the SIAs operate 'consistently' with their legal obligations, but it may on occasion, by drawing focus from what the law requires, in fact increase the possibility that they do so.

7. Conclusion

There is no problem with the co-existence of law and non-law in the same policy space. For any number of reasons, we may want to regulate the same matter simultaneously using tools which are, both in terms of their form and their substance, distinct. Nevertheless, in the context of the *Consolidated Guidance* and now the *Principles*, the coexistence is concerning on a number of fronts. For one, it is not mere co-existence: these documents sit on top of the law in a way which distracts from the latter's content, with the gap between the two filled by the use of section 7 authorisations whose nature and use continues to be shrouded in secrecy, and which have – almost uniquely – survived unreformed the process of rationalisation provoked, ultimately, by the Snowden revelations of 2013. In particular, these documents, with their principles, prohibitions and processes, are not only potentially narrower than the law – giving false reassurance to those who act in accordance with it – but also broader, encompassing conduct that one would expect to be illegal but is not. It distracts from the specific, sometimes contested, content of the law, allowing those acting in accordance with it to give themselves the benefit of the doubt that they should in fact be confronting head on. This mismatch risks turning the *Principles*, like the *Guidance* before it, into something more like a propaganda tool, offering the impression of virtue even where the reality is less edifying, and glossing over the fact that the law seems to permit conduct by Ministers which one might rather it did not.[106] There is an attempt,

[106] See, on this point, Blakely and Raphael (n 35).

as so often in this area of policy, to reap political rewards without paying the countervailing political costs.

This ambiguity carries over into the oversight of compliance with the *Principles*. Such oversight was introduced belatedly, and is carried out by an actor, the IPC, whose constitutional importance derives from the fact that he or she is legally-expert, both reviewing compliance with legal points in contexts in which the courts are unlikely ever to be called upon to adjudicate and reviewing the operation of the regime in the round, rather than on a purely individual basis. These lines are blurred in the context of the *Principles*, which is not a legal document and many of whose key terms are not legal terms. The effect is that rather than the legality of the relevant bodies work being considered, what is addressed is instead is their ability and willingness to comply with what is in effect a rather crude flow chart. Though this is better than nothing, it is a very poor substitute for law as interpreted and applied by courts. It is therefore of particular concern that the improved oversight of the *Principles* as compared to its predecessor nevertheless leaves open the possibility that apparently criminal conduct will not be referred by the IPC to the relevant authorities. Though the *Principles* co-exists with law, the prospect of litigation in this sphere is vanishingly small: the Government fought to very hard to ensure the *Belhaj* case was not litigated, and even if it had been, it would have been litigated behind closed doors, with the key factual conclusions pronounced only in a closed judgment. All of which is to say that though the practice in this area is clearly improved by the recent reforms, the inherent limits of the approach are very great, and are no substitute for a clear legal framework which is consistently and assiduously enforced.