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# Accountability, denial and the future-proofing of British torture

RUTH BLAKELEY AND SAM RAPHAEL

When powerful liberal democratic states are found to be complicit in extreme violations of human rights, how do they respond, and why do they respond as they do? This article explores the various responses of the British state to revelations that UK intelligence and security services colluded in the secret detention, rendition and torture of terror suspects during the first years of the ‘war on terror’. These responses, by successive governments, have been characterized by denial, obfuscation and systematic attempts to obstruct appropriate investigation and avoid accountability. Initially, they flatly denied torture ever took place. As evidence mounted, they prevaricated and downplayed the severity of the extent of the torture, or rationalized and justified its use in relation to what they argued was an existential threat posed by terrorism. Sometimes, they partially admitted the facts; but for the most part, their response was to obstruct investigation and limit accountability. Here, we examine these responses and attempt to account for them within the broader context of British security practices, both historically and today.

A number of scholars have addressed broader questions of human rights abuses by states and the scope for accountability.<sup>1</sup> As Neil J. Mitchell has argued, the literature on norm compliance has tended to focus on the presence of mechanisms for accountability as a predictor for the reduced likelihood of states committing human rights violations in the first place.<sup>2</sup> However, little attention has been paid to the effectiveness of those mechanisms after violations occur. Accountability depends on both ‘a timely and accurate account of actions and policies and how they met or fell short of relevant standards of assessment’, and also ‘a requirement that consequences follow for those responsible for wrongful actions or policies’.<sup>3</sup> With reference to case-studies from historical and more recent contexts, Mitchell argues that when democratic leaders are faced with allegations of involvement in human rights abuses, they tend to react in self-interested and opportunistic ways,

<sup>1</sup> Margaret Keck and Kathryn Sikkink, *Activists beyond borders: advocacy networks in international politics* (Ithaca, NY: Cornell University Press, 1998); Thomas Risse, Stephen Ropp and Kathryn Sikkink, eds, *The power of human rights: international norms and domestic change* (Cambridge: Cambridge University Press, 1999); Todd Landman, *Protecting human rights: a comparative study* (Washington DC: Georgetown University Press, 2005).

<sup>2</sup> Neil J. Mitchell, *Democracy’s blameless leaders. From Dresden to Abu Ghraib: how leaders evade accountability for abuse, atrocity, and killing* (New York: New York University Press, 2012), pp. 3–4.

<sup>3</sup> Mitchell, *Democracy’s blameless leaders*, p. 27.

taking all measures to evade accountability. Democratic leaders are motivated both by self-preservation—saving face, retaining their positions—and by their desire to continue to govern, which in turn depends on maintaining the loyalty of officials, especially security officials. This is achieved through avoiding punishment of those responsible, or, when necessary, enacting it at the lowest plausible level of the command chain.<sup>4</sup> Mitchell points to four techniques for evading accountability: *denial*—of what happened or of responsibility for it; *delay*—of accountability, for example through instigating multiple inquiries, which tends to generate confusion over the details; *delegation*—of responsibility down the chain of command to those at the lowest plausible level; and *diversion*—admitting responsibility, but questioning the standards applied to evaluate the action.<sup>5</sup>

Our own research on British collusion in torture in the ‘war on terror’ reinforces Mitchell’s findings. Indeed, it reveals evidence of all the techniques for evasion of accountability set out above. But this work goes further, to argue that the responses of successive UK leaders were not aimed simply at saving face and preserving the capacity of leaders to govern. The various forms of denial and obstruction in this case are also designed to ensure that collusion can continue uninterrupted. A core concern of intelligence officials and ministers has been to prevent any process that would lead to a comprehensive prohibition on involvement in operations where torture and cruel, inhuman and degrading treatment (CIDT) are a real possibility. Moreover, as we have argued elsewhere, contemporary forms of British involvement in torture emerge from, and are deeply shaped by, a long history of colonial and post-colonial use of torture by the British state.<sup>6</sup>

Our focus here is primarily on collusion in torture by the UK’s intelligence agencies, given that past scholarly work has tended to focus on the role of military personnel in the abuse of prisoners, especially in Iraq,<sup>7</sup> or on the relationship between interrogation and torture, historically and in the ‘war on terror’.<sup>8</sup> Far less attention has been paid to the role of British intelligence services in torture, not least because of the high levels of secrecy surrounding it, which makes research difficult.<sup>9</sup> The work presented here, based on ten years of researching the CIA’s Rendition, Detention and Interrogation programme, including UK involvement, fills this gap.

We begin with a brief overview of British torture in the ‘war on terror’, and situate this in the historical context of previous collusion in torture by British

<sup>4</sup> Mitchell, *Democracy’s blameless leaders*, pp. 23–4, 188–9.

<sup>5</sup> Mitchell, *Democracy’s blameless leaders*, pp. 27–30.

<sup>6</sup> Ruth Blakeley and Sam Raphael, ‘British torture in the war on terror’, *European Journal of International Relations* 23: 2, 2016, pp. 243–66.

<sup>7</sup> Huw Bennett, ‘The Baha Mousa tragedy: British Army detention and interrogation from Iraq to Afghanistan’, *British Journal of Politics and International Relations* 16: 2, 2014, pp. 211–29; Andrew Williams, *A very British killing: the death of Baha Mousa* (London: Vintage, 2013); Owen David Thomas, ‘Security in the balance: how Britain tried to keep its Iraq War secrets’, *Security Dialogue*, publ. online May 2019, <https://doi.org/10.1177/0967010619839544>. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 31 Jan. 2020.)

<sup>8</sup> Samantha Newbery, *Interrogation, intelligence and security: controversial British techniques* (Manchester: Manchester University Press 2015), and ‘The UK, interrogation and Iraq, 2003–8’, *Small Wars and Insurgencies* 27: 4, Aug. 2016, pp. 659–80.

<sup>9</sup> Although see the earlier work of Alex Danchev, ‘Accomplicity: Britain, torture and terror’, *British Journal of Politics and International Relations* 8: 4, 2006, pp. 587–601.

security services. It is now clear that British intelligence was implicated in widespread, systematic abuses after 9/11, and that these practices were known about at the highest levels. As we have argued previously, the involvement of UK officials in such practices took a particular form, shaped by the desire to maintain clean hands and thereby plausibly sustain a ‘narrative of denial’.<sup>10</sup> The recent findings of parliament’s Intelligence and Security Committee (ISC), which provide the most detailed account to date of the extent of British involvement, support our argument in this regard. We then explore the various steps the United Kingdom has taken to deny its involvement and to constrain investigation and limit accountability. We demonstrate that even where the UK government has permitted investigations, none of these has delivered an adequate reckoning. Instead, they have become implicated in what we term the machinery of denial, and are instrumental in carving out spaces in which certain actors, including government ministers, can be exempted from the anti-torture norm in future. Finally, we explore the contours of contemporary practice by the British state. We argue that, while ministers claim that the oversight regime ensures compliance with strict legal and ethical rules, in reality the door remains—deliberately—wide open for continued British collusion in torture. Worryingly, available evidence suggests that such collusion is not merely hypothetical. The past and the present are entwined: it is only because of the refusal to acknowledge the full extent of ‘war on terror’ collusion—and the simultaneous prevention of a comprehensive account of this being published—that current forms of complicity can continue to sit at the heart of British intelligence and security practices.

### **British torture in the ‘war on terror’**

The use of torture by British security services is not new.<sup>11</sup> Indeed, the United States and United Kingdom have a long history of collusion in torture, within the contexts of both imperial expansion and resistance to anti-imperialist struggles.<sup>12</sup> Elkins, for example, illustrates how both British officials and colonial agents acting for the British state used torture widely in efforts to crush the Mau Mau insurgency in Kenya in the 1950s.<sup>13</sup> Likewise, torture was used directly by British officials in attempts to forestall independence in Malaya (1948–60), in Cyprus

<sup>10</sup> Blakeley and Raphael, ‘British torture in the war on terror’.

<sup>11</sup> Ruth Blakeley, ‘Why torture?’, *Review of International Studies* 33: 3, 2007, pp. 373–94; Blakeley and Raphael, ‘British torture in the war on terror’.

<sup>12</sup> Leslie Bethell, *The Cambridge history of Latin America* (Cambridge: Cambridge University Press, 1984), pp. 8–43; Caroline Elkins, *Britain’s gulag: the brutal end of empire in Kenya* (London: Cape, 2005); David Killingray, *A plague of Europeans: westerners in Africa since the fifteenth century* (London: Penguin, 1973), and ‘The maintenance of law and order in British colonial Africa’, *African Affairs* 85: 340, 1986, pp. 411–27; Elisabeth Wood, *Insurgent collective action and civil war in El Salvador* (Cambridge: Cambridge University Press, 2003); Pierre Vidal-Naquet, *Torture: cancer of democracy* (Harmondsworth: Penguin, 1963); Ruth Blakeley, *State terrorism and neoliberalism: the North in the South* (London: Routledge, 2009); Martha Huggins, *Political policing: the United States and Latin America* (Durham, NC: Duke University Press, 1998); Darius Rejali, *Torture and democracy* (Princeton and Oxford: Princeton University Press, 2007); Douglas Valentine, *The Phoenix Program* (New York: Authors Guild Back-inPrint.com, 2000).

<sup>13</sup> Elkins, *Britain’s gulag*.

(1955–9) and in Aden (1963–7).<sup>14</sup> Moreover, within just a few years, similar practices were deployed much closer to home: in early 1971, the British government instigated the use of internment without trial in Northern Ireland to contain spiralling sectarian violence. This was accompanied by the development and routine use of the so-called ‘Five Techniques’: sleep deprivation; hooding; subjecting to noise; food and drink deprivation; and stress positions.<sup>15</sup> The controversy around these methods fed into the development of a network of contemporary policy and legal constraints on the use of violence by UK officials outside military theatres of war. New guidelines were issued by the Joint Intelligence Committee in June 1972. Authorized directly by Prime Minister Edward Heath, the guidelines made clear that the use of coercive interrogations by UK personnel would henceforth be banned. This commitment remains a foundation stone in declaratory policy regarding the treatment of prisoners, and provides a clear backdrop against which UK agencies have had to operate in the post-9/11 era.

Yet it has now been definitively established that British intelligence agencies were deeply and directly involved in the abuse of prisoners throughout the first years of the ‘war on terror’. The evidential record of UK complicity in torture in the ‘war on terror’ has been compiled over a number of years through the painstaking work of journalists, NGOs and parliamentarians. Our previous work on the subject put the matter beyond any reasonable doubt,<sup>16</sup> and was used by the ISC during its four-year inquiry into the mistreatment and rendition of detainees. Taking evidence from us in January 2017,<sup>17</sup> and reviewing over 40,000 documents (many of which remain classified and unseen by us), the ISC published two reports into detainee mistreatment and rendition in June 2018. The first set out the involvement of British intelligence in prisoner mistreatment between 2001 and 2010, and presented devastating findings, concluding that the agencies ‘tolerated actions, and took others, that we regard as inexcusable’.<sup>18</sup> Importantly, involvement was not limited to a small number of isolated infractions, but was widespread and carried out with what seems to have been at least some knowledge on the part of senior officials. Indeed, while the intelligence agencies maintained that they were not aware of the systematic mistreatment of prisoners by foreign partners, the ISC was clear that the multiple reports from personnel on the ground, combined with media and other reporting, make it ‘difficult to comprehend how those at the top of the office did not’ have knowledge of the situation.<sup>19</sup>

<sup>14</sup> Mark Curtis, *Web of deceit: Britain's real role in the world* (London: Vintage, 2003), pp. 334–9.

<sup>15</sup> Ian Cobain, *Cruel Britannia: a secret history of torture* (London: Portobello, 2012).

<sup>16</sup> Blakeley and Raphael, ‘British torture in the war on terror’; Sam Raphael, Crofton Black, Ruth Blakeley and Steve Kostas, ‘Tracking rendition aircraft as a way to understand CIA secret detention and torture in Europe’, *International Journal of Human Rights* 20: 1, 2015, pp. 78–103; Sam Raphael, Crofton Black and Ruth Blakeley, *CIA torture unredacted* (London: Rendition Project and Bureau of Investigative Journalism, 2019), <https://www.therenditionproject.org.uk/unredacted/the-report.html>.

<sup>17</sup> We were the only witnesses to the inquiry who neither were, nor had been, either ministers or intelligence officials. Several former prisoners and their lawyers met with the committee, which was directed to their existing public statements.

<sup>18</sup> Intelligence and Security Committee (ISC), *Detainee mistreatment and rendition: 2001–2010*, HC1113 (London: ISC, 2018), p. 5.

<sup>19</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 4. Indeed, the extent to which the UK intelligence community even acts autonomously from its US partners has been increasingly brought into question, espe-

Much of this involvement took place within the context of a systematic programme of secret detention, rendition and torture undertaken by the CIA, in conjunction with allies from around the world. Our broader work has mapped the evolution and operational architecture of CIA torture, as well as the sheer brutality of the abuses which took place, and stands as the definitive public account of the programme.<sup>20</sup>

Britain was clearly implicated in these abuses. The agencies knew of the existence of CIA ‘black’ sites, with internal memos referencing “‘black’ facilities’ and ‘other centres where the chances of complaint from allied representatives are slight’.<sup>21</sup> Nevertheless, intelligence and questions continued to be passed to the CIA for use in interrogations, despite knowledge of the secret detention and torture to which prisoners were being subjected. For example, both the Security Service (MI5) and the Secret Intelligence Service (SIS, also MI6) supplied questions for the interrogation of Khaled Sheikh Mohammed while he was held and tortured in a Polish black site in 2003, and the Government Communications Headquarters approved the use of its intelligence for his questioning, all despite knowledge that he was being mistreated while held in a secret location.<sup>22</sup> Likewise, although by May 2002 SIS was aware that Abu Zubaydah was held in a black site in Thailand, and was being tortured, British intelligence continued to send the CIA questions to be used in his interrogation.<sup>23</sup>

These two cases were not anomalous. The ISC found at least 232 cases in which UK officials supplied questions or intelligence to partners after they became aware, or suspected, that the detainees in question were being mistreated. In a further 198 cases, British intelligence received information from partners when it was known, or suspected, that such intelligence came from interrogations under torture. Binyam Mohamed, for example, was tortured in Moroccan detention as part of the CIA’s programme, in part on the basis of intelligence and questions supplied by British agencies.<sup>24</sup> Mohamed has given a detailed account of his torture in Morocco during the period in which the British were supplying questions.<sup>25</sup> In another case, the ISC found that an SIS officer was present while a prisoner was transferred from Bagram Airbase in Afghanistan in a coffin-sized box, which was sealed and then loaded onto a truck to be taken to a waiting US aircraft.<sup>26</sup> It has since been reported that this prisoner, codenamed CUCKOO in the ISC report, was Ibn al-Sheikh al-Libi, who was transferred by the CIA from

cially since the Snowden revelations.

<sup>20</sup> Raphael et al., *CIA torture unredacted*.

<sup>21</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 52–4.

<sup>22</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 54.

<sup>23</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 42. This case is currently under investigation by the Metropolitan Police for possible criminal conduct on behalf of British intelligence officials. See Owen Bowcott, ‘Police investigating role of UK officers in torture of Al-Qaida suspect’, *Guardian*, 31 March 2019, <https://www.theguardian.com/law/2019/mar/31/police-investigating-role-of-uk-officers-in-torture-of-al-qaida-suspect>.

<sup>24</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 40–41.

<sup>25</sup> Clive A. Stafford Smith, ‘Memo: FBI involvement in abuse of Binyam Mohammed (Al Habashi)’ (Reprieve, 24 Aug. 2005), <https://www.therenditionproject.org.uk/documents/RDI/050824-Reprieve-Account-of-BM-Detention-and-Rendition.pdf>, p. 9.

<sup>26</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 32.

Bagram to Egypt, whereupon he was subjected to severe torture.<sup>27</sup> The UK was directly implicated in these abuses, with the ISC finding that ‘MI5 continued to pass questions for [al-Libi’s] interrogation after his rendition to [Egypt] and both SIS and MI5 received reports from subsequent interrogations’.<sup>28</sup>

Importantly, the hundreds of cases of collaboration identified by the ISC point to a clear set of systematic institutional practices, with British involvement in the mistreatment of prisoners known or suspected both by individual personnel and by head office. For example, in one case an SIS officer reported to head office in September 2004 the conditions of detention at a US facility in Iraq, ALNWICK, where prisoners were held in small wooden crates, each ‘slightly less than 200cm long, about 180cm high and 120cm wide’.<sup>29</sup> When a second SIS officer arrived at the facility in January 2005, he found what he described as a ‘torture centre’. In testimony to the ISC, this officer stated that

ALNWICK itself was a place where the US took detainees and subjected them to various things which I regard as torture and I think in most people’s understanding of the term is torture. So, most notably, when people were brought there, they were put in wooden crates, which were designed so that you could neither lie down nor stand up and they were obviously dark.<sup>30</sup>

This officer’s assessment was clearly not anomalous, and British intelligence were aware at an institutional level of mistreatment at the facility. Moreover, regardless of any legal duty upon British personnel to intervene meaningfully with their US partners to protest against the practices observed, SIS and Ministry of Defence (MoD) lawyers simply formulated a new policy in 2005 forbidding interviews to take place at ALNWICK. Furthermore, the ISC found that ‘in practice this meant that detainees were transferred to an adjacent Portakabin at ALNWICK where conditions were “to UK standards” to be interviewed, but following the interview they were simply taken back to ALNWICK’. And, crucially, it was the wording of the policy originating from head office which facilitated such practice:

I think it must, there must have been enough ambiguity in the way the policy was communicated—I’m not questioning the policy—but there must have been enough ambiguity in the communication of it to allow that to happen ... I’m pretty sure that, even in that environment, if you have a written legal advice saying, ‘Do not do this’, we will not just go and do it anyway.<sup>31</sup>

The ISC also found that British intelligence was deeply involved in the practice of unlawful prisoner transfers (renditions), even though such operations often involved the severe mistreatment of the prisoners being transferred,<sup>32</sup> and even where such transfers were to states where the risk of further torture or

<sup>27</sup> Ian Cobain and Clara Usiskin, ‘Exclusive: UK spy agencies knew source of false Iraq War intelligence was tortured’, *Middle East Eye*, 6 Nov. 2018, <https://www.middleeasteye.net/news/uk-rendition-ibn-al-sheikh-al-libi-iraq-war-806970986>.

<sup>28</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 32.

<sup>29</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 35.

<sup>30</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 36.

<sup>31</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 36–7.

<sup>32</sup> Raphael et al., *CIA torture unredacted*, pp. 18–19.

other mistreatment was high or near certain.<sup>33</sup> British intelligence knew about, suggested, planned, agreed to, paid for others to conduct or otherwise enabled rendition operations in more than 70 cases.<sup>34</sup>

Again, it is clear that British involvement in these operations was understood at the highest levels. The then foreign secretary Jack Straw personally authorized the rendition of Abdel Hakim Belhadj and Fatima Boudchar to Libya,<sup>35</sup> and the then director of counterterrorism at SIS, Mark Allen, explicitly congratulated his counterpart in Libya on the ‘safe arrival’ of Belhadj and confirmed direct British access to the detainee’s interrogations.<sup>36</sup> In cases such as these, the operations were clearly unlawful and, given institutional knowledge of the human rights records of receiving states, the agencies could not have reasonably concluded otherwise. Indeed, the documentary record makes clear that senior officials were well aware of the legal problems associated with such operations and the need to conceal British involvement. In one case, for example, SIS was asked by a liaison partner to make a financial contribution for a rendition. Subsequent emails between SIS and MI5 indicate that MI5 was reluctant to provide funding given the ‘difficult legal circumstances’, but finally agreed to assist so long as the payment would ‘be made after the event [so that it could be] argued it was not specifically for the flight’.<sup>37</sup> In another case, SIS paid a large share of the costs of rendering two men in October 2004, in an operation Straw authorized. Although SIS fed in questions to subsequent interrogations of the two men, they ‘chose not to seek direct access, due to HMG concerns about publicly exposing British involvement in “forced deportations” and detentions’.<sup>38</sup>

The ISC’s findings, based on a reading of significant amounts of classified documentation to which we have not had access, demonstrate as never before the sheer extent of British involvement in torture. Nonetheless, they also confirm our previous findings concerning both the scope of this involvement and what we have called the peculiarly British approach to torture during this period—an approach shaped largely by the consequences of, and public reaction to, earlier forms of (more direct) British torture. The contemporary approach, we have argued, ‘has been characterised by a cautious pantomime of legal and procedural adherence to international legal commitments and earlier policy statements’, which has become ever more central to the public positioning around liberal norms, security practices and the challenges of contemporary security.<sup>39</sup> Procedurally, this has played out through the development of clear parameters within which intelligence personnel

<sup>33</sup> Sir Peter Gibson, *The report of the detainee inquiry* (London: The Stationery Office, 19 Dec. 2013), <https://www.therenditionproject.org.uk/documents/RDI/131219-Detainee-Inquiry-Report.pdf>, pp. 34–6.

<sup>34</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 88–90, 99–101.

<sup>35</sup> Rajeev Syal and Ian Cobain, ‘Jack Straw faces call to give evidence over role in Libyan rendition’, *Guardian*, 11 May 2018, <https://www.theguardian.com/politics/2018/may/11/jack-straw-give-evidence-role-libyan-rendition-abdel-hakim-belhadj-fatima-boudchar>.

<sup>36</sup> Memo from Mark Allen, SIS, to Musa Kusa, Department of International Relations and Collaboration, Libya, 18 March, 2004, <https://www.therenditionproject.org.uk/documents/RDI/040318-MI6-Memo-Blair-Trip-and-Belhadj-Rendition.pdf>.

<sup>37</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 88.

<sup>38</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 89.

<sup>39</sup> Blakeley and Raphael, ‘British torture in the war on terror’, pp. 244–5, 251.

would need to act. These dictated that officials should neither have the legal responsibility for prisoners (they would rarely, if ever, be the formal detaining authority), nor be physically present during periods of mistreatment and torture. With these caveats in place, involvement in abusive practices was deemed legitimate, ensuring that the agencies could remain full partners of the United States and other allies, including in the use of torture, rendition and illegal detention, while at the same time continuing to insist that the UK counterterrorism effort was underpinned by a robust commitment to human rights.<sup>40</sup>

In line with these conclusions, the ISC found that at no point did British intelligence have detaining authority over individuals, that there were no instances of direct physical mistreatment by UK intelligence officials, and that there were only two cases where they were involved in the mistreatment perpetrated by others.<sup>41</sup> In all other cases, British personnel were absent while the torture took place. Indeed, at times officials left the room specifically for the period of the torture, before returning again to continue their involvement in the interrogation.<sup>42</sup> Similarly, the ISC found no evidence of British intelligence undertaking rendition operations unilaterally; instead, they supported others in doing so—through planning and coordination, including the provision of funding and locational intelligence—in ways which ‘amount to simple outsourcing of action which they knew they were not allowed to undertake themselves’.<sup>43</sup>

However, even this is not the full story. Dogged investigation by a number of researchers, and the subsequent growth of documentary evidence, have increasingly required the United Kingdom to respond to allegations of complicity in torture. As we argue in the next section, the response of the state to the mounting evidence of involvement in human rights abuses is itself shaped by a desire to sustain both a narrative of denial regarding the past—‘Britain neither tortures, nor facilitates torture’—and the freedom to continue colluding in torture where deemed necessary. Although there is a range of individual state practices, each of which plays out in different ways depending on the situational context, overall we argue that together they represent more than the sum of their parts. There is a systematic dimension which has characterized UK responses to allegations of collusion, which—considered as a whole—have clearly designed within them the imperative to deny a full reckoning with the torturous past. We identify a broad *machinery of denial*: a set of durable, interconnecting institutional practices enacted by the state, across government agencies and departments, across administrations, and both contemporaneously and *ex post facto*. We turn now to trace the architecture of this machinery.

<sup>40</sup> Blakeley and Raphael, ‘British torture in the war on terror’, pp. 252–3.

<sup>41</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 21–8.

<sup>42</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 34; Gibson, *The report of the detainee inquiry*, p. 28; Human Rights Watch, *Cruel Britannia: British complicity in the torture and ill-treatment of terror suspects in Pakistan* (New York, 24 Nov. 2009), <https://www.therenditionproject.org.uk/documents/RDI/091124-HRW-Cruel-Britannia.pdf>.

<sup>43</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 90.

## The machinery of denial

### *Suppressing evidence*

Senior intelligence officials and ministers have, for more than 15 years and in the face of demonstrable evidence of collusion, outright refused to acknowledge any involvement in torture. In some cases, such denials were clearly lies (by omission if nothing else). For example, in response to the initial allegations of UK involvement in CIA rendition operations,<sup>44</sup> Foreign Secretary Jack Straw was asked by the Select Committee on Foreign Affairs in December 2005 to

give a categorical statement to this Committee now that this government is not involved in any type of rendition, that we are not assisting, with the Americans, in rendition of their suspects or their personnel and that we are definitely not involved in any rendition of anyone for the purposes of being taken to another country to a secret site, or whatever, for the purposes of torture?

It is now known that, by this point, Straw had personally authorized involvement by SIS in numerous rendition operations, many of which were to countries where the risk of torture or other mistreatment was significant.<sup>45</sup> Nonetheless, he issued a flat denial:

First of all on your last point [involvement in rendition for torture], Eric, yes, I absolutely categorically can give you that undertaking ... Unless we all start to believe in conspiracy theories and that the officials are lying, that I am lying, that behind this there is some kind of secret state which is in league with some dark forces in the United States ... there simply is no truth in the claims that the United Kingdom has been involved in rendition full stop, because we have not been, and so what on earth a judicial inquiry would start to do I have no idea. I do not think it would be justified.<sup>46</sup>

Similarly, Prime Minister Tony Blair insisted in 2005 that

the notion that I, or the Americans, or anybody else approve or condone torture, or ill-treatment, or degrading treatment, that is completely and totally out of order in any set of circumstances ... I have absolutely no evidence to suggest that anything illegal has been happening here at all, and I am not going to start ordering inquiries into this, that and the next thing.<sup>47</sup>

Senior intelligence officials have also long denied involvement in torture. In oral testimony to an earlier configuration of the ISC in November 2006, the Chief of SIS Sir John Scarlett admitted that the agency had directly assisted 'a very small number of renditions where we were certain that there was no risk of torture or CIDT, and

<sup>44</sup> Ian Cobain and Luke Harding, 'UK "breaking law" over CIA secret flights', *Guardian*, 5 Dec. 2005, <https://www.theguardian.com/politics/2005/dec/05/uk.usa>.

<sup>45</sup> Gibson, *The report of the detainee inquiry*, pp. 34–6. Although full details of which operations were authorized by Straw are still classified, he has admitted to authorizing involvement in Belhadj's rendition. See Syal and Cobain, 'Jack Straw faces call to give evidence'.

<sup>46</sup> Jack Straw, 'Examination of witnesses (questions 20–39)', House of Commons Select Committee on Foreign Affairs, *Minutes of evidence*, 13 Dec. 2005, <https://publications.parliament.uk/pa/cm200506/cmsselect/cmcaff/768/5121304.htm>.

<sup>47</sup> 'Rendition: Blair in quotes', BBC News, 19 Jan. 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/4627360.stm](http://news.bbc.co.uk/1/hi/uk_politics/4627360.stm).

where the circumstances would permit this assistance without the breach of our country's international obligations'. However, Scarlett was adamant that SIS had never assisted any renditions into so-called 'black facilities' ... [nor] renditions to third countries, i.e. renditions to countries other than the USA or the detainee's country of origin ... [nor] renditions to the detainee's country of origin where there was a real risk of CIDT or torture, or which would breach the UK's international obligations.<sup>48</sup>

It was this misleading of the public record by SIS (with or without the connivance of the ISC) which enabled the committee to conclude in 2007 that UK intelligence agencies had overseen only minor, isolated infractions of UK policy, and overall had not acted improperly. There was, it concluded, 'no evidence that the UK Agencies were complicit in any "Extraordinary Rendition" operations', where these involved a 'real risk of torture or cruel, inhuman or degrading treatment'.<sup>49</sup> Likewise, the ISC accepted the agencies' now demonstrably false claims that, with regard to sharing intelligence on specific suspects with liaison partners, there were robust safeguards to ensure that such intelligence was not used in torture or mistreatment:

Where there are concerns, the Agencies seek credible assurances that any action taken on the basis of intelligence provided by the UK Agencies would be humane and lawful. Where credible assurances cannot be obtained, the Chief of SIS explained '... then we cannot provide the information.'<sup>50</sup>

Similar denial characterizes the government's response to the ISC's more comprehensive findings in 2018. Prime Minister Theresa May's statement to parliament in June 2018, released alongside the ISC reports, rearticulated this position: 'UK personnel are bound by applicable principles of domestic and international law. The government do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment for any purpose.'<sup>51</sup> In the ensuing House of Commons debate, Foreign Office Minister Sir Alan Duncan MP reiterated this claim, asserting that 'we can and should be proud of the work done by our intelligence and service personnel' and that Britain should feel confident in being able to 'maintain our global reputation as a champion for human rights across the world'. Notwithstanding the ISC's findings, Duncan took 'issue with [the] use of the word "complicity", which I think was a notch too strong. I think it is honest to say that the ISC found no evidence that the agencies had deliberately turned a blind eye.' Likewise, Duncan stated that he would

be grateful if [Shadow Foreign Minister Emily Thornberry MP] thought again about the words she used when she accused officials in our agencies—I think that I quote accurately—of being 'involved in torture', they were not involved in torture, so I really think the right hon. Lady may want to come back to the House and say that, actually, that is an inaccurate accusation.<sup>52</sup>

<sup>48</sup> ISC, *Rendition* (London: Parliament Intelligence and Security Committee, 2007), pp. 51–2.

<sup>49</sup> ISC, *Rendition*, p. 64.

<sup>50</sup> ISC, *Rendition*, p. 13.

<sup>51</sup> Hansard (Commons), 28 June 2018, col. 41 WS.

<sup>52</sup> Hansard (Commons), 2 July 2018, col. 28.

Other ministers followed suit, as did the government's more detailed, written response to the ISC reports.<sup>53</sup>

Overall, the government's response has shown a remarkable level of consistency, with 'top lines' clearly agreed upon and repeated wherever necessary. Such a narrative is only sustainable, however, to the extent that Britain has succeeded in denying full exposure of its involvement in torture. In this sense, ministers and intelligence officials have long presided over a culture of secrecy, enacting a strategy designed to limit oversight and accountability. This was in play from the earliest phase of the 'war on terror', with evidence that intelligence officers failed to produce, or altered the production of, documentary records relating to involvement in the mistreatment of prisoners. Many of MI5's 'prisoner interview reports', introduced in January 2002, appear to have been misplaced, or not to have been completed in the first place. SIS did not maintain formal records until April 2005, and even after this date there are multiple cases where the 'detainee contact reports' were completed either partially or not at all.<sup>54</sup> This was no mistake: one SIS officer testified to the ISC that 'whilst it may be SIS culture to record everything, there were situations [of mistreatment] where people would say something was "not for the write-up"'. The officer testified that there

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

Often, interrogations were framed as 'owned' by a liaison service and 'we just happened to be there', while reports were routinely and systematically filled in with 'no' against the list of potential mistreatment concerns in the template.<sup>55</sup>

Where reports from field officers did describe mistreatment at particular facilities, these appear to have been altered before being passed to the ISC. In one case, an SIS officer visiting a US-run site witnessed a number of hooded prisoners, with at least one forcibly kept kneeling on his bed in a particular stress position. Nonetheless, a Defence Intelligence legal adviser later persuaded SIS to remove all mention of this in submissions to the ISC, claiming a 'misunderstanding' on the part of the SIS official who had visited the facility. As one MoD document stated:

In light of the apparent misunderstanding it was agreed that reference to the discussion between [the head of the MoD interrogation team] and the SIS operative would be removed from the SIS submission [to the ISC]. A letter was subsequently sent to SIS reiterating the position and thanking SIS for the opportunity of resolving this matter before it was exposed to the ISC.<sup>56</sup>

<sup>53</sup> Hansard (Commons), 15 July 2019, col. 591; HM Government, *Government response to the Intelligence and Security Committee of Parliament reports into detainee mistreatment and rendition* (London: Cabinet Office, Nov. 2018), p. 7.

<sup>54</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 21.

<sup>55</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 34.

<sup>56</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, pp. 26–7.

Flight records of aircraft landing at Diego Garcia also went missing before the ISC had an opportunity to review the material, including for crucial periods when there is clear evidence that the island was used to facilitate rendition operations. The FCO claimed that relevant records were ‘incomplete due to water damage’, and when challenged to provide details of such damage, reversed their position and claimed they had ‘dried out’.<sup>57</sup> Subsequent review of these records by the ISC found that the recording policy was ‘woefully inadequate [and] clearly indicates that the record review cannot be relied on to provide any assurances’.<sup>58</sup> This is not just a case of destroying records: ministers have also consistently refused to gather evidence of the use of UK territory in rendition operations. As the then foreign secretary David Miliband made clear in May 2008, ‘we do not consider that a flight transiting our territory or airspace on its way to or from a possible rendition operation constitutes rendition’. As such, the UK has only sought assurances from the US that prisoners are not on board when rendition aircraft land on UK soil, and ministers have repeatedly refused to broaden their investigation.<sup>59</sup> This is of no small consequence, given that we have established that the use of UK territory in the rendition programme was much more extensive than previously thought, even by the ISC.<sup>60</sup> Likewise, the government has persistently refused to investigate or block aircraft that have been shown to have rendered prisoners to torture, citing the need to avoid undermining ‘key areas of cooperation’.<sup>61</sup>

### *Limiting and misleading investigations*

Successive UK governments have gone to considerable lengths to prevent existing details of collusion in torture from coming to light in the UK courts. Some civil actions have been brought against the British government, but it has adopted various measures to prevent key aspects of cases from being heard in open court, or to have them ruled as non-justiciable in their entirety.

In specific cases, the UK government has sought to withhold the publication of key documents, including those which show that British intelligence officers knew about the torture of prisoners held by the CIA in advance of participating in their interrogation, as was the case with Binyam Mohamed.<sup>62</sup> Where the government has had to defend itself against allegations of complicity in mistreatment, intelligence agencies have been shown to have intercepted—for exploitation—privileged communication between lawyers and their clients, in what was clearly

<sup>57</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 95.

<sup>58</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 98.

<sup>59</sup> David Miliband, letter to Andrew Tyrie, chair of all-party parliamentary group on rendition, 5 June 2018, <https://www.extraordinaryrendition.org/documents/appg-letters/send/23-foreign-office/260-miliband-reply-05-06-08.html>.

<sup>60</sup> For early reporting of our findings, see Iain Cobain, ‘UK provided more support for CIA rendition flights than thought—study’, *Guardian*, 22 May 2013, <https://www.theguardian.com/world/2013/may/22/uk-support-cia-rendition-flights>. For full details, see Raphael et al., *CIA torture unredacted*, pp. 44–5.

<sup>61</sup> ISC, *Detainee mistreatment and rendition: current issues* (London, 2018), p. 82.

<sup>62</sup> UK Court of Appeal, *Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, approved judgment (case no: T1/2009/2331), 10 Feb. 2010, <http://www.refworld.org/pdfid/4ba8c30e8.pdf>.

an institutionally accepted practice.<sup>63</sup> Where the UK courts have refused government requests to hold hearings in secret, as in the case brought by five former Guantánamo Bay prisoners who alleged that Britain colluded in their detention and mistreatment, the government offered substantial payouts but refused to admit any liability on the part of UK authorities.<sup>64</sup> Likewise, although the government spent over £11 million attempting to keep the Belhadj litigation out of the courts,<sup>65</sup> arguing that the case was non-justiciable as it turned on the actions of a foreign state (the US), the Supreme Court's judgment in January 2017 found that position to be untenable.<sup>66</sup> This judgment was followed by a full apology from the government to Belhadj and Boudchar, without admission of liability, in an effort to minimize public exposure of additional details of UK involvement.<sup>67</sup>

UK governments have also intervened to ensure that parliamentary and congressional inquiries limit exposure of British complicity. It would seem that from 2009 onwards, UK government officials made regular representations to the US Senate Select Committee on Intelligence to ensure that mentions of the UK were redacted from its final report.<sup>68</sup> The ISC investigation itself was significantly constrained, which meant that it was unable to provide a full account of British collusion.<sup>69</sup> For example, the government refused to provide access to members of the intelligence agencies who had been on the ground at the time, so that the list of potential witnesses was reduced to just four individuals. The committee was in no doubt that 'the terms and conditions imposed were such that we would be unable to conduct an authoritative inquiry and produce a credible report', and consequently 'concluded—reluctantly—that it must draw a line under the Inquiry'. Its findings, it made clear, were 'not, and must not be taken to be, a definitive account'.<sup>70</sup> Moreover, many of the committee's most important findings, such as they are, have been redacted from the publicly available version of the report. These redactions include names of torture victims, perpetrators of abuses, and locations and dates of almost all cases uncovered by the ISC.

<sup>63</sup> Tom Warren and Melanie Newman, *Intelligence agencies target and exploit legally privileged communications, tribunal hears* (London: Bureau of Investigative Journalism, 6 Nov. 2014), <https://www.thebureauinvestigates.com/stories/2014-11-06/intelligence-agencies-target-and-exploit-legally-privileged-communications-tribunal-hears>.

<sup>64</sup> Dominic Casciani, 'UK pays £2.2m to settle Libyan rendition claim', BBC News, 13 Dec. 2012, <http://www.bbc.co.uk/news/uk-20715507>; 'Government to compensate ex-Guantánamo Bay detainees', BBC News, 16 Nov. 2010, <http://www.bbc.co.uk/news/uk-11762636>.

<sup>65</sup> Owen Bowcott, 'UK spent £11m of public money fighting Libya rendition case', *Guardian*, 24 April 2019, <https://www.theguardian.com/world/2019/apr/24/uk-public-money-fighting-libya-rendition-case-abdelhakim-belhaj-fatima-boudchar>.

<sup>66</sup> UK Supreme Court, *Belhaj and another (respondents) v. Straw and others (appellants), Rahmatullah (no. 1) (respondent) v. Ministry of Defence and another (appellants)*, judgment (UKSC3), 17 Jan. 2017, <https://www.supremecourt.uk/cases/docs/uksc-2014-0264-judgment.pdf>.

<sup>67</sup> Hansard (Commons), 10 May 2018, col. 926–7.

<sup>68</sup> Rowena Mason, 'UK ministers met Senate committee during torture inquiry, papers reveal', *Guardian*, 12 Dec. 2014, <http://www.theguardian.com/law/2014/dec/12/uk-ministers-senate-committee-cia-torture-report>; Foreign and Commonwealth Office, North America Dept, letter to Reprieve: Freedom of Information Act 2000 request ref. 0672-14, 1 Aug. 2014, [http://www.reprieve.org.uk/wp-content/uploads/2014/12/2014\\_08\\_01\\_PUB-FOI-response-UK-SSCI-meetings.pdf](http://www.reprieve.org.uk/wp-content/uploads/2014/12/2014_08_01_PUB-FOI-response-UK-SSCI-meetings.pdf).

<sup>69</sup> On the continuing weaknesses of parliamentary oversight of the UK intelligence agencies, as embodied by the ISC, see Andrew Defty, 'Coming in from the cold: bringing the Intelligence and Security Committee into parliament', *Intelligence and National Security* 34: 1, 2019, pp. 22–37.

<sup>70</sup> ISC, *Detainee mistreatment and rendition: 2001–2010*, p. 1.

## Denial and the future-proofing of British torture

The prevention of unfettered access to the documentary evidence relating to Britain's collusion in torture has enabled the broader narrative of denial to be sustained. In maintaining this position in the face of the ISC's findings of systematic collusion, ministers have placed emphasis on what they have termed the 'new and challenging operating environment for which, in some cases, they were not prepared', in which the intelligence agencies took 'too long to recognise that guidance and training for staff was inadequate, and too long to understand fully and take appropriate action on the risks arising from our engagement with international partners on detainee issues'.<sup>71</sup> In other words, any errors of judgement in the early years of the 'war on terror' are attributable to a lack of guidance, and a lack of understanding of the practices of other states (especially the US). In turn, ministers are now clear that these (limited) lessons 'have been learned from these challenging events', and that 'the position now is very different from the one confronting UK personnel in the immediate aftermath of 11 September 2001'.<sup>72</sup> Accordingly, current guidance 'provides clear direction for UK personnel and governs their interaction with detainees held by others and the handling of any intelligence received from them', and is 'coupled with world-leading independent oversight'.<sup>73</sup> We need 'to look forward as well as backwards', and in this light 'the statutory and administrative basis on which our affairs are now organised give us much greater assurance in the House that decisions are made appropriately and that our agencies adhere to the highest possible standards of conduct'.<sup>74</sup> We are not convinced.

From July 2010, British intelligence personnel have had to operate within the constraints laid out by the *Consolidated guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas, and on the passing and receipt of intelligence relating to detainees* (hereafter *Consolidated guidance*).<sup>75</sup> The approach outlined in the guidance was not new, the government argued, and was 'consistent with the internal guidelines under which the security and intelligence services and our armed forces currently operate'. Nonetheless, it was 'putting into the public domain for the first time the policy framework within which we operate', thereby making an 'unprecedented' move to increase transparency in this area.<sup>76</sup>

Following the publication of the ISC reports in 2018, the UK government instructed the Investigatory Powers Commissioner (IPCO) to review the *Consolidated guidance*. This review included a public consultation, with a closed round table

<sup>71</sup> HM Government, *Government response*, p. 9; Hansard (Commons), 28 June 2018, col. 41 WS.

<sup>72</sup> Hansard (Commons), 18 July 2019, col. 974.

<sup>73</sup> Hansard (Commons), 2 July 2018, col. 25, 10 May 2018, col. 927.

<sup>74</sup> Hansard (Commons), 15 July 2019, col. 591–6.

<sup>75</sup> HM Government, *Consolidated guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas, and on the passing and receipt of intelligence relating to detainees* (London: Cabinet Office, 2010), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62632/Consolidated\\_Guidance\\_November\\_2011.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf).

<sup>76</sup> HM Government, *Note of additional information from the secretary of state for foreign and Commonwealth affairs, the home secretary, and defence secretary* (London, July 2010), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62633/additional-information-fcohods\\_o.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62633/additional-information-fcohods_o.pdf).

for interested civil society parties in December 2018.<sup>77</sup> IPCO's review resulted in a series of recommendations for improving the *Consolidated guidance*, all of which were accepted by the government (although many of our recommendations, and those from other civil society organizations, were not taken on board by IPCO). The government subsequently published an updated framework to come into force in January 2020 under a new (but equally contorted) title: *The principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (hereafter *Principles*).<sup>78</sup> Most changes introduced in the *Principles* are relatively minor. Nevertheless, many commentators have welcomed the inclusion of rendition as a form of torture and CIDT, along with the increase in the number of UK organizations who are bound by the *Principles*, so that it now covers, among others, SO15 (the Metropolitan Police's Counter Terrorism Command), and joint units comprising overseas personnel but acting under UK direction.

Although both the *Consolidated guidance* and the *Principles* have been championed as providing a robust and principled framework, in reality they are constructed in such a way as to allow British intelligence and ministers significant operational leeway, specifically to enable continued collusion in torture and CIDT. At the heart of the *Principles* (as of the *Consolidated guidance*) is the requirement for personnel to make a judgement on the risk that participation by the UK in the location, capture, detention or interrogation of prisoners held by partner agencies would lead to unlawful killing, torture, CIDT, rendition or other 'unacceptable standards of arrest and detention'.<sup>79</sup> Where intelligence personnel 'know or believe' that such participation (including through intelligence-sharing) would lead to unlawful killing, torture or extraordinary rendition (defined as rendition where there is a real risk of torture or CIDT), such action is expressly prohibited. However, and crucially, similar action which is judged as leading to a 'real risk' of such consequences is *not* so prohibited.<sup>80</sup> Instead, personnel need either to introduce mechanisms to 'effectively mitigate the risk to below the threshold of real risk through reliable caveats or assurances' or else to consult with ministers.<sup>81</sup>

Much has been written on the problems with assurances, often in the context of the UK's legal commitments when considering the extradition or deportation of individuals.<sup>82</sup> Courts in the UK, as well as the European Court of Human Rights, have spent much time considering the issue, and have required that such assurances

<sup>77</sup> Ruth Blakeley and Sam Raphael, *Recommendations for reform of the Consolidated guidance: submission to the Investigatory Powers Commissioner consultation* (Sheffield and London: University of Sheffield and University of Westminster, 25 Oct. 2018), <https://www.therenditionproject.org.uk/documents/RDI/181025-TRP-Consolidated-Guidance-Recommendations.pdf>.

<sup>78</sup> HM Government, *The principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence to detainees* (London, 18 July 2019), <https://www.therenditionproject.org.uk/documents/RDI/190718-HMG-Principles.pdf>.

<sup>79</sup> *Principles*, pp. 4–5.

<sup>80</sup> In the *Consolidated guidance* the operative phrase was 'serious risk', which was found by the High Court to be a substantively equivalent term: <http://www.bailii.org/ew/cases/EWHC/Admin/2011/2401.html>, para. 61.

<sup>81</sup> *Principles*, p. 6.

<sup>82</sup> See e.g. Andrew Jillions, 'When a gamekeeper turns poacher: torture, diplomatic assurances and the politics of trust', *International Affairs* 91: 3, 2015, pp. 489–504.

be buttressed with post-transfer monitoring and high-level political commitments from both sides. Although such ‘diplomatic assurances’ remain deeply problematic, the assurances mandated in the *Principles* appear to be notably weak in comparison with these stipulations. It is unclear what guidance intelligence personnel have to equip them to judge the level of risk, and therefore the potential need for assurances. Full details of the external oversight of the assurances process are not made public, although a summary recently published by IPCO makes clear that the agencies do not have a ‘thorough and consistent approach to record keeping’, and do not record full details of the underlying basis for the safeguards relied upon.<sup>83</sup> Worryingly, the *Principles* continue to allow for ‘reliable caveats or assurances’ to be agreed with partner agencies verbally rather than in writing.<sup>84</sup> In practice, almost all assurances are verbal, with few written records of individual assurances or even the total number sought by the agencies.<sup>85</sup> Instead, as the director-general of MI5 made clear to the ISC, a wholly unaccountable ‘gentlemen’s agreement’ sits at the heart of the current framework:

There is a sort of superficial attractiveness about wanting MOUs ... In practice of course ... it is not a practical thing to pursue in many instances because it is not achievable. But the same effect is achievable by ... agreement, explanation, negotiation and a clear eye-to-eye understanding with the liaison in question ...<sup>86</sup>

More worryingly still, in cases where even verbal assurances cannot be obtained from the liaison service—in other words, where that service refuses even to agree verbally to treat the prisoner in accordance with its duties under international law—or where such assurances are assessed to be unreliable, consultation with ministers may still lead to the action being authorized.<sup>87</sup> Ministers, in other words, may authorize participation in activities where there is a real risk of torture, even where partner agencies with past records of the systematic use of torture are unwilling or unable to persuade UK personnel that they will treat the suspect in accordance with international law.

Such authorization is clearly on the cards: when giving evidence to the ISC, senior ministers including Theresa May, Amber Rudd, Boris Johnson and Philip Hammond all made references to ‘ticking bomb’ scenarios as potentially justifying operations where torture might occur.<sup>88</sup> As May (then home secretary) made clear: ‘What I am saying is that you’re always balancing risks and that’s why the circumstances in which something occurs in that sense is—it’s a difficult judgement. It’s a difficult balance.’ Hammond (then foreign secretary) was equally open to the possibility of authorizing torture: ‘I’d have to make a judgement about whether the protection of [a terrorist’s] human rights outweighed the human rights of the possibly thousands of people that would be killed or

<sup>83</sup> IPCO, *Annual report 2017* (London: HMSO, Dec. 2018), <https://www.ipco.org.uk/docs/IPCO%20Annual%20Report%202017%20Web%20Accessible%20Version%2020190131.pdf>, p. 82.

<sup>84</sup> *Principles*, p. 7.

<sup>85</sup> ISC, *Detainee mistreatment and rendition: current issues*, p. 59.

<sup>86</sup> ISC, *Detainee mistreatment and rendition: current issues*, p. 60.

<sup>87</sup> *Principles*, p. 6.

<sup>88</sup> ISC, ISC, *Detainee mistreatment and rendition: current issues*, pp. 74–7.

injured as a consequence of [the act of terrorism].’ This ‘weighing of the benefits and risks’ opens the doors to continued complicity, based on the assessment of operational necessity.

This concern is more than hypothetical. As Hammond further testified, he had dealt with cases where there was a ‘serious risk’ of CIDT but where ‘the benefit of the operation is such that it outweighs the risk ... This is a judgement. Clearly one has to make a judgement about the importance of the operation.’<sup>89</sup> Indeed, it is now clear that the recourse to torture continues to be hardwired into the contemporary practice of British intelligence. Hitherto secret MoD policy guidance, designed to operationalize the *Consolidated guidance*, was discovered by the authors and released in May 2019.<sup>90</sup> This guidance states clearly that ministers can authorize intelligence-sharing in cases where the risk of torture is ‘serious’, as long as they ‘agree that the potential benefits justify accepting the risk and the legal consequences that may follow’. Indeed, such operations can be ‘preapproved’ by ministers in exceptional cases, ensuring that—in effect—individuals can be placed on a list to enable intelligence to be shared regardless of there being a serious risk of their torture.<sup>91</sup> Although the MoD has since refused to release figures relating to the number of times ministers have authorized such action (a decision which is currently under challenge), and although the ISC report redacted all such figures from its report on request from the intelligence agencies,<sup>92</sup> past findings by the authors demonstrate that in one year alone (2014) ministers approved all 28 ‘serious risk’ cases brought before them.<sup>93</sup>

That these practices are considered by officials to open themselves, in theory if not in practice, to legal action in UK courts is confirmed by the fact that, when referring *Consolidated guidance* cases to ministers, intelligence officials routinely seek parallel authorization under section 7 of the Intelligence Services Act 1994. This legislation provides for a minister to authorize action undertaken overseas by the intelligence services which would otherwise be unlawful under UK law. As SIS confirmed: ‘We are ... always going to go for a section 7 authorisation. Because, you know, why should my officers carry the risks on behalf of the government personally?’<sup>94</sup>

## Conclusion

The UK’s obligations in relation to torture are clear. Joint Article 3 of the European Convention on Human Rights and the UK Human Rights Act prohibits torture and inhuman and degrading treatment. Under the Human Rights Act, the state

<sup>89</sup> ISC, *Detainee mistreatment and rendition: current issues*, pp. 75–6.

<sup>90</sup> Lucy Fisher, ‘Torture: Britain breaks law in Ministry of Defence secret policy’, *The Times*, 20 May 2019, <https://www.thetimes.co.uk/edition/news/torture-britain-breaks-law-in-ministry-of-defence-secret-policy-2rl5dn2kdd>.

<sup>91</sup> MoD, *MoD policy on the passing or receipt of intelligence relating to detained or captured persons* (London: Nov. 2018), <https://www.documentcloud.org/documents/6015916-MOD-Torture-Policy-Nov-2018.html>.

<sup>92</sup> ISC, *Detainee mistreatment and rendition: current issues*, pp. 17–18.

<sup>93</sup> MoD, Freedom of Information decision notice FOI2014/05808, 8 Dec. 2014.

<sup>94</sup> ISC, *Detainee mistreatment and rendition: current issues*, p. 72.

has obligations to intervene to stop torture and cruel treatment where it knows such treatment is occurring. The United Nations Convention Against Torture, to which the UK is a signatory, prohibits the invocation of any exceptional circumstances—whether a state of war or threat of war, internal political stability or any other political emergency—as a justification for torture. Importantly, under the doctrine of command responsibility, leaders—military or civilian—can be held criminally responsible if they knew or should have known of human rights violations and did nothing to prevent them.<sup>95</sup>

Alongside these longstanding legal obligations, the British government's response to torturous practices in Northern Ireland, at least on the face of it, seemed to suggest that lessons on the inefficacy and counterproductivity of torture from Britain's post-colonial period had been learned. However, both the extent of UK collusion in torture in the 'war on terror' and systematic attempts to deny accountability leave us questioning how deeply this learning has gone. There is little evidence of cultural transformation: mistaken beliefs about torture's supposed efficacy stubbornly persist within the intelligence services and, as statements from several government ministers show, among political leaders as well. This failure to learn also helps explain the self-contradictory, competing narratives constructed by Britain's leaders to explain away their involvement in torture. One version of Britain's intelligence agencies portrays them as supremely competent, with the capacity to develop and follow robust guidance and exercise practised judgement, in line with strict legal and ethical rules. The other version presents a flawed bureaucracy, unaware until too late of the harsh realities of the 'war on terror'. To us, this latter portrayal begins to look like a deliberate diversion strategy, enabling minimal continued oversight of contemporary practice in the field of intelligence-sharing and alleging that unintended collusion in torture is the result of flawed processes rather than any specific policy.

We have attempted to show in this article that the machinery of denial is designed in part to leave open the option of colluding in torture again. We have argued that the past and the present are entwined. It is only through a refusal to acknowledge the full extent of torture in the 'war on terror' that current forms of complicity can continue to sit at the heart of British intelligence and security practices, and that the two contradictory images of the UK's intelligence services can sit side by side. The framing of current guidance as substantively more robust functions to further delay a reckoning with the past. This insistence can be seen in stark terms in the recent refusal of the government, in July 2019, to authorize a full judge-led inquiry, given

the extensive work already undertaken to improve policies and practices in this area ... Parliament and the public can have confidence in the effectiveness of measures taken since 2010 and the new principles announced by the Government today to strengthen the accountability and oversight by Ministers, Parliament and the independent commissioners of the vital work of our security and intelligence agencies.<sup>96</sup>

<sup>95</sup> Geoffrey Robertson, *Crimes against humanity: the struggle for global justice* (London: Penguin, 1999), pp. 206–207.

<sup>96</sup> Hansard (Commons), 18 July 2019, col. 974–5.

Impunity is baked in at every level. The logical conclusion we must draw is that the UK government is unprepared to rule out the torture option. Thanks to legal action against the government by two MPs and the charity Reprieve, at the time of writing we await the outcome of a judicial review of that refusal by Theresa May's government in July 2019. Should this action prove successful, there may yet be a fuller reckoning with Britain's torturous past. But even if a judge-led inquiry ensues, successive governments' highly effective efforts to evade accountability have already limited its scope, including the potential for prosecution. Owing to repeated delay and diversion over many years, evidence will have been lost, finding agents who were there at the time of the abuse of prisoners after so long will not be straightforward, and memories of who said and did what will have long faded. Furthermore, it is highly unlikely that orders were given in explicit terms that would necessarily provide compelling evidence for prosecutions of specific individuals. So, while there are important legal precedents for holding responsible those in leadership positions who knew or should have known what was going on, this does not make identifying those leaders a straightforward matter.

Conventional wisdom assumes that the presence of mechanisms for accountability helps to prevent states from committing human rights violations. But leaders in democracies have found many ways to circumvent those mechanisms extremely effectively, historically and more recently. Mitchell's conclusions continue to hold—leaders in democracies do not take responsibility for human rights violations, nor are they held responsible for them. His and our findings show that there has been a collective failure in policy circles as well as in the scholarly community to recognize how fragile those mechanisms really are in the face of 'opportunism's pull'.<sup>97</sup> But the analysis presented here also raises the question of whether we can be at all confident that the presence of such mechanisms is really a strong predictor of compliance with human rights obligations. The analysis suggests that those mechanisms have been deliberately subsumed within the machinery of denial, rendering them not only ineffective but also potentially dangerous tools in facilitating democratic states' non-compliance with human rights obligations. Valuable scholarly endeavour might explore what it would take to establish more robust mechanisms for accountability, and greater public scrutiny of the things that governments do in our names.

<sup>97</sup> Mitchell, *Democracy's blameless leaders*, p. 189.