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British Torture, Then and Now: The Role of the Judges

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This article is concerned with the return of torture and other related abusive conduct to the British counter-insurgency arsenal following the initiation of military engagements in Afghanistan and Iraq in the early 2000s. It focuses primarily on how judges have engaged with the challenges that this torture and abusive conduct have posed, both in their capacity as judges proper and also as appointees to a range of inquiries that have been initiated in the wake of these actions. The article contrasts the post-2001 work of judges with that during an earlier episode when such state abuse was also evident, Northern Ireland in the 1970s. Arguing that the judiciary has been drawn into the fray much more heavily than in the 1970s and across a great range of platforms, the article analyses this judicial involvement and posits explanations for it against the backdrop of a changing UK politico-legal culture.

INTRODUCTION

This article opens with consideration of a particular episode in British legal history, the incident that lay behind the famous *Ireland* v *UK* case and its 2018 sequel.[1] This was the operation, in the summer of 1971, by British forces in Northern Ireland, of a system of extreme ill-treatment for interrogation purposes on a number of terrorist suspects under their control. The episode involves covering well-trodden ground. But journeying along it in a particular way takes us to a fresh platform from which to view the altogether more recent events at the heart of this article: the return of torture and ill-treatment more generally to the British counter-insurgency arsenal following the initiation of military engagements in Afghanistan and Iraq in the early 2000s, and the ways in which judges have become involved with this. It is now evident that practices first denied and then allegedly put to one side have come back into the state's repertoire and have been deployed as though the *Ireland* v *UK* case – and (as we shall see) the clear ministerial prohibition on torture around the time the case got under way – never occurred. Collusion with states involved in such ill-treatment has been a part of the story as well, in a way in which it never was

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1 *Ireland* v *United Kingdom* (1978) 2 EHRR 25; App 5310/71 *Ireland* v *United Kingdom* 20 March 2018.

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in the earlier era. Once again, judges in the English courts[2] have been drawn into the fray, this time much more heavily than they had been in the 1970s and across a great range of platforms: litigation, inquest and inquiry-based. The article lays this story out and then (having detailed the reaction of government to these judicial engagements) concludes with reflections on the differences between the approach taken by this cohort of judges during each of these two periods of torture-practice.

These two phases of British engagement with torture and ill-treatment, both relatively recent, are poles apart as regards how the rule of law and the judges have functioned in each. The English judiciary, in both their judicial and extra-judicial capacities, were once the reliable defenders of state interests as defined by the executive of the day, perhaps generally (on which more in our concluding section) but certainly so far as the interests at the heart of this article are concerned. But they are altogether more awkwardly positioned these days, frequently revealing a commitment to the law that is sometimes (and in the context of this article frequently) at odds with executive interests. The differences we explore here go beyond the issue of judicial responses to torture and ill-treatment of suspects by (broadly speaking) members of the executive branch, important though this is. They also tell us a great deal both about how the judiciary locates itself in the British state today and about how ideas such as the rule of law and respect for human rights have played a part in underpinning this new judicial position. The article is therefore an effort to understand a change in judicial attitude through the prism of a single issue. The story it tells also explains why certain parts of the wider executive now push openly for formal protection from judicial oversight, a stance driven in part at least by impatience with a cohort of judicial figures whose version of what their job entails does not fit with what, on the executive's view, they ought to be doing. In other words, our single issue may be leading to a recalibration of how the executive arm engages with law, a part of a wider picture for sure but one that might be about to change that picture for ever. That is for later. First, we must travel back to Northern Ireland in the 1970s.

SERVANTS OF THE STATE: NORTHERN IRELAND

Internment

British troops were dispatched onto the streets of Northern Ireland in the summer of 1969.[3] For the first three years, they acted under the political direction

2 The article does not deal with the role of the Northern Ireland judges during the 1970s and 1980s. Concentrated (naturally enough) in case-law, their role was very different from that of their senior colleagues in Britain: for a useful snapshot of the law and the cases from this period in Northern Ireland, see Committee on the Administration of Justice, *Civil Liberties in Northern Ireland: The CAJ Handbook* (Belfast: Committee on the Administration of Justice, 3rd ed, 1997).

3 A company of the Prince of Wales's Own Regiment was sent to Derry on 14 August 1969. Others quickly followed and by October the number of troops sent to Northern Ireland as a whole had risen to 9,800: HC Deb vol 788 col 386 (D. Healy) 15 October 1969.

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of the devolved administration based in Stormont, a government that had been Unionist in complexion since the establishment of the six counties as a separate political entity in 1921.[4] The public order situation in Northern Ireland worsened considerably after the army's arrival. This was partly because the circumstances of disorder in Northern Ireland were fast becoming too serious to be easily managed, but also on account of the perception that the military forces were present as upholders of the status quo, rather than as defenders of the Catholics whose exposure to rioting loyalists had been the initial rationale for their deployment.[5] In a situation of rising violence, the authorities deployed a measure which had figured previously in earlier periods of disorder. On the morning of 9 August 1971, 342 men were taken into detention in an initial army swoop (from a final list of 452 suspects). Of these, 105 had been released by the end of August while the rest were made the subject of indefinite detention orders, with many of these then being made the subject of internment orders proper.[6]

Almost immediately following the introduction of internment, allegations surfaced of serious ill-treatment of and brutality towards internees by the security forces.[7] The Government responded quickly, establishing an inquiry on 31 August 1971, chaired by the Parliamentary Commissioner (or 'Ombudsman'), Sir Edmund Compton, a man whose independence was brought home to the House of Commons by the Prime Minister's assurance that 'his capacity [was] that of a judge.'[8] His first committee colleague was Dr (later Sir) Ronald Gibson, who had been chair of the British Medical Association since 1966, and the second was a real judge, the first to appear in our story: Edgar S Fay QC, a British barrister and circuit judge, veteran of many enquiries.[9] The Committee dealt with forty allegations of ill treatment and found in favour of the official version of events in most instances,[10] something that was made almost inevitable by the refusal of all but two of the detainees to have anything to do with the proceedings. (This was in stark contrast to the 95 army witnesses, 26

4 Among many good historical treatments see P. Bew, P. Gibbon and H. Patterson, *Northern Ireland 1921-1994: Political Forces and Social Classes* (London: Serif, 1996).

5 In the twelve months to February 1971, for example, there were 572 searches of occupied houses and in the seven months to February 1971, no fewer than an average of 650 vehicles were searched every day: HC Deb vol 811 col 780 (I. Gilmour) 11 February 1971.

6 Sir Edmund Compton, *Report of the Enquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising out of the Events on 9 August 1971* Cmnd 4823 (1971) para 9. Of those not released 237 were held in detention in Crumlin jail or on the *Maidstone*, a ship on Belfast quay: *ibid*.

7 An account of the experiences of those subject to such ill-treatment is to be found in I. Cobain, *Cruel Britannia: A Secret History of Torture* (London: Portobello Books, 2012) ch 5. On interrogation in general at this time see L. K. Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge: Cambridge University Press, 2008) 48-57; H. Bennett, 'Detention and Interrogation in Northern Ireland, 1969-75' in S. Scheipers (ed), *Prisoners in War* (Oxford: OUP, 2010) 187-203. For a useful overview covering both periods under discussion in this article see A. Mumford, 'Minimum Force Meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns' (2012) 11 *Journal of Military Ethics* 10, particularly good on 'the high degree of myth-making surrounding British conduct in irregular wars' *ibid*, 11.

8 HC Deb vol 823 col 324 (E. Heath) 23 September 1971.

9 Fay lived until he was 101 and received obituaries in both *The Times* (11 December 2009) and *The Daily Telegraph* (23 November 2009).

10 Compton, n 6 above, ch VIII (summary).

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police witnesses and 11 prison officer witnesses, together with five regimental medical officers, two medical staff officers, two civilian doctors and two specialist medical witnesses who appeared, many of them with legal representation which was thought of 'great assistance to the Enquiry'.[11])

But one set of findings, the central thrust of which was never disputed by the authorities, proved sensational, provoking Prime Minister Heath to write in a memo before its release that it seemed to him 'to be one of the most unbalanced, ill-judged reports [he] had ever read.' To the Prime Minister, it was 'astonishing that men of such experience should have got themselves so lost in the trees, or indeed undergrowth, that they proved quite incapable of seeing the wood'.[12] Compton and his two colleagues found that eleven of the men originally arrested on 9 August had been removed to a secret location for 'interrogation in depth' between 11 and 17 August. It subsequently transpired that a twelfth man had been similarly dealt with at the same time and that two more men were interrogated in the same fashion in October, the latter two being the subject of a supplementary report from Compton and his colleagues.[13] The Committee reported that these men had been subjected to various techniques of sensory deprivation, the five techniques[14] that were to form the basis of the subsequent proceedings in the European Court of Human Rights[15] and that these had been authorised at a high level and that, together with other actions, they had (in the Committee's view) amounted to physical ill-treatment (albeit not physical brutality).[16] The Government defended the techniques as having been designed to increase security and facilitate effective interrogation. It pointed out that they had been used many times in situations of post-war colonial agitation, including in Palestine, Malaya, Kenya, Cyprus, the British Cameroons (1960-61), Brunei (1963), British Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-66), and the Persian Gulf (1970-71).[17] Though the body of the Report does not

11 *ibid*, para 18. The influential Northern Ireland Civil Rights Association had 'let it be known that the enquiry was unacceptable to them because of the constitution of the Committee and the private procedure': *In the Matter of an Application by Francis McGuigan for Judicial Review; In the Matter of an Application by Mary McKenna for Judicial Review; In the matter of decisions and ongoing failures of the Chief Constable of the Police Service of Northern Ireland, the Department of Justice for Northern Ireland and the Northern Ireland Office* MOR11060, 20 September 2019 (Court of Appeal for Northern Ireland) at [14] *per* Morgan LCJ and Stephens LJ (*McGuigan and McKenna*).

12 *The Report of the Baha Mousa Inquiry (The Rt Honorable Sir William Gage Chairman)* HC 1452 (8 September 2011) (Gage report) para 4.37, citing CAB 002084.

13 *Ireland* v *United Kingdom* (2018) n 1 above at [99].

14 Deprivation of sleep; wall standing; hooding; continuous noise; bread and water diet. In the Compton report it was claimed that the hooding never occurred while a detainee was alone in his room. Deprivation of sleep was also not explicitly identified in Compton in the way that wall standing, hooding, noise and deprivation of food and drink (or 'bread and water diet') were (see Compton, n 6 above, paras 47-52) but it was included in the allegations (see *ibid*, paras 57(d), 62 and 66).

15 *Ireland* v *UK* (1978) n 1 above; *Ireland* v *United Kingdom* (2018) n 1 above. There is now an excellent in-depth analysis of that case and its wider context: see A. Duffy, *Torture and Human Rights in Northern Ireland: Interrogation in Depth* (Abingdon: Routledge, 2019).

16 Compton, n 6 above, paras 92-96. 'We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened': para 105.

17 Lord Parker, *Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism* Cmnd 4901 (1972) para 10. 'The rules now

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refer to the fact, a number of RUC Officers had been orally instructed in these practices at the English Intelligence Centre at a seminar in April 1971.[18]

Despite the Prime Minister's fury at what had been conceded, some of the Committee's findings allowed the Home Secretary Reginald Maudling, in his introduction to the Report, to look on the bright side, emphasising that Compton and his colleagues had 'found no evidence of physical brutality, still less of torture or brainwashing.'[19] In defending the Report in Parliament, Maudling declared that he could not 'think of any country in the world where such a standard of thoroughness and impartiality would have been maintained.'[20] Public disquiet about the behaviour of the security forces was not so easily allayed however. On 17 October 1971, shortly before the main Compton report was published, the *Sunday Times* had carried extensive and detailed allegations of what still seemed in ordinary parlance (even after Compton) to be (at very least) brutality towards detainees.[21] Sensing the likelihood of such disquiet, the Home Secretary announced in his written introduction to Compton a second inquiry to provide 'authoritative advice upon the procedures for the interrogation of persons suspected of involvement in a terrorist campaign, including their custody while subject to interrogation, and the application of those procedures.'[22] In the immediate aftermath of the Compton Report, therefore, attention naturally focussed on the nature and composition of this second, now clearly crucial inquiry. Its membership was announced on 30 November, with its terms of reference requiring it to consider 'whether, and if so in what respects, the procedures currently authorised for the interrogation of persons suspected of terrorism and for their custody while subject to interrogation require amendment'.[23]

in force … were issued in 1965 and were revised in 1967 in the light of recommendations made by Mr Roderick Bowen QC in a report on the procedures for the arrest, interrogation and detention of suspected terrorists in Aden (Cmnd 3165)': Compton, *ibid*, para 16. There is now a valuable monograph on the whole topic: S. Newbery, *Interrogation, Intelligence and Security: Controversial British Techniques* (Manchester: Manchester University Press, 2015). And see Cobain, n 6 above, ch 3.

18 Duffy, n 15 above, dedicates a whole chapter (ch 4) to a detailed discussion of what was entailed in interrogation in depth. And see Lord Gardiner's dissenting opinion in Parker, n 17 above, para 6: 'Officers and men of the English Intelligence Centre held a seminar on the procedures in Northern Ireland in April 1971 to teach orally the procedures to members of the Royal Ulster Constabulary.' The number of members of the armed forces trained in these techniques in 1968-71 was 20 (1968), 12 (1969), 13 (1970) and 24 (1971): HC Deb vol 827 col 77 (Lord Balniel) (written answer) 30 November 1971. The annual running costs of the Interrogation Training Centre amounted to £50,000: HC Deb vol 827 col 360 (Lord Balniel) (written answer) 9 December 1971.

19 Compton, n 6 above, Introduction by the Secretary of State for the Home Department, para 14.

20 HC Deb vol 826 col 438 17 November 1971. The statement on the report by the Home Secretary is at *ibid*, 215-224, 16 November 1971. The full debate on the report is at *ibid*, 431-497, 17 November 1971.

21 *Sunday Times* 17 October 1971 (Insight Team).

22 Compton, n 6 above, introduction by the Secretary of State for the Home Department, para 17.

23 Parker, n 17 above, para 1.

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Parker and beyond

The Parker Inquiry was to be altogether more high-powered than Compton had been. Consisting of a committee of Privy Counsellors, the chairmanship was taken by Lord Parker of Waddington, the seventy-one-year old judge who had just retired after thirteen years as England's Lord Chief Justice. His most famous trial had been that of the spy George Blake whom he had jailed for forty-two years. The second judicial figure on the Committee was Lord Gardiner, who had been Lord Chancellor in the previous Labour Government and who had earned a reputation as a liberal on issues relating to crime and civil liberties. The third member of the three-person committee was therefore likely to be of critical importance to the resolution of the issues before it. He was J.A. Boyd-Carpenter who was Conservative MP for Kingston-upon-Thames, a seat he had held since 1945 (after war service in the Scots Guards) and who had participated in a succession of Tory administrations. In his autobiography, published in 1980, Boyd-Carpenter makes no reference to his service on the Parker Committee, but there is one intriguing and possibly relevant remark: 'In the latter part of 1971 the Prime Minister, Edward Heath, who had sent for me in connection with another matter, offered me the Chairmanship of the Civil Aviation Authority', an appointment which however 'would not be announced for some time.'[24] Following the publication of the Parker report, Boyd-Carpenter quit the Commons and went on to chair the Authority that had been promised to him, now rejoicing in the elevated status of a member of the House of Lords, as Baron Boyd-Carpenter of Crux Easton. As expected, his presence proved absolutely crucial since the committee split over its final recommendations, with Boyd-Carpenter joining Lord Parker in issuing a majority report, over a strong dissent from Lord Gardiner.

That majority report, completed on 31 January 1972, was finally released into the public domain on 2 March 1972. No evidence was published and nor were the names of any of those who gave evidence made public.[25] It considered that while it was true that 'some if not all the techniques in questioning would constitute criminal assaults and might also give rise to civil proceedings under English law', it was nevertheless not appropriate to express 'any view in respect of the position in Northern Ireland in deference to the courts there.'[26] This possible unlawfulness did not necessarily mean, however, that the techniques should as a matter of principle be prohibited. The majority considered that, provided they 'are applied as envisaged by those responsible for Service training, the risk of physical injury is negligible'[27] and that 'while long-term mental injury cannot scientifically be ruled out, particularly in the case of a

24 J.A. Boyd-Carpenter, *Way of Life* (London: Sidgwick and Jackson, 1980) 227. The Prime Minister had unsuccessfully sought the Commons Speakership for Boyd-Carpenter shortly before and this may be another reason he had had him in mind: see E Heath, *The Course of My Life* (London: Hodder and Stoughton) 282-283. (My thanks to Neil Duxbury for drawing this point to my attention.) So far as Parker was concerned, the 'final construction of the committee [was] made public on 30th November': Parker, n 17 above, majority report, para 2.

25 Parker, n 17 above, majority report, para 2.

26 *ibid*.

27 *ibid*, para 14.

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constitutionally vulnerable individual, there is no real risk of such injury if proper safeguards are applied in the operation of these techniques.'[28] The majority's anxiety not to prejudge court proceedings in Northern Ireland did not inhibit it from asserting that there was 'no doubt that the information obtained by these two operations directly and indirectly was responsible for the saving of lives of innocent citizens'.[29]

Lord Gardiner's dissenting report was, in contrast, unequivocal that the procedures 'were and are illegal'[30] and that 'their use [could] not be continued without legislation'.[31] Apart from the legal position, Lord Gardiner was equally clear in his mind that the practices were not 'morally justifiable'[32] and that they should be immediately discontinued. He ended his dissent with a passionate statement of his own personal judgment on the whole affair:

> The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world.[33]

Inevitably the effect of the Gardiner dissent was greatly to undermine the credibility of the majority opinion when the Report was finally published. (It may have been Bloody Sunday on 30 January 1972 that caused the delay to its publication.[34]) An editorial in the *New Law Journal* described many parts of Parker's and Boyd-Carpenter's report as 'staggering' in their implications; though it 'disclaims any allegiance to the principle that the end justifies the means … it is only in terms of that principle that the majority's conclusions make sense at all.'[35] The Government's reaction was also muted. Despite the strident view he had taken of the Compton report the year before, the Prime Minister declined to take the majority opinion as even a qualified endorsement of sensory deprivation. After Parker and in a situation of growing violent turmoil in Northern Ireland,[36] the *Ireland* v *United Kingdom* case gradually began to gather momentum. It had been lodged in Strasbourg on 16 December 1971. On the day of publication of the Parker report, Mr Heath made a statement in the House of Commons, announcing that the government 'having reviewed the matter with great care and with particular reference to any future operations, have decided

28 *ibid*, para 17.
29 *ibid*, para 24.
30 Parker, n 17 above, Lord Gardiner's dissenting report, para 10(d).
31 *ibid*, para 18.
32 *ibid*, para 20 (1).
33 *ibid*, para 21. But it is now clear that Lord Gardiner's optimism about how the British had acted during the Second World War was misplaced: Cobain, n 7 above, ch 1.
34 As noted above the report was signed off by its drafters on the day after Bloody Sunday.
35 'Interrogation of Suspects' (1972) 122 *New Law Journal* 205-206.
36 For comprehensive data on fatalities during 'the Troubles', see the remarkable D. McKittrick, S. Kelters, B. Feeney, C. Thornton and D. McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Edinburgh: Mainstream Publishing, 1999).

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that the techniques which the [Parker] Committee had examined [would] not be used in future as an aid to interrogation.'[37] The Prime Minister continued:

> The statement that I have made covers all future circumstances. If a Government did decide – on whatever grounds I would not like to foresee – that additional techniques were required for interrogation, then I think that, on the advice which is given in both the majority and the minority reports, and subject to any cases before the courts at the moment, they would probably have to come to the House and ask for the powers to do it.[38]

A later independent enquiry identified the various efforts that were made in the immediate aftermath of the Prime Minister's undertaking to ensure that it took effect.[39] In particular, on 29 June 1972, the Secretary to the Joint Intelligence Committee M.E. Herman acting with the authority of the Cabinet Secretary issued a *Directive on Interrogation by the Armed Forces in Internal Security Operations*, setting out the new position, saying: 'In the light of instructions from the Prime Minister, the Secretary of the Cabinet requests JIC(A) Departments and Agencies, the Home Department and the Northern Ireland Office to ensure, with immediate effect, that any interrogations for intelligence purposes are conducted in conformity with the Directive.'[40]

In subsequent years, many of Parker's colleagues were to follow him into service in Northern Ireland. Through the 1970s and into the 1980s, the senior English judges had found themselves engaged with Northern Ireland affairs in both their judicial and (often more critically) extra-judicial capacities, providing cover for the killings by the army on 'Bloody Sunday',[41] advising changes to the law so as to make convictions of terrorist suspects more likely through the ordinary criminal law (including by effectively abolishing the jury),[42] upholding the acquittal of soldiers for the killing of civilians in controversial circumstances,[43] and (a little later) legitimising an inquest procedure that made accountability for state killing altogether more difficult.[44] So far as internment itself was concerned, a retired Court of Appeal judge Sir Henry Gordon Willmer allowed himself to be appointed chair of the Detention Appeal Tribunal when the government had felt the need for some judicial cover for its (by late 1972) very controversial internment policy.[45] In Britain, the newly enacted Prevention of Terrorism (Temporary Provisions) Act of 1974 was

37 HC Deb vol 832 cols 743-749 2 March 1972 (with the excerpted remarks at col 744): https://api.parliament.uk/historic-hansard/commons/1972/mar/02/interrogation-techniques-parker (last accessed 20 May 2020).
38 *ibid*, col 746.
39 Gage report, n 12 above, ch 6.
40 JIC (A) (72) 21 (Final): See Gage report, *ibid*, 439.
41 *Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972, which led to loss of life in connection with the procession in Londonderry on that day* (Chair: Lord Widgery) HL 101, HC 220 (18 April 1972) (Widgery report).
42 *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Chair: Lord Diplock) Cmnd 5185 (December 1972) (Diplock Report).
43 *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105.
44 *McKerr* v *Armagh Coroner* [1990] 1 WLR 649.
45 Detention of Terrorists (Northern Ireland) Order 1972, made under the Northern Ireland (Temporary Provisions) Act 1972.

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benignly interpreted in favour of state power.[46] The senior judges oversaw a series of large-scale terrorist trials in England which were afterwards shown to have involved miscarriages of justice, and fought hard in their judicial capacities to avoid any of the shortcomings in these convictions reaching the public domain.[47] The majority Parker report was not an outlier; it was a mainstream reflection of the attitude of the senior judiciary to the Northern Ireland problem. The London-based judges did their job to the best of their abilities as they understood it, which was – so far as both inquiries and cases were concerned – not to stand in the state's way. The extent to which this reflected a more general judicial attitude is a matter to which, as earlier indicated, we return in the concluding remarks to this essay.[48] The judiciary mustered to tackle the next wave of counter-terrorism operated on a wider range of platforms and were as compliant on none of them as had been their predecessors in the 1970s.

AFGHANISTAN AND IRAQ: SERVANTS OF THE LAW

'The Global War on Terror'

As is well-known, on 11 September 2001 the Al Qa'ida group managed a shocking and spectacularly successful attack on the United States with the deployment of hijacked civilian aircraft to bring down the Twin Towers in New York and severely to damage the Pentagon, centre of American defence planning. The invasion of Afghanistan (harbourer of the Al Qa'ida leadership) that this provoked was followed two years later by the US-led invasion and then occupation of Iraq.[49] From the start the UK Government, and in particular the Prime Minister Tony Blair, stood full-square behind the United States with regard to both actions, casting the challenge posed by Al Qa'ida in dramatic terms as a civilizational challenge to the West.[50] The American leadership of President George W Bush and in particular his influential colleagues in the Administration Dick Cheney (Vice-President) and Donald Rumsfeld (Secretary of State for Defence) were determined to achieve victory in both theatres of this loosely described 'war on terror'. It became increasingly clear that this entailed bending and occasionally ignoring the law, including what had long been assumed to be those international and domestic rules protecting basic human rights, not least the prohibition on torture. There were immediate suspicions about the treatment of detainees (suspected 'unlawful combatants') at the US camp in Guantanamo, and then on 30 April 2004 Seymour Hersh's article on Abu

46 *R (Stitt)* v *Secretary of State for the Home Department Times* 3 February 1987.

47 See notes 76-78 below. General essays on this issue include C.A. Gearty, 'The Cost of Human Rights: English Judges and the Northern Irish Troubles' (1994) 47 *Current Legal Problems* 19 and A. McColgan, 'Lessons from the Past? Northern Ireland, Terrorism Now and Then, and the Human Rights Act' in T. Campbell, K. Ewing, and A. Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: OUP, 2011) 177.

48 See text at n 212ff below.

49 See generally *The Report of the Iraq Inquiry* HC 264 (6 July 2016) (the Chilcot Report).

50 'Blair sees Iraq as Clash About Civilisation' *The Guardian* 21 March 2006 at https://www.theguardian.com/politics/2006/mar/21/iraq.iraq (last accessed 19 March 2019).

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Ghraib appeared in the New Yorker complete with its unforgettable and now bleakly iconic photographs of abuse.[51] The British authorities found themselves embedded in a global struggle in which torture and/or degrading treatment of suspects appeared routine, or at best to be countenanced by their senior partner as a 'necessary evil'.[52]

Where did the English judges fit as this story gradually emerged? The situation was more complex than it had been in Northern Ireland. There were three kinds of potential culpability that could come their way for adjudication. First, there was active participation: had the British forces and/or security service personnel actually themselves engaged in torture or in analogous inhuman treatment of suspects? Second, and at the other end of this compromised moral spectrum, had they 'merely' used information/evidence that came their way which had been or may have been secured by such abuse? Third, somewhat in the middle, were these military/security service personnel passive participants, not doing the interrogations but at very least present or around when these took place, getting the suspect to the abusers, assisting with the right questions to ask, sorting logistics out in the aftermath of this work of others?

The judges' involvement was to address all three avenues of potentially culpable activity and to see them engaging in various ways: that of the grand impartial inquiry head, à la Parker; that of equivalent to a coroner diving deep into particular fatalities or allegations of abuse; that of the judicial review or trial judge facing a novel assertion of the need to investigate extra-jurisdictional illegality or to evaluate the admissibility of possibly tainted evidence; and that of the common law referee overseeing large-scale law suits of sometimes unimaginable complexity against the armed forces. In each of these spheres, the post-2001 judicial engagement with torture and ill-treatment was altogether more challenging to the authorities than it had been in Northern Ireland. The various fora of judicial activity played off each other, fortified by a reinvigorated framework of judicial review (which process of renewal had barely begun in the 1970s) and the newly enacted Human Rights Act 1998, coming fully into force less than a year before the 11 September attacks.[53]

Judicial robustness at home was validated by a range of rulings from the European Court of Human Rights that post-dated the 1970s and pushed the boundaries of the European Convention of Human Rights further than had previously been thought possible.[54] There was now also the spectre of proceedings before the International Criminal Court (ICC) to take into account: legislation paving the way for its jurisdiction came into force just ten days

51 Torture at Abu Ghraib at https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (last accessed 20 May 2019). On earlier concerns about ill-treatment see text at n 68 below.

52 M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004).

53 The Human Rights Act 1998 took partial earlier effect in Scotland, Wales and Northern Ireland as part of the devolution settlements agreed for those jurisdictions in 1998 and came fully into force on 2 October 2000: it incorporated the bulk of the rights set out in the European Convention on Human Rights into UK law.

54 See further below. An important example in the fields of terrorism and jurisdiction is *Chahal* v *United Kingdom* (1996) 23 EHRR 413.

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before the 11 September attacks,[55] and it was ratified just three weeks later, on 4 October 2001. The Government now felt the need to show willing, given the possibility of the court's prosecutors deeming controversial incidents in military theatres to be a matter for their office.[56] The wider legal context was therefore much richer and more prescriptive than it had been in the 1970s.

In 2005, an early challenge was thrown up, when the then most senior court in the United Kingdom, the Appellate Committee of the House of Lords (forerunner to the Supreme Court) had the opportunity to reflect on the common law's longstanding prohibition of torture, in *A* v *Secretary of State for the Home Department* (No 2)[57] *(A (No 2))*. It involved the second of the three kinds of potential use of ill treatment identified above. The occasion of the Lords intervention was a ruling by the Special Immigrations Appeals Commission (SIAC), subsequently affirmed in the Court of Appeal,[58] that 'the fact that evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence [against the appellants in this case] but did not render it legally inadmissible'.[59] There was background UK law. The Diplock Report into Northern Ireland's legal system in 1972[60] had led to a fairly relaxed legal standard on the reception of potentially tainted admission evidence in the Province,[61] and in 1984 the UK parliament had enacted a controversial test of admissibility for such evidence in England and Wales that had stressed reliability rather than immorality.[62] The various individuals before SIAC in the case that became *A (No 2)* had been detained in England without trial on account of their being suspected terrorists and while SIAC was pretty sure that the information that had been used to justify their incarceration had been procured by torture engaged in by foreign powers it could not establish this as fact. The British authorities had neither done it nor been in its vicinity when it (allegedly) occurred. The Home Secretary argued that in the absence of evidence of torture the information supplied could indeed be used.

Because their lordships were emphatic that evidence secured by torture could never be used, the case in the Appellate Committee turned on which party had the burden of proof. Resisting a strong dissent by Lord Bingham[63] which would have placed the onus of enquiry on the Commission where a plausible doubt was raised as to the provenance of the material relied upon (whether due to

55 International Criminal Court Act 2001, s 82; The International Criminal Court Act (Commencement) Order 2001 (2001 SI 2161).

56 See n 173 below.

57 [2005] UKHL 71; [2006] 2 AC 221. See further *Youssef* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] AC 1457. For a scholarly treatment of the whole subject see M. Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge: Cambridge University Press, 2013). On the case itself in its wider, counter-terrorism context see C. Gearty, 'Terrorism and Human Rights' (2007) 42 *Government and Opposition* 340.

58 [2004] EWCA Civ 1123; [2005] 1 WLR 414.

59 *A (No 2)* n 57 above at [9] *per* Lord Bingham.

60 n 42 above, paras 73-92.

61 Northern Ireland (Emergency Provisions) Act 1973, s 6(2).

62 Police and Criminal Evidence Act 1984, s 76(2).

63 With which Lord Nicholls of Birkenhead and Lord Hoffmann agreed: *A (No 2)* n 57 above at [80] and [99] respectively.

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advocacy or to its own knowledge of the situation in the relevant state), the majority went for a test ('is it established, by means of such diligent enquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture?'[64]) that, as Lord Bingham observed, was one which 'in the real world, can never be satisfied.'[65] Lord Bingham's critique was harsh:

> The foreign torturer does not boast of his trade. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet. The result will be that, despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been 'established'.[66]

Baha Mousa

While it was true that in the *A (No 2)* case a bare majority (four to three) in the House of Lords had as a matter of practice made it possible for the judicial limbs of the security state to act on torture evidence as and when it came before them, the question of active participation in ill-treatment had also begun to bubble to the surface at around the time this case was being argued and decided: were the UK forces involved themselves in torture and serious mistreatment in their new theatres of war, in either of the first or third senses referred to above (direct actors or facilitators)? A ruling a few years after *A (No 2)* refused to allow the argument that any kind of torture-complicity made subsequent prosecution for terrorist offences impossible.[67] But by the summer of 2003, Amnesty International was already reporting claims about the mistreatment of a 'substantial portion' of detainees being held by British forces.[68] That same year the death of Baha Musa, an Iraqi civilian in British custody was said to have been preceded by classic methods of ill-treatment that were (as we have seen) supposedly long banned – the deployment of stress positions and deprivation of food and water.[69] As early as January 2004, the Minister for the Armed Forces Adam Ingram was being

64 *ibid* at [121] *per* Lord Hope of Craigshead. Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood agreed, *ibid* at [145], [158] and [172] respectively.

65 *ibid* at [59].

66 *ibid*.

67 In *R* v *Ahmed* an accused facing terrorism charges alleged that he had been tortured by a foreign state with the complicity of the UK authorities and that as a result his prosecution should be regarded as an abuse of process and not be permitted to proceed. The refusal to stay by the trial judge was upheld on appeal: [2011] EWCA Crim 184; [2011] Crim LR 734.

68 See Amnesty International, *Iraq: One Year on the Human Rights Situation Remains Dire* (2004) cited in C. Ferstman, T.O. Hansen and N. Arajärvi, *The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations? A Discussion Paper* (University of Essex Human Rights Centre, Ulster University, Transitional Justice Institute, 1 October 2018) 11 (n 23).

69 That this case became so notorious was mainly due to the remarkable energy of Baha Musa's father Mr Daoud Musa, a police officer in Basra in southern Iraq: see, as an early example of the coverage his work for justice for his son attracted, R. McCarthy, 'They were kicking us laughing. It was a great pleasure for them' *The Guardian* 21 February 2004 at https://www.theguardian.com/world/2004/feb/21/iraq.iraq (last accessed 11 May 2020).

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forced on the defensive in parliament.[70] Fresh controversy followed allegations made in spring of that year that British forces in Basra had engaged in serious misconduct in the aftermath of an engagement with the enemy in what became known as the 'Battle of Danny Boy'.[71] In May 2004, a highly critical report by the International Committee of the Red Cross found its way into the press.[72]

The traditional vehicles of military accountability ground into action. Various courts martial took place in 2005 and 2006[73] but with very limited success: only one of the seven soldiers charged with the ill-treatment and manslaughter of Baha Musa was convicted, Corporal Donald Payne – and he had pleaded guilty.[74] In a court-martial in Germany in November 2005 seven British soldiers stood accused of murdering an Iraqi civilian, Nadhem Abdullah, on 11 May 2003. They were cleared of all charges, with the presiding judge finding that there had been 'major issues of credibility, particularly in connection with some of the Iraqi witnesses'.[75]

These decisions were (potentially, one does not know the true facts) mirror images – albeit at an altogether more junior level in the judicial hierarchy – of the notorious cases in the 1970s (referred to in passing earlier) where Irish defendants in major terrorist trials had been convicted of serious offences in a way that was afterwards found to have been unsafe, with defence evidence being written off in pre-emptive fashion by such distinguished senior figures as Mr Justice (later Lord) Bridge,[76] Mr Justice (later Lord) Donaldson,[77] and (later in the process) the Lord Chief Justice Lord Lane.[78] Other courts-martial cases in the early 2000s produced similar outcomes but, even in these comparatively early days after the invasion of Iraq, concerns about the procedures governing their operation were attracting criticism. The situation was not helped from the authorities' point of view by the continued drip-drip effect of hostile news coverage of alleged further examples of army abuses that (together with the failure to secure convictions at courts-martial) were a regular feature of public discourse during 2005 and 2006.[79]

70 HC Debs vol 416, cols 138-141 WH, 7 January 2004; Ferstman, Hansen and Arajärvi, n 68 above, 11.

71 For full details see the *Report of the Al-Sweady Inquiry* (Chair: Sir Thayne Forbes) HC 818 (17 December 2014) (*Al-Sweady Inquiry*).

72 Ferstman, Hansen and Arajärvi, n 68 above, 11 n 27.

73 *ibid*, 13-14.

74 See *Al Skeini* notes 87-88 below; Ferstman, Hansen and Arajärvi, n 68 above, 14.

75 Ferstman, Hansen and Arajärvi, *ibid*, 13.

76 The trial of the Birmingham Six; see Lord Bridge's obituary in the *Independent* 28 November 2007 at https://www.independent.co.uk/news/obituaries/lord-bridge-of-harwich-judge-who-presided-over-the-trial-of-the-birmingham-six-760722.html (last accessed 11 May 2020) and, more generally, C. Mullin, *Error of Judgment: The Truth About the Birmingham Bombings* (London: Chatto and Windus, 1986).

77 The wrongful conviction of the Guildford Four: Sir John May, *Report of the Inquiry into the Circumstances Surrounding the convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974: Final Report* HC 449 (1993-94).

78 The rejection of the application by the Birmingham Six for a review of their convictions: *R* v *Callaghan and Others* (1988) 88 Cr App R 40.

79 The Aitken Report, n 80 below, contains a useful summary (at 3) of the more serious allegations and proven incidents, many of which had occurred in the first couple of years of the occupation.

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In 2007, the army thought it wise to commission its own investigation into 'cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004', and its inquiry duly reported in January 2008.[80] The Report's author, Brigadier Aitken, considered 'that it would be a mistake to make radical changes to the Army's essential organisation unless there was clear evidence that the faults [the authors] were seeking to rectify were endemic. They were not.'[81] This was because, it was said, the number of allegations causing concern had tailed off after the initial period of engagement in 2003–4, due, Brigadier Aitken was confident, to 'the wide range of corrective measures' that had been put in place.[82] Interestingly when discussing the Baha Musa case, the Report referred back to the Prime Ministerial statement of Edward Heath ruling out the five techniques deployed in Northern Ireland, while declining to explain or speculate on 'how soldiers on the ground in Iraq in 2003 apparently came to think that certain practices which had been previously proscribed were lawful.'[83] The Report concluded that '[d]etermining exactly how and when specific direction in 1972 came to be lost in 2003 would have to be a matter for separate investigation'.[84] But so far as the military's approach to investigating its own suspected wrongdoers was concerned, the failure to secure convictions did not imply 'any fundamental flaws in the effectiveness of the key elements of the Military Criminal Justice System,'[85] albeit some 'weaknesses in the system' had been 'identified as a result of experience, and rectified'.[86] There had been a few wrongdoers, but they were nowhere to be seen today, and the problems in the system of accountability (so far as there had been any) had been successfully addressed.

By the time of Brigadier Aitken's report, the courts were proving altogether less sanguine when it came to the accountability of the armed forces for ill treatment than Brigadier Aitken had been or the various courts-martial that had been able to find their way to exoneration of the persons before them. The death of Baha Mousa was the subject of a successful judicial review in a case decided by Rix LJ and Forbes J as early as 14 December 2004, with the Administrative Court ruling that the control the British forces had enjoyed over the deceased (who was in a military prison in custody at the time of his death) meant that the duty to investigate the incident for potential breaches of Articles 2 and 3 of the European Convention (now of course part of domestic law after the coming into force of the Human Rights Act) applied, notwithstanding its having occurred outside the UK and Europe, and that on the facts this duty had not (at that time) been properly discharged.[87] Almost exactly a year later, on 21 December 2005, the Court of Appeal heard the case of the other claimants including the five who, unlike in the case of Baha Mousa, had been unsuccessful in the High Court. By the time of this hearing the Government had accepted

80 *The Aitken report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* (25 January 2008) (Aitken Report).
81 *ibid*, para 6.
82 *ibid*.
83 *ibid*, para 17.
84 *ibid*, para 19.
85 *ibid*, para 30.
86 *ibid*, para 31.
87 *R (Al Skeini)* v *Secretary of State for the Defence* [2004] EWHC 2911 (Admin); [2007] QB 140.

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the ruling on jurisdiction so far as Baha Mousa's death was concerned,[88] and the Court ruled that the proceedings be remitted to the High Court but stayed until disciplinary proceedings (including the then pending court-martial proceedings) were exhausted in his case.[89] In an unusual 'postscript' with which Richards LJ explicitly agreed, and reflecting the way argument in the case had developed, Sedley LJ expressed his 'appreciation of the disclosure to the court of correspondence manifesting a significant difference of opinion between two departments of state on a matter of importance to these claims.'[90] Sedley LJ went on:

> Ordinarily governmental policy positions are simply reflected in the line of argument put forward by Treasury counsel, subject always to his own professional judgment. But this is not possible where government itself is divided. It seems to me an honourable thing, as well as a step in the direction of open government, that in such circumstances the court which means in turn the parties and the public – should be told of the division of view.[91]

All members of the court joined in Brooke LJ's appreciation of the 'claimants' lawyers, and particularly their solicitor Mr Phil Shiner, [who] have rendered a valuable public service in bringing forward their clients' claims and prosecuting them with such conspicuous skill and vigour.'[92] This will not be the last time Mr Shiner appears in the course of this article, and nor is it the only time that it is possible to see or guess at sharp differences of opinion as between government lawyers and litigating departments of state. To the new vigour added by the Human Rights Act we see evident in this early case the importance to our story of the campaigning lawyer and of the independent standing of the government's legal team, both reflective of the growth of law as an autonomous entity of increased confidence and power as compared with earlier generations.

Over a year after the House of Lords' final ruling on the case (dealing mainly with a jurisdictional matter related to the other appellants in the case),[93] the full enquiry sought into Baha Mousa's death was finally conceded, with the government turning in August 2008 to a former Lord Justice of Appeal, the Right Honourable William Gage to 'investigate and report on the circumstances surrounding [his] death … and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees … and to make recommendations.'[94]

88 *R (Al-Skeini)* v *Secretary of State for the Defence* [2005] EWCA Civ 1609; [2007] QB 140. See further the House of Lords decision on these cases: [2007] UKHL 26; [2008] 1 AC 153 and n 93 below for the Strasbourg sequel.

89 *R (Al-Skeini)* v *Secretary of State for the Defence ibid* at [178] *per* Brooke LJ; at [207] *per* Sedley LJ; at [209] *per* Richards LJ.

90 *ibid* at [208]; at [209] *per* Richards LJ.

91 *ibid*.

92 *ibid* at [141] *per* Brooke LJ. See also [208] *per* Sedley LJ and [209] *per* Richards LJ.

93 n 88 above. And for the judgment of the European Court of Human Rights extending UK responsibility well beyond the military barracks see *Al Skeini* v *United Kingdom* (Grand Chamber) (2011) 53 EHRR 18.

94 Gage report, n 12 above, para 1.4.

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Obstructionism at the Ministry

Within a year of the appointment of Gage, the 'Danny Boy' incident from spring 2004 was generating pressure for a second enquiry, and again it was a direct result of judicial review proceedings launched by Phil Shiner's law firm, Public Interest Lawyers. In early 2009, and relying on the jurisdiction now clearly established in the *Baha Mousa* case, five Iraqi nationals commenced proceedings for a judicial review in respect of the alleged failure by the Secretary of State for Defence to conduct an independent inquiry into allegations they had made of serious abuse at the hands of British forces while in custody over a period of months at two different army bases. (A sixth claimant's case related to the alleged unlawful killing of his nephew at the first of these camps.[95]) During hearings in this *Al-Sweady* litigation in the late spring and summer of that year, it became apparent that there were insoluble difficulties in getting materials out of the army: the tensions identified by Sedley LJ in *Baha Mousa* appeared now to have spun entirely out of control. The attitude to disclosure of both the Royal Military Police and the Secretary of State was later said by the Divisional Court judges to have been 'lamentable',[96] the issue a 'constant and repeated source of friction and difficulty.'[97]

Eventually matters became so bad that the solicitors representing the Defence Department wrote to the Court explaining that it was 'clear that the searches conducted to date cannot be said to have been effective and can no longer be regarded as reasonable and proportionate.'[98] The lawyers went on to acknowledge on behalf of the Secretary of State 'that he cannot provide the reassurance that the Court will seek that all material documents have been disclosed within the timescale of the present hearing' and so the Court would not be able to deliver rulings on the incidents which were the subject-matter of the application.[99] The Government's lawyers even revealed that they had contemplated sending in the Metropolitan Police, who however had declined to become involved.[100] The only option for the Court was to order a stay on the proceedings before it pending (as the judges went out of their way to make clear) the establishment of a proper inquiry.[101] The judgment of the High Court ends with a tribute that echoed that of the Court of Appeal in *Baha Mousa*. Their lordships could not 'part with this case without paying tribute to the claimants' legal advisers who although greatly outnumbered by the Secretary of State's legal team ha[d] persisted with their requests for disclosure skilfully and with commendable determination.'[102] On 25 November 2009 the Government conceded this second inquiry under the Inquiries Act 2005, 'into the allegations that Iraqi nationals

95 *R (Al-Sweady)* v *Secretary of State for Defence* [2009] EWHC 2387; [2010] UKHRR 300 (Scott Baker LJ; Silber and Sweeney JJ) (*Al-Sweady*).
96 The word is used twice, at [8] re the Royal Military Police, and at [13] in relation to the Secretary of State.
97 *ibid* at [8].
98 *ibid* at [41].
99 *ibid*.
100 *Al-Sweady Inquiry* n 71 above, para 1.7; *Al-Sweady* n 95 above at [62].
101 *Al-Sweady ibid*.
102 *ibid* at [67].

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were detained after a fire fight with British soldiers in Iraq in 2004 and unlawfully killed at a British camp, and that others had been mistreated at that camp and later at another facility.'[103] Its chair was to be the former High Court judge Sir Thayne Forbes.

It is worth pausing to reflect on what the *Al-Sweady* case revealed: here was a Department of State unable to secure from its own subordinates an evidential base which had been required by court direction in order to facilitate the operation of the rule of law. Such a failure on the part of ordinary litigants would have risked being classified as contempt. If it had occurred in the field it would have been seen as mutiny, a refusal to obey orders on a subversively collective scale. And mutiny it was in a way, against the law even if not their own commanding officers. By their diligent engagement with fact-finding, it was a mutiny that the lawyers – on all sides, and the court backing them up – had precipitated; the refusal of these lawyers and judges to hold back, to cover-up, to let go at vital moments was what had precipitated the crisis. The main problems had been with the evidence of one Colonel Dudley Giles: 'if Colonel Giles continues to be put forward as a principal or even a significant witness in judicial review proceeding or if he is in any way responsible for disclosure, it is our view that any Court seized of those proceedings should approach his evidence with the greatest caution.'[104]

There was more to come for the senior judges to engage with, and in particular Silber J who had been on the Bench in *Al-Sweady*. In early March 2010, in an effort to control the flow of domestic litigation (as well as a possible ICC incursion), the Ministry of Defence had established the Iraqi Historic Allegations Team (IHAT) 'to review and investigate allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009.'[105] This was followed a few months later by the Iraqi Historic Allegations Panel (IHAP) to take forward the enquiries made by IHAT.[106] The question immediately arose as to whether, quite apart from whether they might satisfy the ICC prosecutors, these initiatives complied with the state's now

103 *Al-Sweady Inquiry* n 71 below, para 1.8 where the full terms are set out. The Inquiries Act 2005 is the legal basis for many inquiries but there are also many non-statutory inquiries: See J. Beer QC (ed), *Public Inquiries* (Oxford: OUP, 2011); A. Stark, *Public Inquiries, Policy Learning, and the Threat of Future Crises* (Oxford: OUP, 2018).

104 *Al-Sweady* n 95 above at [60]. The incident does not appear to have affected the Colonel's career: R. Norton-Taylor and I. Cobain, 'British Colonel keeps rank despite being branded "unreliable witness"' *The Guardian* 12 November 2010 at https://www.theguardian.com/uk/2010/nov/12/british-colonel-giles-iraq-inquiry (last accessed 11 May 2020). After retirement in March 2012 he went on to become Chief Executive Officer of the British Horological Institute and its Museum Trust. Now retired from these roles, his public LinkedIn profile gives the reader a sense of his current interests: 'I now spend my time indulging my passion for military history. PrimariIy I'm concentrating my efforts on battlefield guiding – where I work as a freelance guide for a number of companies', at https://uk.linkedin.com/in/dudley-giles-b1477418 (last accessed 11 May 2020).

105 See the written ministerial statement by the Minister of State at the Ministry of Defence to the House of Commons, HC Debs vol 506 cols 93-94 (B. Rammell) (written answer) 1 March 2010. For further background, see https://modmedia.blog.gov.uk/2016/01/13/ihat-what-it-is-and-what-it-does/ (last accessed 26 May 2020).

106 See *R (Ali Zaki Mousa and others)* v *Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) (Sir John Thomas, P; Silber J) at [19]-[20].

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well-established obligations of investigation under the Human Rights Act. In July 2010, a further enquiry commissioned by the Army and involving an independent consultant provided what the Chief of the General Staff General Sir David Richards in his foreword described as an 'independent assurance that even more [was] now being done than in 2008, and that officers and soldiers do understand the importance of treating properly those whom we detain whilst on operations.'[107]

Despite this defensive manoeuvre, the law in general, with Phil Shiner once again in the vanguard, must at this point have seemed unstoppable. In November 2010 an ambitious effort was made to get beyond all the then operating investigations and force a public inquiry into the plethora of allegations that all acknowledged were by now emerging rapidly from the Iraqi theatre. In *R (Ali Zaki Mousa)* v *Secretary of State for Defence*,[108] Public Interest Lawyers represented a group of over 140 Iraqis who argued that the only way to meet what was due to them under the positive obligations contained in Article 3 of the European Convention was by way of a third full enquiry under the 2005 Act, into all such allegations. The Government successfully resisted the application in the High Court, pointing out that there was so much already going on – IHAP; IHAT; Gage; the Al-Sweady inquiry – that it was not unlawfully lax of it to want to wait and see before deciding whether such a wide ranging further review was required.

A critical factor in the High Court's ruling in this new case was its belief as to the independence of the IHAT investigations. The claimants had argued that the Royal Military Police (RMP) investigators within IHAT were 'serving soldiers, subject to military discipline and command' reporting to a soldier who was himself 'answerable to the military command' and so they did not have the 'necessary hierarchical and institutional independence' to be independent for the purposes of the Convention.[109] The Defendant persuaded the court that in fact the RMP investigators worked in an entirely separate chain of command and so as a matter of practice were entirely outwith the army system.[110] But there was an additional problem: the claimants pointed out that the RMP (together with a related branch concerned with the welfare of detainees, the Military Provost Staff (MPS)) had been heavily involved in Iraqi operations, participating in interrogations on the ground and engaging on a daily basis with the detainees being held by British forces. If there was wrongdoing for IHAT's RMP to expose then they, the RMP, had been as heavily involved as any in what they now had to uncover.[111] For this reason, it was submitted, their independence was fatally compromised. So far as the Defendant was concerned,

107 Ministry of Defence, *Army Inspectorate Review: Policy, Training and Conduct of Detainee Handling: Report by the Inspectorate into the implementation of policy, training and conduct of detainee handling* (15 July 2010) (the Purdy Report). Unlike the Aitken Report, n 80 above, this report did ponder why the Heath prohibition on the five techniques had not been followed, suggesting among other reasons that 'many soldiers did not understand the meaning of "proscribed"': Purdy Report *ibid*, para 22.

108 [2010] EWHC 3304 (Admin) (Richards LJ and Silber J).

109 *ibid* at [33].

110 *ibid* at [34].

111 *ibid* at [68].

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this whole argument was based on a 'mistaken premise'.[112] There were barely any MPS people around in Iraq at the relevant time and so far as the RMP was concerned, there were in fact two parts to its operation: the section assisting on the ground in Iraq (General Police Duties (GPD)) was not the same as the personnel from Special Investigation Branch who were removed from daily engagement on this particular Iraqi 'frontline', and it was from this latter group that the IHAT RMP team had been drawn. So only exceptionally would these RMP personnel have found themselves caught up in the arrest and detention of Iraqis.[113] All this came from Colonel Ian Prosser, Deputy Provost Marshall for Custody and Guarding, and it was persuasive so far as the High Court was concerned, with a witness statement from an army insider for the claimants setting out a more critical perspective on RMP conduct overall being something on which the Court felt 'unable to place any weight'.[114] If the RMP were implicated or were likely to be implicated in any investigations, or if a member of the IHAT RMP team had been involved in a case, then IHAT had civilian personnel who could take the lead.[115] The overall independence of the operation was not compromised.

The problem with this neat solution was that the original premise of the claimants had not in fact been false and it had been the Defendant who had been misleading as to the true situation. For the members of the Court of Appeal who heard the claimants' appeal in July 2011, this must have been a dramatic discovery.[116] The High Court judgment had been handed down on 21 December 2010. On 10 February 2011 leave to appeal was granted, with the Court then noting with concern that the Defence Secretary's response to that application for permission to appeal had conceded that the GPD Branch of the RMP was indeed involved as a matter of course in IHAT matters and that what had been presented as fact to the High Court less than three months before – on a key issue – was as the Secretary of State now directly conceded 'not correct'.[117] The inextricability of the link between GPD personnel and IHAT was made excruciatingly clear in a witness statement that was generated for the Court of Appeal – and so which had not been before the High Court – from the civilian head of IHAT Mr Geoff White.[118] When Colonel Prosser had asserted to the High Court that the 'GPD [had] no part to play now in the conduct of investigations within IHAT' that was, as the Court of Appeal explicitly noted, now clearly acknowledged to be 'erroneous'.[119] New witness statements revealed further evidence of how immersed the Provost Branch (encompassing the MPS and both sides of the RMP) had been in managing detention and the treatment of detainees. It was 'the reality

112 *ibid* at [69].
113 *ibid* at [70]-[75].
114 *ibid* at [77]. Three senior army officers submitted witness statements addressing the concerns expressed by this witness: *ibid*.
115 *ibid* at [83]-[84].
116 *R (Ali Zaki Mousa)* v *Secretary of State for Defence* [2011] EWCA Civ 1334. Maurice Kay, Sullivan and Pitchford LJJ.
117 *ibid* at [11].
118 *ibid* at [16]-[18].
119 *ibid* at [20].

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of the situation on the ground'[120] that led the Court of Appeal unanimously to find it 'impossible to avoid the conclusion that IHAT lack[ed] the requisite independence.'[121] The 'wait and see' policy fell with the independence of IHAT, it now being left to the Secretary of State to consider how to proceed.

Whether Colonel Prosser had simply lied to the High Court or been so relaxed about his responsibilities as not to properly inform himself before giving his considered expert opinion on the matter, the likely assumption that he and his colleagues had made, surely, was that he would not be held accountable for it. Perhaps in a previous age this would have been the case. Presumably once they became aware of the truth the barristers representing the Secretary of State refused to hide it from the High Court, and neither the judges there nor those in the later proceedings before the Court of Appeal were prepared to sweep it under the carpet. Five senior judges had seen off a deliberate or reckless attempt to mislead them, one that needed an element of their collusion to be effective, a collusion that was no longer as easy to obtain from the judges as (speculating now it is appreciated) it might have been in earlier times.

Changes made to the procedure in response to this judgment – mainly replacing the RMP with the Royal Navy Police – were once again challenged, with the Divisional Court now finding that, while the alterations had been beneficial, the situation was such that an entirely fresh approach was required. This was not least because the Court was now being told that

> there might be as many as 150–160 cases involving death and 700–800 cases involving mistreatment in breach of Article 3 though the precise numbers that require investigation [would] be determined by decisions as to the scope of the application of the Convention to the activities undertaken by the British armed forces in Iraq.[122]

The Court's favoured approach was one based on the coroner's inquest,[123] and in yet a further ruling in the case in October 2013,[124] the Divisional Court laid down basic guidelines for the conduct of such inquiries,[125] with the judges refusing to accept any significant delay to the Article 3 case-load simply because of the inundation of Article 2 work.[126] The Court observed that each inquiry 'should be established by the appointment of a suitable person such as a retired judge or possibly a very experienced practitioner to conduct the inquiry (referred to for convenience by us as the Inspector)' and, furthermore, that in 'making the appointment close attention will need to be paid to ensuring that the person is able to embark immediately on the inquiry and to devote

120 *ibid* at [34].
121 *ibid* at [36].
122 *R (Ali Zaki Mousa and others)* v *Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) (Sir John Thomas, P; Silber J) at [3].
123 *R (Ali Zaki Mousa and others)* v *Secretary of State for Defence (No 2)* n 106 above at [199]-[200], [212]-[225].
124 *R (Ali Zaki Mousa and Others)* v *Secretary of State for Defence* [2013] EWHC 2941 (Admin).
125 *ibid* at [7]-[49].
126 *ibid* at [45]-[48].

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the necessary time so that the inquiry is completed within the shortest possible time.'[127]

In this same October ruling, the Court also agreed the appointment of Mr Justice Leggatt as Designated Judge to oversee the whole revised process from the judicial side. This role involved oversight of those cases where no prosecutions had been launched, or where one had been initiated but failed, or where there had been no criminal investigation at all, and where despite this the facts in a given case were suggesting that an inquiry under the Convention was required. The idea of a designated judge was 'primarily to ensure that the risks of delay and a lack of direction were minimised, but also to ensure all applications would be to a single judge familiar with the overall issues'.[128] In January 2014, Sir George Newman was appointed as the overall inspector of the various coronial enquiries that were put in place after the Court of Appeal's ruling, conducting 'individual fatality investigations assigned to him from time to time, with his agreement, by the Ministry of Defence.'[129] A former High Court judge, Sir George had been appointed the Chairman of the Security Vetting Appeals Panel (a Cabinet Office body) in 2009 and afterwards served two terms as a Surveillance Commissioner. Despite his weighty presence delays continued, drawing the critical attention of the designated judge.[130]

This final Ali Zaki Mousa case makes a fleeting reference to another piece in the jigsaw that made the law's intervention in relation to military ill-treatment so effective: money. Their lordships observed in passing that the claimant

> is funded by the Legal Aid Agency under a high costs case plan on the basis that if the claimant succeeds the lawyers are entitled to a significantly greater payment than if the claimant fails. The differential is large; the 'at risk' rate for a Grade A, Grade B and Grade C is £70; the *inter-partes* rates are respectively £326, £288 and £242.[131]

Another tool available to litigants has been the Protective Costs Order[132] (or Costs Capping Order[133]), under which litigants acting in the public interest could insulate themselves from the destruction that defeat under the usual principle of loser-pays can entail, especially when up against a branch of government.[134] The framework of state funding had opened up possibilities that might in earlier eras been considered too great a risk.

127 *ibid* at [10].
128 *ibid* at [4].
129 See https://www.gov.uk/government/people/george-newman (last accessed 11 May 2020).
130 See *Al-Saadoon* v *Secretary of State for Defence* [2015] EWHC 1769 (Admin) at [33], describing a state of affairs which the judge found to be 'deeply disappointing' at [35]. See further *Al-Saadoon* v *Secretary of State for Defence* [2016] EWHC 773 (Admin).
131 *R (Ali Zaki Mousa and Others)* v *Secretary of State for Defence* [2013] n 124 above at [55].
132 Senior Courts Act 1981, s 51.
133 See Criminal Justice and Courts Act 2015, s 88.
134 An early example is *R (Campaign for Nuclear Disarmament)* v *Prime Minister* [2002] EWHC 2712 (Admin) in which the claimant sought a declaration that United Nations resolutions did not legitimise the use of force in Iraq: the Administrative Court capped the claimant's costs exposure at £25,000. For judicial guidance on when such orders should be made see *R (Corner House Research)* v *Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600.

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Binyam Mohamed

The problem of disclosure that had precipitated the Al-Sweady inquiry was also to the fore in an important civil action that had been launched the year before that inquiry was set up. The days were long gone when it was enough to declare litigation by convicted terrorists claiming to have been ill-treated by the authorities to be required to fail because of the 'appalling vista' such a case would open up were it successful.[135] In *R (Binyam Mohamed)* v *Secretary of State for Foreign and Commonwealth Affairs*[136] (*Binyam Mohamed*) a group of former Guantanamo inmates began legal action against the State, alleging British culpability of the third sort identified at the start of this section: collusion in the repeated torture and ill-treatment that the claimants said that they had suffered at the base. The High Court insisted on full disclosure in the case. This lead to the settlement of all of the men's claims, the then Justice Secretary saying that the payments (which were confidential) were necessary to avoid a legal battle which could have cost up the £50m.[137] Some years later, however, the Government was unable to avoid a dramatic public defeat, in *Alseran* v *Ministry of Defence*[138] (*Alseran*), 'the first full trials of civil compensation claims in which the claimants themselves and other witnesses have testified in an English courtroom'.[139] The four lead claims were among the 600 and more such cases behind the litigation and the proceedings produced rulings in favour of the claimants, with consequent damages awards of £10,000- £15,000 for ill-treatment contrary to Article 3 and extra sums also for breaches of Article 5 (the right to liberty) and various physical assaults. All the tort claims were rejected as time-barred but the one-year limitation for human rights actions was disapplied, the judge finding this action to be 'equitable' and therefore permitted under the relevant section of the HRA.[140] That same year in the dramatic Supreme Court decision of *Belhaj* v *Straw*; *Rahmatullah (No 1)* v *Ministry of Defence*, efforts by the Government to insulate itself from legal action alleging complicity in alleged

135 Lord Denning in the appeal by the Birmingham Six against their convictions in which they argued that their confessions had been obtained by ill-treatment: *McIlkenny* v *Chief Constable of the West Midlands* [1980] QB 283, 323D.

136 [2008] EWHC 2048 (Admin). See further on appeal [2010] EWCA Civ 65; [2011] QB 218, and shortly after and exceptionally [2010] EWCA Civ 158; [2010] 3 WLR 554, where the government's inability any longer to control the courts is laid bare. For a glimpse of the extent of the controversy, discussed further in the conclusion to this article, see R. Norton-Taylor, 'Binyam Mohamed court ruling shatters spies' culture of secrecy' *The Guardian* 10 February 2010 at https://www.theguardian.com/world/2010/feb/10/law-binyam-mohamed-case (last accessed 8 July 2019).

137 'Compensation to Guantanamo detainees was necessary' *BBC News* 16 November 2010, where there is also a link to the Justice Secretary Mr Clarke's statement in the House of Commons.

138 [2017] EWHC 3289 (QB); [2018] 3 WLR 95. See generally U. Grusic, 'Civil Claims Against the Crown in the Wake of the Iraq War: Crown Acts of State, Limitation under Foreign Law and Litigation Funding in Alseran v Ministry of Defence' (2018) 37 *Civil Justice Quarterly* 428.

139 [2017] EWHC 3289 (QB); [2018] 3 WLR 95 at [1].

140 *ibid* at [870], and for the reasons see [849]-[870]. See R. English, 'MOD to compensate Iraqis for "ill-treatment"' *UK Human Rights Blog* 18 December 2017 at https://ukhumanrightsblog.com/2017/12/18/mod-to-compensate-iraqis-for-ill-treatment/ (last accessed 9 July 2019). The victims in the ill-treatment cases that gave rise to *Ireland* v *UK* eventually received similar levels of compensation: there is a full list at Newbery, n 17 above, 122.

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tortious acts overseas by pleading state immunity or foreign acts of state proved unavailing.[141]

The plethora of legal actions – especially *Binyam Mohamed* – that dogged the final years of the Blair-Brown New Labour hegemony (and, as we can see with *Alseran*, that continued for years afterwards) had pushed the question of ill-treatment by the British military well up the domestic political agenda, with neither of the main political parties adopting their natural posture: it was the Labour Government that defended the army against the stinging critique of a Conservative party now led by the young and apparently progressive David Cameron, who may have been opposed to the Human Rights Act but who was not against human rights as such.[142] In his Party's manifesto for the 2010 election Cameron had declared torture to be 'unacceptable and abhorrent' and that his Party would 'never condone it'.[143] The *Binjam Mohamed* settlement came early in his tenure as head of a new Coalition government which he had formed with the Liberal Democrats. True to his word on the wider issue as well, Cameron turned to a senior judicial authority to produce answers to the series of vexing questions on ill-treatment of which he had made such effective political capital in the preceding years. Sir Peter Gibson was an Oxford graduate and former member of Fountain Court chambers who had become a member of the Court of Appeal before being appointed Intelligence Service Commissioner in 2006, a position from which he stood down in order to chair this new inquiry. Covering both the second and third of the sorts of involvement with which this article is concerned, the Prime Minister asked Peter Gibson to '… look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11.'[144] Mr Cameron explained that our 'reputation as a country that believes in human rights, justice, fairness and the rule of law – indeed, much of what the services exist to protect – risks being tarnished.'[145]

The blaze of initial publicity having run its course, it was agreed that the series of civil actions and police investigations that were already underway needed first to be concluded before it could begin its work. The decision to wait made the time-frame set by the Prime Minister of a report within a year impossible to achieve from the outset.[146] In fact so extensive were the police matters now

141 [2017] UKSC 3; [2017] AC 964. The case was eventually settled with the Government denying liability but nevertheless acknowledging it could and should have done more to protect the claimant: see N. Clapham, 'The *Belhaj* finale: Exclusion of Closed Material Procedure Means Less Scrutiny of DPP Decisions' *UK Human Rights Blog* 5 July 2018 at https://ukhumanrightsblog.com/2018/07/05/the-belhaj-finale-exclusion-of-closed-material-procedure-means-less-scrutiny-of-dpp-decisions-nicholas-clapham/ (last visited 22 May 2020).

142 See A. Travis, 'Cameron pledges Bill to restore British freedoms' *The Guardian* 28 February 2009 at https://www.theguardian.com/politics/2009/feb/28/conservatives-human-rights (last accessed 18 May 2020).

143 See *Invitation to Join the Government of Britain* (2010) 109.

144 HC Deb vol 513 col 176 6 July 2010. Gibson was joined on the panel by Dame Janet Paraskeva, a senior civil servant, and Peter Riddell, a journalist who resigned to take up a new appointment shortly after the Inquiry was established.

145 HC Deb vol 513 col 175 6 July 2010.

146 *ibid* col 176.

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linked to the Inquiry's remit, with yet further enquiries emerging after the conclusion of a first wave, that the possibility of the Commission ever even getting off the ground quickly became a live issue. Some eighteen months down the line, with still more police investigations having by then been launched (this time into a newly emerging Libyan dimension to the alleged ill-treatment), the Government decided to put the Commission out of its state of suspended misery. On 18 January 2012, the then Justice Secretary Kenneth Clarke delivered the note of termination in a statement to the House of Commons, and it was allowed to the now imminently defunct Chair and his team only that they prepare a 'report on its preparatory work to date, highlighting particular themes and issues which might be the subject of further examination.'[147] But matching the vigour of his colleagues on the bench in the cases we have analysed, the Inquiry refused to go quietly. Gibson delivered the required last report to government in June 2012, and not even its schematic framework and tentative set of assessments could mask (and were surely not intended to mask) the indications it contained of serious state collusion in mistreatment. It became inevitable, therefore, that publication of even the open version of this findings-free report would become the subject of bitter dispute within Whitehall.

The report, eventually made public eighteen months after completion (on the same day as the jury returned its verdict of guilty in the notorious terrorism case involving the prosecution of those responsible for the murder of fusilier Lee Rigby on 22 May 2013[148]), contained extensive redactions on which the Government had continued to insist.[149] The report details no fewer than 27 issues that it would have liked to investigate further, possibly capable of being distilled without irony into one question, 'what was really going on, and what kind of guidance was there with regard to what was really happening?'.[150]

The Intelligence and Security Committee (ISC) to which matters had been effectively handed on the winding-up of Gibson[151] was finally to report on detainee treatment and rendition in late June 2018. This was a political rather than a judicial or quasi-judicial engagement with the recent past and so outside the remit of this article. But it should be noted that in a way that was reminiscent of Gibson, and despite its status as a statutory body with members drawn from both Houses of Parliament, that Committee's own investigations were also hampered. On this occasion the obstacle faced was not so much police investigations as so complete a denial of access to essential witnesses that the ISC eventually felt obliged to give up its work, with the result that its eventual report was regarded by the Committee itself as incomplete.[152] But, as with Gibson, even its tentative

147 HC Deb vol 538 col 752 18 January 2012.

148 See I. Cobain, 'Why did the Gibson Inquiry into rendition disappear?' *The Guardian* 6 July 2015 at https://www.theguardian.com/commentisfree/2015/jul/06/gibson-inquiry-rendition-david-cameron-uk-torture (last accessed 21 May 2019).

149 *The Report of the Detainee Inquiry* December 2013 at https://www.gov.uk/government/publications/report-of-the-detainee-inquiry (last accessed 21 May 2020) (Gibson report). On publication of the open report see para 1.2.

150 *ibid* Annex A.

151 Intelligence and Security Committee, *Detainee Mistreatment and Rendition: 2001-2010* HC 1113 (28 June 2018).

152 *ibid*, 1.

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conclusions, or 'key findings', were politically explosive, two cases of direct UK involvement in the mistreatment of detainees and many, many examples of UK support for or collusion with other state agencies engaged in ill-treatment and the rendition of suspects to places where it was highly likely they would be ill-treated.[153]

The Government's minimal response to the Committee, initially issued by way of prime ministerial statement on the same day as its reports were published,[154] invited the newish office of the Investigatory Powers Commissioner 'to make proposals to the Government' about how the relevant consolidated guidance on detention and interviewing 'could be improved, taking account of the ISC's views and those of civil society'.[155] That Commissioner, Sir Adrian Fulford, had been a Lord Justice of Appeal and before that a judge on the ICC before assuming his new role, which he combined with his continued status as a lord justice. At the Prime Minister's invitation, Sir Adrian ran a public consultation on the guidance, starting on 20 August 2018 and ending on 7 November the same year. His proposed revised version of the guidance was submitted to the Prime Minister on 14 June 2019, and was published in July 2019.[156] This sort of exercise, one of looking forward rather than back, learning lessons for the future, improving procedures and so on, very much in the spirit of earlier internal inquiries,[157] was never likely to be embarrassing to government in the way that searching analyses of the past by independent bodies clearly had been.

Amnesia in the army

In all of the blizzard of doubtful state practice that has been uncovered, it might reasonably be asked: what had happened to the solemn pledge given by Prime Minister Edward Heath in 1972 to end the interrogation techniques that had proved so reputationally damaging to that earlier generation of politicians?

153 *ibid*, 2-5.

154 28 June 2018, see https://www.gov.uk/government/speeches/pm-written-statement-isc-detainee-reports (last accessed 20 June 2019). A fuller response was later published: *Government Response to the Intelligence and Security Committee of Parliament Reports into Detainee Mistreatment and Rendition* Cm 9724 (November 2018).

155 *ibid*. The reference is to 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 Related to Detainees* (July 2010). The Investigatory Powers Commissioner had been given formal oversight of the guidance by way of a prime ministerial direction to him, issued under the Investigatory Powers Act 2016, s 230, with effect from 1 September 2017, *ibid*.

156 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) at https://www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations (last accessed 30 July 2019). Fulford's review of the consolidated guidance in part resulted from a critical report from another (on this occasion former) Court of Appeal judge, Sir Mark Waller in his capacity as Intelligence Services Commissioner, in 2016: *Report of the Intelligence Services Commissioner. Supplementary to the Annual Report for 2015: Concerns raised by the Intelligence and Security Committee of Parliament about the government's responsibilities in relation to partner counter-terrorism units overseas* HC 458, SG/2016/95 (15 September 2016).

157 See the reports at notes 80 and 107 above.

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Nowhere is the difference in attitudes as between the judges of the 1970s and 1980s and those of today clearer than in the way this more recent generation of judicial investigators has approached this central mystery at the core of the reversion to bad practices (including collusion in torture) that has followed the Iraqi invasion and occupation. Here was something that even Brigadier Aitken had noticed in 2008 (even though he simply left it to one side) and which the later internal (Purdy) report had put down to, among other things, the lack of a good vocabulary on the part of your average trooper.[158]

In October 2011, the High Court found itself ruling on *Guidance to Intelligence Officers and Service Personnel* on detention and interviewing, guidance which did contemplate hooding in certain circumstances and in advising that a full prohibition be restated the Court drew attention to the Heath Directive.[159] This was exactly the question to which Sir William Gage in his enquiry into the Baha Musa case in 2011 had returned again and again,[160] eventually concluding that '… the Heath Statement, regrettably, had, for the most part, long since been forgotten.'[161] A revealing exchange which took place in the course of a mid-2000s investigation by the ISC[162] was recalled by Gibson in the course of the Report into his truncated investigation that was (as we have seen) finally published at the end of 2013:

> During the course of his evidence to the ISC the then Chief of the SIS [Secret Intelligence Service] (Sir John Scarlett) and the then Director General of the Security Service (Baroness Manningham Buller) acknowledged the lack of corporate awareness of an undertaking given in 1972 by the then Prime Minister, Edward Heath, in relation to interrogation techniques used in Northern Ireland.[163]

> Sir John was no doubt right to observe that SIS does not see itself as an interrogator and its documents refer more frequently to interviews or "debriefs" of detainees. However, despite Sir John's distinction between interrogations and interviews, the Heath statement was still of relevance to the Agencies. Indeed, the 1972 prohibition on the five coercive interrogation techniques, used during internment in Northern Ireland, was specifically drawn to the attention of the Agencies.[164]

The Committee report then went on to detail the Government's defence:

158 See Aitken Report, n 80 above; Purdy Report, n 107 above.

159 *Equality and Human Rights Commission* v *Prime Minister and Others; Al Bazzouni* v *Prime Minister and Others* [2011] EWHC 2401 (Admin); [2012] 1 WLR 1389 at [80].

160 n 12 above. See chapter six on the Heath statement and the subsequent Directive. The exact directive that was issued is set out at Gage report, para 4.104.

161 *ibid*, vol 1, para 2.1525. For a different account suggesting that there had never been any serious intention of following it see I. Cobain, n 7 above, 161-165; Newbery, n 17 above, 104-106.

162 Intelligence and Security Committee, *Report on the Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* Cm 6469 (1 March 2005) (ISC report).

163 Gibson report, n 149 above, para 5.9. This is how the 2005 Committee put it in their report: 'The observance of human rights is an important part of the Agencies' general training. However, prior to their deployment to Afghanistan, the SIS officers were not given specific training on the rights of detainees and the Geneva Conventions, nor were they aware of the 1972 announcement banning certain interrogation techniques' *ibid*, para 38.

164 Gibson report *ibid*, para 5.10. See n 12 above for how this instruction was drilled down at the time, a point noted by the Committee in a set of remarks not included here.

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> The Agency Heads told the ISC that the lack of knowledge of this policy position was not determinative of the conduct of the Agencies because the Human Rights Act outlawed the prohibited techniques in any event. In her evidence to the ISC, the Director General of the Security Service, Baroness Manningham-Buller, said that a more pertinent question was whether her staff were fully aware of the Human Rights Act and the European Convention on Human Rights: she felt strongly that they should be. Continuing, she said the answer to the question of whether her staff were aware of the 1972 statement was, therefore, 'yes', as the Human Rights Act and the European Convention covered the prohibited techniques.[165]

As a memorandum they submitted to the ISC inquiry in 2005 had made abundantly clear, both the SIS and the Security Service now believed themselves to 'operate in a culture that respects human rights' with the result that 'coercive interrogation techniques are alien to both services' general ethics, methodology and training'.[166] Concluding, the ISC summarised the Agencies' position as follows: 'They [SIS and the Security Service] therefore regarded the normal levels of training, which emphasised the requirements of the Human Rights Act 1998 as sufficient for the staff deploying to Afghanistan.'[167]

Had Gibson had the opportunity, his Inquiry 'would have wished to examine with witnesses: first what guidance and human rights training SIS and Security Service officers received; and second, whether this training or other training was sufficient to make officers aware that the techniques banned in the undertaking were not acceptable.'[168] And, we might add, did human rights turn out to be a little more vigorous and trouble-making for their people than the service leaders might have assumed when fending off allegations of contrived amnesia in 2005?

PUSHBACK

The assertiveness of the judicial engagement detailed above has not gone unchallenged. A major concern has been with the expense of and also the relative lack of results achieved by Iraqi Historic Allegations Team (IHAT), the body that as we have seen was established by the Ministry of Defence in 2010 to lead inquiries into the Iraqi allegations. The task had quickly become enormous: IHAT had an initial caseload of 165 cases and a target to complete its investigations by 1 November 2012 but its constantly expanding caseload pushed the date of conclusion further and further into the distance. By October 2015, its docket stood at 1,515 with a further 665 allegations to be screened. When it was established, IHAT was expected to cost £7.5 million. As at the end of September 2016 its work has already cost £34.7 million, with nearly £60 million more already planned for.[169] As noted in passing above the designated judge

165 *ibid*, para 5.11.
166 ISC report, n 162 above, para 39.
167 *ibid*. See Gibson report, n 149 above, para 5.12.
168 *ibid*, para 5.13.
169 House of Commons Defence Committee, *Who Guards the Guardians?* 6th Report of Session 2016-17 HC 109 (10 February 2017) para 13.

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Mr Justice Leggatt had described progress as 'deeply disappointing' in a case decided in June 2015.[170] A report released in September 2016 into its processes commissioned by the Attorney General from the former Director of Public Prosecutions Sir David Calvert Smith[171] was highly contingent in its assessment that IHAT's work could be completed by the latest of its many revised deadlines, the end of 2019.[172]

Politics moved faster than this however. In a savage report published in February 2017, the Common's Defence Committee concluded in its provocatively entitled report *Who guards the guardians?* that IHAT had 'lost the confidence of service personnel, this Committee and the wider public.'[173] The Committee recommended that IHAT be closed. To achieve this, the Defence Committee's members made clear that they were not convinced that officials at the ICC would 'commit to investigate such a large case load which is based, to a great extent on discredited evidence.'[174]

The last point here referred to a dramatic development precipitated by the *Al-Sweady* report into the Danny Boy incident that had been published in December 2014. Generated as we have seen by the *Al-Sweady* litigation, the report by the former High Court judge Sir Thayne Forbes levelled a number of strong criticisms against the conduct of the army personnel whose actions he had been asked to investigate.[175] But crucially he had also concluded that the vast majority of the allegations, including all the most serious ones, were 'wholly and entirely without merit or justification'.[176] Moreover a number of Iraqi witnesses had approached the giving of evidence before him in a way that had been 'both unprincipled in the extreme and wholly without regard for the truth.'[177] One of the lawyer's implicated in these criticisms was none other than the army's bête noire Phil Shiner, and following publication of Forbes's report, and as a direct result of investigations conducted subsequent to it by the Ministry of Defence, Shiner's Public Interest Lawyers and another law firm found themselves before the Solicitors Disciplinary Tribunal facing over forty allegations of wrongdoing.[178]

In due course Shiner admitted to the payment of Iraqi middlemen to find claimants to underpin his Iraqi litigation, and as a result, inevitably, he was struck off the roll of solicitors for misconduct, on 2 February 2017. The Defence

170 *Al-Saadoon* v *Secretary of State for Defence* [2015] EWHC 1769 (Admin) n 130 above at [35].

171 Sir David Calvert Smith, *Review of the Iraq Historical Allegations Team* 15 September 2016, para 2.9 at https://www.gov.uk/government/publications/review-of-iraq-historic-allegations-team) (last accessed 11 May 2020).

172 *ibid*, para 1.2.

173 *Who Guards the Guardians?* n 168 above, para 42.

174 *ibid*, para 120. On 13 May 2014 the ICC Prosecutor had 'opened a preliminary examination of the responsibility of officials of the United Kingdom for alleged war crimes involving the systematic abuse of detainees in Iraq between 2003 and 2008': Calvert Smith, n 171 above, para 312. This had followed the submission, on 10 January 2014, by the European Center for Constitutional and Human Rights (ECCHR) and Phil Shiner's Public Interest Lawyers of a 250-page communication to the ICC Prosecutor detailing alleged abuses arising during this time period: Ferstman, Hansen and Arajärvi, n 68 above, 11 (footnote omitted).

175 *Al-Sweady Inquiry* n 71 above, Executive Summary, para 735.

176 *ibid*, para 737.

177 *ibid*, para 738.

178 See Government Reply to *Who Guards the Guardians?* n 169 above, para 10.

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Secretary Michael Fallon welcomed the Tribunal's decision, stating that '[j]ustice has finally been served after we took the unprecedented step of submitting evidence on his abuse of our legal system. Phil Shiner made soldiers' lives a misery by pursuing false claims of torture and murder – now he should apologise. We will study any implications for outstanding legal claims closely.'[179] Eight days later Fallon announced that IHAT would close at the end of June that year.[180] At its closure, it 'reported that it had decided not to pursue 1,668 allegations after an initial assessment, while 40 still had to undergo preliminary evaluation; 34 investigations, involving 108 victims, were ongoing; and that it had closed, or was closing, 700 allegations.'[181]

As of 1 July 2017, the remaining investigations were integrated into the service police system and taken over by a new investigative unit, the Service Police Legacy Investigations (SPLI):

> SPLI inherited cases from IHAT, and one referral from IHAT to the SPA [the Service Prosecution Authority]. The referral has since been discontinued by the SPA. Moreover, most remaining allegations of ill-treatment have been discontinued during 2017–2018. There is very limited public information on the structure and management of SPLI.[182]

Five further referrals to the SPA have now also not lead to any charges.[183] Sir George Newman's role as investigator survived the closure of IHAT and after his death in June 2019, he was succeeded by a retired Court of Appeal judge, Dame Heather Hallett.[184] (Dame Heather had already taken over his role as Chair of the Security Vetting Appeals Panel.[185])

179 O. Bowcott, 'Phil Shiner: Iraq human rights lawyer struck off over misconduct' *The Guardian* 2 February 2017 at https://www.theguardian.com/law/2017/feb/02/iraq-human-rights-lawyer-phil-shiner-disqualified-for-professional-misconduct (last accessed 13 May 2020). The other law firm was cleared: O. Boycott, 'Law firm Leigh Day cleared over Iraq murder compensation claims' *The Guardian* 9 June 2017 at https://www.theguardian.com/law/2017/jun/09/law-firm-leigh-day-cleared-over-iraq-compensation-claims (last accessed 13 May 2020).

180 See the Government's reply, received on 5 April 2017 and appended to the Committee's Ninth Special Report at https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/114902.htm, para 13 (last accessed 13 May 2020).

181 Ferstman, Hansen and Arajärvi, n 68 above, 16.

182 *ibid*, 16-17 (footnotes omitted). See the government guidance at https://www.gov.uk/guidance/service-police-legacy-investigations (last accessed 17 May 2020), where it is reported that five further referrals to the SPA have likewise not led to charges: SPLI Quarterly Update 1 October – 31 December 2019, paras 3.1-3.2 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868044/20200227-SPLI_QTR_RPT_1OCT19-31DEC19-FINAL.pdf (last visited 17 May 2020).

183 SPLI Quarterly Update, *ibid*, paras 3.1-3.2.

184 See https://www.gov.uk/government/collections/iraq-fatality-investigations (last accessed 13 May 2020).

185 For this appointment see https://www.gov.uk/government/collections/iraq-fatality-investigations and also 'PM Appoints New Chair of the Security Vetting Appeals Panel' 1 April 2019 at https://www.gov.uk/government/news/pm-appoints-new-chair-of-the-security-vetting-appeals-panel (last accessed 13 May 2020). For the work of the Iraq Fatalities Investigations team see Iraqi Fatality Investigations, *Inquiring into All the Circumstances Surrounding Allegations of Unlawful Killings by British Forces*: https://www.gov.uk/government/collections/iraq-fatality-investigations (last accessed 13 May 2020).

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If unwelcome, judicially-generated and judicially overseen inquiries were one arena in which to fight back, the judicial process proper was another. The different tack government has needed to take to cope with the seriousness of the judicial branch's commitment to the rule of law (as compared with earlier periods) is exemplified in the terms of the Justice and Security Act 2013. Following *Binjam Mohamed*, the Supreme Court in 2011 had, in *Al Rawi and Others* v *the Security Service and Others*,[186] refused a request from the state agencies to rely on closed material in defending themselves against civil claims for damages asserting the (partial) responsibility of the UK for rendition to, and detention and ill-treatment at various foreign secure facilities including Guantanamo Bay. The justices held that there was no power at common law to allow evidence to be admitted in closed proceedings (modelled on an already operative statutory system overseen by the Special Immigration Appeals Commission). This would have permitted sensitive material to be admitted in evidence without it being revealed to the claimants, the whole process being overseen by an independent counsel whose job it would have been to represent the client at one remove from actual contact. Such systems were possible, the Court unanimously considered, and indeed already existed in various niches of practice,[187] but they could only be established by legislation.

The 2013 Act promptly gave the necessary underpinning to a new system under which allegations of ill-treatment/torture could continue to be made as part of civil litigation for damages but their ventilation would be required to take place well away from the claimants and their lawyers.[188] The process has now also been applied to judicial review cases.[189] Clearly a major advantage of such an approach lies in the ability that the Government now has to continue to fight these claims without having any (alleged) dirty linen washed in public. So, to take one pertinent example, in *CF* v *Ministry of Defence and Others*,[190] the claimant's allegations of unlawful detention and torture suffered at the hands of British authorities in Somaliland were met by the Court agreeing to go into closed session, and efforts thereafter to extract even a broad indication of how the Defendants were resisting the allegations proved unavailing. The High Court ruled that the case was essentially only about compensation, and therefore as it did 'not directly affect the liberty of the subject, there [was] no irreducible minimum of disclosure, or necessary minimum revelation by summary or gist of the Defendants' case, obligatory despite the consequences for national security.'[191] No fewer than 54 applications for closed proceedings were made in the period up to June 2018, almost all of them brought by government

186 [2011] UKSC 34; [2012] 1 AC 531.

187 Of which there is a very good general review at *A Guide to the Role of Special Advocates & The Special Advocate's Support Office* (Special Advocates Support Office, 2nd ed, March 2019).

188 Justice and Security Act 2013, s 6. For an early case see *McGartland and Another* v *Secretary of State for the Home Department* [2015] EWCA Civ 686.

189 *R (Sarkandi and Others)* v *Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687; *XH* v *Secretary of State for the Home Department* [2015] EWHC 2932.

190 [2014] EWHC 3171 (QB).

191 *ibid* at [23] *per* Irwin J. cf *R (K, A and B)* v *Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 1261 (Admin); *Belhaj and another* v *Director of Public Prosecutions and another* [2018] UKSC 33.

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or police bodies.[192] And yet despite this a review of the system, promised at the time of enactment,[193] has yet to materialise; indeed although there was to have been a report by 2018 the required reviewer has not (at the time of writing) even been appointed.[194]

Recent years have also seen a growing full-frontal assault on the role of law insofar as it affects military operations abroad. The Defence Committee in its 2017 *Who Guards the Guardians?* report had pulled no punches, deploring the 'explosion of so-called "lawfare" in the United Kingdom' which 'has directly harmed the defence of our Nation,'[195] and welcoming in anticipation any derogation from human rights law that might benefit the military.[196] On this last point, in the immediate aftermath of the Shiner finding of misconduct, Michael Fallon had written to the chair of the Joint Committee on Human Rights Harriet Harman, providing details on a suggestion he had floated earlier – and which the Defence Committee had picked up – that at some point in the future the UK derogate from the Convention so far as overseas military operations were concerned, but not promising it in the immediate future.[197] In May 2019, his replacement but one as Secretary of State for Defence Penny Mordaunt initiated a consultation on the possibility of a law excluding the armed forces from historical prosecutions outside Northern Ireland.[198] In the background, as there has been since David Cameron's entry into government in 2010, there is the continued question of repeal or amendment of the Human Rights Act 1998. Case-law under the Act has insisted on full inquiries with regard to the death of members of the army on training grounds and in friendly fire abroad as well as in situations where their equipment has left them vulnerable: these cases have been as unpopular with the military leadership as the ones discussed in this article.[199]

The Human Rights Act has been the subject of an elaborate set of proposals for amendment from a currently influential think tank.[200] In particular it advocates that parliament should amend the Human Rights Act so that it does not apply to any death before the legislation came into force in October 2000. It also recommended legislation that would require the consent of the Attorney

192 A. McCullough QC, '"Secret Justice": An Oxymoron and the Overdue Review' *UK Human Rights Blog* 28 January 2020 at https://ukhumanrightsblog.com/2020/01/28/secret-justice-an-oxymoron-and-the-overdue-review/ (last visited 15 May 2020).

193 Justice and Security Act 2013, s 13.

194 McCullough, n 192 above.

195 *Who Guards the Guardians?* n 169 above, para 127.

196 *ibid*, paras 113-114.

197 See the Joint Committee's website for further details. The Secretary of State's letter – together with a useful policy rationale annexed – can be found at https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301_SoS_to_Chair_re_Derogation.pdf (last visited 13 May 2020).

198 D. Sabbagh, 'Mordaunt to give veterans amnesty for battle crimes' *The Guardian* 15 May 2019 at https://www.theguardian.com/uk-news/2019/may/15/mordaunt-vows-introduce-amnesty-military-veterans (last accessed 28 August 2019).

199 See *R (Smith)* v *Secretary of State for Defence* [2010] UKSC 29; [2011] 1 AC 1 (on the nature of the Article 2 duties in relation to the death of service personnel abroad).

200 R. Elkins, P. Hennessy and J. Marionneau, *Protecting Those Who Serve* Policy Exchange, 28 June 2019 at https://policyexchange.org.uk/publication/protecting-those-who-serve/ (last accessed 18 May 2020).

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General before a prosecution is brought against former or serving UK forces. The Overseas Operations (Service Personnel and Veterans) Bill, introduced by the Government into the House of Commons on 18 March 2020,[201] envisages a range of time limitations on the ability to sue for alleged past wrongs arising out of foreign engagements, and also countenances amendment of the Human Rights Act so as to ensure its goal is met.[202] There is a requirement in the Bill for the Secretary of State to think about derogation where a 'significant' overseas operation is being contemplated.[203] All of this appears designed to reduce the capacity for judicial engagement in the fields of concern to those pushing for such changes in the law.

CONCLUSION

On 26 February 2010 the Court of Appeal found itself required to give an additional judgment in the *Binyam Mohamed* litigation, mentioned above,[204] that it thought it had concluded some two weeks before. The appeal had originally come before it because the Foreign Office had desired to overturn a High Court ruling that seven redacted sub-paragraphs in a yet earlier judgment on the same matter should now be made public. That issue had been settled conclusively against the government by the unanimous decision of the appeal court judges, a remarkable indication in itself of how far the courts were now willing to intrude into issues of national security.[205]

However, in the course of resolving it, a new dispute was generated. This involved a particular paragraph in the draft judgment of the Master of the Rolls, circulated by long convention to all the parties in advance of delivery of the ruling, about which the lawyers acting for the Secretary of State had then, and highly unusually, raised objections. In an attempt to meet Counsel's concerns and still before the judgment had been released, the Master of the Rolls offered a redraft which then promptly (and not unexpectedly) excited opposition from the other sides. After delivery of judgment (with the modified paragraph) the Court of Appeal received further representations before deciding to make public the original draft, lest

> a damaging myth … develop to the effect that in this case a Minister of the Crown, or counsel acting for him, was somehow permitted to interfere with the judicial process. This did not happen, and it is critical to the integrity of the administration of justice that if any such misconception may be taking root it should be eradicated.[206]

201 Bill 117.
202 *ibid*, clauses 8-11.
203 *ibid*, clause 12, added a new section 14A to the Human Rights Act.
204 See text at nn 136-137 above.
205 The ruling was immediately understood to be very important: Norton-Taylor, n 136 above.
206 *R (Binyam Mohamed)* v *Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158; [2010] 3 WLR 554 at [17]. The original Court of Appeal judgment is at [2010] EWCA Civ 65; [2011] QB 218.

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Hence the unexpected additional judgment. Here are extracts from the draft paragraph to which the Foreign Secretary through his lawyers had taken such exception. It begins by recalling the commitment to human rights that has already been noted here as having been made by the Security Services:

> '… it is … germane that the SyS [Security Services] were making it clear in March 2005, through a report from the Intelligence and Security Committee that 'they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training' (paragraph 9 of the first judgment), indeed they 'denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government' (paragraph 44(ii) of the fourth judgment). Yet that does not seem to be true: as the evidence in this case showed, at least some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK's involvement with the mistreatment of Mr Mohammed by US officials. ….. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning such mistreatment can be relied on…. Not only is there an obvious reason for distrusting any UK Government assurance, based on SyS advice and information, because of previous 'form', but the Foreign Office and the SyS have an interest in the suppression of such information.[207]

It is hardly surprising that the Foreign Office sought to prevent this draft being confirmed, but also perhaps not entirely unexpected, in view of the judicial record we have now reviewed, that it was (ultimately) unsuccessful.

The security state had initially learned to live with the degree of judge-led oversight that had followed the *Malone* v *UK* decision on telephone-tapping in Strasbourg in 1983[208] and which had in time spread from the interception of communication right across the services.[209] As we have seen, in 2005 the human rights angle was seen as a solution to the problem of the ignorance of the services with regard to the Heath directive of 1972. It may be that initially both limbs of the state – political and intelligence – assumed that the judges would not challenge this approach, that despite their newly prominent role they would not push things too far, and this was probably still believed as late as 2005. The story that emerges from the torture controversies of the post-2001 period is that the judges appear, not only individually but collectively, to have forgotten what the government believed that their role was, or if they knew it they rejected it. No longer was there the occasional Lord Gardiner who needed to be out-manoeuvred by his senior colleagues or outplayed by prime ministerial power of appointment. The enquiries were full of Lord Gardiners, and now it was the Lord Parkers who were the outliers (if they were to be had at all). A new place had been found, one in which not only innovative stars like Lord Bingham but also emerging senior figures like (now) Lord Leggatt and more mainstream judges– men like Gage, Gibson, and Newman – could

207 [2010] EWCA Civ 158 at [18].
208 (1984) 7 EHRR 14.
209 See for a recent example, discussed above, the Justice and Security Act 2013, in particular (in this context) s 5.

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feel at home. And when one of these judges found for the authorities, as in the main Sir Thayne Forbes did with his devastating report in *Al-Sweady*, no head of steam was built up on the other side alleging whitewash or cover up, a further stark contrast with Northern Ireland in the 1970s.[210]

If the judges' approach to issues related to torture and state ill-treatment has indeed changed as compared with the 1970s, what can have brought about such a (cultural) shift? Clearly there is now an immediacy to such atrocities when delivered via modern means of communication that makes inaction more difficult than in the past.[211] As the article demonstrates, the growth of international law and its deepening reach into the domestic arena has also been important. This was first announced in the famous *Pinochet* litigation early on in Mr Blair's first term of office,[212] and then further embedded via the ICC's emphasis on complementarity, requiring local systems of accountability to be put in place under threat of ICC intervention if not done or done badly. Critical too, for sure, has been the Human Rights Act and the way that European court judgments generally – both ECHR and EU – have slowly introduced to British judges the expanding limits of the possible, a role also performed by the UK judges' increased awareness of and interaction with other jurisdictions (the US and Commonwealth in particular) where judicial activism has longer traditions, even in the security arena. In each of these regional and international spaces in particular, the prohibition of torture and inhuman and degrading treatment stands at the very core of the ethic of human rights and public accountability on which they are built.

The change goes further though. There is a wider picture, alluded to in passing earlier,[213] of a system of administrative law newly developing in the late 1970s and the early 1980s[214] and of the growth of public law as an autonomous, self-confident community of lawyers with sources of funding for novel litigation and its own rules of engagement. The last of these in particular involves a commitment to independence that, as we have seen, has proved itself capable on occasion of transcending the needs of government clients and even the asserted interests of national security. Behind these lawyers – on both sides – has stood a thriving, independent Bar. A key part of this schema are the active Inns of Court, with the penetration of government circles through the frequent presence of senior lawyers in important political decisions.[215] This has resulted

210 Widgery report, n 41 above. And see now from this more recent era, undoing the damage of that earlier report, *Report of the Bloody Sunday Inquiry* (Chair: Lord Saville of Newdigate) HC 29 (2010-11) (15 June 2010).

211 A point made to great effect by one of the key advocates in the litigation discussed in this article Richard Hermer QC, in a speech at the Ministry of Defence on 15 March 2019 (copy of text with author).

212 *R (Pinochet Ugarte)* v *Bow Street Metropolitan Stipendiary Magistrates (No 2)* [1999] UKHL 1; [2000] 1 AC 119.

213 See text in paragraph at n 48 above.

214 Culminating in reforms to be found in the Supreme Court Act 1981: see *O'Reilly* v *Mackman* [1983] 2 AC 237.

215 During the period under discussion here, Home Secretaries who have also been barristers have included Kenneth Clarke, Michael Howard, David Waddington and Leon Brittan. Lord Chancellors were by tradition drawn from the legal professions but since the establishment of the Ministry of Justice, three Secretaries of State in that Department (combining that post with that

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in ministers and lawyers whose loyalty is shared between their two professional homes: the one in Whitehall fleeting and insecure, the other in the Temple permanent and loyal. One might be a 'here today; gone tomorrow' Minister[216] but once a Bencher always a Bencher.

These background developments do not, however, tell the full story. However charismatic they might be, individual judges do not drive deep change in attitude by dint of their personality. The Bar has been independent and self-confident for centuries, and always supportive of even the most radical of its barristers. It is altogether too simplistic to see the judges as having moved from being passive in the field of public law during the 1970s and 1980s to being (suddenly? mysteriously?) active in the 2000s. One of the commonplaces of critical scholarship during the earlier period was how politically *activist* the higher judiciary were, how willing to disrupt governmental agendas in the name of due process or *Wednesbury* unreasonableness. John Griffith's famous Chorley lecture attacking the judges was delivered in 1978.[217] Patrick McAuslan's radical critique of planning law was published in 1980.[218] The first edition of Harlow and Rawlings's innovative textbook appeared in 1984.[219] The controversial cases about judicial control of government came thick and fast during the second half of the 1970s, at exactly the time the judges were proving themselves so compliant over Ireland.[220] The dates tell us something about this, and about the nature of judicial power at this time: it was largely about controlling a Labour administration intent on radical engagement of a transformative sort. The judiciary were going through one of their periods of anxiety about the radical potential of a Labour government and reacted accordingly.[221] But if the issue was one of national security, not even a Labour Home Secretary had anything to fear.[222]

So what happened to this judicial activism on wider social and economic questions that was such a feature of the mid 1970s? It disappeared during the long period of Tory hegemony between 1979 and 1997 when passivity on the national security side[223] was joined by restored deference on matters economic.[224] And when 'new' Labour reemerged as a political force in the

of Lord Chancellor) have been barristers: Lord Falconer, Kenneth Clarke and Robert Buckland. Many lawyers have of course had prominent political careers that involved neither of these offices, for example Tony Blair, Margaret Thatcher and Geoffrey Howe.

216 As the BBC's Robin Day once famously said to the then Secretary of State for Defence Sir John Nott, provoking him to leave the studio where he was being interviewed, at https://www.youtube.com/watch?v=ln3SpXXYTHY (last accessed 16 June 2020).

217 J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1.

218 P. McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon Press, 1980).

219 C. Harlow and R. Rawlings, *Law and Administration* (London: Weidenfeld and Nicolson, 1984).

220 *Congreve* v *Secretary of State for the Home Department* [1976] 1 QB 629; *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014.

221 See from an earlier era E. Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929). Hewart was lord chief justice at the time he wrote this attack on the 'despotism' of administrative processes in the newly centralising state.

222 *R (Hosenball)* v *Secretary of State for the Home Department* [1977] 1 WLR 766.

223 *Secretary of State for the Defence* v *Guardian Newspapers* [1985] AC 339; *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] 1 AC 374 (on the result if not the reasoning); *Attorney General* v *Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

224 *Nottinghamshire County Council* v *Secretary of State for the Environment* [1986] AC 240; *R (Hammersmith and Fulham London Borough Council)* v *Secretary of State for the Environment* [1991] 1 AC 521.

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mid-1990s, entering government in 1997, the judges found a party so centrist that far from being a threat to the established order it was a potentially valuable ally in the effort their own leadership was then making to throw off the burdens of the past (both worsened as well as epitomised by the poor public reception accorded the *Spycatcher* and miscarriage of justice affairs). Human rights proved an irresistible vehicle through which to demonstrate change. In March 1993 the then Master of the Rolls Sir Thomas (afterwards Lord) Bingham, gave his famous lecture 'The European Convention on Human Rights: Time to Incorporate'.[225] The day before the then leader of the Labour opposition John Smith had signalled his support for human rights,[226] a position enthusiastically endorsed by his successor Tony Blair.[227] Even the common law began to rediscover its roots in fundamental rights.[228] Labour and the judges were on the same side. And for both, if human rights did not protect from torture then what was the point of them?

The judges had certainly changed too, making them individually and collectively more agreeable to this pivot to rights. The anthropologist of law might see a collective of men (and a few women) who had not done military service (as their predecessors in the 1970s would invariably have done), who had generally no memory of what war is like (as once again the 1970s judges had) and who saw in their service as judges an opportunity to do the kind of thing that they were taught in their law schools was a public good – securing the independence of the judiciary; insisting on the need for accountability at all levels of government, including through – post 1998 – ensuring respect for human rights. All this dovetailed nicely with an emerging Labour hegemony that had made the (rule of) law and human rights central to it. Promoting both may have been part of the price that the Labour administrations of Tony Blair and Gordon Brown (and the early Conservatism of David Cameron) were prepared to pay (insofar as they understood it as a consequence) to show the freshness of their approach to government as compared to the party leaderships that had preceded them.[229]

The judges may have taken this normative dimension to new Labour enthusiastically to heart, but it was never entirely clear, the first year or two apart, that its architects ever did. Blair appeared to come to regret the breadth of the powers his government had invested in the courts under the rubric of human

The courts could still be activist if it was a radical Labour local administration that was being challenged: *Bromley London Borough Council* v *Greater London Council* [1983] AC 768.

225 T. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 106 *Law Quarterly Review* 390.

226 In a speech to the pressure group Charter 88 on 1 March 1993.

227 See *Bringing Rights Home* (Labour Party, 1996).

228 See now M. Elliot and K. Hughes (eds), *Common Law Constitutional Rights* (London: Hart Publishing, 2020).

229 See for example *Belhaj and Another* v *Straw and others; Rahmatullah* v *Ministry of Defence and Another* [2017] UKSC 3; [2017] AC 964; *R (Al-Saadoon and Another)* v *Secretary of State for Defence* [2008] EWHC 3098 (Admin) leading to *Al-Saadoon and Mufdhi* v *United Kingdom* (2010) 51 EHRR 9 (Fourth Chamber).

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rights.[230] For his part, as prime minister Gordon Brown hankered after a 'Bill of Rights for Britain'[231] that might well have had the effect of reducing the jurisdictional reach of the Human Rights Act in the way for which Policy Exchange now argue.[232] As we have seen, it was the (in the early days) neo-Blairite David Cameron that killed off the Gibson enquiry that the Conservatives had committed themselves to in opposition and which had been established early in the coalition's term of office. It may indeed be the case as suggested above that the Security Services believed that they had happened upon, in their new-found commitment to human rights and judicial oversight, an attractive way of bringing their operations up-to-date with the changing mood of the country while not sacrificing operational effectiveness – a 'cake-and-eat-it' approach that might produce occasional reverses[233] but was on the whole worth having. Do they now believe this has gone too far? Do the armed services? Certainly the leadership of the latter has not been inclined to accept a human rights approach to military engagement which they view as wholly inappropriate to conflict (whether full war or counter-terrorist in aspect), and, as is well-known, the military has long had great influence so far as getting its political message across to politicians and the general public is concerned. Their antagonism to human rights goes as far back as the 1950s, when the Colonial Office was resisting the European Convention's possible impact on military operations abroad.[234] If the country is indeed swerving back to a past where affording a *carte blanche* to executive power in the field of security is once again to be the norm, we may be about to see the executive set itself the task of taming these out-of-date judges, men and women whose normative assumptions have been long left behind by 'the real world'.

This remains to be seen. It is right to end on the most recent case of all, one that brings us back to the very start. Might the victims of the inhuman and degrading/torture that generated *Ireland* v *UK* be about to get their day in court? On 20 September 2019 the Northern Ireland Court of Appeal found that the Chief Constable's promise of a proper inquiry, made to interested parties, had given rise to a legitimate expectation that such an inquiry would be forthcoming, and what had taken place by way of inquiry subsequently had not been sufficient.[235] The majority found that it was right that the treatment meted out to the claimant should now be regarded as torture.[236] The response this case produces will be further evidence of the direction in which the law is headed.

230 An example, of which there are others, is N.Temko and J. Doward, 'Revealed: Blair attack on human rights law' *The Observer* 14 May 2006 at https://www.theguardian.com/politics/2006/may/14/humanrights.ukcrime (last accessed 18 May 2020).

231 See *The Governance of Britain* Cm 7170 (July 2007) ch 4.

232 Elkins, Hennessy and Marionneau, n 200 above.

233 For example *Liberty* v *Secretary of State for Foreign and Commonwealth Affairs* [2015] UKIPTrib 13 77H.

234 A.W.B. Simpson, *Human Rights and the End of Empire* (Oxford: OUP, 2001).

235 *McGuigan and McKenna* n 11 above at [116 (vi)] of the majority judgment (Morgan LCJ and Stephens J; Sir Donnell Deeny dissenting). There is a useful official summary of the decision at https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Francis%20McGuigan%20and%20Mary%20McKenna%20%28The%20Hooded%20Men%29.pdf (last visited 18 May 2020).

236 *ibid* at [116(i)].

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