



Detention, Interrogation and Security: Oversight and Accountability

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Detention, Interrogation and Security: Oversight and Accountability

Date: 5 March 2015

Venue: Bingham Centre for the Rule of Law
British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London, WC1B 5JP

Speakers:

- Clare Algar, CEO, Reprieve
- Professor John Gearson, Professor of National Security Studies & Director, Centre for Defence Studies, King's College London
- Sapna Malik, Partner, Leigh Day
- The Rt. Hon. Sir Malcolm Rifkind QC MP, Intelligence and Security Committee, Parliament

Chair:

- Sir Daniel Bethlehem KCMG QC, 20 Essex Street

This event report provides a summary of the introduction by the Chair, the presentations by speakers, and Q&A. It does not offer comment on or analysis of the views expressed by speakers. On occasion, footnotes have been added to direct readers to sources referred to by speakers.

Background and introduction by the Chair

The Bingham Centre for the Rule of Law convened a panel of experts to consider the implications for the United Kingdom of the United States Senate Select Committee on Intelligence report on the CIA's detention and interrogation programme (the SSCI Report), published in December 2014.

Sir Daniel Bethlehem QC chaired the event. He introduced the speakers and provided a brief summary of the context and background as a precursor to the discussion.

The SSCI Report

The SSCI report took three and a half years to compile following the decision of the Senate Committee to open the inquiry in March 2009. The Report was conducted after it emerged that the CIA had destroyed video recordings of interrogations in 2005. The report was completed in December 2012 and is more than 6,700 pages long.

During 2013 and 2014 the Senate Committee sought comments from the CIA, made changes to its report, and worked with the Obama Administration and others to seek redactions so that the report could be declassified and published.

On 9 December 2014 the SSCI published a 525 page Report consisting of key findings and an executive summary of the full report. Separately, the SSCI simultaneously published the Minority

views on the Report which spanned 167 pages, and the separate document on Additional Views, 19 pages long. The remainder of the Report remains classified. On the same date, the CIA released a 136 page declassified version of an official CIA response and critique of the SSCI Report. Cumulatively, around 800 pages of documents were published, containing redactions to various degrees.

The methodology of the SSCI Report was based on documentary review, as Committee Chair Senator Dianne Feinstein notes in her introduction. The committee staff reviewed about 6 million pages of CIA and other documents. They did not conduct any interviews with officials or any hearings. The report covers the period from 2001 to 2009 but the main focus of the report is the period of 2001 to 2006 when the *Hamdan* decision was handed down and the end of 2007 when the Enhanced Interrogation Program (EIT) was stopped.¹ On the 22 January 2009, President Obama issued an executive order which amongst other things prohibited the CIA from holding detainees for any lengthy period of time and also prohibited certain means of interrogation.

Sir Daniel drew attention to several of the Report's summary findings and conclusions, notably, that the CIA's use of EIT was not an effective means of acquiring intelligence, and that the CIA's justification of the use of EIT rested on inaccurate claims with regards their effectiveness. Other conclusions refer to brutality far worse than the CIA represented to policy makers of the practices and the harshness of the detention. A further series of conclusions referred to the inaccuracy of the representations that the agency made to the Department of Justice, to the White House, and to other organs of oversight and accountability. Following the release of the report there was a very sharp domestic debate in the US which is still ongoing. Sir Daniel recalled that former president Dick Cheney took to the airwaves to say that he considered the methods justified and denied that there was anything wrong with them.²

Sir Daniel then noted a number of considerable outstanding issues that remain and which the US still must come to terms with within its machinery of government framework: the issue of accountability; the issue of oversight; and the issue of compensation. Article 14 of the Convention Against Torture, as well as international humanitarian law, requires compensation for victims of torture.

In the UK, in June 2010 the coalition government announced a detainee inquiry to be led by Sir Peter Gibson.³ The assessment was subsequently made that that inquiry could not continue because of a number of criminal proceedings that were potentially commencing. Sir Peter Gibson and his inquiry team released a report in 2013 on the basis of a review of 20,000 documents provided to them by UK agencies and departments. That report indicated 27 issues that they would have liked to investigate further, effectively setting out an agenda for further review. The Prime Minister thereafter referred the matter to the Intelligence and Security Committee (ISC) for further review.

The Bingham Centre asked speakers to address three issues:

¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

² Cheney's remarks were widely reported. See for example, Josie Ensor, 'Dick Cheney: Us Senate Torture Report Deeply Flawed', The Telegraph, 11 December 2014 <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11286817/Dick-Cheney-US-Senate-torture-report-deeply-flawed.html>

³ The Detainee Inquiry, available at <http://www.detaineeinquiry.org.uk/>

- the extent to which the report adds to our reliable body of knowledge about the practices of states in combating terrorism threats;
- how the UK Government, parliament and others should respond to the findings in the report; and
- to what extent, if at all, the report should prompt any changes in mechanisms for accountability and oversight of UK counter-terrorism law and practice.

Presentations by speakers

Clare Algar, CEO, Reprieve

With regard to the first issue set before the panel, Clare explained that Reprieve was very experienced with cases involving torture, having spent a great deal of time discussing first hand experiences, so she considered it unlikely that there would be anything encompassed within the SSCI Report which Reprieve was unfamiliar with. However, there were revelations in the Report which were new, such as the use of rectal feeding, a practice which doctors have since condemned as medically unjustified.

Clare outlined several substantial aspects of the Report which she found of particular significance. She referred specifically to the treatment of Abu Zubaydah, a client that Reprieve acts for, who was tortured 24 hours a day for 19 days. This included being water boarded 2-4 times a day, 266 hours spent in a coffin shaped box, and 29 hours spent in a small confinement box. Clare said that the effect on him was unsurprising: the CIA report describes that he cried, he begged, he whimpered, whilst continuing to maintain that he did not have any additional information.

Clare then raised what she considered to be a more interesting aspect of the Report in the effect that the programs had on the CIA agents who were involved, in that the account of Abu Zubaydah's treatment provided for an important snapshot both of the effect of torture on the person who was being tortured but also on the people who were involved in it.

Clare drew attention to a further observation in the Report, a point that Sir Daniel made reference to in his introductory remarks, of the struggle around the narrative of the torture programme in the US. One narrative is represented by the Dick Cheney position, which claims that such methods were legitimate, legal, and also necessary and useful, and an opposing counter narrative argues that it was none of those things. Clare considers the SSCI Report to have taken a positive step in the direction of the counter narrative.

Turning to the second set of issues – how the UK Government and Parliament should respond to the findings – Clare expressed her belief that the UK should conduct a similar exercise, in the form of a judge-led inquiry. She provided justification for such an inquiry in the considerable evidence which suggests that British intelligence services were involved to some degree in the rendition and torture program. Clare noted that it is not suggested that UK agents were involved to the same extent as US agents were in, for example, the aforementioned torture incidents.

Clare went on to discuss a number of pieces of such evidence. Regarding Diego Garcia, Clare cited a statement from former Foreign Secretary Jack Straw to the ISC in 2005 in which he strongly denied that the UK was involved in rendition and rejected the need for a judicial inquiry. In February 2008, David Miliband admitted that Diego Garcia had been used for rendition flights, specifically in two incidents, which involved stopping to refuel. In January 2015,

Lawrence Wilkerson, who was chief of staff with Colin Powell, stated that the site, which the UK leases to the US military, was used by the CIA as a transit place, where people were temporarily housed, interrogated from time to time, and where 'nefarious activities' were conducted.⁴

Clare discussed the Binyam Mohamed case,⁵ where the English court found intelligence services to be mixed up in the abuse of Binyam Mohamed, in particular, that essentially they either knew or ought to have known that he was being tortured by the CIA and that they continued to provide questions to be asked to Binyam. It was in response to that judgment that David Cameron initially announced his support of a judge-led inquiry.⁶ And finally, there is the Belhaj case,⁷ where Mr Belhaj and his pregnant wife, and also Mr al-Saadi and his wife and 4 children, were rendered to Libya. When Tripoli fell, a number of documents were recovered from government offices. These included a letter, obtained by the Human Rights Watch, which appears to be written by Sir Mark Allen, then head of the intelligence services, to Moussa Koussa, enthusiastically claiming credit for the rendition of these people. The letter referred to the receipt of the air cargo, and claimed that although the infrastructure that delivered these people was American, the intelligence was decidedly British, and that therefore Sir Mark felt that he had a right to correspond directly with Moussa Koussa rather than through the CIA.

As a whole, argued Clare, all these facts constituted good evidence of incidents which need to be investigated, and she recalled that when Cameron became Prime Minister, one of the first things he did was announce a judge-led inquiry. Essentially, Clare said, Cameron recognised that the reputation of the intelligence services needed to be cleared but also that we needed to get to the bottom of what happened, specifically stating that it was appropriate for a judge to tackle this rather than the ISC,⁸ in part because the ISC had been overseeing the intelligence services at the time when Mr Belhaj was rendered.

Clare argued that the reason it is important that there be a UK inquiry, and that it be the best sort of inquiry it could possibly be, was that if we did not use a robust inquiry for this task then what was the very purpose of the robust inquiries and in what situations would they be applicable? She made the point that the issue is very serious: it concerns significantly powerful and significantly secret services arguably involved in torture. Clare returned to address the narrative point, that if what we are trying to present is a narrative that torture is not acceptable, a judge-led inquiry would be the likely way to reach that conclusion. Clare expressed her concern at a comment made recently by Sir John Sawers, ex-Mi6 Director, that torture has been used for thousands of years in order to extract useful information, and her disappointment in this line of reasoning on which the security services were falling back on, arguing that this was not the sort of narrative that we should be trying to adopt.

Professor John Gearson, Professor of National Security Studies & Director, Centre for Defence Studies, King's College London

John examined how the issues posed a policy challenge, contextualising some of the legal arguments put forward by the other panel members. John noted that highlighting context was

⁴ Source: Vice News interview, available at <https://news.vice.com/article/cia-interrogations-took-place-on-british-territory-of-diego-garcia-senior-bush-administration-official-says>

⁵ *R (Binyam Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin).

⁶ Hansard 11 Mar 2009 : Column 289.

⁷ *Belhaj & Boudchar v. The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others*, [2014] EWCA Civ 1394.

⁸ Hansard 6 July 2010 : Column 185.

important, not to serve as an apology for the CIA's position, but in order to better comprehend the actions and policy adopted. Against that background, John addressed issues of responding to terrorism and of accountability.

As a terrorism analyst, John agreed that there was no doubt that 9/11 brought in a new age of terrorism, where all the rules changed and everything was different. However, John argues that this was not the key event which shaped what followed. Instead, John considers that it was actually the 1995 Aum Shinrikyo underground attack that sparked the change in attitude towards policy development. He argues that the policy community who advised the decision makers who then carried out or approved counter-terrorism operations were effected in an extraordinary way by these events and the whole idea of nihilistic independent groups, capable of delivering bio and chemical based weapons against any country in the world. This set the grounding of a whole policy debate within the United States and other countries about low risk but high consequence threats. John contends that when 9/11 transpired, it fitted into this concept and therefore policy options that would normally not be considered were accepted by the government. John described how they rejected the traditional concept that terrorism was about communication. He recalled a classic phrase in the 70s – that 'terrorists want a lot of people watching, not a lot of people dead' – was rebuffed by policy makers who said it no longer applied because these terrorists wanted a lot of people dead, and they were less concerned about who was watching.

John noted that even now, ISIL/Islamic State is being described as a 'death cult'. John considers the phrase to be a very unhelpful way of talking about the group, and whilst he expressed understanding at why such language is used, he argued that in a similar manner to post-9/11, it means people stop thinking about it as a campaign with thresholds, and the point of this debate is that there were no thresholds or real boundaries, only at certain levels which were reluctantly brought in. The agencies were desperate, and they were looking for any answer. Additionally, everything that was previously understood about terrorism was rejected because it did not appear to be state-sponsored. Crucially, the Americans found themselves in this position because they did not know whether the objective was to endure, to contain the threat of Al-Qaeda, or to prevail. Ultimately they wanted the destruction of Al-Qaeda, but did not understand exactly what they were facing, and that led to some of the actions that took place. He suggested that the British were also similarly confused at the time. John further explained that in order to understand the different perspective of the US, one must take into account that terrorism was regarded as a principal security threat, a position not shared by other countries in the world. The UK security strategy listed terrorism as one of the possible threats it might face, not the principal threat facing the UK, and therefore the policy response was different in those circumstances.

John quoted Tony Blair, in the wake of 9/11 ('is there any limit to what they will do?') to lend support to his portrayal of this idea of a nihilistic enemy, which represented the mind-set at the time. Contrary to what the UK is currently doing in Qatar, conversing with members of the Taliban, etc., at the time there was no concept of understanding, just a "defeat or be defeated" mind-set amongst policy makers.

Even at the end of this period in 2006, the Home Secretary talked about modifying some of our freedoms in the short term. John believes that the policy community were influenced by a particular group of analysts or a number of analysts in the mid- to late-1990s who were then faced with this unprecedented challenge. Within the British context, legal and moral arguments aside, John considered the problem with an ends versus means approach to be that when you

take the gloves off, tactical views override strategic aims, and in his view, that is what the SSCI Report reveals. There was a tactical desire to get information as quickly as possible, and the narrative was ignored because it was not the primary objective. In Northern Ireland, many of the people who structured that campaign will now publicly say that it was utterly counterproductive, and our American friends to whom we said that responded that Northern Ireland was a completely different situation to what they were currently facing.

In a European Court of Human Rights decision in 1978,⁹ the British services admitted to five techniques which they declared they would never use again which included wall standing, hooding, noise, sleep deprivation, withholding food and drink, stating that 'we give this unqualified undertaking that the five techniques will not in any circumstances be reintroduced as an aid to interrogation', which constituted a very clear decision at the policy level. In practice, however, by 2003 this statement had been lost by the Ministry of Defence (MoD), and no longer constituted part of training. The military found itself dealing with what we thought was a war-fighting situation, but was actually a post-conflict problem, and contention with civilians. John went on to provide insight into interrogation and tactical questioning units, explaining that UK interrogators were exposed to illegal techniques as part of their training (as a way of demonstrating what was wrong) before being instructed how to conduct interrogation. This practice was still ongoing even in 2005. The official MoD report stated that the army had not modernised this doctrine properly. For an organisation that is proud of its training, John considered that this demonstrated a fundamental institutional failing, which helps to understand some of the failures that happened in America.

John then proceeded to address the question of what insights arise out of the SSCI Report. He agreed that to some extent the details of the programme were revealing, but considered most things to be already known in 2005 and 2006, through a number of ground-breaking news reports, and the release of multiple documents through the American system. Of the SSCI Report revelations, he found the details of the programme and the role that private contractors – survival, evasion, and resistance psychologists, not interrogators – played in shaping the programme to be particularly remarkable. The maximums became the minimum, insofar as the constraints that were placed on interrogation techniques became the norm: that is, the maximums were where you began rather than where you might end up. Rejecting outside agencies and their advice, the programme took on a life of its own but, as an analyst, John found insightful the extent to which the CIA even in its response to this Report admitted that it did not actually understand the enemy it faced and that it was desperate for information and knowledge. The CIA is the world's leading intelligence agency which suffered an attack on its homeland and did not know what enemy it was facing, so they were very desperate in many respects. John illustrated this point with the CIA quote, 'the sum total of information provided from detainees and enhanced techniques substantially advanced the agencies strategic and tactical understanding', but pointed out that it preceded that statement by declaring that 'the report ignored how little the CIA knew at the time', which was very significant.

John made a point similar to one made by Clare: a striking matter that comes out of the SSCI Report and the commentaries around it is that adopting these techniques affected the organisations themselves. The major-general who was running Guantanamo, which the military established, was subsequently transferred to Iraq, and the series of advanced interrogation techniques that were only approved for the use of the highest value of intelligence assets or intelligence potential were transported into Iraq and used in a post-conflict situation of

⁹ *Case of Ireland v. the United Kingdom*, ECHR judgment, Application no. 5310/71.

insurgency. This proved to be a complete catastrophe that, in John's opinion, led then to the Abu Ghraib disaster for America. The SSCI Report further reveals how far staff were pressured to stay "within the narrative", that is, not to criticise the programme, something which John thinks also applied in the policy community. Many people at various stages of the Afghan and Iraq intervention felt that they could not speak out against the effectiveness of the campaign, quite apart from the interrogation procedures. The CIA's response even admits that they occasionally accepted compelling sole-source intelligence cases for detaining individuals in an effort to be sure that all possible things had been done to thwart attack planning. The national priority was preventing attacks, so they stopped using normal intelligence tradecraft, stopped checking and validating intelligence, because they were so under pressure and desperate. John considered this to be very insightful in the Report, and something which could not be denied, even by the minority views.

In terms of how the UK should respond, John commented that the delivery of the minority views with SSCI Report was as a disaster. The whole purpose of such committees is to achieve unanimous agreement from all members. He accepted that he was not familiar with the internal points of discussion of the work within the committee but thought that it would have been better unpublished, though he suggested that perhaps it was impossible for the minority views to remain unpublished because of the politics of the situation.

As a response, John advocated the need to think about reviewing the approach of our agencies and militaries for future conflicts. He expressed uncertainty as to how the "five eyes" intelligence system would function in the future, when allies have different moral and legal contexts to their powers – a debate has yet to really open up. The utility of armed forces in conducting counter terrorism is shown by the fact that paramilitaries were deeply involved in the CIA's programme, as revealed by the SSCI Report, and ultimately Britain needs to have a debate about the future of its counter terrorism policy. Whilst John lends support to the view that the oversight system in Britain is evolving, he expressed reservations in that it has still has some way yet to go. He raised the open question of whether, given that the intelligence committee in America was provided briefings about these activities, at least to certain individuals, Britain would like that sort of knowledge to be passed on if there were any practices that were potentially problematic. John asked whether the incorporation of such a mechanism, could improve oversight in Britain.

John clarified an earlier point of Clare's that it is not technically correct to say that the ISC was overseeing SIS during these periods, in so far as the ISC's mandate is to review past activities and not current activities. However, John raised the suggestion of whether, in an era where we might be increasingly relying on our intelligence agencies in ongoing campaigns, oversight should somehow be brought to bear on existing operations, which may last for decades.

Finally, John addressed the role of oversight from organisations such as the ISC, when we have an era of inquiries; Chilcot, Butler, and others, as well as judicial oversight. John concluded that, ultimately, what this whole situation reveals is that trust, and what has been termed strategic confidence amongst policy makers and the public, has been undermined by these campaigns. That consequence must have a negative effect on the security of the UK, not just concerning the rights of the individuals who suffered these terrible experiences, but also from a policy perspective, for which it has also proved to be a disaster.

Sapna Malik, Partner, Leigh Day

Sapna began by addressing the first question set for the panel, concerning the SSCI Report, describing the accounts of what had already been either suspected, reported, or in some cases found by various other enquiries and alleged by those who have been subjected to these processes.

In particular, Sapna commented that the SSCI Report builds on and provides further detail of reports of the Council of Europe, rulings from the European Court of Human Rights, UK courts (as Clare mentioned the case of Binyam Mohamed), questions raised by the Gibson Report, and built on what we started to understand from the US torture memos that were released several years ago.

Sapna questioned what constituted a reliable body of knowledge. To some extent, she recognised that the SSCI Report retrospectively makes reliable the testimonies of the former detainees that have made some very strong allegations following their release and during their detention, often facing potential death penalty situations. Allegations need to be proven but are often dismissed, particularly when they are made during the course of a court case. A civil case for instance, is one of the very few ways that a victim or a survivor of torture can actually present their case to try and get answers and accountability. Sapna argued that in the UK the main option to bring such a case is through a civil case, and that often the only way this is possible is to claim compensation, but somehow that appears to taint the evidence and reasons behind the case. However, very often it is not money that claimants want but answers and some form of accountability.

Sapna cited the ongoing case of Belhaj, as one such case where clients openly stated that they would drop their case if they received an apology and acknowledgement from those involved of what happened to them and a determination/admission that it was unlawful. Sapna made an important distinction that although the SSCI Report provides some credibility to those allegations, it does not provide a complete picture, as it only deals with CIA detention sites. It does not deal with Guantanamo, military detention facilities, places like Abu Ghraib or Camp Nama, or secret detention facilities in Iraq and elsewhere run by the military. Furthermore, it does not deal in a comprehensive way with the rendition programme; there is no mention of pregnant women and children in the Report, and obviously it does not cover the UK's role in any regard.

Therefore, Sapna argued, with those issues and the 27 issues that were raised by Sir Peter Gibson when he published his report, much remains to be answered.

As for how the UK Government and other bodies should respond, Sapna recognised that, as already mentioned by the panel, there are criminal investigations currently still ongoing as to the role of the UK personnel, presumably in torture and the complicity of torture which is a crime in the UK. There is the ongoing investigation into the Belhaj case, the suspended investigation into the Binyam Mohamed case, and we assume that given what has happened to Binyam that the Met Police have requested and are thoroughly searching through the Report. There are ongoing investigations by the Iraq Historic Allegations Team (IHAT), which will be interesting as it potentially covers Bagram, the detention facility in Afghanistan where people were being taken. Sapna expressed her hope that the Met, IHAT, and other various investigations are looking at criminal sanctions for involvement of UK officials.

Sapna echoed Clare's earlier suggestion that there needs to be a judge-led inquiry, carried out under the Inquiries Act 2005, that has the power to compel witnesses to give evidence, to compel disclosure, that has the final say on documents that are redacted and what goes into a

report, that gives status to former detainees, and allows for questions to be put in cross-examination to the security services. Expressly, Sapna cited the Baha Mousa inquiry as a good model.¹⁰ Sapna noted that of course not all of the sessions will be open, or all of the material available and put online for all to see, but encouraged the presumption that evidence be given in the open rather than in closed sessions where little information would be released to the public.

Sapna then proceeded to provide justification for the demand of a judge-led inquiry. Such an inquiry was necessary in order to answer many of the questions raised in Sir Peter Gibson's report, in particular, the extent of UK knowledge of the torture techniques being used, the monitoring and treatment of detainees when they were involved in operations with the US, and the extent to which UK officials may have been complicit. The inquiry should investigate whether there was inappropriate involvement of the UK in rendition, and as Clare referenced, into the very plain speaking letter that appears to be from Sir Mark Allen to Moussa Koussa, which appears to demonstrate a level of inappropriate involvement in rendition.

Sapna emphasised that it was important that such an inquiry should not prejudice police investigations, but argued that documents can still be gathered, reviewed, and organised, for a time when public hearings and questioning can take place. Other actions that Sapna hopes the government will take within ongoing litigation include ceasing attempts to get cases struck out of court. Having brought in the Justice and Security Act in 2013 (JSA), the government can now ask for closed material procedures. The government had offered these as the very reasons for why the JSA was needed – it was said that if closed material procedures were available then it would enable the courts to properly and fairly test these allegations, and that would benefit the security services. However, the UK Government is still trying to get cases struck out of court after having passed the JSA by arguing that the US would be very offended if a UK court potentially criticised its involvement in acts such as rendition and torture.

Sapna declared her hope and expectation that the government will have to very carefully take on board what has been revealed in the SSCI Report when pursuing public-interest immunity certificates and when seeking and justifying closed material proceedings. She noted that judges give very careful scrutiny to any such requests and consider what material is now in the public domain. In terms of going forward, Sapna considers that there is no option now for the UK to turn a blind eye to what is being done by other countries with whom the UK liaises in counter terrorism operations, for being incurious about methods, or for being overly deferential to both our own security services and those of other countries. Finally, Sapna encouraged debate over whether there is a need for the Investigatory Powers Tribunal, now that we have these closed material procedures through the JSA.

The Rt. Hon. Sir Malcolm Rifkind QC MP, Intelligence and Security Committee, Parliament

Sir Malcom opened his comments by expressing his agreement with the majority of points made by other panel members. He acknowledged the SSCI Report to be a very powerful, impressive, and shocking Report. Furthermore, Sir Malcom commented that it was actually a very shocking Report not just for the general public here or in the US, but also for many within UK intelligence agencies. As had already been mentioned by other speakers, Sir Malcom recognised that it was unfortunate that it was a partisan report: a report essentially produced by democrats on the

¹⁰ The Baha Mousa Public Inquiry, available at www.bahamousainquiry.org

committee with republicans producing their own minority renunciation of its conclusions, which inevitably has an impact on its authority. In the UK, the ISC has never had a partisan report in its history, never takes a vote on partisan grounds, and very much believes that should continue to be the case.

Sir Malcom expressed his view of what was shocking about the Senate Report. It was not, he said, the revelation of EIT, which was well-known already, but the comprehensive nature of it and the extent to which private consultants, who lacked particular experience within this area, had been used to advise. Sir Malcom also expressed interest, and reassurance, in the degree of internal opposition within the CIA, and within the intelligence community, when they discovered what was happening. Their concerns, warnings, and reservations were all ignored, and the fact that within the intelligence community there was clearly very strong anger at what was happening is reassuring. Sir Malcom credited President Obama for taking action to repudiate the measures. Sir Malcom argued that although the UK position was different from the US position – there are not widespread allegations of torture by British personnel – it was still very serious: there are allegations of complicity, knowledge, awareness, or benefitting from intelligence that might have been acquired by the US or others as a result of their interrogation procedures.

Sir Malcom then addressed the issue of whether there should be a judge-led inquiry in the UK, rather than the work that the ISC has already started and which will continue under the new Parliament. Sir Malcom made the point that although it may sound preferable to propose a judge-led inquiry, as an apparent ultimate test of protecting the public interest, he disagrees with those who say that little could be achieved without it. Sir Malcom reminded the panel that they were convened for this very event to discuss the Senate Committee Report, wherein all of this information was published not because of a judge-led inquiry in the US, but because a group of politicians on their intelligence committee produced a Report which was able to inform the world as well as their own fellow citizens. Sir Malcom therefore rejected the idea that a judge-led inquiry could achieve a superior result than a Parliamentary or Senate committee.

Sir Malcom made clear that he did not harbour any personal views about whether there should or should not be a judge-led inquiry, as it was not the ISC's decision but the UK Government's decision to depart from that procedure. Sir Malcom considered that in his opinion it would not actually make a huge amount of difference to the procedure. With regard to the point raised concerning the power to compel witnesses, Sir Malcom responded that the ISC has never had any problem getting people to give evidence, and that if someone declined to give evidence, it would be assumed by everyone that they had something to hide, which would be against their own benefit. Sir Malcom told the panel that the ISC had never had any difficulties of the kind that it was implied a judge-led inquiry would avoid, though he confirmed that it was a matter for the wider public to deliberate on.

Concerning the current work of the ISC, Sir Malcom explained that the Committee was asked some months ago by the Government to take over from Sir Peter Gibson the work on the detainee issues, and made it clear at that time that they were still completing the Report on the Lee Rigby murder, and furthermore that the Committee had already committed itself to a privacy and security inquiry which was a consequence of the Snowden revelations and their implications in the United Kingdom. The Lee Rigby Report was published some months ago and Sir Malcolm noted that it was widely welcomed as the best exhaustive study of matters relevant to the work of the intelligence agencies. An unprecedented amount of information was made available in the public domain, with far less redaction than in the past which included much more about the

role and activities of the intelligence agencies. Sir Malcom noted that the ISC would be producing their privacy and security report in the next week or so and that it will be a major report, with some very important recommendations, and would further demonstrate that the ISC is able to deliver a very important contribution in its oversight of our intelligence agencies.

Sir Malcom sought to explain a matter which he considered insufficiently understood. This point related to the way the JSA has transformed the powers of the ISC. Sir Malcom noted that if he had been asked a couple of years ago whether the ISC had sufficient power to deliver the results required (and obviously reference would be made to the problems that occurred in the Mohamed case when the ISC was misled several years ago) he would have had to respond that no, they did not have enough power, and that some other route would have to be chosen to ensure a proper inquiry. This is because, prior to the JSA, the powers of the ISC were as defined in the original Act in the 1990s. First, they could not compel, by law, the intelligence agencies to provide answers to their questions. They were able to request information from the intelligence agencies but the intelligence agencies were not required to deliver information. Sir Malcom pointed out that did not mean that they tended to refuse, but that they could quite legally, and even in good faith, pick and choose what they shared with the ISC, forming their own judgments about what was important to disclose.

That situation has now changed: under the JSA the intelligence agencies cannot refuse to provide information. If they are unhappy with what the ISC requires from them, their only recourse is to go to the Prime Minister. Only the Prime Minister can refuse the ISC permission to see information on the grounds of national security, which the ISC would have to be satisfied were genuine grounds. Sir Malcom explained that it is difficult and unusual to raise concerns of national security, as the ISC is cleared to see top secret information.

Sir Malcom made the further point that, not only does the ISC now have a legal right which it did not have in the past, the Secretariat now has the power – used both in the Rigby investigation and in the privacy and security inquiry – to go into Thames House, GCHQ, Vauxhall, and actually examine in the very offices of the intelligence agencies material relevant to enquiries.

Additionally, Sir Malcom noted that up until a year ago, the original legislation did not give the ISC a way to deal with any matters other than policy, resources, and administration. In particular, the original Act did not mention operations. In practice, the ISC has dealt with operations over the years, but only when the Prime Minister or the intelligence agencies considered it appropriate to cooperate, either because something had leaked or for some other reason that it was in their interest to do so. The ISC now has oversight of operations of the same basis as policy, resources, and administration, and every three months receives a full quarterly report from each intelligence agency outlining activity in the previous few months. Sir Malcom recognised that in the past, unless something was either volunteered to the Committee, leaked to the newspapers, or somehow came into the public domain, the ISC did not know any more than the public about the activities of the agencies. He recalled an occasion where an intelligence chief was upset about some critical comments the ISC were making in a report, and although he admitted that the criticism of the particular matter was justified, he was disappointed that the report did not cover how very successful the agency had proven that year, to which Sir Malcom responded that they were not informed of such information by the agencies, and so of course could not provide a comprehensive picture.

Sir Malcom recognised that the work and effectiveness of an oversight committee depended on its budget and its resources, and drew attention to the effective doubling of the budget and staff of the ISC in the last year. Sir Malcom was currently unable to suggest any additional powers

from the Government or Parliament which had not already been implemented that would make a material difference to the ISC's effectiveness. After the general election, where a new committee will inevitably be formed, Sir Malcom stated that they will have the benefit of the work already carried out by ISC staff over the last six months, going through all of the detainee material upon their appointment. Concerning the Belhaj case and the Libyan rendition, Sir Malcom commented that it is currently a matter being dealt with by the police, and that the ISC, just as with the Gibson or any other inquiry, could not begin investigations until the police inquiry had been resolved.

Comments & Questions

Sir Daniel Bethlehem opened the session for comments and questions with several of his own thoughts after listening to each of the speakers. He queried whether the SSCI Report presents a standard for the ISC in the sense that it was very rigorous and very detailed in terms of its historical review and whether this meant that the ISC must produce something which is matching in terms of its content.

Sir Malcom responded that in fact the ISC had already done so with the Lee Rigby Report, which ran to 200 pages covering a single incident, whereas the Senate Report covered a whole process. The Rigby Report, he said, contained 200 pages providing in detail every single stage of whether the individuals involved were on the radar of the intelligence agencies, what the involvement of the intelligence agencies was, and why they took the actions they did. Sir Malcom told the panel that the report was the most rigorous report that has ever been produced on an intelligence matter within the UK.

Sir Daniel then raised the Binyam Mohamed initial report, where there was concern that information that had not been provided to the ISC. Sir Malcom responded that, at the time, the ISC could not require the intelligence agencies to provide information and that, under the assumption of good faith, the intelligence agencies had so much to do that they did not put enough effort into going through all of their files. That situation changed following the court order,¹¹ and they applied a different standard. When the ISC started the Lee Rigby inquiry, Sir Malcom recalled being told by the then head of Mi5 that they [Mi5] were going to apply the same standard when supplying the ISC with the information they require as if it was a court that was requiring it, dedicating a number of staff to meeting that requirement.

Sir Daniel noted that as he was looking into the publication of the Senate Report, he, and a number of other commentators who have since expressed themselves in the New York Times,¹² were concerned about the prism through which the Senate approached the report. In particular, the approach was through the prism of effectiveness, rather than through the prism of legality or the prism of values, and Sir Daniel queried whether this approach was the correct approach.

Sir Daniel then recapitulated Sir Malcom's response to Clare and Sapna in terms of their request for a judge-led inquiry, stating that in the US this was a Senate Report, and not a judge-led

¹¹ *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs*, [2010] EWCA Civ 65, [2011] QB 218.

¹² Did the Torture Report Give the C.I.A. a Bum Rap?, David Cole, available at http://www.nytimes.com/2015/02/22/opinion/sunday/did-the-torture-report-give-the-cia-a-bum-rap.html?rref=opinion&module=Ribbon&version=context®ion=Header&action=click&contentCollection=Opinion&pgtype=article&_r=0

inquiry, and asked whether the panel considers that the Senate Report itself was somehow inadequate, and that a judge-led inquiry would have reached a different kind of conclusion. In doing so, is the panel acknowledging that the US process has produced a very credible report, but proposing that the UK should adopt a different process?

Sir Daniel went on to say that the points that John made about operational oversight seem to be tremendously important, and observed that thus far in the discussion there had been no reference to the Intelligence Services Commissioner, or other commissioners. Sir Daniel queried whether the panel would agree that in terms of accountability and oversight mechanisms, our commissioners work sufficiently well, and whether oversight and accountability should be operational as well as strategic and retrospective.

Sir Daniel then offered that regarding the “variable geometry of law”, following John’s statement, and having personally sat in a government seat, he could say as a matter of record that the variable geometry of law between allies was one of the most challenging issues that they had to deal with. Sir Daniel raised two further questions about the UK system and the US system. First, he asked whether panellists considered that the fact our UK intelligence agencies report through a political channel to the foreign secretary (in the case of SIS and GCHQ) and the Home Secretary (in the case of the Security Service), makes the decision-making process different, perhaps less political, or less agency political, than the US system where the CIA has a cabinet-level individual around the table. Secondly, many of the practices that we have in focus were practices that were addressed by politically-appointed lawyers in the Department of Justice and in the White House and elsewhere: we have a practice in the United Kingdom of not having politically-appointed lawyers. Do these machinery of government differences make the UK system qualitatively different?

Questions from the audience were fielded over the publication of the heavily redacted *Guantanamo Diary* by detainee Mohamedou Ould Slahi, the ISC’s lack of access to the full SSCI Report documents, the extent to which the focus on effectiveness had proved a distraction for the SSCI Report, and the lack of consideration of things on a political level – which was not properly examined, resulting in a missed opportunity or a partial picture from what happened within the CIA but not the legal and political authorisation they received. Further questions were asked regarding whether Professor Gearson considered there to be a continuing difference in legal frameworks between the UK and US, or whether those differences were effectively narrowed by changes brought in by the Obama administration.

Sir Daniel then added additional questions for John regarding context: what is the relevance of context when it comes to accountability and oversight, and whether there was a machinery of government failure because the context was not reined in sufficiently, or whether the context went towards providing mitigation of the actions of the intelligence agencies?

A further question from the audience was addressed to Sir Malcom regarding exactly how one would challenge an authoritative prime ministerial decision that information is unavailable on grounds of national security.

Sapna addressed the prism through which these issues should be viewed, specifically championing legality and the rule of law. Sapna acknowledged that consideration of effectiveness was somewhat helpful. Sir Daniel interjected to make the point that one of the concerns that emerged in the US is that it was the White House and Department of Justice lawyers who were saying ‘it is lawful therefore do it’, rather than leaving the question to be addressed on wisdom, even after the question of legality was taken. Regarding party political

lawyers advising on these issues, Sapna thought that it was not an appropriate system. She argued that although Obama clearly made the decision that those lawyers should not face personal sanction, their complicity was debatable. In particular, Sapna cited their memos and circular arguments in justification of what was allowed to happen.

Sir Malcom, in response to the question directed towards the ISC's lack of access to the full Senate Report, explained that it was an impossibility, as any classified material in a US court may only be made available if the US government agrees.

With regard to testing a Prime Ministerial decision to withhold information on the grounds of national security, Sir Malcom explained that every time the ISC produces a report and there is a proposal for a redaction, in the first instance it is discussed with the intelligence agencies, whereby if an agreement cannot be reached, the ISC approaches the Prime Minister for a decision on the matter. The Prime Minister would then have to share with the ISC his reasons why he thought national security required a redaction, and ultimately that decision is the Prime Minister's responsibility. If, however, the ISC thought or concluded that the Prime Minister was using national security on false terms, e.g., to avoid embarrassment or for other reasons that were not legitimate national security, Sir Malcom speculated that the ISC would refuse to accept the decision. Although the ISC would not be able to stop the redaction, it could make a public statement that the ISC considered the redaction unjustified in terms of the proper criteria, which would be very damaging to a prime minister. Ultimately, Sir Malcom suggested that the committee could resign, creating a crisis, though stressed that in practice this problem has never arisen. Sir Malcom stated that as far as he was aware, all Prime Ministers since the committee was established applied genuine national security considerations.

Sir Daniel then approached the issue of Sir Malcom's former role as Foreign Secretary at the time that the Intelligence Services Act came into force. He asked about the role of the Foreign Secretary, especially as it compared to the position in the UK. Sir Malcom recognised that these are interesting and often discussed issues, and there was discussion of whether warrants should continue to be signed by secretaries of state (Home or Foreign Secretary), or as some people argue they should go to a court. Sir Malcom's view is that the present system is preferable because in the US the process and decisions under the Foreign Intelligence Surveillance Act (made by judges) have attracted the same criticism as decisions of our own ministers. He disagreed with the proposition that because you involve judges you solve political issues. A judge is only able to apply legal criteria and is unable to consider whether something is politically sensible. In this sense, Sir Malcom advocated the advantages of political judgements, under which a warrant can be adjusted, if necessary.

Clare addressed the prism of effectiveness by arguing that just because something is effective, it does not make it right, legal, or ethical. The question of national security prompted discussion of Binyam Mohamed, where disclosure of UK documents was sought by national security-cleared US lawyers (not published to the public), and the Foreign Secretary attempted to deny access on the basis of national security. Clare argued that the decision in Binyam Mohamed indicated that it was national embarrassment rather than national security which motivated the government's concerns, and that this was the problem with national security being cited as a defence to publication. Finally, Clare argued that although the JSA has improved capabilities of the ISC, its track record remained unfortunate in that issues currently being investigated were uncovered by journalist Ian Cobain (Belhaj), Reprieve (Binyam Mohamed), and other journalism sources (PRISM surveillance program: Snowden and the Guardian).

In concluding the event, John offered some insights on context. John agreed that the policy approach was a failure in the machinery of government. As an analyst at the time of Guantanamo, he expressed his opinion that he and many others knew what the US needed to try and achieve, but that this was overridden by the tactical requirement of gathering intelligence and the prevention of attacks on America. John reminded the panel that regarding legality, under Obama the targeted assassination campaign has expanded to a level surpassing that of the Bush administration. Secondly, the rendition programme was initiated by the Clinton administration, so this did not constitute a party partisan case, but rather different administrations faced with different situations. John did not consider this context to provide mitigation, but to serve as an explanation of how the machinery of government reacts to different pressures. John demonstrated the continuing differences between the UK and US legal frameworks with the different approaches of the drone campaign and subsequent use of lethal force of drones by the US. In his final point, John noted that the nature of the intelligence sharing relationship makes it very difficult to know the provenance and derivation of the intelligence in question.

This report was report was prepared by Jack Kenny, with the assistance of Justine Stefanelli and Dr Lawrence McNamara.

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