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**‘THE OVERSIGHT OF THE UK INTELLIGENCE AND SECURITY
SERVICES IN RELATION TO THEIR ALLEGED COMPLICITY IN
EXTRAORDINARY RENDITION’**

Alice McDonald

Abstract

Allegations that the UK Secret Intelligence Service and Security Service were complicit in extraordinary rendition in the “War on Terror” raise concerns about the effectiveness of the existing UK intelligence oversight framework. This thesis analyses the response of oversight institutions to the allegations, and considers their ability to provide meaningful intelligence oversight, both individually and holistically. It considers an oversight framework based on the separation of powers, in which the state institutions have complementary roles.

This thesis argues that the existing legislative oversight framework is outdated and that although due weight should be afforded to national security concerns, the current balance lies too far in favour of the executive. Both the Intelligence and Security Committee (ISC) and judiciary require greater powers to provide meaningful oversight. There is also an increasing role for civil society and transnational organisations, especially given the difficulties international intelligence cooperation poses for domestic intelligence oversight.

The thesis considers: (1) the legislative oversight framework and law relating to extraordinary rendition; (2) the global intelligence landscape in which the UK intelligence and security agencies operate, and effect of increasing international intelligence cooperation; (3) executive oversight and the relationship between the executive and the UK agencies; (4) the structure and powers of the ISC, and its reports concerning extraordinary rendition; (5) the role of the judiciary within intelligence oversight, and judgments made in the context of extraordinary rendition; (6) the increasing role for non-traditional actors, including Non-Governmental and Transnational Organisations and the Press.

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ACKNOWLEDGEMENTS

I would like to thank Durham Law School for its assistance in producing this thesis. I am especially grateful to Professor Ian Leigh for his patience, and all the invaluable advice, support and supervision he has given me during the course of my MJur.

CHAPTER 1: INTRODUCTION

There has never been a more apposite time at which to scrutinise the oversight of UK intelligence and security agencies. In an extraordinary few years, the actions and operations of the Security Service (MI5), Secret Intelligence Service (MI6 or SIS) and GCHQ have hit newspaper headlines as never before, in relation to allegations of the agencies' complicity in the US led 'global spider's web'¹ of extraordinary rendition.² Discussions revolving around such allegations have largely focused upon the need for effective and public oversight and accountability of the intelligence and security services. This is because although the agencies operate within a difficult global environment, and against a variety of diverse threats,³ it is increasingly evident that a democratic society which upholds liberal values must, to some extent, be able to legitimately regulate the actions of its agencies.

Although definitions of “extraordinary rendition” differ slightly, broadly speaking, it is agreed that the term refers to the practice of,

‘forcibly transporting a person – usually alleged to be involved in terrorist activity –

¹ Committee on Legal Affairs and Human Rights, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, Council of Europe: Strasbourg (Doc. 11302 rev.) (11/06/2007) <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>> 46.

² See, amongst other similar articles, C Brown, ‘Rendition victim was handed over to the US by MI6’, *The Independent*, 14 December 2005 <<http://www.independent.co.uk/news/uk/politics/rendition-victim-was-handed-over-to-the-us-by-mi6-519413.html>> last accessed 05/02/10; I Cobain, ‘Britain ‘complicit in mistreatment and possible torture’ says UN’, *The Guardian*, 27 January 2010 <<http://www.guardian.co.uk/world/2010/jan/27/britain-complicit-possible-torture-un>> last accessed 05/02/10; R Norton-Taylor, ‘MI5 faces crisis of credibility as torture denials are discredited’, *The Guardian*, 10 February 2010 <<http://www.guardian.co.uk/world/2010/feb/10/torture-mi5-binyam-mohamed>> last accessed 11/02/10; D Rose, ‘Revealed: MI5’s role in torture flight hell’, *The Observer*, 29 July 2007 <<http://www.guardian.co.uk/uk/2007/jul/29/usa.politics>> last accessed 11/02/10.

³ See ‘Chapter 2: The Challenges of Working within a Global Intelligence Landscape’ 28-48.

from one country to another country without relying on the normal legal processes...and for the purposes of subjecting them to interrogation and other forms of treatment that include torture or cruel and degrading treatment.’⁴

As discussed below, both the lack of due process associated with such a procedure, and use of torture, mean that it contravenes many international legal norms. However, despite the UK government’s insistence that there is no foundation in allegations of their complicity in the practice of extraordinary rendition,⁵ it has been alleged that the UK’s role went, ‘far beyond that of a bystander.’⁶ This is difficult to corroborate, given the inherent secrecy in this area, and relative lack of court cases clarifying the UK government’s practice in this area. However, if the allegations are found to be true, they would cast a shadow upon the reputation of the UK intelligence and security agencies in a national and international arena.

Given that the allegations of complicity in extraordinary rendition purport to implicate all actors within the intelligence process, including the executive, the challenge for the government lies in identifying any operational and policy failures which may have led to such allegations being promulgated, and ensuring that they are amended.⁷ Regardless of whether

⁴ Professor P Sands, ‘Extraordinary Rendition: Complicity and its consequences’, (JUSTICE International Rule of Law Lecture 2006, Middle Temple Hall, London) 15 May 2006 <<http://www.justice.org.uk/resources.php/197/extraordinary-rendition-complicity-and-its-consequences>> last accessed 17/06/2011, para. 2.

⁵ See, for example, HC Deb 20 January 2006, vol 441, cols 37WS-38WS (Jack Straw); A Johnson, ‘Letters: Detention, torture and human rights’ *The Guardian*, 10 July 2009 <<http://www.guardian.co.uk/world/2009/jul/10/letters-detention-human-rights>> last accessed 07/02/2011; D Miliband and A Johnson, ‘Letters: Intelligence, torture and the courts’ *The Guardian*, 12 February 2010 <<http://www.guardian.co.uk/world/2010/feb/12/intelligence-torture-and-the-courts>> last accessed 07/02/2011.

⁶ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), para. 88 (per Thomas LJ).

⁷ Schreier, F, ‘The Need for Efficient and Legitimate Intelligence’ in Born, H, and Caparini, M, (eds), *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Ashgate Publishing Ltd., Hampshire

the allegations are true or not, the fact that they have arisen raises concerns about the extent to which the UK agencies are overseen by other independent branches of state, and how they may appear more democratically accountable than at present. In order to do this, it is necessary to critically analyse the oversight mechanisms which currently oversee the actions of UK agencies and, if necessary, reform them into a cohesive system in which the agencies are held as publicly accountable as existing public services and government departments.⁸

However, given that the issues surrounding intelligence oversight are complex⁹ and necessarily revolve around the premise of retaining operational secrecy as far as possible¹⁰, it is impossible to model intelligence oversight in the same way as “ordinary” public services.¹¹ However, it is important to allow discussions about intelligence oversight as far as possible, and within an appropriate forum, given that this is an area of high national interest. In order to do so, there must be sufficient access to information to ensure that discussions are

2007), 39; Born suggests that this is only possible if governments are willing to accept responsibility for failures, in ‘Parliamentary and External Oversight of Intelligence Services’ in Born and Caparini (eds.) *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Ashgate Publishing Ltd., Hampshire 2007), 167.

⁸ Caparini, M, ‘Controlling and Overseeing Intelligence Services in Democratic States’ in Born & Caparini (n 7), 3; see more especially, Geneva Centre for the Democratic Control of Armed Forces (DCAF), ‘Contemporary Challenges for the Intelligence Community’ (Backgrounders Series) 03/2006 <<http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18415&nav1=5>> last accessed 08/10/10.

⁹ Leigh, I, ‘More closely watching the spies: three decades of experiences’ in Born, H, Johnson, L, & Leigh, I, *Who’s Watching the Spies? Establishing Intelligence Service Accountability* (1st edn, Potomac Books 2005) 7.

¹⁰ ‘Foreword by Ambassador Theodor H. Winkler and Ambassador Leif Mevik’ in Born, Johnson & Leigh (n 9) ix; Herman, M, *Intelligence Power in Peace and War* (CUP, Cambridge 1996), xii; Treverton, G, ‘Reorganizing U.S. Domestic Intelligence: Assessing the Options’ RAND Corporation Monograph Series MG-767-DHS, Homeland Security Program and the Intelligence Policy Centre, Santa Monica 2008 <<http://www.rand.org/pubs/monographs/MG767/>> last accessed 09/10/10, 103; Eminent Jurists’ Panel, *Assessing Damage, Urging Action* (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights 2009) 68.

¹¹ Caparini in Born & Caparini (n 7), 18.

informed,¹² and do not unnecessarily sensationalise the issues. The reports of the Intelligence and Security Committee (ISC), court judgements and media reports, are largely responsible for informing the debate on intelligence oversight at present, although their authoritativeness is somewhat limited by the restrictions upon their content and, in relation to the courts, the openness of their procedure, as is discussed in this thesis.

An effective model of intelligence oversight is one based upon the constitutional separation of powers and implements different levels of oversight involving state and non-state actors with complementary, but not similar, powers.¹³ The oversight framework in the UK follows this model by balancing the respective roles of the executive, legislature and judiciary, as the three branches of the state. In theory, therefore, the executive is involved in overseeing and authorising the agencies' actions, the legislature seeks to provide legal limits within which they must operate, and the judiciary subsequently reviews any purported wrongdoing. By doing so, it prevents any possibility of their individual use of excessive authority within intelligence, and provides agencies with the independence from party politics. This is necessitated by their continuing and future role in securing the state's interests.¹⁴

As discussed throughout this thesis, in practice the roles of the executive, legislature and

¹² Schreier in Born & Caparini (n 7) 44; Gill, P, *Policing Politics: Security Intelligence and the Liberal Democratic State* (1st edn., Frank Cass & Co. Ltd., London 1994), 253; Gill, P, 'The Politicization of Intelligence: Lessons from the Invasion of Iraq' in Born, Johnson & Leigh (n 9), 15.

¹³ Caparini in Born & Caparini (n 7) 23.

¹⁴ Born, H & Leigh, I, 'Chapter 5: Democratic accountability of intelligence services' in Stockholm International Peace Research Institute (SIPRI) Yearbook 2007, *Armaments, Disarmament and International Security* (38th edn, OUP 2007)197-198; Caparini in Born & Caparini (n 7) 7-8; Lindsay, K, *The British Intelligence Services in Action* (Dunrod 1980) 272; Gibson, S, 'In the Eye of the Perfect Storm: Re-Imagining, Reforming and Refocusing Intelligence for Risk, Globalisation and Changing Societal Expectation' (2005) Risk Management 7(4) 23-41, 31.

judiciary are not as clearly delineated as the separation of powers theory dictates. However, if all involved parties are endowed with effective authority by which to truly hold agency practices to account, cooperate effectively, and enforce sanctions where necessary,¹⁵ as discussed, then there is reason to believe that such a system may be successful. It is also increasingly important to recognise the growing role of civil society within intelligence oversight, given the mobilisation of the public, civil society organisations and the media, in respect of publicising allegations of extraordinary rendition.¹⁶ The challenge of ensuring effective oversight must therefore be approached from the understanding that ‘oversight is a process, not an event.’¹⁷ It will take time for the actors within intelligence oversight to inhabit their new roles and exercise their powers appropriately and confidently. In order to facilitate such developments, any recommendations must be implemented with long term objectives, rather than in response to the specific allegations in question.¹⁸ For this reason, proposals of specific legislation criminalising complicity in extraordinary rendition are short sighted and will have limited long term effect.¹⁹

This thesis will therefore analyse the current oversight framework of the UK intelligence and security services in relation to recent allegations of their complicity in extraordinary rendition. It will consider how the existing formal mechanisms of oversight have reacted to

¹⁵ Caparini in Born & Caparini (n 7) 8; Schreier in Born & Caparini (n 7) 42.

¹⁶ Gill, P, ‘The Intelligence and Security Committee and the challenge of security networks’ (2009) *Rev. Int'l Studies* 35(4) 929-941, 940.

¹⁷ Schreier, F, *Fighting the Pre-Eminent Threats with Intelligence-Led Operations* (DCAF Occasional Paper 16, 2009), 108.

¹⁸ As a contrast, consider the circumstances in which the current legislative framework was formulated, 13-21.

¹⁹ See proposals by the All Party Parliamentary Group on Extraordinary Rendition; ‘Extraordinary Rendition: Closing the Gap: A Proposal to Criminalise UK Involvement’ 11/05/2009 <http://www.extraordinaryrendition.org/index.php/component/docman/doc_details/216-extraordinary-rendition-closing-the-gap> last accessed 25/09/2011, 127-133.

such allegations, and how well placed they have been to do so in terms of their structure and powers. This introductory chapter will include a section outlining the current oversight mechanisms, as set out by the relevant legislation. It will also consider the domestic and international legal obligations surrounding the issue of complicity in extraordinary rendition, in order to provide context to the subsequent discussions. The second chapter will then concentrate on the operational context in which the agencies collect and analyse intelligence. Relevant considerations here include the globalisation of security threats, the technological revolution, the blurring of agency boundaries, the internal regulation of the agencies, and most importantly, the growth of international intelligence cooperation. This last development truly blurs the boundaries between law, intelligence and international relations, and has wide implications for the ability of oversight mechanisms to perform their functions of review.

In chapters 3 – 5, this thesis will consider the response of the executive, parliamentary and judicial branches of state, in their respective forms of oversight mechanisms, to allegations of agency complicity in extraordinary rendition. Chapter 3 begins with an analysis of the executive's role in the oversight process, in terms of its proper relationship with the intelligence and security agencies, use of the principle of ministerial responsibility, and previous policy regarding alleged complicity in extraordinary rendition. Chapter 4 then moves onto the role of the ISC as a mode of parliamentary scrutiny of the relevant agencies. Further to merely considering the statutory role and powers of the ISC, it is also essential to consider how the committee has asserted its powers in practice, in terms of its legal mandate. In order to do this, one must look closely at the ISC's recent reports, especially those relating to the treatment of detainees overseas²⁰, and allegations of complicity in rendition²¹.

²⁰ ISC, 'The handling of detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq' (Report) (March 2005) Cm 6469.

Chapter 5 will focus on the courts and judiciary as forms of intelligence oversight, both in terms of the statutory Investigatory Powers' Tribunal and Intelligence Commissioners, and also in relation to the treatment of intelligence and security related issues within the “normal” judicial process. Recent cases, including *Al Rawi and Others*²², heard in the Supreme Court, and *Mohamed (No. 2)*²³, before the Court of Appeal, have raised important questions as to the extent to which “incidental” judicial oversight should defer to the executive over intelligence and security issues. At the same time, procedural rules and processes, such as the closed material and special advocate procedure have been important in accommodating issues of intelligence within the UK legal system.

Chapter 6 will look at the contribution of non-traditional oversight mechanisms, including the media, NGOs, and transnational bodies, to effective intelligence oversight. This is an aspect of oversight which has traditionally been somewhat neglected by academics. However, the fervour with which numerous NGOs and investigative journalists drove the debate on extraordinary rendition demonstrates the importance of analysing their role in informing and monitoring public perception and understanding of the intelligence and security services. The chapter will therefore examine the advantages, and limitations, of their contribution to intelligence oversight, in order to identify how they might more successfully and effectively oversee the agencies.

²¹ ISC, ‘Rendition’ (Report) (July 2007) Cm 7171.

²² *Al Rawi and others v Security Service (JUSTICE and others intervening) (‘Al Rawi and others’)* [2011] UKSC 34; [2011] 3 W.L.R. 388.

²³ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (‘Mohamed (No. 2)’)* (CA) [2010] EWCA Civ. 65; [2011] Q.B. 218.

Having considered the above issues, this thesis will conclude with a summary of the performance of oversight mechanisms in relation to extraordinary rendition, and the lessons which this has highlighted in terms of the future of intelligence oversight in general. Due to the constraints of time, and word limit, this thesis will not consider developments in intelligence oversight past summer 2011.

1.1 The Legislative Oversight Framework of the UK Intelligence and Security Services

Although the historical background of the intelligence and security agencies has been previously dealt with to a far greater extent than possible here,²⁴ it is fitting to begin this thesis with a brief account of the events leading to the creation of the ‘piecemeal’²⁵ legislative framework which currently regulates the oversight of the UK agencies. Prior to the 1980s, responsibility for the intelligence and security services was based upon the Crown prerogative, rather than specific legislation,²⁶ and therefore the agencies operated within a quasi-secret no man’s land, free from public scrutiny of their actions.²⁷ In this sense, it is therefore certainly true that traditionally, ‘intelligence was the last taboo of British politics.’²⁸

²⁴ Most notably by Andrew, C, *The Defence of the Realm: The Authorized History of MI5* (Penguin Books, London 2009). See also Dorrill, S, *MI6: Fifty Years of Special Operations* (Fourth Estate, London 2000); Gill, P, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12); Herman, *Intelligence Power in Peace and War* (n 10); Jones, R, *Reflections on Intelligence* (Heinemann, London 1989); Lindsay (n 14); Lustgarten, L, & Leigh, I, *In From the Cold: National Security and Parliamentary Democracy* (OUP, Oxford 1994).

²⁵ Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 929.

²⁶ Leigh, I, ‘Accountability of Security and Intelligence in the United Kingdom’ in Born, Johnson & Leigh (n 9) 79.

²⁷ Andrew (n 24) 754; Starmer, K, ‘Setting the record straight: human rights in an era of international terrorism’ (2007) E.H.R.L.R. (2) 123-132, 128.

²⁸ *Ibid* (Andrew) 753.

The emergence of intelligence oversight as a pressing political issue was prompted by revelations and scandals involving agency officials during the 1980s; in a domestic context, for example, the conviction of Michael Bettany for passing information to Soviet agents, and the publication of *Spycatcher* by former agent Peter Wright, brought agency malpractice into the public domain, and emphasised the government's desire to retain secrecy within the realm of intelligence.²⁹ In an international context, cases taken to the European Court of Human Rights (ECtHR), brought the actions of the UK agencies under the scrutiny of a wider judicial forum. In *Malone v UK*³⁰ the ECtHR's decision that telephone tapping was unauthorised in domestic law led to the Interception of Communications Act 1985, the UK's first intelligence legislation.³¹ This proscribed a legal framework for telephone tapping and mail opening³² and established both a complaints tribunal³³ and a Commissioner to review the issuance of warrants authorised by the Home Secretary.³⁴ Whilst Andrew credits the ECtHR in *Leander v Sweden*³⁵ with emphasising that intelligence agencies' powers must be "sufficiently clear"³⁶, the decision in *Hewitt and Harman v UK*³⁷, relating to the UK agencies' use of surveillance powers, had a similar effect. In this way, the 'European dimension' was very influential in terms of provoking legislative oversight provisions³⁸, and in response, the UK government

²⁹ *Ibid* 754 – 767, for a comprehensive account of events during this period.

³⁰ *Malone v United Kingdom* (1984) 7 EHRR 14.

³¹ For a more detailed analysis than possible here, see Lloyd, I, 'The Interception of Communications Act 1985' (1986) Mod. L. Rev. (49) 86-95.

³² s2 Interception of Communications Act 1985.

³³ Schedule 1, ICA 1985.

³⁴ s8 ICA 1985.

³⁵ *Leander v Sweden* (1987) 9 EHRR 433.

³⁶ Andrew (n 24) 760.

³⁷ *Harman and Hewitt v UK* (1992) 14 EHRR 657.

³⁸ Leigh & Lustgarten, 'Legislation: The Security Service Act 1989' (1989) Mod. L. Rev. (52) 801, 803; echoed by Andrew (n 24) 756-760.

introduced legislation implementing the minimum level of oversight required by the ECtHR.³⁹ However, given the speed with which the UK responded to the ECtHR's decisions in *Malone v UK* and *Hewitt v Harman v UK*, the resulting legislation created an oversight system which has been termed, 'unsatisfactory [and] compartmentalised'.⁴⁰ These cases were bound by the lack of explicit legislative basis for the UK intelligence and security agencies⁴¹, and thus went to the very heart of the agencies' ability to operate without external control.

The resulting legislation came in the form of the Security Service Act 1989⁴², followed by the Intelligence Services Act 1994. These pieces of legislation put MI5 and MI6 on a statutory footing for the first time⁴³ and outlined the respective functions of the agencies. Section 1(2) SSA 1989 outlines the Security Service's functions as below;

'the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'⁴⁴

Similarly, according to s1(1) ISA 1994, the functions of the Secret Intelligence Service are;

'(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

³⁹ *Ibid* (Leigh & Lustgarten) 822.

⁴⁰ Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 938.

⁴¹ Leigh in Born, Johnson & Leigh (n 9) 4.

⁴² Andrew (n 24) 756-760.

⁴³ s1 SSA 1989; s1(1) ISA 1994.

⁴⁴ s1(2) SSA 1989. See also s1(3), and amendments.

(b) to perform other tasks relating to the actions or intentions of such persons.’⁴⁵

The ISA 1994 also attempts to limit the exercise of the above functions to situations which are necessary;

‘(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty’s Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime.’⁴⁶

However, the extent to which this constrains the agency’s actions is questionable given that the situations in which SIS may act are drafted very widely in order to allow for a variety of situations; as Wadham notes, for example, the expression “national security”, ‘can mean whatever the Government of the day chooses it to mean.’⁴⁷ Since neither ss1 SSA 1989 nor ISA 1994 proscribe actions which the agencies may or may not employ in the course of their operations, both Leigh and Starmer have criticised them as not sufficiently specific.⁴⁸ Further, Leigh and Wadham suggest that a more limited statutory definition of the agencies’ roles, listing specific prohibited actions, would be more appropriate and successful at keeping in check the powers of the security service.⁴⁹ Although the relative vagueness of ss1 SA 1989 and ISA 1994 allows the agencies to respond flexibly to new and emerging threats, the arguments of these academics are influential if one considers that such threats, might be more

⁴⁵ s1(1) ISA 1994.

⁴⁶ s1(2) ISA 1994.

⁴⁷ Wadham, ‘Legislation: The Intelligence Services Act 1994’ (1994) 57 Mod LR 916, 919.

⁴⁸ Leigh in Born, Johnson & Leigh (n 9) 94-5; Starmer (n 27) 129.

⁴⁹ Leigh & Lustgarten, ‘Legislation: The Security Service Act 1989’ (n 38) 809; Wadham (n 47) 918-9.

effectively resolved by easy reference to legally based general guidance, which would entrench the agencies' domestic and international legal obligations and prevent wrongful decision-making.⁵⁰ The vagueness with which the agencies' functions are termed therefore detracts from the benefit in their being enshrined in legislation.

Section 2 of both the SSA 1989 and ISA 1994 also entrench the role of Director-General of the Security Service, and Chief of the Secret Intelligence Service⁵¹, which is significant if one considers the traditional secrecy which surrounded these positions.⁵² This development also clearly enforces that the agencies operate according to a clear power hierarchy, with a line of control leading to the heads of the agencies. However, the fact that both agency heads also have a direct right of access to the Prime Minister⁵³, may raise questions about the proximity of the agencies to the executive⁵⁴; even if these are without foundation, the mere *perception* that the agencies may be influenced by party politics could undermine their public independence.

Section 4 SSA 1989 established the role of the Security Service Commissioner, who reviews the Secretary of State's authorisation of warrants relating to interferences with property. This was mirrored by s8 ISA 1994, in the form of a Commissioner performing this role in relation to the Intelligence Service's activities. These positions were consolidated by the Regulation of Investigatory Powers Act 2000, which changed their titles to the Interception of

⁵⁰ See 'Chapter 2: The Globalised Intelligence Landscape', 28-48.

⁵¹ s2 SSA 1989; s2 ISA 1994.

⁵² See, for example, Andrew (n 24) 774-778.

⁵³ s2(4) SSA 1989; s2(4) ISA 1994.

⁵⁴ See 'Chapter 3: The Role of the Executive', 49-62.

Communications Commissioner⁵⁵, and the Intelligence Services Commissioner⁵⁶. The former monitors the authorisation of warrants relating to interception methods⁵⁷, whilst the latter reviews the issuance of warrants relating to intrusive surveillance and interference with property.⁵⁸ Each Commissioner's remit therefore cover both agencies, insofar as they require warrants for the specified activities. The agencies must disclose all relevant information to the Commissioners⁵⁹, who report annually to the Prime Minister, according to ss58(4) and 60(2) RIPA 2000. Although the Commissioners therefore enjoy considerable access to information, they work part-time. This necessarily mean that their approach cannot be as thorough as would be desirable, given that the Commissioners' reports are based upon conclusions drawn from reviewing a sample of warrants actually granted, and from limited auditing visits to the agencies in questions.⁶⁰

Both SSA 1989 and ISA 1994 established Tribunals for the investigation of complaints about the agencies⁶¹, which were consolidated into the single Investigatory Powers Tribunal (IPT) by s65(Part IV) RIPA 2000. The IPT's powers under RIPA 2000 are wide, and purport to cover, 'interception of communications; communications data; intrusive surveillance; directed surveillance; interference with property; covert human intelligence sources;

⁵⁵ s57 (Part IV) RIPA 2000.

⁵⁶ s59 (Part IV) RIPA 2000.

⁵⁷ s57(2) RIPA 2000.

⁵⁸ s59(2) RIPA 2000.

⁵⁹ s58(1) and s60(1) RIPA 2000.

⁶⁰ See, for example, Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 63; although the authors talk about the role of Commissioner as established by the ICA 1985, the same criticisms are equally valid for the later legislation.

⁶¹ s5 and Schedule 2 SSA 1989; s9 and Schedule 2 ISA 1994.

investigation of protected electronic information.’⁶² However, the fact that the IPT seeks to accommodate intelligence within a specialised forum heavily dictates its procedure; s69(1) RIPA 2000 holds that the Secretary of State may determine the rules by which the IPT operates, including with regards to the evidential requirements and burden of proof⁶³, the level of information the complainant is given about the reasons for the conduct in question⁶⁴, and its ability to proceed without the presence of certain persons (including the complainant).⁶⁵ Although the Tribunal therefore has access to all the relevant information it needs under s68(6)-(7) RIPA 2000, s68(4) holds that it is under no obligation to give reasons for its decisions.⁶⁶ This raises the *perception* that the IPT’s process is not sufficiently independent of the executive, through the Secretary of State’s involvement in the IPT process. Furthermore, it also raises questions about the extent to which the Tribunal is a form of open justice by which a complainant may have its rights upheld. Although the IPT publishes decisions it considers “key rulings”⁶⁷, this itself implies that the IPT reaches a value-based decision about which rulings are “key”, and should be reported, and which are not. The subjectivity of such an approach does not promote certainty for those wishing to make a complaint to the IPT about the UK agencies. The IPT’s role as a decision-making body will be analysed in further detail in this thesis.⁶⁸

⁶² ‘What the Tribunal can Investigate’ <<http://www.ipt-uk.com/default.asp?sectionID=1>> last accessed 19/05/2011.

⁶³ s69(2)(g) RIPA 2000.

⁶⁴ s69(4)(a) RIPA 2000.

⁶⁵ s69(4)(b) RIPA 2000.

⁶⁶ s68(4) RIPA 2000.

⁶⁷ ‘Key IPT Rulings’ <<http://www.ipt-uk.com/sections.asp?pageID=73§ionID=19&type=rulings>> last accessed 20/02/2012.

⁶⁸ See ‘Chapter 5: The role of the judiciary’ 90-111.

The most significant achievement of the ISA 1994 is that s10(1), ‘establishes for the first time a system of parliamentary accountability for all three services’⁶⁹, in the form of the Intelligence and Security Committee (ISC).⁷⁰ The Committee comprises nine Members of Parliament, none of whom can be serving Cabinet Ministers.⁷¹ It must make an Annual Report, which it presents firstly to the Prime Minister⁷²; s10(6)-(7) ISA 1994 holds that only after suitable redactions are made is the report presented to Parliament, before publication. The ISC also has only limited access to information relevant to the publication of its reports, since it may not request specific documents⁷³, and may have information requests refused on the basis that the material it seeks is ‘sensitive’.⁷⁴ For such reasons Wadham argues that, ‘[i]n general, the provisions relating to the Committee imply that its members cannot be trusted with sensitive information.’⁷⁵ Although these rules were envisaged as a means by which to safeguard the secrecy of operational details and identity of intelligence officers, the ability of the ISC to function effectively as a means of oversight rests upon it being sufficiently informed about the events about which it seeks to report.

By analysing the background of the existing legislative intelligence oversight framework it is arguable, *prima facie*, that the current legislation fails to properly balance the inherent tension at the heart of the intelligence process, between the need to protect the state’s security and the desire that all aspects of the state should, as far as possible, be transparent. The context in which the existing intelligence legislation was drafted means that the statutes provide a

⁶⁹ Wadham (n 47) 916.

⁷⁰ The ISC is considered fully in ‘Chapter 4: The Role of the Intelligence and Security Committee’ 63-89.

⁷¹ s10(2) ISA 1994.

⁷² s10(5) ISA 1994.

⁷³ s3(1), Schedule 3 ISA 1994.

⁷⁴ s3(1)(b), Schedule 3 ISA 1994; for a definition of ‘sensitive information’ see s4, Schedule 3 ISA 1994.

⁷⁵ Wadham (n 47) 926.

minimalist oversight framework which arguably does not have sufficient powers of effective scrutiny.⁷⁶ Given the operational challenges which arise from the modern global intelligence landscape, the legislative framework is not compatible with intelligence oversight theory, which sees the division of functions between the branches of state as a means by which to ensure effective oversight. In contrast, the existing framework is noticeably deferential to the executive⁷⁷ and not sufficiently prescriptive. The ISC's Annual Report for 2010-2011 recognised that the current legislation is 'outdated', and should be replaced with narrower legislation which more strictly regulates the agencies' actions, as well as providing the Committee itself with greater powers.⁷⁸ A fuller, and more specific, analysis of the current UK intelligence oversight framework will be provided in subsequent chapters.

1.2 The Law Relating to Torture and Extraordinary Rendition

In order to provide some context as to how the practice of extraordinary rendition has highlighted deficiencies in the current system of intelligence oversight in the UK, this section will consider the legal obligations, both domestic and international, which affect the UK's response to the allegations of agency complicity in the practice.

Extraordinary rendition consists of both the extrajudicial capture of an individual, and their

⁷⁶ Leigh in Born, Johnson & Leigh (n 9) 94-5.

⁷⁷ *Ibid.*

⁷⁸ ISC, 'Annual Report 2010-2011' (Report) (July 2011) Cm 8114, 81-2.

removal to a third country where they may be tortured during interrogation.⁷⁹ Until very recently, the allegations relating to the actions of UK agencies in no way suggested that agency personnel were *directly* involved in torture and extraordinary rendition. However, it has recently been alleged that the UK agencies led the extraordinary rendition of an individual from Hong Kong to Libya.⁸⁰ Given that little is known about this incident to date, and the time constraints of this thesis, it is not possible to consider it fully, or to explore in sufficient detail the impact of these revelations upon the UK agencies' policies. This thesis will instead focus upon the general allegations made thus far of the agencies' complicity in extraordinary rendition; that is, the extent to which the agencies, knowingly or otherwise, facilitated and assisted the CIA's renditions programme.⁸¹ The term 'complicity' covers a broad range of acts⁸², from actual knowledge of the CIA's mispractice, to the interrogation of said detainees⁸³, the provision of information to the US subsequently used to render individuals⁸⁴, the feeding of questions to the US to ask detainees⁸⁵, or the use of UK territory

⁷⁹ Sands, 'Extraordinary Rendition: Complicity and its consequences' (n 4) paras. 2-3.

⁸⁰ R Yapp, 'British-led rendition of Libyan and family to Gaddafi prison', *The Telegraph* <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8754114/British-led-rendition-of-Libyan-and-family-to-Gaddafi-prison.html>> last accessed 25/09/2011; I Cobain & M Chulov, 'Libyan papers show UK worked with Gaddafi in rendition operation', *The Guardian*, <<http://www.guardian.co.uk/world/2011/sep/04/libyan-papers-show-uk-rendition>> last accessed 25/09/2011.

⁸¹ Sands, 'Extraordinary Rendition: Complicity and its consequences' (n 4) para. 18.

⁸² *Ibid*, para. 7.

⁸³ Binyam Mohamed alleged that he was interviewed by an MI5 official when held in Pakistan by the US; Reprieve, 'Human Cargo: Binyam Mohamed and the Rendition Frequent Flyer Programme' (Report) 10 June 2008 <<http://www.reprieve.org.uk/publications/humancargo/>> last accessed 17/06/2011, 7; ISC, 'Rendition' (n 21) 33.

⁸⁴ In the extraordinary rendition of Bisher al-Rawi and Jamil el Banna, information passed from the UK to the US subsequently led to their capture; ISC, 'Rendition' (n 21) 37-46.

⁸⁵ In the rendition of Binyam Mohamed, Mohamed was interrogated using questions based on specific information and facts which he alleges could only have come from UK sources; 'Binyam Mohamed Statement in Full', *The Guardian* <<http://www.guardian.co.uk/world/2009/feb/23/binyam-mohamed-statement-guantanamo>> last accessed 21/06/2011.

for the refuelling of rendition flights.⁸⁶

A number of existing domestic and international legal instruments are relevant to various aspects of these scenarios. For example, the first of the two elements of extraordinary rendition, that is, the extrajudicial transfer of an individual, constitutes an, ‘arbitrary arrest, detention or exile’ under the terms of Article 9 Universal Declaration of Human Rights (UDHR).⁸⁷ It also breaches Article 9 of the International Covenant on Civil and Political Rights (ICCPR), and the right to liberty and security within Article 5 of the European Convention on Human Rights (ECHR), which is incorporated into UK law via the Human Rights Act 1998. Furthermore, a number of procedural offences can result from the very nature of the secrecy of the detention in which individuals are kept. Detainees have no right to hear the charges made against them, as per Article 9(2) ICCPR. Furthermore, they cannot challenge the legality of their detention by right, as is enshrined within Article 9(4) ICCPR, and have no right to a prompt trial, as per Article 9(3) ICCPR. As may also be presumed by the means by which such individuals are transferred to certain sites, and interrogated in relation to terrorism, they also do not benefit from the principle of presumptive innocence, thus contravening Article 11 UDHR. In relation to the means by which detainees are transported over state boundaries, the Convention on International Civil Aviation (“Chicago Convention”) provides for State sovereignty concerning the air space over their territory.⁸⁸ It also holds that civil aircraft used for State purposes must have express permission in order to

⁸⁶ The UK territory of Diego Garcia was used as a refuelling stop for certain rendition flights; see HC Deb 21 February 2008, vol 472, cols 547-560 (David Miliband).

⁸⁷ Art 9 Universal Declaration of Human Rights 1948.

⁸⁸ Art 1, International Convention on Civil Aviation (Chicago Convention) 1944. For a discussion of the Convention’s application to extraordinary rendition, see European Commission for Democracy (Venice Commission), ‘Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners’ (Opinion No. 363/2005, CDL-AD (2006) 009, 17-18 March 2006, paras. 86-104.

fly over another's territory.⁸⁹ This would therefore appear to apply to aircraft used by private air companies to transport detainees for the purposes of rendition.⁹⁰

In relation to the second aspect of extraordinary rendition, an absolute prohibition on the use of torture is widely accepted to be of *jus cogens* status, as enunciated by Lord Hope in *ex parte Pinochet Ugarte (No 3)*.⁹¹ It has also been enshrined in numerous international legal instruments, most notably Article 2 of the Convention Against Torture 1984, which codifies the law in this area. The prohibition against the use of torture is also contained within Article 3 ECHR, Article 7 ICCPR, Articles 13, 4, 17 of the Third Geneva Convention (Relative to the Treatment of Prisoners of War) and Articles 31, 32 of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War).⁹² The Convention Against Torture also outlaws complicity in torture. Given that constructive knowledge of the use of torture can create liability, actual ignorance of torture having taken place is not a defence.⁹³ Article 12 CAT holds that states have a positive obligation to investigate allegations of torture. Although there have been various criminal investigations relating to the rendition allegations, they have focused upon the UK's involvement in the practice, rather than the actions of other states. Sands argues that the obligation to investigate under Article 12 includes investigation of other states' policies involving torture which may have implicated

⁸⁹ *Ibid*, paras. 93-95.

⁹⁰ *Ibid*, paras. 102-3, 145-153.

⁹¹ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* [2000] 1 AC 147, 152 (per Lord Hope).

⁹² Art 2, Convention Against Torture 1984; see also, Art 7, ICCPR; Art 3, ECHR; Arts 13, 4, 17, Third Geneva Convention (Relative to the Treatment of Prisoners of War); Arts 31, 32, Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War).

⁹³ i.e. that the state should have known that torture was taking place; see discussion in Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture (23rd report, session 2008-09) HL Paper 152, HC 230 4 August 2009, para. 32.

the UK in some form.⁹⁴ If true, then it is arguable that the UK's investigations may not have fulfilled the requirements of Article 12 CAT.

Given that extraordinary rendition therefore may potentially lead to breaches of many international legal obligations, it is important to consider in what circumstances the UK may be liable for any such, 'internationally wrongful acts',⁹⁵ under the rules of state responsibility. States are responsible for breaches of international obligations which can be attributed to it⁹⁶, its organs and officials.⁹⁷ Therefore, any potential misconduct of UK intelligence personnel, if causing a breach of international law, would create liability under the Draft Articles.⁹⁸ The UK might also face responsibility under Article 16 of the Draft Articles, if established that the Intelligence and Security Agencies knowingly assisted in the commission of an internationally wrongful act by another state. If, as is argued, 'the key issue is whether that aid or assistance specifically facilitated the internationally wrongful act',⁹⁹ then the broad range of acts constituting complicity in extraordinary rendition, outlined above, may be covered by Art 16.¹⁰⁰ Similarly, the alleged actions of UK personnel in cooperating and

⁹⁴ Sands, 'Extraordinary Rendition: Complicity and its consequences' (n 4) para. 35.

⁹⁵ International Law Commission (ILC), Draft Articles on State Responsibility for Internationally Wrongful Acts (adopted by the ILC on 8 August 2001).

⁹⁶ Art. 2, ILC Draft Articles.

⁹⁷ Art. 4, ILC Draft Articles.

⁹⁸ See also Art.6, Draft Articles, for potential liability in respect of the conduct of another state's organ, if that organ is acting under the direct control of another state. Such control arguably might be established in respect of the US's control of foreign agents, and therefore might also be a potential ground of secondary liability for the UK, if the agencies are found to have exercised direct control over foreign agents' actions in the practice of extraordinary rendition. See APPGER and New York University Centre for Human Rights and Global Justice, 'Briefing Paper: Torture by proxy: International Law applicable to 'Extraordinary Renditions'' (12/10/05) APPG-01-05, 99.

⁹⁹ Scheinin, M, and Vermeulen, M, 'International law: human rights law and state responsibility' in Born, H, Leigh I & Wills, A, *International Intelligence Cooperation and Accountability* (1st edn., Routledge 2011), 261.

¹⁰⁰ *Ibid* 261-2.

assisting other states in rendition operations may create liability under the Draft Articles.¹⁰¹ Importantly, if state responsibility was established under these rules, the UK would be required to remedy its breaches, potentially in the form of compensation to those affected, or an apology.¹⁰² Both such remedies would constitute a significant change in attitude from the UK government towards those allegedly subjected to extraordinary rendition. The rules of state responsibility therefore may provide a route by which to identify and remedy any breaches of international law in a way which is meaningful to both the citizens of the state and the individuals directly affected by the practice of extraordinary rendition.

The effect of such comprehensive international legal obligations is also felt within the UK legal system; s134 Criminal Justice Act 1988 makes the use of torture a crime in domestic law, as required by Article 4 CAT, whilst the HRA 1998 incorporates the provisions of the ECHR into domestic law. In the case of *A and Others (No 2)* the House of Lords also held that material which has been obtained through torture is inadmissible as evidence before the courts.¹⁰³ Although this aspect of the House of Lords' decision was welcome, it must be noted that the standard of proof used to consider whether evidence should be admitted was held to be whether, on the balance of probabilities, torture was used; '[i]n other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it.'¹⁰⁴ This leaves the applicant with a heavy burden to overcome in order to demonstrate the use of torture in obtaining the evidence before the court, which is unfortunate given that an individual generally has far fewer resources than the state to prove such allegations, and might face great difficulties in obtaining the sufficient evidence to do so.

¹⁰¹ Arts. 40 and 41, Draft Articles; *ibid* 262-265.

¹⁰² Arts. 34-37, Draft Articles; *ibid* 266-269.

¹⁰³ *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

¹⁰⁴ *Ibid*, para. 119 (per Lord Hope).

As discussed, many domestic and international legal obligations apply to all variations of complicity in extraordinary rendition, in relation to the means by which an individual is transported to a third state outside of due process, and the subsequent use of torture. This may be litigated in both the domestic and international arena, given the potential for liability to arise under the rules of state responsibility. However, to date, there have been relatively few cases brought directly against a state for their alleged complicity in the use of torture, or the practice of extraordinary rendition. In the UK, attempts at litigation have largely resulted in discussions surrounding the use of secret evidence and the closed material procedure, rather than the substance of the allegations.¹⁰⁵ Until cases move towards discussions of the substantive content of allegations of complicity, it will therefore be somewhat difficult to predict how the UK courts might interpret the relevant laws and obligations in this area.

¹⁰⁵ See discussions in 'Extraordinary Rendition in the UK Courts', 98-109.

CHAPTER 2: THE CHALLENGES OF WORKING WITHIN A GLOBAL INTELLIGENCE LANDSCAPE

2.1 Introduction: The Global Intelligence Landscape

The role of the UK intelligence agencies has become much more publicly visible in recent years, reflecting, ‘the new significance accorded to intelligence’¹⁰⁶ within the UK’s domestic and foreign policies since the events of 9/11. Although the resulting globalisation and expansion of intelligence have somewhat led to greater public knowledge about the intelligence process, there is still largely a ‘veil of secrecy’¹⁰⁷ under which intelligence activities take place, and which prevents the agencies from adopting the level of openness which is sought from actors outside the intelligence circle. This has created a difficult environment in which the UK agencies must operate, given that the current oversight structure which exists in relation to the UK agencies is arguably not sufficiently prescriptive to do so in a globalised intelligence landscape.¹⁰⁸ The agencies’ ability to stay within the boundaries of acceptable practice has been challenged through lack of specific guidance and therefore, in order to effectively analyse the current UK intelligence oversight framework, it is firstly necessary to consider the operational landscape in which the UK intelligence and

¹⁰⁶ Eminent Jurists’ Panel (n 10) 68; ‘Preface’ in Born & Caparini (n 7); Caparini in Born & Caparini (n 7) 23; Leigh in Born, Johnson & Leigh (n 9) 85; Born, H, & Johnson, L, ‘Balancing Operational Efficiency and Democratic Legitimacy’ in Born, Johnson & Leigh (n 9) 225; Field, A, ‘Tracking terrorist networks: problems of intelligence sharing within the UK intelligence community’ (2009) *Rev. Int’l Studies* 35(4) 997-1009, 997; Herman, M, ‘11 September: Legitimizing Intelligence?’ (2002) 16(2) *Int’l Rel* 227, 228.

¹⁰⁷ Caparini in Born & Caparini (n 7) 3.

¹⁰⁸ For an outline of the argument that s1 SSA 1989 and s1 ISA 1994 are not sufficiently detailed to provide acceptable oversight, see above, ‘The Legislative Oversight Framework of the UK Intelligence and Security Services’, 13-21.

security agencies operate, in order to understand the challenges they face, and how these may lead to accountability gaps.¹⁰⁹

Three main factors have contributed to changing state of the global intelligence landscape: firstly, horizontal and international ‘superterrorism’¹¹⁰ has emerged as the predominant threat to global security, thus changing the nature of the agencies’ response to security threats. Secondly, globalisation has broken down boundaries between states, thereby facilitating the free exchange of intelligence information between states, and enabling foreign partner agencies to share information about their practices. Consequently, this means that, ‘national security is becoming ever more dependent on regional and global stability and the solidarity of like-minded nations.’¹¹¹ Finally, the technological revolution, leading to an expansion of intelligence collection and creation of an open intelligence landscape, creates difficulties for the agencies in terms of their ability to extract meaningful data from vast quantities of accessible information.

An open intelligence landscape means that the UK agencies may successfully pursue their operations against terrorist threats; with fewer barriers between foreign liaison partners, partner agencies may easily cooperate and create meaningful intelligence relationships.¹¹² Such relationships may be pursued through transnational associations such as the Berne

¹⁰⁹ This is an essential ‘prerequisite for effective control, accountability, and oversight’, see Schreier in Born & Caparini (n 7) 44.

¹¹⁰ Leigh in Born, Johnson & Leigh (n 9) 5.

¹¹¹ Schreier in Born & Caparini (n 7) 28.

¹¹² Caparini in Born & Caparini (n 7) 23.

Group¹¹³, or on a more informal and opportunistic basis. However, given that “superterrorism” is horizontal and decentralised, all such intelligence relationships and networks must assist state intelligence agencies to quickly and effectively mobilise in response to a rapidly changing threat.¹¹⁴ Due to the source of most terrorist threats within the Middle East, intelligence relationships with local agencies are particularly valuable to Western states, given that local agents speak the language, understand the culture, and know the terrain.¹¹⁵ Although not displacing the power of the most influential countries within the intelligence community, such developments have allowed previously weak foreign agencies to wield some influence over the operational aspects of the “War on Terror”.

Given that the UK intelligence and security agencies previously operated in a closed intelligence environment, generally cooperating in bilateral relationships with a select number of states of largely equal power and influence, they are now, ‘far too slow...to restructure, reorient, and adapt their activities to the new risks, dangers, threats and opportunities in the current security environment.’¹¹⁶ As such, the agencies must overcome a number of challenges before they may operate comfortably within the modern intelligence landscape. The biggest of these challenges lies with the need for increased international intelligence cooperation, since there is an ever-present danger that cooperation between various agencies, which adhere to different operational and human rights standards, can result

¹¹³ See, for example, the attempt to create European intelligence networks; Gill, P, & Phythian, M, *Intelligence in an Insecure World* (3rd edn., Polity Press, Cambridge 2009), 60.

¹¹⁴ Schreier in Born & Caparini (n 7) 29.

¹¹⁵ Hitz, F, ‘Human Source Intelligence’ in Johnson, L, (ed.), *Handbook of Intelligence Studies* (Routledge, Oxon. 2009), 128.

¹¹⁶ Schreier in Born & Caparini (n7) 26; Gibson, ‘In the Eye of the Perfect Storm: Re-Imagining, Reforming and Refocusing Intelligence for Risk, Globalisation and Changing Societal Expectation’ (n 14) 23, 37.

in complicity in practices such as extraordinary rendition.¹¹⁷ Although the usefulness of intelligence liaisons outweighs such threats, Gill argues that the agencies need to nevertheless focus upon achieving internal cultural change¹¹⁸, in order to protect against potentially negative outside influences.

Despite increased international intelligence cooperation, ‘globalization and the information revolution cause problems anywhere to metasize much faster than before.’¹¹⁹ Since terrorist plots are horizontal and decentralised, they may transcend boundaries, making it difficult for intelligence agencies to trace their activities across borders despite mobilized resources and technologies.¹²⁰ Furthermore, given the effect of globalisation in breaking down state barriers, there are increasing numbers of actors within the intelligence sector: public, private and rogue, who operate on a level playing field, and therefore make intelligence predictions difficult to make.¹²¹ The increasing use of technologically driven responses to terrorism allows the agencies to increase their collection capacity and interpret intelligence in new ways. However, ironically, over-reliance on new technologies leads to the collection of vast quantities of fragmented information, meaning that traditional methods of collecting intelligence are marginalised in favour of methods which make it difficult to integrate

¹¹⁷ Eminent Jurists’ Panel (n 10) 68, 79-80. This is also a relevant concern with regards to waterboarding. BBC, ‘Brains, not brutality’ (Today Programme, Radio 4) <http://news.bbc.co.uk/today/hi/today/newsid_9170000/9170110.stm> last accessed 15 June 2011, at 2.03 and 05.11 onwards (Dr Kim Howells).

¹¹⁸ Gill in Born & Caparini (n 7) 196.

¹¹⁹ Andregg, M, ‘Intelligence Ethics: Laying a Foundation for the Second Oldest Profession’ in Johnson (n 115) 62.

¹²⁰ Gibson, ‘In the Eye of the Perfect Storm: Re-Imagining, Reforming and Refocusing Intelligence for Risk, Globalisation and Changing Societal Expectation’ (n 14) 37.

¹²¹ Schreier in Born & Caparini (n 7) 29.

information and promote cohesive operational practices.¹²² As a consequence, agencies must constantly prioritise which leads to follow, and may easily miss vital fragments of actionable intelligence. The use of human intelligence (HUMINT), as a traditional collection method, may be a useful means of obtaining accurate and personalised intelligence. However, in recent years it has developed against a background of operational frustrations and as a means by which to make sense of fragmented intelligence about terrorist activity. As such, the reliability of HUMINT may be undermined by inconsistent operational practices caused by insufficient training and guidance, as in the treatment of detainees under UK custody by the UK agencies.¹²³

Cumulatively, these challenges create an intelligence landscape which is difficult to navigate successfully, especially given the lack of detailed legislative regulation of the agencies. Of overriding importance is the need to ensure that the UK agencies' responses to "superterrorism" are accompanied by relevant adjustments in the oversight structure.¹²⁴ Given the numerous intelligence developments which have taken place in recent years, one must question whether an oversight system designed in the 1980s and 1990s is out of date for the modern world, and the environment in which agencies now operate.¹²⁵ This chapter will continue with an examination of some of the afore-mentioned challenges faced by the UK intelligence and security agencies, starting with a consideration of the practice of intelligence cooperation, and also focusing upon the internal challenges facing agencies, and the ethical standards to which they must work in this new global intelligence landscape.

¹²² Field (n 106) 998, 1006.

¹²³ ISC, 'The handling of detainees...' (n 20), paras. 111-3, 118, 120-1, 123, 126-9, 131.

¹²⁴ Leigh in Born, Johnson & Leigh (n 9) 5; Gibson, S, 'Future Roles of the UK Intelligence System' (2009) 35(4) *Rev Int'l Stud* 917, 924.

¹²⁵ Caparini in Born & Caparini (n 7) 20, 23.

2.2 International Intelligence Cooperation¹²⁶

For the intelligence community, an important consequence of the events of 9/11 has been increasing cooperation between UK agents and, ‘their opposite numbers in partner-countries’¹²⁷, as a means by which to mobilise against the terrorist threat¹²⁸. A certain level of cooperation has always occurred between intelligence agencies, given that, ‘no one state is so omniscient that it has access to all the intelligence information relevant to its national security interest.’¹²⁹ However, the modern day threat of decentralised “superterrorism”, means that MI5 and MI6 are now necessarily dealing, on a day-to-day basis, with ‘non-traditional partners from developing world countries.’¹³⁰ Therefore, the need for valuable intelligence is increasingly seen to outweigh the challenges of dealing with new, and possibly hostile, foreign counterparts.¹³¹ This is not necessarily a problem *per se*, but if UK agencies mean to maintain good practice, they must be vigilant to remain independent from other states’ political interests and goals, and not be influenced by the practices of foreign agencies.¹³² As the allegations of UK complicity in the CIA-led rendition programme demonstrates, these challenges are very real. Greater cooperation between state agencies creates problems for the oversight of intelligence agencies, since there is little guidance as to how intelligence procured from foreign agencies should be provided for within the legislative oversight

¹²⁶ For a far more exhaustive account of international intelligence cooperation, see Born, Leigh & Wills, (n 99).

¹²⁷ O’Brien, K, ‘Managing national security and law enforcement intelligence in a globalised world’ (2009) Rev. Int’l Studies 35(4) 903-915, 904.

¹²⁸ Herman, ‘11 September: Legitimizing Intelligence?’ (n 106) 228.

¹²⁹ Forcese, C, ‘The collateral casualties of collaboration: the consequences for civil and human rights of transnational intelligence’ in Born, Leigh & Wills (n 99), 72.

¹³⁰ O’Brien (n 127) 904; Herman, ‘11 September: Legitimizing Intelligence?’ (n 106) 233.

¹³¹ Sir John Sawers, 28 October 2010, full transcript accessible at <<http://www.guardian.co.uk/uk/2010/oct/28/sir-john-sawers-speech-full-text>> last accessed 16/06/2011.

¹³² Gibson, ‘Future Roles of the UK Intelligence System’ (n 124) 928.

framework.¹³³ This section will therefore explore the challenges of increased international intelligence cooperation, and how they have manifested in examples of alleged extraordinary rendition.

An initial challenge for intelligence services who share material with their foreign counterparts illustrates the flip-side of the technological revolution; the fact that where actionable intelligence is successfully shared across state boundaries, it becomes increasingly difficult to secure that material from outside interference.¹³⁴ The ease with which intelligence may be shared facilitates the ability of rogue parties to gain access to sensitive material, and increases the possibility of agencies unwittingly, 'sharing information with discreditable regimes.'¹³⁵ The risk of having the resulting material intercepted by outside parties may act as a disincentive for states to share sensitive and valuable information with their foreign counterparts, especially given the time and resources employed in sifting through, and interpreting, vast quantities of fragmented information in order to produce actionable intelligence.¹³⁶

The terms of an intelligence relationship are largely determined by the states involved; in particular, the influence of certain Western states has generally dictated the priorities and content of the information flow within their relationship with local, less powerful,

¹³³ Hayez, P, 'National oversight of international intelligence cooperation' in Born, Leigh & Wills (n 99), 158.

¹³⁴ Gill & Phythian (n 113) 59.

¹³⁵ Leigh, 'The Accountability of Security and Intelligence Agencies' in Johnson (n 115) 68.

¹³⁶ Gibson, 'Future Roles of the UK Intelligence System' (n 124) 923.

agencies.¹³⁷ The CIA's 'outsourcing of torture'¹³⁸ to states with questionable adherence to international human rights obligations reflects the United States' place within the hierarchy of the global intelligence community. Conversely, Western agencies can also be influenced by those of less powerful states, given that they are increasingly reliant upon the knowledge and interpretation skills of local intelligence agents. Given these inequalities, agencies might be more likely to turn a blind eye to, or not inquire about, their local counterparts' use of intelligence sourcing techniques such as torture¹³⁹ if protestations might jeopardise their partnership with that agency. However, Pfaff argues that successful intelligence relationships are premised on a number of 'reasonable shared expectations'¹⁴⁰ of what the states involved will and will not do in the course of their operations. As signatories of international legal instruments banning torture, such as the Convention Against Torture 1984 (CAT), states therefore implicitly create expectations that they will adhere their international legal obligations, through their adoption of the statute.¹⁴¹ Therefore states which use, condone, or are complicit in torture undermine the very basis on which they seek to construct meaningful intelligence relationships.

Given the need to maintain operational secrecy in the realm of intelligence, international intelligence cooperation between foreign agencies is often characterised by a, 'high premium

¹³⁷ Hitz in Johnson (n 115) 128.

¹³⁸ HC Deb 7 September 2009 vol 495 col 940-943 (David Davis).

¹³⁹ Hitz in Johnson (n 115) 128.

¹⁴⁰ Pfaff, T, 'Bungee Jumping off the Moral Highground: Ethics of Espionage in the Modern Age' in Goldman, J, (ed.), *Ethics of Spying: A Reader for the Intelligence Professional* (1st edn, The Scarecrow Press, Inc. 2009), 92.

¹⁴¹ *Ibid.*

placed on source protection and general reluctance to pool ‘sensitive’ information.’¹⁴² Mutual distrust may prevent the exchange of valuable intelligence between counterpart agencies, and thereby undermine intelligence relationships. In order to discourage this, states sharing intelligence with their foreign counterparts generally do so according to the “control principle”; that is, the doctrine ‘which shields information supplied to an agency by intelligence partners in other countries from attribution.’¹⁴³ In other words, shared information may only be used according to the sending state’s instructions, thus also making, ‘secretive government...a collateral consequence of intelligence sharing.’¹⁴⁴

The effect of the control principle is clear in relation to the allegations of complicity; evidence provided by foreign agencies relating to certain individuals’ alleged rendition may not be published, or appear as evidence before the courts. It can be argued that an alternative effect of the control principle is that any intelligence which might dispel allegations of impropriety made against the agencies is also withheld from publication. It has therefore been argued that blanket provisions, or caveats, relating to the future use of shared intelligence, ‘ris[k] giving secrecy law an extended reach.’¹⁴⁵ In *Mohamed (No. 2)*, the Court of Appeal considered the application of the control principle in detail, holding it to be of considerable importance in determining the effect of the disclosure of intelligence material.¹⁴⁶ Although the Court did order publication of certain paragraphs relating to the torture of Binyam

¹⁴² Gill & Phythian (n 113) 57.

¹⁴³ Born, Leigh & Wills (n 99), 5.

¹⁴⁴ Forcese, ‘The collateral casualties of collaboration: the consequences for civil and human rights of transnational intelligence’ in Born, Leigh & Wills (n 99), 84-5.

¹⁴⁵ *Ibid*, 86.

¹⁴⁶ *Mohamed (No. 2)* (n 23); see, for example, para. 49 (per Lord Judge).

Mohamed, its decision was, ‘dependent on highly unusual facts’¹⁴⁷; there had been prior publication of the information in question in the United States, meaning that the US-UK intelligence relationship would not be harmed by disclosure.¹⁴⁸

It is arguable that the control principle provides a means by which states sharing intelligence may resist attempts at accountability. In terms of the UK oversight system, for example, there is no precedent to show how information shared between foreign intelligence agencies might be scrutinised by domestic bodies.¹⁴⁹ Although the Intelligence and Security Committee is the parliamentary committee which oversees the agencies’ actions, it is charged only with overseeing the actions of the UK agencies, not those of foreign states.¹⁵⁰ Indeed, the Committee has explicitly stated, in reports relating to the treatment of detainees and the practice of rendition, that it would not consider the legality, or otherwise, of US agencies’ practices.¹⁵¹ However, given that UK and US intelligence operations have been very closely linked in their response to modern day terrorist threats¹⁵², arguably the two states’ policies cannot be clearly delineated into the remits of separate inquiries without the possibility that key information might be lost, or left unconsidered. Indeed, it has been argued that domestic parliamentary oversight bodies appear best placed to scrutinise international intelligence cooperation, so long as they have sufficient powers of investigation, and a wide enough

¹⁴⁷ Leigh, I, ‘National courts and international intelligence cooperation’ in Born, Leigh & Wills (n 99), 241.

¹⁴⁸ Also see Chapter 5 for an analysis of the *Binyam Mohamed* litigation, 98-109.

¹⁴⁹ Hayez, P, ‘National oversight of international intelligence cooperation’ in Born, Leigh & Wills (n 99), 158-160.

¹⁵⁰ s10(1) ISA 1994.

¹⁵¹ ISC, ‘The handling of detainees...’ (n 20); ISC, ‘Rendition’ (n 21).

¹⁵² For an analysis of the US-UK “special relationship”, and how it operates in relation to intelligence policy, see Wallace, W, & Phillips, C, ‘Reassessing the Special Relationship’ (2009) 85(2) Int’l Affairs 263, especially 273-278.

remit, to do so.¹⁵³ In order to allow for scrutiny of intelligence liaisons within the UK oversight framework, the legislation establishing the ISC's powers and remit must therefore be brought up to date, as is advocated elsewhere in this thesis.¹⁵⁴

Standards must be set against which intelligence obtained by torture methods, and then sent to the UK agencies, may be scrutinised. This is especially true given that the UK agencies' use of such intelligence may undermine the UK's human rights obligations if they have knowledge of the means by which the material was obtained; acceptance and use of such intelligence may constitute 'complicity' within the terms of Article 4 CAT 1984. Given the dominance of the control principle, and need to protect sources and operational detail, it is inevitable that the UK agencies may sometimes be passed useful and actionable intelligence for which they do not know the source. It is submitted that such intelligence may be acted upon if all reasonable inquiries are made to find out the means by which it was obtained. If such inquiries are unanswered, leave doubt, or point to the use of torture, then it must be assessed whether, on the balance of probabilities, torture is deemed to have been used. The burden in *A and Others (No 2)* would be reversed and placed upon the government to prove that torture has not been used. Such an approach would be time consuming, requiring relevant information to be sought before intelligence could be acted upon. Furthermore, although intelligence is not sought in an evidential capacity, this approach would subject it to similar tests as have been advocated by the courts. However, by employing such a stringent approach, the UK agencies would be able to ensure that, as far as possible, they act upon reliable and "safe" information. In turn, this would reduce the chances of the agencies being

¹⁵³ Born, H, and Wills, A, 'International responses to the accountability gap: European inquiries into illegal transfers and secret detention' in Born, Leigh & Wills (n 99), 220.

¹⁵⁴ See, 'The Legislative Oversight Framework of the UK Intelligence and Security Services', 13-21.

implicated in future allegations of complicity by entrenching domestic and international legal obligations at the heart of foreign liaison agreements.

The practice of extraordinary rendition demonstrates the ease with which the international community may potentially, ‘side-step the need for accountability and conformity with human rights norms.’¹⁵⁵ Although states recognise the importance of intelligence oversight within their own domestic legal systems, an *international* oversight framework does not exist in a distinct form.¹⁵⁶ To an extent, this is easy to comprehend; the practices of diverse foreign agencies acting in pursuance of domestic priorities cannot be expected to easily fit one single model of global oversight. Furthermore, the existing network of international legal obligations, as typified by the CAT 1984, ECHR, ICCPR and Geneva Conventions, could be said to constitute international standards to which intelligence should necessarily conform. However, an international intelligence oversight framework is necessary and achievable, given the increase in international intelligence cooperation, and circumstances in which agencies might find themselves compromised, and for which they require *specific* guidance. To a certain extent, the case law of the European Court of Human Rights could be said to demonstrate, ‘a slowly expanding body of pan-European legal norms for oversight beyond the nation state itself.’¹⁵⁷ However, the impact of the ECtHR is limited, given that its effect is, firstly, European and, secondly, a responsive form of oversight. Global intelligence oversight must be constructed differently to domestic intelligence oversight since it is unrealistic to expect global oversight to be exhaustive, or to focus on issues of efficiency, which are better

¹⁵⁵ Gill & Phythian (n 113) 81.

¹⁵⁶ Eminent Jurists’ Panel (n 10) 68.

¹⁵⁷ Born, H, & Johnson, L, ‘Balancing Operational Efficiency and Democratic Legitimacy’ in Born, Johnson & Leigh (n 9) 228.

placed to be examined by domestic bodies. Rather, an international body would set minimum standards of propriety for intelligence agencies around the globe, upon which domestic bodies would add specific details according to the organisation, administration and policies of that State's intelligence and security agencies.

2.3 Internal Challenges

Although intelligence agencies were designed to be only, 'concerned with information (and forecasts)¹⁵⁸, the modern day terrorism threat necessitates that agencies must now be proactive in sourcing intelligence from a range of external sources, and through the use of new technologies. They must also cooperate closely with other internal agencies, in the form of fusion centres, and similar joint services.¹⁵⁹ However, the move from traditional intelligence practices creates a danger that, without specific operational guidance, the individual roles of MI5 and MI6 could, to some extent, merge and become indistinguishable, or could overlap with the role of the police. In both instances, this would challenge effective oversight within the existing UK framework, and so this section thus explores the difficulties which face the UK agencies internally within the new global intelligence landscape.

¹⁵⁸ Herman, *Intelligence Power in Peace and War* (n 10) 113, 140.

¹⁵⁹ Gill & Phythian (n 113) 58; Field (n 106) 998.

Hitz notes that after the events of 9/11, '[a] division between domestic and international spheres of terrorism no longer existed'¹⁶⁰; as such, the need for MI5 and MI6 to cooperate closely has made the distinction between the two less obvious.¹⁶¹ Evidently, without cooperation between domestic and external agencies, there cannot be a consistent and effective national response to the global terrorist threat. However, since MI5 and MI6 have, 'different institutional priorities and responsibilities'¹⁶², extensive cooperation might cause the agencies to adopt practices which are not best suited to the work that they individually perform. Given that MI6's work concerns external threats to the state, it must necessarily cooperate with its foreign counterparts, and work within various different jurisdictions. This may make it difficult for the agency to interpret its legal obligations, and apply them in a changing operational context. Furthermore, collaboration with non-traditional intelligence partners may at times compromise the agency's adherence to legal and human rights standards.¹⁶³ Although the ISA 1994 seeks to place legal boundaries upon the work of MI6, agencies concerned with gathering *external* intelligence may necessarily be more difficult to regulate.¹⁶⁴ A possible concern is that such a professional culture within external intelligence could, 'infect the law-based norms of internal intelligence'¹⁶⁵ and, in order to prevent this, cooperation between the UK agencies should be regulated internally through working guidelines; it is submitted that narrower legislative definitions of the separate agencies' roles and duties would facilitate a conscious separation between the two.

¹⁶⁰ Hitz in Johnson (n 115) 126. Although Hitz refers to the US conception of terrorism, the same is true for the UK.

¹⁶¹ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (DCAF Intelligence Working Group, Occasional Paper 3) 07/2003, 30-31; Caparini in Born & Caparini (n 7) 5; Andregg in Johnson (n 115) 33.

¹⁶² Field (n 106) 999, 1007.

¹⁶³ Born & Leigh in SIPRI Yearbook 2007 (n 14) 200; Forcese in Born, Leigh & Wills (n 99) 87-9.

¹⁶⁴ Schreier in Born & Caparini (n 7) 32.

¹⁶⁵ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161), 29.

The blurring of boundaries between the roles of the UK intelligence and security agencies also appears through the details of the allegations of complicity in extraordinary rendition. For example, Binyam Mohamed alleges that he was interviewed by a member of the security service (MI5) during his detention in Pakistan.¹⁶⁶ Given that MI5 is primarily a domestic agency charged with protecting national security from within, whereas MI6 acts on overseas threats, any interviewing of detainees held abroad would logically be performed by MI6 personnel. This example demonstrates the potential for confusion that enhanced cooperation may have in relation to extraordinary rendition, given that the overlapping of the agencies' roles makes it difficult to piece together an accurate account of events. Although the ISC oversees the actions of both MI5 and MI6, a blurring of agency roles and lack of institutional separation may make the role of the ISC, and other oversight institutions, more difficult to perform.¹⁶⁷ Therefore, although the recording of inter-agency collaboration no doubt already exists at an internal level, the ISC must be made aware of the details of such cooperation, within the limits of the "needs to know" doctrine, in order to allow it to delineate the actions of the two agencies, and thus ensure their propriety.

There has also been extensive cooperation between the UK agencies and the police in recent years, with the intelligence agencies increasingly using traditional policing techniques such as detention and interrogation.¹⁶⁸ Any broadening of the intelligence agencies' role must be accompanied with parallel safeguards to ensure that agencies do not compromise their legal obligations or create a system of, 'political policing.'¹⁶⁹ This is because MI5 and MI6

¹⁶⁶ ISC, 'Rendition' (n 21) 33-4.

¹⁶⁷ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161), 30-1.

¹⁶⁸ Eminent Jurists' Panel (n 10) 73.

¹⁶⁹ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 213.

primarily exist to source and gather intelligence, and therefore do not operate with the overriding long term view of furthering criminal investigations.¹⁷⁰ In relation to the practice of extraordinary rendition, for example, torture evidence is not admissible within UK courts¹⁷¹, and so the results of the agencies' actions are actionable only in an operational context. Furthermore, given that the use of policing techniques by the UK intelligence agencies currently has no specific legal basis, the publication of guidance relating to the correct procedure in relation to the use of interrogation is welcome in providing specific and detailed operational advice in this area.¹⁷²

2.4 Ethical Standards

Although it is obvious that the UK intelligence and security agencies must operate in accordance with specific ethical and legal standards, in practice, intelligence operations give rise to, 'many grey areas of moral thought, and generat[e] perplexing dilemmas where agents must balance the national interest in security...against some other virtue...'¹⁷³ This is especially obvious in relation to alleged complicity in extraordinary rendition, and torture, since the definition of 'complicity' encompasses many situations and different degrees of

¹⁷⁰ Eminent Jurists' Panel (n 10) 80.

¹⁷¹ *A and Others (No. 2)* (n 103).

¹⁷² HM Government, 'Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees' (July 2010) <http://www.cabinetoffice.gov.uk/newsroom/news_releases/2010/100706-detainees.aspx> accessed 16/02/2010.

¹⁷³ *Andregg in Johnson* (n 115) 53.

activity, or inactivity. In analysing how the UK intelligence agencies have sought to balance national security and the protection of democratic values, it is important to acknowledge the operational context in which they have worked, and especially the lack of a defined legal framework. This section will consider how the UK agencies' ethical standards have been upheld against the backdrop of the "War on Terror", how they are subjected to oversight, and whether this has been compromised by their alleged complicity in extraordinary rendition.

In terms of the relationship between ethical standards and UK intelligence oversight, the ISC is not *formally* concerned with monitoring the agencies' propriety, since according to s10(1) ISA 1994 it has no formal remit over operational concerns.¹⁷⁴ In practice, however, the ISC has gone further than its legal remit¹⁷⁵ by considering allegations of agency complicity in rendition in its 2007 report, which undoubtedly related to operational issues.¹⁷⁶ In support of this development, some academics have suggested that parliamentary oversight is meaningless unless it incorporates some focus on the agencies' propriety.¹⁷⁷ By updating the text of s10, which currently holds that the ISC will consider the agencies' 'expenditure, administration and policy', to include responsibility for overseeing the agencies' propriety, the Committee's role in monitoring ethical practice would be given a clear legal basis. The ISC would therefore be able to consider propriety comprehensively rather than in a piecemeal fashion, which is currently the case; 'Rendition', for example, contained no specific

¹⁷⁴ Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 932; See also the discussion in 'Chapter 3: The Role of the Intelligence and Security Committee', 49-62.

¹⁷⁵ The Rt. Hon. Sir Malcom Rifkind MP, 'Intelligence Oversight in the UK: The Intelligence and Security Committee', Royal United Services' Institute, 16 November 2010 <<http://isc.independent.gov.uk/>> last accessed 23/11/10, 3, 6.

¹⁷⁶ ISC, 'Rendition' (n 21).

¹⁷⁷ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 326; Born & Leigh in SIPRI Yearbook 2007 (n 14) 204; Leigh in Born, Johnson & Leigh (n 9) 88; Dorrill (n 24) 780.

references to human rights, although it evidently considered the agencies' propriety through the very subject matter of the report.

Specific guidelines and codes of practice also must be formulated internally in order to firmly entrench the agencies' need to adhere to their domestic and international human rights obligations; due to the inherent secrecy of intelligence, it is difficult to know to what extent such a system already exists. In the interests of transparency, and from a presentational point of view, such guidance should preferably be made public or, if too sensitive, made available to the ISC, who could decide to redact its content if necessary. Although ultimately, 'final resolutions of ethical dilemmas will not be found in statutes or even in declarations of human rights'¹⁷⁸, precautions such as these will ensure that the agencies' decision-making processes are influenced by an understanding of the UK's legal human rights obligations, and how they may be engaged in an operational context.

Although the oversight system within the UK is multi-layered and complex, ultimate responsibility for the ethical standards of intelligence agents must lie at an agency level. As Gill argues, 'if oversight is only an external function then it becomes easier for agencies to see it as something troublesome that should be resisted.'¹⁷⁹ A commitment to ensuring good practice necessitates that agency employees must, 'be protected if they feel obliged to 'blow the whistle'¹⁸⁰ in order to ensure that concerns over certain events or practices may be

¹⁷⁸ Gill & Phythian (n 113) 155; see also 'Preface' in Goldman (n 140), xii.

¹⁷⁹ Gill in Born & Caparini (n 7) 198.

¹⁸⁰ Gill & Phythian (n 113) 153, 158. Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 258.

highlighted without fear of reprisal. In the past, whistle-blowing former agents have been viewed as damaging the agencies' reputations, and their ability to conduct operations in secret.¹⁸¹ It is true that certain revelations may be counterproductive, in that they serve no public interest and cause more harm than good, especially if heavily publicised by media bodies.¹⁸² However, if leaks genuinely reveal malpractice, whistle-blowers assist in ensuring the effectiveness of the political and legal processes which seek to regulate and oversee the agencies.¹⁸³ Therefore, in order to balance the need to prevent disclosure of sensitive information and the desire to identify and remedy wrongdoing, an independent and effective internal mechanism is required so that whistle-blowing agents do not resort to publication as first resort.¹⁸⁴

Although the UK agencies employ a staff counsellor to whom agency personnel may consult about their ethical concerns or grievances¹⁸⁵, there is no formal institution which considers internal complaints against the agencies' practices; the IPT considers claims brought by *individuals* alleging unlawful agency action, whilst the ISC has no separate function of addressing complaints. However, given that few details are known about the role, and the process by which complaints are resolved, it is impossible to conclude as to whether it is an effective internal mechanism, or merely a, 'safety-valv[e] to reduce the risk of public disclosure.'¹⁸⁶

¹⁸¹ *Ibid* (Lustgarten & Leigh) 223.

¹⁸² *Ibid* 226.

¹⁸³ *Ibid* 225.

¹⁸⁴ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 257.

¹⁸⁵ See the explanation of his role at Secret Intelligence Service MI6, 'Well-being' <<https://www.sis.gov.uk/careers/working-for-us/well-being.html>> last accessed 16/06/2011.

¹⁸⁶ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 258.

2.5 Conclusion

The context in which the UK intelligence and security services now operate is globalised and ever changing, especially given the increasing need for international intelligence cooperation in order to counter the global threat of “superterrorism”. It is submitted that the SSA 1989 and ISA 1994 do not provide sufficiently narrow regulation of the agencies’ activities to allow them to operate successfully within this environment. In order for the UK agencies to cooperate with their foreign counterparts without compromising their legal commitments and policies, they must approach collaboration with a firm idea of their aims, and the means by which they will achieve these. Furthermore, although the control principle is vital to fostering trust between states, it must not be allowed to frustrate intelligence oversight, especially that which is undertaken by the ISC. Ensuring adherence to human rights norms, whilst maintaining effective intelligence cooperation, rests upon States somehow accommodating scrutiny of the control principle within the remit of national oversight bodies. These are better placed than international bodies to contextualise the principle with specific regard to the operational workings of national intelligence agencies.¹⁸⁷

The UK intelligence and security services must also be careful not to confuse their roles, between both each other, and also the police, since this may create internal confusion and operational delays. The agencies’ internal structures must accommodate the upholding of the agencies’ ethical and human rights commitments, in order to encourage consistent practice which is based upon clear legislation and international legal instruments. Personnel with

¹⁸⁷ See Forcese’s suggested “borderless review” of international intelligence agreements by domestic oversight bodies; Forcese in Born, Leigh & Wills (n 99), 91.

grievances related to misconduct must also be encouraged to report such, through an effective internal reporting mechanism, rather than facing the prospect of a prosecution under the Official Secrets Act as an initial step. Such changes to the current practices of the UK security and intelligence agencies would help to provoke meaningful change in the agencies' operational practices, and to equip them to deal with the future challenges which lie in the area of intelligence.

CHAPTER 3: THE ROLE OF THE EXECUTIVE

3.1 Introduction

This chapter will consider the government's relationship with the UK intelligence and security agencies, in order to analyse their role within the overall intelligence oversight framework. Given that the executive is the branch of state most closely involved in the direction of the agencies' operations, in many ways they have the most important oversight role in terms of their relationship with MI5 and MI6.¹⁸⁸ Executive oversight is therefore the most informed branch of oversight, and perhaps also the "safest", given that the overlap of intelligence with foreign and defence policy means that Ministers are constantly mindful of maintaining national security and restricting sensitive information. Alternatively, however, the executive's protectiveness in regard to the UK intelligence agencies may raise concerns over the concealment of intelligence issues which are genuinely in the public interest, and the possibility of political influences affecting agency policies.

Statutory provisions, in the form of ss1(1) and 2(1) SSA 1989, and ss1(1), 2(1), 5 and 7 ISA 1994, formally regulate Ministers' involvement with the agencies, but the secrecy and informality of the relationship between the two means that little is actually known about the extent and substance of their contact with each other. An extensive and fully accurate study of the executive aspect of intelligence oversight is therefore largely impossible. In terms of the allegations of UK complicity in extraordinary rendition, the lack of public information

¹⁸⁸ Born & Leigh in SIPRI Yearbook 2007 (n 14) 200-201; Caparini in Born & Caparini (n 7) 10.

surrounding the executive-agency relationship has made it difficult to separate the commands of agency heads with the involvement of government officials. This has been exacerbated by the secrecy of the agencies, and the denial, by government representatives, of all knowledge of complicity, in response to questions regarding the allegations of complicity.¹⁸⁹

The first part of this chapter looks at the role of the UK executive in theory, and in practice, by considering the statutory role of the executive in relation to the UK intelligence agencies, the principle of ministerial responsibility, the risk of politicization of intelligence, and the executive's willingness to accept responsibility for any wrongdoing. This section will also advocate the need for the executive's relationship with the agencies to be more clearly defined, and preferably limited to *control*, rather than oversight. The second part of the chapter will consider the executive's role in controlling the publication, or restraint, of information about intelligence and UK agencies in the public domain.

3.2 Executive Oversight: Theory and Practice

Theoretically, the executive-agency relationship should not be so close that the executive politically influences the agencies, but should be close enough to prevent them from operating without checks.¹⁹⁰ Translating this into practice, however, is difficult since the

¹⁸⁹ Johnson, 'Letters: Detention, torture and human rights' (n 5); Miliband and Johnson, 'Letters: Intelligence, torture and the courts' (n 5).

¹⁹⁰ Leigh in Born, Johnson & Leigh (n 9) 5-6.

existing legislative provisions allow for extensive executive control of the agencies without parallel parliamentary checks.¹⁹¹ It may be the case that information about the executive's control of the agencies must be restrained as far as possible, especially if it relates to operational decision-making. However, if effective intelligence oversight relies upon the contribution of various actors, then this imbalance might frustrate the ISC's oversight capacity, by creating areas of sensitive information to which the Committee has no access. This section will therefore analyse how the executive fulfils its statutory oversight functions in practice, and how well placed it is to do so within the intelligence oversight framework.

Sections 1 of the SSA 1989 and ISA 1994 place responsibility for the intelligence and security services' actions upon each agency's relevant Secretary of State¹⁹²; the Home Secretary retains responsibility of the Security Service (MI5), whereas the Secret Intelligence Service (MI6) is responsible to the Foreign Secretary. This reflects the operational focus and remit of the two agencies. The agencies are directed by the heads of the agencies on a day-to-day basis, themselves appointed by the relevant Secretary of State, in accordance with ss2 SSA 1989 and ISA 1994. More important operational decisions are generally taken by the relevant Minister¹⁹³, who also holds powers of authorisation for warrants allowing officials to interfere with property¹⁹⁴, to intercept material¹⁹⁵ or to practise surveillance.¹⁹⁶ Government

¹⁹¹ Eminent Jurists' Panel (n 10) 68; Venice Commission, 'Report on the Democratic Oversight of the Security Services' (Study No. 388/2006, CDL-AD (2007) 016, 11 June 2007, para. 5; Leigh in Born, Johnson & Leigh (n 9) 95.

¹⁹² Cameron, I, 'Beyond the Nation State: The Influence of the European Court of Human Rights on Intelligence Accountability' in Born & M Caparini (n 9) 40; s1(1) Security Service Act 1989; s 1(1) Intelligence Services Act 1994.

¹⁹³ Leigh in Born, Johnson & Leigh (n 9) 84.

¹⁹⁴ s5 ISA 1994.

¹⁹⁵ s5 Regulation of Investigatory Powers Act 2000 ('RIPA 2000').

¹⁹⁶ s30 RIPA 2000.

guidance as to the handling of detainees under UK custody has entrenched this by holding that intelligence personnel must inform the relevant Secretary of State before proceeding where they are unsure about the appropriate actions to take.¹⁹⁷ However, more generally, both pieces of legislation which established the agencies' roles and remits allude to the executive's role within intelligence oversight very broadly, and do not provide specific detail about how the executive-agency relationship should operate in practice, in response to operational difficulties.¹⁹⁸ Any attempt to provide more specific detail has occurred in a piecemeal fashion, as demonstrated by the guidance to intelligence personnel on the treatment of detainees. The resulting lack of principles regulating the executive-agency relationship therefore creates potential challenges for the ISC, the courts, or civil society in responding to alleged agency misconduct, and producing authoritative reports about the intelligence agencies' actions.

The powers held by Ministers, and especially the Prime Minister, concern both the *control* of the agencies, in terms of the direction of their activities, and also aspects of their *oversight*. Therefore, executive oversight, in relation to alleged complicity in torture, revolves around policies which the government *itself* has promulgated and sanctioned. The resulting proximity between the executive and intelligence agencies could potentially politicise the agencies, through shielding them from external criticism. The government guidelines about the treatment of detainees by UK agencies reinforce the doctrine of ministerial responsibility; Ministers are called upon to make decisions as to appropriate action where it is believed that

¹⁹⁷ 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' (n 172) see table at 6, para. 11.

¹⁹⁸ Leigh & Lustgarten, 'Legislation: The Security Service Act 1989' (n 38) 811; Leigh in Born, Johnson & Leigh (n 9) 95.

there is a serious risk that torture, or mistreatment, may have been used to generate information.¹⁹⁹ Under previous governments, the lack of specific guidelines as to the agencies' procedures in situations involving detention and interrogation has made it difficult to determine whether Ministers were aware of the renditions cycle, or policy relating to the UK agencies' alleged complicity in such.²⁰⁰ For this reason, it was suggested that a forthcoming inquiry by Sir Peter Gibson investigate the extent of previous ministerial accountability within its remit, as well as the means by which it is to be achieved in the future, and according to the new guidelines.²⁰¹ In any case, through establishing a clear, and public, decision-making hierarchy, and establishing approved procedure for certain specific situations, the new guidance creates some certainty for agency personnel, although this is limited to the particular situations in which it applies.

Ultimate responsibility for both agencies rests upon the Prime Minister, as the head of the executive. This manifests itself in several legislative provisions; ss2(4) SSA 1989 and ISA 1994 hold that all reports by the agencies' heads must be sent directly to the Prime

¹⁹⁹ 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' (n 172), see table at 6.

²⁰⁰ Human Rights Watch, *No Questions Asked*: Intelligence Cooperation with Countries that Torture (Report) (June 2010), 26-27. However, it was previously alleged that guidance issued to intelligence officials stated that they were under no legal obligation to intervene if they were present during an episode of torture, or knew that it had occurred, at 27; I Cobain, 'Tony Blair knew of secret policy on terror interrogations' *The Guardian*, 18 March 2010 <<http://www.guardian.co.uk/world/2010/mar/18/overseas-torture-government-refuses-publish>> last accessed 13/02/2011.

²⁰¹ Human Rights Watch, 'United Kingdom: Letter to Sir Peter Gibson on the Inquiry into involvement with detainees in counter-terrorism operations' 2 December 2010 <<http://www.hrw.org/en/news/2010/12/03/united-kingdom-letter-sir-peter-gibson-inquiry-involvement-detainees-counter-terrori>> last accessed 13/02/2011. The Gibson inquiry no longer has an official mandate regarding the allegations of complicity, but will report to the government on its findings before it was wound down.

Minister²⁰², and s10(5) ISA 1994 provides that the reports of the Intelligence and Security Committee must also be sent to the Prime Minister prior to their publication. The reports of the Intelligence Services Commissioner²⁰³ and Interception of Communications Commissioner²⁰⁴ are also sent firstly to the Prime Minister. The membership of the ISC is appointed by the Prime Minister, according to s10(3) ISA 1994²⁰⁵, and he may also decide to withhold sections of the Committee's reports before laying them before Parliament.²⁰⁶ Agency heads also have a direct right of access to the Prime Minister.²⁰⁷ Indeed, it has been argued that in practice, despite the doctrine of ministerial responsibility, the head of the executive is largely responsible for running the intelligence services.²⁰⁸ However, with only broad legislative provisions regulating the chain of command between the executive and the intelligence agencies, it is difficult to know whether this is true.²⁰⁹

The extent to which Ministers uphold their legislative roles of oversight depends upon their willingness to proactively exercise their responsibilities and seek advice before making important decisions.²¹⁰ Gill suggests that the doctrine of "plausibility deniability" has previously been adopted by Ministers in order to let the agencies to operate largely

²⁰² Such reports must also be made to the relevant Secretary of State, see ss2(4) SSA 1989 and ISA 1994.

²⁰³ s60(2)-(5) RIPA 2000.

²⁰⁴ ss58(2)-(7) RIPA 2000.

²⁰⁵ s10(3) ISA 1994.

²⁰⁶ s10(7) ISA 1994.

²⁰⁷ s2(4) SSA 1989; s2(4) ISA 1994.

²⁰⁸ Leigh & Lustgarten, 'Legislation: The Security Service Act 1989' (n 38) 810; Lindsay (n 14) 269.

²⁰⁹ It has been said that national legislation, especially concerning the use of covert operations, should contain, 'a clear chain of command between the actions of agents in the field and the highest levels of the executive branch', in order for executive members to be held accountable, if necessary; see DCAF, 'Intelligence Services' (Backgrounders Series) 03/2006.

²¹⁰ Leigh in Born, Johnson & Leigh (n 9) 85.

unchecked by the executive²¹¹, whilst allowing the executive to subsequently plead ignorance if evidence of malpractice is made public. The doctrine suggests that, in order to avoid public scrutiny, Ministers should seek the minimum information necessary for them to carry out their responsibilities. As such it may, ‘insulate top decision-makers and political authorities from the consequences’²¹² of their departments’ policies, and allow them to characterise failures as individual errors rather than systemic policy.²¹³ This appears to have been the case in relation to the investigation of the actions of an individual MI5 officer in the case of Binyam Mohamed, rather than an investigation into the actions of the security hierarchy as a whole.²¹⁴

However, “plausible deniability” may otherwise be seen as a natural extension of the “need to know” doctrine; that is, the fact that sensitive information and intelligence is shared only between agency personnel who must have access to it. This significantly protects operational secrecy through minimising the possibility of valuable intelligence being leaked to external sources.²¹⁵ Read as such, “plausible deniability” may be as much concerned with protecting intelligence operations and sources as with protecting Ministers from external criticism. However, if this is the case, given that the executive has legislative responsibilities with regards to MI5 and MI6, they must nevertheless be seen to exercise *informed* scrutiny over

²¹¹ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 223.

²¹² Caparini in Born & Caparini (n 7) 18.

²¹³ See, for example, the conclusions in ISC, ‘Rendition’ (n 21).

²¹⁴ I Cobain, ‘Police investigate MI5 officer who interrogated Binyam Mohamed’ *The Guardian*, 11 February 2010 <<http://www.guardian.co.uk/uk/2010/feb/11/mi5-binyam-mohamed>> last accessed 09/02/2011. However, the investigation against “Witness B” was later dropped, although more general investigations into potential agency criminality continue, see R Norton-Taylor, ‘MI5 officer escapes charges over Binyam Mohamed torture case’ *The Guardian*, 17 November 2010 <<http://www.guardian.co.uk/world/2010/nov/17/mi5-officer-binyam-mohamed-case>> last accessed 09/02/2011.

²¹⁵ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 219.

the intelligence agencies. Within an overly broad legislative framework, the doctrines of “plausible deniability” and “need to know” may instead create the impression that the Minister is perceived, within the agencies themselves, as an “outsider” who is not possessed of the relevant skills to have access to valuable intelligence.²¹⁶ Although it is generally the case that the Home and Foreign Secretaries generally have little or no, prior intelligence experience, their decision-making authority must be respected by the agencies. Ministers may only practically be called to account by Parliament, ‘for the actions of the intelligence agencies if [they] have real powers of control’²¹⁷, and are well informed and briefed by agency officials.²¹⁸

As a result of the proximity between the areas of foreign security policy and intelligence, it is true that, to some extent, ‘the intelligence activities of states...are inescapably bound up with politics.’²¹⁹ Whilst an effective working relationship between the executive and UK security and intelligence agencies is necessary, their relationship should not be so close as to allow for the possibility of ministerial abuse, or overt politicization, of the intelligence process.²²⁰ Given the legislative provisions which allow Ministers to exert influence on the intelligence process, there may be a risk that Ministers concerned with policy within a specific department may employ agency resources for party political purposes²²¹ and thus compromise the quality and focus of intelligence. The most obvious example of this is the intelligence dossier produced to support the existence of weapons of mass destruction in Iraq,

²¹⁶ *Ibid.*

²¹⁷ Born & Leigh in SIPRI Yearbook 2007 (n 14) 199.

²¹⁸ DCAF, ‘Intelligence Practice and Democratic Oversight – A Practitioner’s View’ (n 161), 7, 27-8,44; Gill in Born, Johnson & Leigh (n 9) 14.

²¹⁹ Gill in Born, Johnson & Leigh (n 9) 12; Herman, *Intelligence Power in Peace and War* (n 10) 137.

²²⁰ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 217-20, 223-4.

²²¹ Born & Leigh in SIPRI Yearbook 2007 (n 14) 197.

and the subsequent UK invasion.²²² Although an extreme instance of intelligence politicization, one could also argue that the proximity between the UK and US agencies' intelligence policies in the "War on Terror" was driven by the UK government's desire to maintain a productive relationship with the US.²²³ If the allegations of the UK's complicity in the CIA's rendition programme are found to be true, therefore, the UK agencies' actions could be viewed as a result of political influence within the intelligence process. A means by which to minimise the possibility of such politicisation is to ensure that the powers of the other branches of oversight, the ISC, judiciary and civil society, are sufficiently robust to check against the use of intelligence for, 'narro[w] political or sectoral interests.'²²⁴ An internal system of feedback, and effective tasking between Ministers and the intelligence services, would also keep the intelligence process outside of party politics, and ensure constant monitoring of the possibility of politicisation.²²⁵

Ensuring that a balanced relationship exists between the executive and the UK intelligence agencies does not guarantee effective oversight unless the executive willingly accepts responsibility for its decisions and actions, and welcomes increased scrutiny of intelligence.²²⁶ This has not traditionally been the case, with the Home Affairs Committee stating in 1999 that, 'in the past resistance to greater openness came...from Whitehall and Government'.²²⁷ In relation to the allegations of complicity, although the UK government acknowledged that the British territory of Diego Garcia was used as a refuelling stop by CIA

²²² On the intelligence used to support the Iraq invasion see, for example, Gill in Born, Johnson & Leigh (n 9).

²²³ See Wallace & Phillips (n 152) 263-284.

²²⁴ Born & Leigh in SIPRI Yearbook 2007 (n 14); also Born in Born & Caparini (n 7) 164.

²²⁵ Schreier in Born & Caparini (n 7) 38.

²²⁶ *Ibid*, 39; Born in Born & Caparini (n 7) 167.

²²⁷ Home Affairs Committee, *Accountability of the Security Service* (HC 1998-99, 291), para. 7.

rendition planes²²⁸, generally executive responses to the allegations have consisted of wholesale refusal that the agencies would engage in such practices without consideration of the issues involved.²²⁹ The recent out of court settlement made by the government to former detainees of Guantanamo Bay²³⁰ was explained as a money-saving exercise²³¹ which avoided the expense of drawn out litigation, and the danger of allowing sensitive information to be published. However existing legal procedures allow for the use of sensitive information within the court room procedure²³², and so one might question whether policy reasons were in fact overriding factors in their decision to settle. The publication of guidance as to the treatment of detainees by UK forces²³³ is therefore to be welcomed in overtly emphasising ministerial responsibility for making certain key decisions, and detailing a clear chain of command for the decision-making process.

Section 7 ISA 1994 purports to limit the liability of the executive in respect of the actions of officials operating abroad, through holding that,

‘(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one

²²⁸ HC Deb 21 February 2008, vol 472, cols 547-560 (David Miliband); BBC, ‘UK apology over rendition flights’ 21 February 2008 <http://news.bbc.co.uk/1/hi/uk_politics/7256587.stm> last accessed 14/02/2011.

²²⁹ See, for example Johnson, ‘Letters: Detention, torture and human rights’ (n 5); Miliband and Johnson, ‘Letters: Intelligence, torture and the courts’ (n 5).

²³⁰ I Cobain, ‘Guantánamo Bay prisoner payouts a first step to ending legacy of torture’ *The Guardian*, 16 November 2010 <<http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-prisoner-payouts?intcmp=239>> last accessed 14/02/2011.

²³¹ HC Deb 16 November 2010, vol 518, cols 752 -766 (Kenneth Clarke) especially cols 753, 756 (‘The settlement...involves no concession of liability or withdrawal of allegations’), 757, 763.

²³² See ‘Extraordinary Rendition in the UK Courts’, 98-109.

²³³ 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’ (n 172).

which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.’

The Secretary may authorise such actions, according to s7(3)(a) ISA 1994, if they are, ‘necessary for the proper discharge of a function of the Intelligence Service’. However, given that Ministers are responsible in international law for the actions of intelligence agencies²³⁴, they would still incur legal liability for any wrongful actions in relation to the practice of extraordinary rendition. Therefore, Ministers must be proactive in ensuring responsible operational practice. A definitive account of the UK’s domestic and international legal obligations, published by an expert non-executive body, and endorsed by the government, would assist in ensuring that, regardless of any party political policies or interests²³⁵, the government recognises as binding certain legal provisions concerning torture and extraordinary rendition.

The forthcoming review of allegations of complicity by Sir Peter Gibson was said to formally draw a line under alleged agency malpractice, and make recommendations for the future.²³⁶ Its terms of reference, as set in July 2011, covered the UK Government and agencies’ knowledge of, and involvement in, rendition, including how growing awareness of such

²³⁴ Eminent Jurists’ Panel (n 10) 89.

²³⁵ See, for example, Eminent Jurists’ Panel (n 10), that certain states have previously sought to differentiate between when torture is acceptable, and when it is not, at 85. This is echoed by Scheinin in Scheinin, M, et al, ‘Law and Security: Facing the Dilemmas’ (European University Institute, EUI Working Papers) (Law 2009/11) ISSN 1725-6739, 58.

²³⁶ BBC, ‘Torture claims: David Cameron announces inquiry’ 6 July 2010 <<http://www.bbc.co.uk/news/10521326>> last accessed 09/02/2011.

practices changed agency policy.²³⁷ Although the inquiry is now defunct, given its remit over government policy, it would have been interesting to observe the extent of ministerial participation with the inquiry as a means of oversight. A number of former Ministers committed themselves to give evidence to the inquiry²³⁸, and the fact that witnesses' evidence would not be used against them in future criminal proceedings was thought to constitute a powerful incentive to persuade others to volunteer.²³⁹ Although the Prime Minister has not confirmed that the inquiry's report will be published,²⁴⁰ it is submitted that this is necessary in order to ensure that transparency is *seen* to have been achieved, despite the fact that the inquiry itself has ceased its investigations.

The difficulty in making sense of the relationship between the executive and the agencies rests upon the fact that the executive's role, in relation to the agencies, is too broad. Oversight, a separate concept to that of *control*, is, 'a means of ensuring public accountability for the decisions and actions of security and intelligence services.'²⁴¹ The executive evidently has a relationship of control in relation to the UK intelligence agencies, due to their legislative operational decision-making capacity.²⁴² It has also been argued that the executive

²³⁷ HM Government, 'The Detainee Inquiry: Terms of Reference' (July 2011) <<http://www.detaineeinquiry.org.uk/wp-content/uploads/2011/06/20110706-The-Detainee-Inquiry-and-HM-Government-Terms-of-reference.pdf>> last accessed 01/03/2012.

²³⁸ I Cobain, 'Torture inquiry: Tony Blair under pressure to testify' *The Guardian*, 7 July 2010 <<http://www.guardian.co.uk/law/2010/jul/07/torture-inquiry-witnesses-peter-gibson>> last accessed 09/02/2011.

²³⁹ R Norton-Taylor, 'Torture inquiry will not lead to any prosecutions' *The Guardian*, 7 July 2010 <<http://www.guardian.co.uk/law/2010/jul/07/torture-inquiry-not-lead-prosecutions>> last accessed 09/02/2011.

²⁴⁰ HC Deb 6 July 2010, vol 513, col 187 (David Cameron).

²⁴¹ Born & Johnson in Born, Johnson & Leigh (n 9) 226.

²⁴² According to Born & Leigh, for example, 'the executive branch plays a major, if not the most important, role in controlling (tasking, steering and monitoring of) intelligence services', in Born & Leigh in SIPRI Yearbook 2007 (n 14) 198.

exercise a role of *oversight* over the UK intelligence agencies²⁴³, which should consist of a clear tasking system to identify and prevent intelligence failures.²⁴⁴ However, an essential feature of oversight is said to be the extent to which it is independent from the executive.²⁴⁵ The fact that the executive has roles in both the control of the agencies, and their oversight, therefore creates confusion in terms of the overall UK oversight structure. Furthermore, its proximity to the agencies means that it is ill placed to oversee the agencies' actions objectively as a 'source of external control.'²⁴⁶ Therefore, the executive's relationship with the intelligence agencies should be clearly limited to that of control, and references to the executive's capacity of *oversight* should be removed.²⁴⁷ The principle of ministerial responsibility would remain intact, given the *control* aspect of the relationship. However, the proposed approach would only succeed if Parliament and the judiciary had more effective powers of oversight regarding their ability to deal with the subject matter in question.

3.3 Conclusion

The overriding theme running throughout the preceding discussion has been the difficulty of achieving a balanced relationship between the executive and the intelligence and security

²⁴³ Schreier in Born & Caparini (n 7) 38-9.

²⁴⁴ *Ibid.*

²⁴⁵ Born & Johnson in Born, Johnson & Leigh (n 9) 236-8.

²⁴⁶ Born & Leigh in SIPRI Yearbook 2007 (n 14) 199.

²⁴⁷ That is, such provisions which interfere with the oversight regime, such as the Prime Minister's relationship with the ISC and the Commissioners.

agencies. Too little control, and a “State within a State” mentality may reign²⁴⁸; too much, and the intelligence process may become tainted by party political policies. The former option creates difficulties for proper and effective oversight, whilst the latter compromises the impartiality of intelligence procured by the services. It is submitted that Ministers should be as proactive as practically possible without overstepping their legislative duties; given the broadness of ss 1(1) SSA and ISA 1994, and lack of detail as to the relevant Ministers’ duties, it is difficult to see how this would occur. The existing legislative provisions must therefore be more narrowly constructed, in order to make the executive-agency relationship as open as possible. The government’s guidance on the procedures relating to the detention and interrogation of detainees is instructive as to the chain of command in certain situations.

Further to analysing the executive’s role in the control, and oversight, of the intelligence services, one must also consider its powers within the broader UK intelligence framework, which comprises the parliamentary and judicial branches of state, as well as civil society. It is striking how broad and permissive the executive’s legislative powers are compared to those of the parliamentary and judicial branches, as discussed above. Given the executive’s broad, and conflicting, roles within both control *and* oversight of the intelligence agencies, a more satisfactory approach would be to carefully limit its future role to that only of *control*, with oversight responsibility vested in Parliament and the judiciary, both of which are more independent from a presentational point of view.

²⁴⁸ Eminent Jurists’ Panel (n 10), para. 4.

CHAPTER 4 – THE ROLE OF THE INTELLIGENCE AND SECURITY

COMMITTEE²⁴⁹

4.1 Introduction

Although a state's system of intelligence oversight is, 'the product of its system of government, politics, history and culture'²⁵⁰, broadly speaking, it relies upon a series of checks and balances from the three branches of state, as well as from a range of outside bodies.²⁵¹ Parliamentary oversight is essential given that the contribution of parliamentarians, as citizens' elected representatives, is the most democratically legitimate means of state scrutiny.²⁵² In order to provide effective oversight within intelligence, an area already shrouded in a 'veil of secrecy'²⁵³, parliamentary oversight institutions must be robust, with meaningful powers enabling them to hold the agencies, and executive, to account.

In the United Kingdom, parliamentary scrutiny is provided in the form of the Intelligence and Security Committee, established by the Intelligence Services Act 1994 to review the security

²⁴⁹ Leigh, I, 'The UK's Intelligence and Security Committee' in Born & Caparini (n 7) 16-17.

²⁵⁰ Schreier in Born & Caparini (n 7) 38.

²⁵¹ Caparini in Born & Caparini (n 7) 13, 23; Eminent Jurists' Panel (n 10) 68; Leigh in Born, Johnson & Leigh (n 9) 7.

²⁵² Eminent Jurists' Panel (n 10) 68; Venice Commission, 'Report on the Democratic Oversight of the Security Services' (n 191) para. 32; Leigh in Born, Johnson & Leigh (n 9) 8; Schreier, *Fighting the Pre-eminent threats with Intelligence-led Operations* (n 17); Geneva Centre for the Democratic Control of Armed Forces, 'Parliamentary Oversight of Intelligence Services' (DCAF Backgrounders Series 03/2006), 2.

²⁵³ Caparini in Born & Caparini (n 7) 3.

and intelligence agencies’, ‘policy, administration and expenditure.’²⁵⁴ The extent to which it has provided an effective means of parliamentary scrutiny is much disputed, especially given the somewhat subdued response of its reports investigating counter terrorism issues after 9/11.²⁵⁵ This chapter will analyse the structure and powers of the ISC, its relationship with the executive, and its response to allegations of complicity in the practice of extraordinary rendition, in order to assess its role within the UK’s intelligence oversight network. Since the ISC is the most visibly active means of intelligence oversight, this chapter will be somewhat longer than the others within this thesis, in order to properly analyse its work and role.

4.2 The ISC’s Structure and Powers: Theory and Practice

The ISC was conceived as a means by which to ensure critical parliamentary involvement in intelligence oversight²⁵⁶ after the controversies besetting the agencies during the 1980s and 1990s.²⁵⁷ However, given the reactive nature of this legislation, the current oversight framework consists of, ‘an unsatisfactory, “compartmentalised” system of review that fails to close the gaps.’²⁵⁸ The ISC’s powers, for example, are heavily curbed by the comparative influence of the executive within intelligence oversight. This section will consider in detail

²⁵⁴ s10(1) ISA 1994.

²⁵⁵ See ISC, ‘Rendition’ (n 21); ISC, ‘The handling of detainees...’ (n 20).

²⁵⁶ Leigh in Born, Johnson & Leigh (n 9) 87.

²⁵⁷ See, ‘The Legislative Oversight Framework of the UK Intelligence and Security Services in ‘Introduction’, 13-21.

²⁵⁸ Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 938.

the legislative provisions concerning the ISC's structure, membership, powers and access to information.²⁵⁹

The ISC's 'constitutionally unique'²⁶⁰ status as a statutory parliamentary committee, as established in s10(1) ISA 1994, affects its powers in terms of its reports, access to information and ability to hear evidence from certain witnesses. The Committee is structured in this way due to, 'reasons of national security...'²⁶¹; the sensitive nature of the information with which the Committee deals necessitates a body which is not primarily responsible to Parliament and has lesser powers than a select committee. However, in reality, the reasons for retaining the ISC's status are 'more apparent than real'.²⁶² Indeed, it is arguable that if the ISC was structured as a select committee, it would gain greater legitimacy given, 'the important and valuable signal it would send that the oversight process was properly independent of the executive.'²⁶³

The ISC comprises nine serving Members of Parliament from the Commons and the Lords, chosen by the Prime Minister in consultation with the Leader of the Opposition, as established by s10(2) ISA 1994. The Committee meets frequently, interviewing dozens of witnesses in order to produce its reports, and participating in foreign exchange

²⁵⁹ These are contained within s10 and Schedule 3 ISA 1994.

²⁶⁰ Leigh in Born, Johnson & Leigh (n 9) 87; Bochel, Defty, & Dunn, 'Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Service' (2010) 38(3) Policy and Politics 483, 484.

²⁶¹ Rifkind (n 175) 8.

²⁶² HAC, *Accountability of the Security Service* (n 227), paras. 21, 36; the 'key difference is that under the statutory procedure the final word rests with the executive, whereas under the select committee procedure the final word rests with Parliament', para. 35.

²⁶³ HAC, *Accountability of the Security Service* (n 227), paras. 38, 41; this has been echoed by the ISC itself in, ISC, 'Annual Report 2010-2011' (n 78) 81-2.

programmes.²⁶⁴ New members face a ‘steep learning curve’²⁶⁵ in order to understand the challenges facing the intelligence community, and to carry out their role with a degree of specialist knowledge.²⁶⁶ At a presentational level, therefore, the ISC appears willing to proactively exercise its oversight responsibilities, although parliamentary involvement in intelligence oversight carries with it the potential risk of ISC members sensationalising intelligence, or leaking sensitive information²⁶⁷. However, one has only to read the Committee’s reports in order to ascertain that the former is not a legitimate concern; they are very restrained in their treatment of intelligence matters.²⁶⁸ As for the latter issue, ISC members have not leaked a single issue to date.²⁶⁹ This could be because intelligence is an area which holds, ‘little opportunity for personal recognition or political advantage’²⁷⁰, meaning that Committee members are unlikely to ignite party political issues. Indeed, the way in which the Committee completes its work suggests that the above concerns may be based upon little else but a desire to discredit the exercise of parliamentary scrutiny as a form of intelligence oversight.

At the heart of the ISC’s effectiveness is the extent to which it balances its analytic function with the need to retain a constructive working relationship with the agencies.²⁷¹ On one hand,

²⁶⁴ Leigh in Born, Johnson & Leigh (n 9) 90; Defty, A, ‘Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee’ (2008) 61(4) Parliamentary Affairs 621, 633.

²⁶⁵ *Ibid* (Defty), 629.

²⁶⁶ DCAF, ‘Parliamentary Oversight of Intelligence Services’ (n 252), 3; Schreier in Born & Caparini (n 7) 44; Leigh in Born, Johnson & Leigh (n 9) 90.

²⁶⁷ *Ibid* (Born, Johnson & Leigh) 8.

²⁶⁸ Defty, ‘Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee’ (n 264), 627.

²⁶⁹ Leigh in Born, Johnson & Leigh (n 9) 94; Rifkind (n 175) 2.

²⁷⁰ Bochel, Defty & Dunn (n 260) 485.

²⁷¹ Caparini in Born & Caparini (n 7) 19.

the ISC's relationship with the agencies, built on trust, has allowed the Committee to carry out its mandate without excessive opposition.²⁷² However, this proximity to the agencies risks members becoming "institutionalized", and losing their independence.²⁷³ Although there is nothing to suggest a deliberately biased approach on the part of the ISC, some of the Committee's recent conclusions have been somewhat uncritical of the agencies, including those in 'Rendition', the ISC's report into alleged agency complicity in extraordinary rendition.²⁷⁴ In order to ensure the democratic legitimacy of parliamentary intelligence oversight,²⁷⁵ it is therefore submitted that a more satisfactory model might incorporate a number of intelligence specialists within the Committee's membership.²⁷⁶ This would both answer claims of insufficient expertise on the part of ISC members, and give the Committee more confidence in making its judgements and recommendations.

The ISC's mandate, as detailed in s10(1) ISA 1994, holds that the Committee may only scrutinise the agencies', 'expenditure, administration and policy.' The provision therefore does not directly authorise the ISC to consider operational matters. Indeed, the wording of s10(1) may be interpreted to authorise the ISC's scrutiny of the effectiveness and, '*management* of the intelligence community'²⁷⁷ rather than its propriety. Given that the most pertinent questions about the agencies' actions revolve around their operational activities, especially in relation to torture and extraordinary rendition, s10(1) effectively attempts to

²⁷² Rifkind (n 175) 2, also 3-4.

²⁷³ Caparini in Born & Caparini (n 7) 14, 19; Schreier in Born & Caparini (n 7) 44; DCAF, 'Parliamentary Oversight of Intelligence Services' (n 252), 4.

²⁷⁴ See discussion of the conclusions in 'Rendition' (n 21) and 'The handling of detainees...' (n 20), in 'The ISC and Extraordinary Rendition', 75-87.

²⁷⁵ Born in Born & Caparini (n 7) 171.

²⁷⁶ Venice Commission, 'Report on the Democratic Oversight of the Security Services' (n 191), 32.

²⁷⁷ Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 932.

strip the ISC of full powers of scrutiny²⁷⁸, thus fragmenting intelligence oversight across different institutions.²⁷⁹ This makes it difficult for a parliamentary body to draw meaningful conclusions and make attainable recommendations, which is especially concerning in relation to the allegations of complicity in torture, since it may prevent the production of truly exhaustive and authoritative reports.

In practice, however, the ISC has considered operational matters, as demonstrated by the subject matter of its 2007 report, ‘Rendition’, which examined the agencies’ alleged complicity in the practice of extraordinary rendition.²⁸⁰ Widely held opinion, including that of the current ISC Chairman, is that the Committee deliberately expanded its remit to do so.²⁸¹ Defty is more conservative in his opinion that whilst the Committee has kept ‘fairly rigidly’²⁸² within its s10(1) boundaries, it has only slightly ventured into consideration of operational matters.²⁸³ This difference in opinion could be due to the fact that the line between policy and operational details is very thin²⁸⁴ and therefore easily confused; intelligence operations are necessarily carried out under broader policy objectives. Therefore, despite the suggestion that the ISC’s second report into Binyam Mohamed was, ‘a matter of

²⁷⁸ Leigh in Born, Johnson & Leigh (n 9) 88. Dorrill calls the ISC ‘toothless’ for the same reason; Dorrill (n 24) 780.

²⁷⁹ Born in Born & Caparini (n 7) 169.

²⁸⁰ ISC, ‘Rendition’ (n 21); Rifkind (n 175) 3, 6; Bochel, Defty & Dunn (n 260) 484.

²⁸¹ Rifkind (n 175) 3, 6.

²⁸² Defty, ‘Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee’ (n 264) 627.

²⁸³ *Ibid*, 628-9; the ISC now also covers the ‘wider intelligence machinery’ within its remit; see Rifkind (n 175) 7.

²⁸⁴ Johnson argues that the ISC’s non-operational remit means that, ‘it is badly placed to look at agencies’ effectiveness in implementing policy’ in Johnson (n 115) 72.

Government policy not Agency operation'²⁸⁵, one has to question whether the two can easily be separated.²⁸⁶ The broadening of the ISC's remit indicates that existing statutory provisions should be updated to include operational issues formally within the ISC's mandate, and to thus provide a clear basis for the Committee's future investigations.²⁸⁷ In its Annual Report for 2010-2011, the ISC itself recommended such legislative changes in order to parallel development in intelligence practices, and to remedy the fact that the Committee's, 'remit and powers have evolved beyond the *de minimis* position set out in the 1994 Act.'²⁸⁸

In terms of its investigative ability, the ISC may initiate inquiries of its own accord,²⁸⁹ having done so especially prolifically during the last few years. However, given its scarce resources, members are almost wholly dependent upon the agencies to contribute meaningfully to the ISC's reports²⁹⁰, since they have, 'no way of checking on...what they are told.'²⁹¹ Given the fundamental role of parliamentary intelligence oversight, this reliance upon the agencies has the potential to undermine the ISC's ability to provide thorough and unbiased scrutiny.²⁹² Again, the ISC itself has recommended, and requested, more assistance with investigative and research resources.²⁹³ The Committee may request witnesses to give evidence, but is

²⁸⁵ Rifkind (n 175) 5.

²⁸⁶ Leigh in Born & Caparini (n 7) 182.

²⁸⁷ The Home Affairs Committee suggested that the ISC be given operational scrutiny as long ago as 1999; see HAC, *Accountability of the Security Service* (n 227) para. 17. Rifkind states that the ISC will consider, 'whether the legislation now needs to be amended...and give the ISC explicit oversight of the intelligence community as a whole', in Rifkind (n 175) 10.

²⁸⁸ ISC, 'Annual Report 2010-2011' (n 78) para. 273.

²⁸⁹ Born in Born & Caparini (n 7) 172.

²⁹⁰ For this reason, Gill also suggests that ISC members need to be, 'highly aware of their vulnerability to being misled...' in Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 937.

²⁹¹ *Ibid*, 936.

²⁹² DCAF, 'Parliamentary Oversight of Intelligence Services' (n 252), 3-4.

²⁹³ ISC, 'Annual Report 2010-2011' (n 78) 82.

unable to summon them; since the most relevant evidence would be from “inside” sources²⁹⁴, those also most likely to refuse to appear before the ISC, this again potentially constrains its ability to make accurate, objective conclusions.²⁹⁵ In order to remove concerns that the ISC is too close to the agencies²⁹⁶, more evidence could be taken from outside sources, including journalists, NGOs and international bodies.²⁹⁷ The wider the range of sources consulted in the course of the ISC’s investigations, the more effective the Committee will be in its duty of ‘protecting the state as a whole...rather than narrower political or sectoral interests.’²⁹⁸

The ISC is somewhat restrained in terms of its access to information, given that it cannot request specific documents, only general “information”²⁹⁹, which the agencies or Secretary of State may refuse to disclose if they judge it to be ‘sensitive information’³⁰⁰. This discretionary statutory regime³⁰¹ therefore allows the agencies, and executive, a certain amount of influence in its dealings with the ISC. However, the Committee generally receives more information than the bare minimum by virtue of its relationship with the agencies, maintained over years of cooperation.³⁰² This is not satisfactory; rather than gaining access to extra information through its reputation, the ISC should have the potential to access all intelligence information

²⁹⁴ Caparini in Born & Caparini (n 7) 19.

²⁹⁵ Supperstone, M, ‘Editorial: The Intelligence Services Act 1994’ [1994] PL 329, 329.

²⁹⁶ Leigh in Born & Caparini (n 7) 193.

²⁹⁷ *Ibid.* To some extent, this already occurs; see, for example, ISC, ‘Rendition’ (n 21) ‘Annex B: List of Witnesses (Non-Government Witnesses)’

²⁹⁸ Born & Leigh in SIPRI Yearbook 2007 (n 14) 203; Johnson (n 115) 71.

²⁹⁹ Sch. 3 para. 3(1) ISA 1994; Leigh in Born, Johnson & Leigh (n 9) 88.

³⁰⁰ Sch. 3 paras. 3(1)(b)(i) and 4 ISA 1994.

³⁰¹ Leigh in Born, Johnson & Leigh (n 9) 88.

³⁰² Gill in Born, Johnson & Leigh (n 9) 23; HAC, *Accountability of the Security Service* (n 227), para. 31; Rifkind (n 175) 3-4.

by statutory *right*, even if it should choose not to fully exercise this.³⁰³ In any case, the executive's powers over the ISC's access to information entrenches the perception that the ISC, 'cannot be trusted with sensitive information'³⁰⁴, and thus detracts from the legitimacy and authority of parliamentary oversight.

The final aspect of the ISC's powers to be scrutinised is its ability, or lack of, to control the content of its reports. As detailed in s10(5)-(7) ISA 1994, the Committee reports primarily to the Prime Minister, who presents its work to Parliament after making any necessary redactions. It has been stressed that any such changes are not made arbitrarily; the ISC undertakes a balancing exercise before agreeing to suggested redactions.³⁰⁵ However, without statistics showing how many challenges are upheld, or not, it is impossible to know how rigorously the Committee treats such requests. Evidently, some of the information accessed by the ISC will not be suitable for publication, but, as far as possible, a parliamentary oversight body must be allowed to publish their conclusions and recommendations without restriction. The fact that it is the Prime Minister, a potentially interested party, who suggests possible redactions, enforces the view that the Committee is not trusted to report responsibly, thereby undermining its position as representative of, and responsible to, *Parliament* as a whole.³⁰⁶

³⁰³ Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 253.

³⁰⁴ Wadham (n 47) 926.

³⁰⁵ Letter from The Rt. Hon Dr Kim Howells (for the ISC) to Tom Porteus (Human Rights Watch) (ISC 2009/10/71, 19 February 2010), 2.

³⁰⁶ Bochel, Defty & Dunn (n 260) 486.

Having considered the ISC's structure and powers, it appears that the current statutory framework is insufficient to deal with the Committee's role of parliamentary scrutiny; in the Committee's own words, the legislation is, 'significantly out of date.'³⁰⁷ The fact that the ISC's powers are subjected to those of the executive, and agencies, means that it appears less critical than would be the case if it were seen to be more independent. This raises concerns about its treatment of issues including alleged complicity in rendition, given the absolute prohibition of these practices in domestic and international law, and the need for domestic oversight mechanisms to be unequivocal in upholding the agencies' related legal obligations.

4.3 The ISC and the Executive

An essential aspect of the ISC's contribution to intelligence oversight is the extent to which it provides a check against the executive's powers³⁰⁸, and thus, 'ensures a stable, politically bipartisan approach'³⁰⁹ to intelligence. However, the apparent proximity between the ISC and the executive raises concerns about the "ownership" of the Committee and its powers³¹⁰, and whether this affects its ability to provide meaningful and independent oversight. This has partly been covered in this thesis; the ISC's powers, or lack thereof, suggest a system in which the executive is dominant, given its more intimate knowledge of threats to national

³⁰⁷ ISC, 'Annual Report 2010-2011' (n 78) para. 273.

³⁰⁸ Born in Born & Caparini (n 7) 164.

³⁰⁹ Leigh in Born, Johnson & Leigh (n 9) 8.

³¹⁰ Caparini in Born & Caparini (n 7) 171; Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 936.

security, and the innate secrecy of such information.³¹¹ In order to assess where the balance of power lies between the executive and ISC in practice, it is necessary to examine the relationship between the two in greater detail.

The legislative provisions relating to the ISC demonstrate the considerable influence that the executive may theoretically wield over the Committee, and the corresponding risk of political deference, manifested through party political divides or an unwillingness to criticise individuals' actions.³¹² This is enforced by the fact that some of the Committee's reports remain unpublished, thus undermining its investigative work and, 'increasing the government's control over policy...and...insulating [it] from criticism.'³¹³ Within the ISC's reports, the perception that intelligence is inherently useful and good resounds through them³¹⁴, which perhaps precludes their ability to be critical.

Despite the appearance that the executive exercises considerable power in its relationship with the ISC, Forcese, writing from a Canadian comparative perspective, emphasises that the Committee's reports merit a substantial response from the government, and thus cumulatively help to create, 'a rich corpus of material explaining and justifying government policies.'³¹⁵

³¹¹ See, for example, Leigh in Born, Johnson & Leigh (n 9) 87; Schreier in Born & Caparini (n 7) 40.

³¹² Caparini in Born & Caparini (n 7) 14.

³¹³ Venice Commission 'Report on the Democratic Oversight of the Security Services' (n 191), para. 82; Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 36.

³¹⁴ Some ISC reports previously began with a statement praising the work of the agencies, and acknowledging the difficult circumstances in which they operated; see, for example, ISC, 'Annual Report 2006-2007' (Report) (Jan 2008) Cm 7299, 3.

³¹⁵ Forcese, C, 'Fixing the Deficiencies in Parliamentary Review of Anti-Terrorism Law: Lessons from the United Kingdom and Australia' (Institute for Research on Public Policy (IRRP) Choices, vol 14(6) May 2008) 17-18.

The fact that the present executive has actively sought the ISC's opinions on several policy issues³¹⁶ suggests that it is willing to have a more consultative partnership with the Committee. This contrasts to previous governments' approach to parliamentary oversight, where, 'resistance to greater openness came not from the security and intelligence agencies, but from Whitehall and Government.'³¹⁷ Indeed, previous ISC reports called for increased Ministerial involvement in the oversight process³¹⁸, whilst also noting executive reluctance to interact with those parliamentary bodies whose remit incidentally touched upon intelligence.³¹⁹ Central to the ISC's future success is therefore the extent to which the executive accepts that further to cooperating with the Committee, in terms of giving evidence to its hearings, they must also implement its recommended reforms where necessary. This would both allow the ISC to properly fulfil its statutory role of scrutinising policy, as within s10(1) ISA 1994, and ensure that the executive take its reports into account within its decision-making processes.

When assessing the respective powers of the executive, and the ISC, one must remember that, 'the choice is not between executive or legislative sovereignty...[t]he challenge is to use the

³¹⁶ These include a second (unpublished) report on the Binyam Mohamed case, an unpublished report on the treatment of detainees in UK custody, and a future report upon the use of sensitive intelligence information in judicial proceedings. The ISC will also provide Sir Peter Gibson with evidence when he begins his investigation into the UK's complicity in extraordinary rendition; Rifkind (n 175) 4-5; Miliband and Johnson, 'Letters: Intelligence, torture and the courts' (n 5).

³¹⁷ HAC, *Accountability of the Security Service* (n 227) para. 9.

³¹⁸ Leigh in Born & Caparini (n 7) 188; Leigh in Born, Johnson & Leigh (n 9) 84; Bochel, Defty, & Dunn, (n 260) 484.

³¹⁹ Human Rights Watch, 'Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan', (1-56432-571-7) November 2009, 32.

best attributes of both branches'³²⁰. Therefore, the most effective relationship between the two would both respect the executive's ultimate responsibility for the agencies whilst retaining a meaningful parliamentary contribution. Given that the current balance of power lies with the executive, it falls upon the executive and agencies to consciously ensure the proper review and implementation of the ISC's recommendations.³²¹ It is also imperative that the ISC itself more confidently and independently inhabits its role; by actively demonstrating its critical function, the Committee will enforce that it is a distinct and independent oversight body, rather than a mere Whitehall puppet.³²²

4.4 The ISC and Extraordinary Rendition

In July 2007, the ISC produced 'Rendition'³²³, a report which analysed the mounting allegations of UK complicity in extraordinary rendition, and followed closely behind the Committee's previous report into the handling of detainees under UK custody overseas.³²⁴ Given that these reports concern issues intrinsically linked to the agencies' operational policies in the "War on Terror", they are instructive in revealing the Committee's approach to oversight of the agencies. This section will therefore explore the content of both reports, especially 'Rendition', and their implications for parliamentary oversight.

³²⁰ Schreier, *Fighting the Pre-eminent threats with Intelligence-led Operations* (n 17); this is echoed by Johnson, who states that, '[n]o one level of accountability stands alone. They are inter-linked, complementary and independent', in Johnson (n 115) 81.

³²¹ Born in Born & Caparini (n 7) 165.

³²² Gill & Phythian (n 113), 166.

³²³ ISC, 'Rendition' (n 21).

³²⁴ ISC, 'The handling of detainees...' (n 20).

Prior to the commission, and publication, of ‘Rendition’, there were mounting reports from a number of sources which indicated concerns about the extent of the UK’s role in the US-led rendition programme; as the ISC itself admits, ‘[w]ithin a few months of 9/11, allegations of “Extraordinary Rendition”...began to surface in the media.’³²⁵ These allegations were supported by evidence amassed by journalists, NGOs and interested bodies, and thus presented a *prima facie* case for the government to answer, or rebut.³²⁶ The allegations of complicity were also considered by the executive in Parliament; in January 2006 the Foreign Secretary issued a written ministerial statement denying that the government had granted permission to any cases of rendition since 9/11.³²⁷ Given the mounting levels of interest in the issue, both within Parliament and amongst the general public, it is somewhat surprising that the ISC did not produce ‘Rendition’ until July 2007. However, this is perhaps understandable when one considers that the Committee had produced two special reports in quick succession³²⁸, as well as its annual reports, and has scarce resources limiting its capacity for investigation.

³²⁵ ISC, ‘Rendition’ (n 21) 5.

³²⁶ See, for example, APPG on Extraordinary Rendition and New York University Centre for Human Rights and Global Justice, ‘Briefing Paper: Torture by proxy: International Law applicable to ‘Extraordinary Renditions’ (n 98); All Party Parliamentary Group on Extraordinary Rendition (APPGER), ‘Note From Andrew Tyrie to the Intelligence and Security Committee’ 30 October 2006 <<http://www.extraordinaryrendition.org/index.php/appg-letters-on-extraordinary-rendition/uk-committees?start=25>> last accessed 17/03/11; C Brown, ‘Rendition victim was handed over to the US by MI6’ (n 2).

³²⁷ HC Deb 20 January 2006, vol 441, cols 37WS-38WS (Jack Straw). However, a subsequent Foreign Secretary announced that two rendition flights in 2002 had in fact landed on the island of Diego Garcia, which is UK territory; HC Deb 21 February 2008, vol 472, cols 547-560 (David Miliband).

³²⁸ See ISC, ‘The handling of detainees...’ (n 20); ISC, ‘Report into the London Terrorist Attacks on 7 July 2005’ (Report) (May 2006) Cm 6785.

Before producing ‘Rendition’, in 2005 the ISC published a report which considered whether UK officers were aware of any mistreatment of detainees held in Afghanistan, Guantanamo Bay and Iraq, whether appropriate training was delivered for the purpose of interviewing such detainees, and the extent of ministerial knowledge of any concerns raised.³²⁹ The report identified several instances in which UK intelligence personnel had concerns about the possible mistreatment of detainees, or breach of their rights, by the US authorities, and a few circumstances where the conduct of UK personnel themselves had been called into question; however, ‘[a]part from the limited and specific breaches to which we have referred, [the ISC]...found no evidence that UK intelligence personnel abused detainees.’³³⁰

In its conclusions, the report emphasised the difficult context in which the agencies operate, and the need for valuable intelligence in order to anticipate and counteract terrorist threats.³³¹ In relation to instances where concerns were directly related to the conduct of UK intelligence staff, the officers in question were said to have been unaware of the correct procedures to follow.³³² The ISC also highlighted the agencies’ failure to deliver appropriate training in relation to officers’ lack of guidance about the Geneva Conventions and their application to detainees under UK supervision.³³³ Guidance has now been issued relating to the treatment of detainees, and procedures to follow in cases of possible mistreatment,³³⁴ although this has taken years, given that concerns regarding agency personnel were known for years prior to the ISC report. The 2005 report noted that any allegations of mistreatment

³²⁹ ISC, ‘The handling of detainees...’ (n 20) 5.

³³⁰ *Ibid*, 31.

³³¹ *Ibid*, 31.

³³² *Ibid*, 27-28.

³³³ *Ibid*, 30-32.

³³⁴ Guidance was issued in 2004; *ibid*, 32.

were reported, and treated, as, ‘isolated incidents’³³⁵, and not indicative of a deliberate policy to mistreat detainees. The Committee also criticised the fact that, in many cases, Ministers were not informed or consulted about developments in relation to the interrogation and treatment of detainees until long after they had materialised, and been resolved.³³⁶

Although the issues considered in the 2005 report concerned a “grey area” of the UK agencies’ practices, the ISC’s report was confined to criticisms relating to procedural matters. In response to the allegations of mistreatment, for example, the Committee did not criticise the actions of the US and UK agencies *per se*, but focused on the procedure by which agency superiors were notified, Ministers consulted and any training implemented.³³⁷ Moreover, at several points throughout the report the ISC did not appear to analyse the issues raised in sufficient detail. For example, the Committee accepted without question MI5’s assertion that the UK officers involved in incidents of mistreatment were simply unaware of UK policy on the matter³³⁸; this may indeed have been the case, but the serious nature of the allegations warranted further investigation. Furthermore, the report devoted only two paragraphs to “ghost prisoners”³³⁹, although such detainees are central to a discussion of rendition. Although the ISC was proactive in commissioning and driving the 2005 report³⁴⁰, by limiting its analytical ability as detailed above, it signalled that it was more comfortable considering the agencies’ *management* than their *propriety*.³⁴¹ In this way, the Committee’s approach in

³³⁵ *Ibid*, 27-28; see also 14-15, 27-8, 31-32.

³³⁶ *Ibid*, 30-32.

³³⁷ *Ibid*, 29-32 (‘Conclusions and Recommendations’).

³³⁸ *Ibid*, 27.

³³⁹ *Ibid*, 20.

³⁴⁰ *Ibid*, 2-4.

³⁴¹ Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 932.

the 2005 report appeared to demonstrate that in future reports it would again be hesitant in criticising the UK agencies' actions in relation to the practice of extraordinary rendition.

The ISC's 2005 report therefore left a number of questions for the Committee to consider in 'Rendition' including whether appropriate guidance on rendition would be made available to personnel, whether more would be discovered about "ghost prisoners"³⁴², and whether ministers would be informed or consulted about alleged instances of rendition. However, the overriding theme which links the two reports is the necessity of balancing the need for agencies to share and receive intelligence with the need to uphold international legal obligations, and agencies' ethical policies. Given that most shared intelligence is disclosed without revealing its source, or the means by which it was gained, the agencies have to assess its credibility in order to judge whether to use it³⁴³; it is this assessment of intelligence which lies at the heart of the ISC's 2005 and 2007 reports.

The terms of reference of the 'Rendition' report were two-fold; firstly to consider whether the UK agencies had, 'any knowledge of, and/or involvement in, rendition operations...and [secondly] their overall policy for intelligence sharing with foreign liaison services (principally the United States) in this context.'³⁴⁴ These appeared to be comprehensive objectives, given the range of allegations the Committee was to consider. However, the very broadness of the first objective made the substantive content of the report dependent upon the interpretation of "rendition", meaning that certain aspects of complicity in torture, which

³⁴² ISC, 'The handling of detainees...' (n 20), 20.

³⁴³ *Ibid*, 14-15.

³⁴⁴ ISC, 'Rendition' (n 21) 5.

covers a very broad range of acts³⁴⁵, may not have been considered. This is emphasised by the fact that the report distinguished five separate “types” of rendition.³⁴⁶ The second objective of the 2007 report tied in with the dilemmas associated with increasing international intelligence cooperation.

It was further suggested by the All Party Parliamentary Group on Extraordinary Rendition (APPGER) that the ISC should also consider the system of executive involvement in ‘Rendition’, and a third term of inquiry was also proposed;

‘Is the practice of extraordinary rendition making Britain more or less secure, and what, if any, changes in Government policy are required?’³⁴⁷

It is submitted that the first suggestion would indeed be a natural term of inquiry, given that an understanding of ministerial involvement in the intelligence process is central to the agencies’ alleged complicity in rendition, with the ISC examining this issue in its 2005 report. However, the proposed third term of inquiry would be too broad for the Committee to consider; although it may consider the agencies’ policies, as established through s10(1) ISA 1994³⁴⁸, political judgements lie outside the ISC’s limited remit. It was explicitly stated that, as in the 2005 report, ‘Rendition’ would not analyse the legality of the US agencies’ actions.³⁴⁹ Although it is true that the ISC’s remit extends only to the UK agencies, such a

³⁴⁵ For a discussion of the range of acts covered by “complicity” in extraordinary rendition see, for example, Sands, ‘Extraordinary Rendition: Complicity and its consequences’, (n 4). Also see ‘Introduction’ 21-27.

³⁴⁶ ISC, ‘Rendition’ (n 21) 6, para. 7.

³⁴⁷ APPGER, ‘Note from Andrew Tyrie to the Intelligence and Security Committee’ (n 326), 2.

³⁴⁸ s10(1) ISA 1994.

³⁴⁹ ISC, ‘Rendition’ (n 21) 5.

statement could be read as meaning that the Committee was unwilling to consider any US-derived material during the course of its investigations. The difficulties faced by domestic oversight bodies, with regards to unravelling international intelligence cooperation, mean that it would therefore have been difficult for the Committee to successfully fulfil their second term of reference. It is therefore interesting that when apportioning blame for any wrongdoing, the report's conclusions focus on the US's actions rather than the UK's³⁵⁰ despite not formally considering the propriety or legality of the US agencies' actions.³⁵¹

Much in the same vein as the ISC's 2005 report, 'Rendition' adopted, 'a rather sober, non-sensational approach to an issue which is often the subject of lurid speculation.'³⁵² This perhaps implicitly signalled that the ISC would be unwilling to indulge in the "conspiracy theories" concerning possible UK complicity in torture and rendition. The report firstly defined extraordinary rendition by distinguishing it from four other instances of rendition.³⁵³ However, this distinction appears somewhat artificial given the potential overlap between the categories of rendition; for example, although the ISC argued that 'the transfer of battlefield detainees from Afghanistan to Guantanamo Bay would fall into the category of "Military Renditions"',³⁵⁴ if torture of cruel, inhumane or degrading treatment was practised during the detention, as has been alleged in some instances, could it not also be classified as extraordinary rendition? The same argument would also be relevant for instances of

³⁵⁰ ISC, 'Rendition' (n 21) 67.

³⁵¹ Wright, A, 'Fit for purpose? Accountability challenges and paradoxes of domestic inquiries' in Born, Leigh & Wills (n 99), 179.

³⁵² Defty, 'Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee' (n 264), 627.

³⁵³ ISC, 'Rendition' (n 21) 6.

³⁵⁴ *Ibid.*

“Rendition to Detention”. The narrowness of these definitions, limiting the circumstances which could be classified as *extraordinary* renditions, therefore reduced the extent to which UK agencies could technically be found to be complicit in the practice.

In terms of structure, ‘Rendition’ set out the legal framework and background surrounding the use of renditions before and during the “War on Terror”, and considered the increasing need for international intelligence cooperation. It then considered four case studies of alleged victims of the practice, distinguishing them on the basis of facts. This approach was somewhat unusual, since the ISC generally does not consider individual cases.³⁵⁵ However, this means of structuring the report maintained the overriding argument that the cases mentioned were unique and not symptomatic of general policy.³⁵⁶ The report then considered ethical concerns raised by rendition allegations, the role of the UK agencies, and the issue of “ghost flights” before making conclusions and recommendations. The report’s content therefore appears comprehensive, although a section considering ministerial knowledge and involvement would have been useful, given the ISC’s criticisms of this in its 2005 report. Furthermore, a discussion of the meaning of the term “complicity” would have assisted in identifying the range of acts referred to within the allegations, and would have therefore provided a more authoritative account of the UK’s liability. The length of the report also somewhat detracts from its content; the sections on ‘legal framework’, ‘the nature of intelligence sharing’ and ‘ethical dilemmas’ were very short considering their importance to the subject matter and conclusions of the report.

³⁵⁵ The IPT is the institution to which such a complaint should be brought; Rifkind (n 175) 4; ISC, ‘Rendition’ (n 21) 31.

³⁵⁶ *Ibid* (ISC), 34-5, 43.

The ISC's conclusions in 'Rendition' followed the opinion that the agencies were slow to realise the extent of the US's policy of extraordinary rendition and its implications for them.³⁵⁷ If one follows this argument then it is implied that any complicity on the part of UK agencies was provided unknowingly. In terms of the specific cases which were detailed, the Committee found that the agencies, 'acted properly'³⁵⁸ and were not involved in the rendition of Martin Mubanga. A UK officer had interviewed Mubanga during his detention in Zambia, without reporting any evident mistreatment, and the UK agencies knew of the US's plan to render him to Guantanamo Bay, also notifying the relevant Ministers.³⁵⁹ Given this, and the changes occurring within US foreign policy at this time³⁶⁰, one might have expected the agencies to have kept a closer watch on Mubanga or to have intervened once they learned of his future deportation.

In the case of Binyam Mohamed, it was found that 'there is a reasonable probability' that intelligence passed from the UK agencies to the US was later used in his interrogation.³⁶¹ Once again the agencies had interviewed him during his detention, without reporting any mistreatment; moreover, although they were aware of the plan to transport him to Guantanamo Bay, they did not seek assurances as to his treatment.³⁶² The ISC called this latter failure 'understandable' due to the agencies' lack of knowledge of US policy, yet

³⁵⁷ Gill, 'The Intelligence and Security Committee and the challenge of security networks' (n 16) 933-4; ISC, 'Rendition' (n 21) 65.

³⁵⁸ *Ibid* (ISC), 65.

³⁵⁹ *Ibid*, 31-32.

³⁶⁰ *Ibid*, 19-29.

³⁶¹ *Ibid*, 34, 66.

³⁶² *Ibid*, 33-34.

‘regrettable’³⁶³, and failed to confirm or deny Mohamed’s allegations.³⁶⁴ Evidence which has been provided in reports by outside bodies, and through information divulged in court cases³⁶⁵ would appear to show that Mohamed was indeed involved in the practice of extraordinary rendition. If true, this raises the question of why the ISC appeared unwilling to robustly criticise the agencies for their role in Mohamed’s rendition, and whether they were aware of the nature of the agencies’ actions or not.

In the case of Bisher al-Rawi and Jamil el-Banna, the ISC found that the sharing of information between the US and UK agencies about the men’s movements was ‘routine’ and could not have been expected to have been acted on, especially since it was covered by a caveat.³⁶⁶ Indeed, the Committee said that it was, ‘clear that [the men’s arrest] was not at the instigation of the Security Service.’³⁶⁷ However, there remain unanswered questions about why intelligence was passed to the US authorities rather than the Gambian authorities, and why the men’s bags were not searched the second time they attempted to fly to Banjul, if no action was expected through this shared intelligence. Given that these events occurred subsequent to the renditions of Martin Mubanga and Binyam Mohamed, amongst others, it is possible that the UK agencies would have had misgivings about how the shared intelligence might be used, although perhaps not if the incidents were dealt with independently, and not

³⁶³ *Ibid*, 34, 66.

³⁶⁴ ISC, ‘Rendition’ (n 21) 34.

³⁶⁵ See, for example, *Farhi Saeed Bin Mohamed v Obama* (unreported) 19 November 2009, US District Court, District of Columbia; Reprieve, ‘Human Cargo: Binyam Mohamed and the Rendition Frequent Flyer Programme’ (n 83); Reprieve, ‘Adding Insult to Injury: Torture in the Twenty-First Century: Refuting the ‘incredible’ US statement that Binyam Mohamed’s Description of his CIA-sponsored torture in Morocco is ‘not credible’ (Report) 30 July 2008 <http://www.reprieve.org.uk/publications/2008_07_30addinginsulttoinjury/> last accessed 17/06/2011.

³⁶⁶ ISC, ‘Rendition’ (n 21) 38.

³⁶⁷ *Ibid*, 41.

considered as an evolving pattern. However, even if the latter option is more accurate, it demonstrates a flawed assessment of the recurring instances of alleged rendition.

In 'Rendition', the ISC noted that the agencies at all times acted appropriately and according to policy.³⁶⁸ However given the number of conflicting reports, and evidence detailing alleged involvement in rendition, there remains the question of whether it is true that the UK agencies, being aware of the US's change in foreign policy and the mistreatment of detainees in UK custody overseas, and having witnessed a growing number of renditions to Guantanamo Bay, did not have suspicions of there being a real risk of torture or mistreatment occurring? If this is true then the ISC's report does not detail sufficient evidence to support such a conclusion. The necessary redaction of the Committee's reports makes it difficult for the Committee to persuasively argue that their conclusions are supported by compelling and accurate evidence, since even if this exists it is unseen by the public at large. This is perhaps where the ISC could profit from increased collaboration with NGOs and outsider bodies to enhance the authority of their reports from a public perspective. In the absence of such, and especially given the increasing amount of information which would seem to indicate otherwise, it is difficult to agree with the ISC's conclusions in 'Rendition'.

A pressing issue raised by 'Rendition' was the extent to which the ISC should consider the UK intelligence agencies' adherence to human rights norms. Born argues that scrutiny of the agencies' protection of human rights is a key function of legislative accountability.³⁶⁹ However, thus far, this has not been followed by the ISC; as Gill notes, its reports before

³⁶⁸ *Ibid*, 67.

³⁶⁹ Born in Born & Caparini (n 7) 164.

2005 contained, ‘the complete absence of any explicit reference to human rights.’³⁷⁰ Although the ISC dealt with torture and lack of due process in ‘Rendition’, the report focused upon the agencies’ efficiency and *management*³⁷¹ and thus once more, ‘firmly situat[ed] questions of human rights and ethics within the framework of the importance to the UK of intelligence sharing with the US and, implicitly, the importance of not disrupting this relationship.’³⁷²

The question of whether the ISC may consider human rights issues rests upon its remit. If the Committee strictly confines itself to s10(1) ISA 1994 by considering the agencies’ ‘policy, administration and expenditure’³⁷³, and thus their *management*³⁷⁴, then it may legitimately produce reports which do not consider human rights issues, or do so only in a cursory manner. However, given the ISC’s extension into considering operational issues and, ‘the harm that can be done to civil liberties and human rights by intelligence agencies, this is unsatisfactory.’³⁷⁵ Issues such as alleged complicity in the rendition and treatment of detainees in UK custody, concern the agencies’ *propriety*, of which a key part is their adherence to human rights.³⁷⁶ The argument for the ISC to consider human rights is therefore

³⁷⁰ Gill & Phythian, (n 113) 164-5.

³⁷¹ Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 932.

³⁷² Farson, S, et al (eds), *PSI Handbook of Global Security and Intelligence: National Approaches. Vol 2: Europe, the Middle East, and South Africa* (Intelligence and the Quest for Security Series) (Praeger Security International 2008), 410.

³⁷³ s10(1) ISA 1994.

³⁷⁴ Gill, Phythian and Defty argue that the ISC has sought to maintain a management-type role, rather than that of oversight; Gill & Phythian, (n 113) 161; Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 932; Defty, ‘Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee’ (n 264) 639.

³⁷⁵ Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 932.

³⁷⁶ *Ibid.*

a pressing one, especially given the context of international legal obligations under which the agencies operate.

At the same time that the ISC has produced its work relating to rendition and intelligence oversight, parliamentary committees not formally mandated in respect of the UK intelligence and security agencies have also begun to consider these issues. The most notable contributions in this area have come from the APPGER, Joint Committee on Human Rights (JCHR), Foreign Affairs Committee (FAC) and the Home Affairs Committee (HAC).³⁷⁷ The very fact that such bodies have ventured into the realm of intelligence suggest that they recognise ‘perceived limitations in the work of the ISC’³⁷⁸, and seek to remedy these through their own reports. Their respective reports appear to be more overtly critical than the ISC’s, thus upholding a critical function of parliamentary scrutiny.³⁷⁹ However, perhaps as a consequence of this, the UK agencies and the executive may be more likely to cooperate with, the ISC. The involvement of other parliamentary committees in intelligence oversight somewhat undermines the Committee’s position, which reinforces the argument that in order for it to regain its reputation as an independent and impartial body, the ISC must consciously become more critical of the agencies, and distance itself from any outside, and potentially corrupting, influence.

³⁷⁷ See, for example, APPGER, ‘Note From Andrew Tyrie to the Intelligence and Security Committee’ (n 326); APPGER and New York University Centre for Human Rights and Global Justice, ‘Briefing Paper: Torture by proxy: International Law applicable to ‘Extraordinary Renditions’’ (n 98); Joint Committee on Human Rights, ‘Allegations of UK Complicity in Torture (n 93); FAC report; HAC, *Accountability of the Security Service* (n 227).

³⁷⁸ Bochel, Defty, & Dunn (n 260) 485; Gill, ‘The Intelligence and Security Committee and the challenge of security networks’ (n 16) 935.

³⁷⁹ Bochel et al make the point that the HAC, FAC and JCHR have all, at some stage, called for greater accountability and oversight of the agencies; *ibid*, 485.

4.5 Conclusion

If ‘Parliaments need high-quality intelligence in order to make appropriate decisions on national security’³⁸⁰, it is in their interests to ensure that the intelligence and security agencies maintain high standards and implement effective procedures. The ISC can only do so if it is granted wider statutory powers, since the existing legislation curbs its ability to work independently and unhindered by outside influences. It has been suggested that any changes to the ISC’s structure and powers would damage the relationship between the Committee and the agencies, and thus ‘set back effective scrutiny.’³⁸¹ However, given that the agencies have often been said to welcome the work of oversight bodies³⁸², they might otherwise be expected to recognise the ISC’s extended powers as constructive to the future of intelligence.

Generally speaking, the ISC has been restrained in its approach to the issue of possible complicity in rendition and torture, as demonstrated by the conclusions of its 2005 and 2007 reports, produced in the face of emerging information about the renditions cycles. Although the new Chairman of the ISC argues that the Committee will, ‘be critical where [it] see[s] failures or shortcomings’³⁸³ this has arguably not been the case so far; criticisms have focused on issues relating to management rather than the substantive content of the allegations made against the agencies. Although this may be appropriate for an annual report, it is surprising that the ISC, having initiated the reports in question, did not proceed to robustly investigate and analyse the numerous allegations made against the UK intelligence and security agencies.

³⁸⁰ DCAF, ‘Parliamentary Oversight of Intelligence Services’ (n 252), 1.

³⁸¹ HAC, *Accountability of the Security Service* (n 227) para. 37.

³⁸² Rifkind (n 175) 2, 9-10.

³⁸³ *Ibid*, 11; at 5, Rifkind also claims that ‘the investigatory work undertaken by the ISC...has made an important contribution ...’

The Committee's failure to do so emphasises both its structural deficiencies, and overt deference to the executive, neither of which are advisable characteristics in an independent oversight body.

CHAPTER 5: THE ROLE OF THE COURTS

5.1 Introduction

Although the primary means by which to hold intelligence agencies accountable must, necessarily, come from the executive and parliamentary branches, judges play an important role as the, ‘final arbiters of the statutory powers that security and intelligence agencies possess.’³⁸⁴ This is because robust judicial decision-making in the realm of intelligence can highlight inappropriate practices, chastise those responsible, impose remedies and sanctions³⁸⁵, suggest reform to existing legislation and thus generally contribute to an institutionalized oversight regime. Judicial decisions in cases related to alleged complicity in extraordinary rendition reveal much about the court’s relationship with the executive, and the importance attached to the particular constitutional principles and civil liberties at stake.

Decisions made within both the domestic and international context initially acted as a catalyst forcing regulation of the agencies in the 1980s and 1990s.³⁸⁶ However, given the executive’s tendency to advocate secrecy of the agencies’ actions in pursuance of the ‘War on Terror’, and the resort to controversial administrative measures in order to accommodate sensitive

³⁸⁴ Born & Leigh in SIPRI Yearbook 2007 (n 14) 207.

³⁸⁵ Born & Caparini, (n 7), 9, 42.

³⁸⁶ Born, Johnson & Leigh (n 9) 5; Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 290; Andrew (n 24) 756-766; Gill, ‘The Intelligence and Security Committee and the Challenge of Security Networks’ (n 16), 929-30, 938; Leigh & Lustgarten, ‘Legislation: The Security Service Act 1989’ (n 38) 801, 803; Starmer (n 27) 128-9; Wadham, (n 47) 917; *Malone v UK* (n 30); *Harman and Hewitt v UK* (n 37); *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109; [1988] UKHL 6.

issues within the justice system³⁸⁷, the judiciary's decision-making capacity has been considerably challenged in recent years. Unlike their foreign counterparts, judges in England and Wales are not involved in the prior authorisation of agency action, and have no power to strike down legislation, meaning that their direct involvement in agency activity is limited to incidental and *ex post facto* review. Courts are only able to consider rendition and torture insofar as these issues arise in on-going court proceedings, thus limiting the noticeable effect of judicial decision-making on the UK intelligence and security agencies. In turn, this has been exacerbated by a general judicial unwillingness to challenge executive discretion in national security affairs and policy decisions.³⁸⁸

This chapter will therefore consider the theoretical role of the judiciary within intelligence oversight, before looking at how the judiciary conducts itself in practice, in relation to the UK's intelligence legislation. It will then analyse how the practice of extraordinary rendition, in relation to the intelligence and security agencies, has arisen within specific cases in the UK, and how the courts have considered the issues of secrecy, integral to the agencies' operations, in the context of making decisions related to the state's national security.

³⁸⁷ Eminent Jurists' Panel (n 10) 78.

³⁸⁸ Venice Commission, 'Report on the Democratic Oversight of the Security Services' (n 191), para. 85.

5.2 The Judicial Function within Intelligence Oversight: Theory

The role of the judiciary within intelligence oversight is two-fold; firstly, they provide incidental and *ex post facto* review of the agencies' actions arising from legal issues brought within the legal system³⁸⁹; and secondly, they authorize certain agency actions which would otherwise be forbidden, but which are deemed necessary in specific circumstances³⁹⁰. The first of these functions is the most important given that judicial decision-making, within the realm of intelligence, relates to the exercise of judicial deference in the consideration of matters central to a state's security³⁹¹. In this way, 'the willingness of the courts to strike down laws and actions deemed to be unlawful or unconstitutional'³⁹² demonstrates the extent of judicial activism within a state at any one time.

In terms of intelligence oversight, the courts have generally been seen to have a minimal role in overseeing the agencies' actions, which has been exacerbated by the tendency of certain politicians to characterise judicial decision-making as undemocratic.³⁹³ However, although the judiciary's role in intelligence oversight is not as central as that of the other two branches of state, it creates '*anticipatory control*'³⁹⁴, by which the agencies are aware that their actions could subsequently be examined in a judicial setting. The very independence of the judiciary, and the fact that they are a less "democratic" branch of state than the legislature or

³⁸⁹ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161), 66.

³⁹⁰ *Ibid*, 54; Born & Caparini (n 7), 15, 39.

³⁹¹ *Ibid*, 16.

³⁹² *Ibid*, 15.

³⁹³ Starmer (n 27) 124.

³⁹⁴ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161), 53.

executive³⁹⁵, means that they provide a purely detached form of review, untouched by political considerations. Judicial decisions are necessarily grounded in legal norms and principles³⁹⁶, meaning that judges' interpretations of the agencies' domestic and international legal obligations define the limits of their permissible behaviour. In order to facilitate effective judicial decision-making, any legislation relating to intelligence oversight must therefore be precisely drafted in order to provide a 'reference point' for judges if raised in a case.³⁹⁷ This relates to the argument that such laws must provide for sanctions to be applied if they are broken; without meaningful penalties, there is arguably little incentive for the agencies to adhere to a legislative framework.³⁹⁸ Therefore, such developments must be accompanied by robust interpretation of these laws, and imposition of sanctions, in order to be meaningful.³⁹⁹

Within its role of intelligence oversight, the judiciary has traditionally been charged with protecting citizens' fundamental rights and civil liberties from the possibility of an over-zealous executive.⁴⁰⁰ In times of heightened security concerns, it is increasingly important that the judiciary acts robustly to retain the state's constitutional principles. The potential consequences of the executive preventing the judiciary, whether consciously or not, from fully exercising their decision-making powers are wide; the executive's influence in intelligence and security would continue largely unchallenged, extraordinary powers would

³⁹⁵ This refers to the fact that the judiciary is not elected and thus not directly responsible to citizens in the same way that elected politicians are.

³⁹⁶ Feldman, D, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' [2006] PL 364, 375.

³⁹⁷ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161) 53, 64.

³⁹⁸ *Ibid*, 53-5.

³⁹⁹ *Ibid*, 74.

⁴⁰⁰ Born & Leigh in SIPRI Yearbook 2007 (n 14) 207.

begin to be viewed as ordinary due to the trend of ‘legislative creep’⁴⁰¹, and the intelligence agencies would potentially begin to view abrogation of constitutional principles as justified under increasing numbers of circumstances.⁴⁰² In relation to the practice of extraordinary rendition, where the issues concerned involve torture, illegal detention and lack of due process, this would severely curb the fundamental rights of the individuals involved, and would limit the judiciary’s oversight of the agencies’, and executive’s, actions.

5.3 The Judicial Function within Intelligence Oversight: the UK Legislation in Practice

Within the current legislative oversight framework, the judicial function is channelled into three judicial roles established by the Regulation of Investigatory Powers Act 2000; the Investigatory Powers Tribunal (IPT),⁴⁰³ Intelligence Services Commissioner⁴⁰⁴ and Interception of Communications Commissioner⁴⁰⁵. The Commissioners, both retired judges, review the authorisation of warrants authorised by the relevant Secretary of State relating to intrusive surveillance and interference with property, and the interception of communications.⁴⁰⁶ Their role is not especially relevant to consideration of the allegations of complicity in extraordinary rendition with which this thesis is concerned. The IPT, however, considers complaints brought against the agencies by affected parties. These statutory judicial

⁴⁰¹ Feldman, ‘Human Rights, Terrorism and Risk: the Roles of Politicians and Judges’ (n 396), 370.

⁴⁰² DCAF, ‘Intelligence Practice and Democratic Oversight – A Practitioner’s View’ (n 161), 71.

⁴⁰³ Established in ss65 – 70 RIPA 2000.

⁴⁰⁴ Established in s57 RIPA 2000.

⁴⁰⁵ Established in s59 RIPA 2000.

⁴⁰⁶ ss57 and 59 RIPA 2000.

mechanisms were specifically created to operate effectively within the largely secret realm of intelligence, meaning that they therefore also have the potential to be less transparent than usual courtroom proceedings. This section will consider how effectively the IPT carries out its judicial functions, and how it fits into the broader intelligence oversight framework, given that it is a non-traditional judicial mechanism which operates differently to the courts.

Within the current statutory oversight regime, the Investigatory Powers Tribunal is a mechanism by which individuals may bring complaints against the misuse of the intelligence and security services' statutory powers under ss65 – 70 RIPA 2000. This appears to include complaints relating to torture and mistreatment, since the ISC has repeatedly said that the IPT is the appropriate forum for complaints and allegations of complicity in extraordinary rendition to be addressed rather than in its own reports.⁴⁰⁷ However, there is some confusion over whether such complaints fall within the IPT's jurisdiction, given that its powers under RIPA 2000 are listed as covering, 'interception of communications; communications data; intrusive surveillance; directed surveillance; interference with property; covert human intelligence sources; investigation of protected electronic information.'⁴⁰⁸ This would therefore not include jurisdiction for alleged complicity in rendition. However, ss65(3)-(5) RIPA 2000⁴⁰⁹ appear to allow jurisdiction over such allegations; the agencies' alleged actions presumably classifies as conduct taking place in relation to the individual⁴¹⁰ and which the complainant believes, 'to have taken place in challengeable circumstances or to have been

⁴⁰⁷ ISC, 'Rendition' (n 21) 31; ISC, 'The handling of detainees...' (n 20) 8, 19.

⁴⁰⁸ 'What the Tribunal can Investigate' <<http://www.ipt-uk.com/default.asp?sectionID=1>> last accessed 19/05/2011.

⁴⁰⁹ ss 65(3)-(5) RIPA 2000.

⁴¹⁰ s65(4)(a) RIPA 2000.

carried out by or on behalf of any of the intelligence services.’⁴¹¹ Although it appears that the IPT therefore has jurisdiction, the potential confusion surrounding this issue has the capacity to be misleading for individuals seeking to make a complaint against the agencies but unaware of the appropriate avenue to pursue.

In the case of *A v B*⁴¹², the Supreme Court unanimously dismissed an appeal brought by a former MI5 agent seeking to uphold his Article 10 ECHR rights in a court rather than before the IPT, determining instead that the IPT was the clear avenue through which concerns about the intelligence agencies should be determined. The decision was based upon the fact that s65(2)(a) RIPA 2000 was held to have allocated the IPT jurisdiction over claims brought under s7(1)(a) HRA 1998, relating to breaches of Convention rights by public authorities.⁴¹³ Through this decision, the Supreme Court effectively upheld the IPT as an entirely appropriate form of judicial mechanism, holding that although the requirements of intelligence necessitated precautions in terms of the IPT’s openness, the Tribunal nevertheless complied with the fair trial requirements of Article 6 ECHR.⁴¹⁴ Given the substance of this decision, it is somewhat surprising that claims alleging complicity in extraordinary rendition have not been brought to the IPT, but have instead been determined through the traditional legal route.

⁴¹¹ s65(4)(b) RIPA 2000. This would also mean that the action would fulfil s65(3), and s65(5)(a); that the complaint is brought against the intelligence services (s65(3)) and related to conduct undertaken ‘by or on behalf of ‘ them (s65(5)(a)).

⁴¹² *R(on the application of A) v Director of Establishments of the Security Service (‘A v B’)* [2009] UKSC 12; [2010] 2 A.C. 1.

⁴¹³ *Ibid*, para. 23.

⁴¹⁴ *Ibid*, para. 30.

It has been argued that, '[t]here is a clear need for alternative avenues of redress for individuals who claim to have been adversely affected by the exceptional powers often wielded by security and intelligence agencies.'⁴¹⁵ Indeed, it is reasonable to suggest that a body charged exclusively with considering truly sensitive intelligence would be able to effectively balance the requirement of fair due process against that of security.⁴¹⁶ In *Al Rawi and others*, discussed below, Lord Brown advocated that a specialist intelligence tribunal was one of the only methods by which the secrecy of intelligence could be accommodated alongside the public interest in having such claims heard.⁴¹⁷ However the IPT, in its present form, appears not to balance these competing interests as effectively as is possible.⁴¹⁸ The lack of transparency regarding the Tribunal's hearings and decision-making means that justice is not *seen to be done* in the cases it hears, which is a crucial element of judicial decision-making. The IPT heard its first open court hearing in July 2010, in which it upheld a complaint for only the *fourth* time in its ten year existence.⁴¹⁹ Such statistics do little to instil confidence in the tribunal's decision-making and protection of individuals' rights.⁴²⁰ The legislative provisions regulating the IPT's procedure therefore somewhat limit the full exercise of traditional judicial function⁴²¹ through allowing a predominantly secret form of

⁴¹⁵ Born & Leigh in SIPRI Yearbook 2007 (n 14) 210.

⁴¹⁶ *Ibid.*, 210-12.

⁴¹⁷ *Al Rawi and others* (n 22), para. 86 (per Lord Brown).

⁴¹⁸ Gill claims that the IPT was clearly designed instead, as other oversight institutions, 'to provide a minimalist review structure that would pass muster before the European Court of Human Rights' in Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (n 12) 295. Specific reform of the IPT, or a more appropriate judicial forum for intelligence matters is too wide a subject for this thesis, but is advocated as the most appropriate route.

⁴¹⁹ Sections of the judgement are still redacted – see *Paton v Poole Borough Council*. Also see, A Travis, 'Time to review the surveillance tribunal', *The Guardian*, 2 August 2010 <<http://www.guardian.co.uk/commentisfree/libertycentral/2010/aug/02/surveillance-investigatory-powers-tribunal>> accessed 09/11/2010.

⁴²⁰ Born, Johnson & Leigh (n 9), 95.

⁴²¹ Supperstone, 'Editorial: The Intelligence Services Act 1994' (n 295) 331.

judicial scrutiny and thus reducing the number of complaints pursued in the traditional manner, especially since the IPT's decisions cannot be challenged in court.

5.4 Extraordinary Rendition in the UK Courts

Writing in 1994, Supperstone predicted future problems for the courts operating within the realm of intelligence in terms of, 'the meaning that is to be given to the concept "national security" and its operation in practice.'⁴²² For the purposes of this thesis, the phrase "national security" shall be taken to refer to, 'the protection of the most fundamental institutions of the state from the threat of being undermined by its enemies...'⁴²³ The traditional approach taken by the judiciary has been to recognise that national security, 'is not a question of law. It is a matter of judgment and policy...entrusted to the executive.'⁴²⁴ This general unwillingness to consider national security and intelligence in detail can partly be explained by the judiciary's perceived lack of expertise and knowledge about the intelligence process and national security threats.⁴²⁵ The government's response to unfavourable judicial decisions may also be a contributing factor; following the High Court's decision in 2009 to allow publication of the 7 redacted paragraphs relating to Binyam Mohamed's torture, for example, the government

⁴²² Supperstone, 'Editorial: The Intelligence Services Act 1994' (n 295) 330.

⁴²³ Jaconelli, J, *Open Justice: A Critique of the Public Trial* (1st edn., OUP, Oxford 2002), 117.

⁴²⁴ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, para. 50 (per Lord Hoffmann).

⁴²⁵ Leigh in Born, Leigh and Wills (n 99), 232.

proclaimed itself, ‘deeply disappointed.’⁴²⁶ Indeed, the Foreign Secretary explicitly stated that the High Court had failed to appropriately assess the existing national security concerns.⁴²⁷ Although the government’s subsequent appeal was not upheld, such statements demonstrate a lingering perception that the exercise of independent and critical judicial decision-making, in the realm of intelligence and national security, is undemocratic.⁴²⁸

Feldman argues that the evidential procedures employed by the courts endow them with sufficient appreciation of the risks and competing interests inherent within intelligence.⁴²⁹ If so, the obvious limitation of this approach is that it fails to allow the judiciary to openly rationalise and justify their decisions, so that their understanding of the intelligence process is not publicly acknowledged. In any event, even if the judiciary is less informed about intelligence affairs than the executive, it is submitted that this is not necessarily a justification for the judiciary not to fully scrutinise the agencies’ actions where necessary; if the role of the judiciary is to consider the *legal*, rather than *policy*, issues within particular proceedings, it does not necessarily need intelligence expertise. Indeed, it could be argued that too intimate a knowledge of the agencies’ operations could disproportionately influence judicial decisions concerned with national security and intelligence. Weight could be placed upon the government’s assessment of national security whilst still respecting the judiciary’s role in assessing policy insofar as it concerns legal rights and obligations, and, ‘publicly and rationally justifying its decisions...independently of any consideration of democratic

⁴²⁶ ‘Binyam Mohamed: Full text of David Miliband’s Statement’, *The Telegraph* <<http://www.telegraph.co.uk/news/politics/6349658/Binyam-Mohamed-full-text-of-David-Milibands-statement.html>> last accessed 15/03/2012.

⁴²⁷ *Ibid.*

⁴²⁸ Starmer (n 27) 124.

⁴²⁹ Feldman, Human Rights, Terrorism and Risk: the Roles of Politicians and Judges’ (n 396), 382.

accountability...'⁴³⁰ This would prevent a stifling of the judiciary's potential role within intelligence oversight, by more effectively ensure that the imposition of legal sanctions and *ex post facto* review by the courts.

Given that extraordinary rendition encompasses multiple elements, spans jurisdictions and contravenes numerous legal obligations, it is perhaps not surprising that it has been raised before courts in both the UK and abroad in numerous types of legal actions. Habeas corpus actions challenging the legality of the detainees' detention at Guantanamo Bay have been considered by US courts, whilst claims for civil damages founded in tort and purported breaches of the Human Rights Act 1998 have been brought before the UK courts, as in the *Al Rawi* litigation, jointly brought by alleged former detainees.⁴³¹ Extraordinary rendition has arisen in actions concerning the possible disclosure of intelligence information, such as the *Binyam Mohamed* litigation⁴³², requests made under the Freedom of Information Act 2000⁴³³, and proceedings concerning the exercise of diplomatic relations.⁴³⁴ The practice has also been considered incidentally in the criminal trials of those alleged to have been tortured, for example Rangzieb Ahmed, who was convicted of terrorism offences but claimed that the UK was complicit in his torture whilst held in Pakistan.⁴³⁵

⁴³⁰ *Ibid*, 375-6.

⁴³¹ See, for example, *Al Rawi and others* (n 22).

⁴³² *Binyam Mohamed (No 2)* (n 23).

⁴³³ See, for example, APPGER, "Freedom of Information: Downloads" <http://www.extraordinaryrendition.org/appg-letters-on-extraordinary-rendition/freedom-of-information/cat_view/35-appg-letters/48-freedom-of-information.html?limit=5&order=date&dir=ASC> last accessed 15/03/2012.

⁴³⁴ *R (on the application of Al Rawi and Others) v Secretary of State for Foreign and Commonwealth Affairs and another (United Nations High Commissioner for Refugees intervening) ('Al Rawi [2006]')* [2006] EWCA Civ 1279.

⁴³⁵ His appeal against conviction was refused in *R v Ahmed (Rangzieb)* [2011] EWCA Crim 184.

It is therefore evident that extraordinary rendition may arise in a diverse range of legal proceedings, and that the extent to which the courts in such proceedings consider the practice will depend upon the precise facts in issue. This somewhat limits the judiciary's contribution to intelligence oversight; it is difficult to cohesively consider the judiciary's approach to intelligence oversight, or to find recurring themes within the courts' judgments, when any decision may technically be distinguished on the basis of its facts. Furthermore, it is submitted that the incidental nature of such oversight, and the increasing evidential considerations which affect such legal proceedings, means that it fails to consistently uphold the rights of individuals concerned, especially given the extent of international and domestic legal obligations in this area.

In the UK there have so far been relatively few judicial decisions which have considered the practice of extraordinary rendition, or the substance of the allegations made against the agencies. For this reason, both the *Binyam Mohamed* and *Al Rawi* litigation have largely framed the analysis of the judiciary's role within intelligence oversight. The *Binyam Mohamed* litigation stemmed from Mohamed's attempts to defend himself in proceedings brought by the US government; in order to do so, his defence argued that it was necessary for them to have access to information passed from the US agencies to the UK agencies relating to his mistreatment. The Divisional Court considered an application for judicial review of the Foreign Secretary's decision to refuse to supply this information.⁴³⁶ This judgment was particularly noteworthy in that the court considered the substance of the allegations, and concluded that there was an arguable case of wrongdoing, in which the UK agencies were

⁴³⁶ See, for example, *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 W.L.R. 2579, although there were several hearings of related issues by the Divisional Court.

involved, however innocently.⁴³⁷ The court also found that, according to the right to a fair trial, the information in question was essential to Mohamed's ability to defend the allegations in question, and should therefore be disclosed.⁴³⁸ The Divisional Court therefore firmly situated its judgment within the context of intelligence oversight, by tackling the issues of torture and rendition involved, and making tentative conclusions regarding the allegations in question.

The *Binyam Mohamed* litigation comprised extensive satellite proceedings on issues relating to the publication of seven paragraphs which summarised the US's representations to the UK agencies about Mohamed's treatment. In *Binyam Mohamed (No 2)*, the Court of Appeal considered whether the paragraphs had been properly restrained from publication by the UK courts. The Defendant contended that it was in the interests of open justice, and within the public interest, for the paragraphs to be published, and the court upheld this. The court explicitly considered its own role in intelligence-related proceedings, with Lord Judge recognising that open justice, and the principle of a Defendant knowing the grounds upon which he was successful, reflected democratic accountability.⁴³⁹ The court also analysed the control principle and found that the doctrine did not have a constitutional or legal basis, but was a development of the flexibility of intelligence cooperation.⁴⁴⁰ As such, it was not inviolable, but subject to scrutiny by the courts.⁴⁴¹ The Court of Appeal's judgment therefore demonstrated judicial confidence in adjudicating within the realm of intelligence, and

⁴³⁷ *Ibid*, paras. 65-70, 91.

⁴³⁸ *Ibid*, paras. 105, 141, 147.

⁴³⁹ *Binyam Mohamed (No 2)* (n 23), para. 39 .

⁴⁴⁰ *Ibid*, paras. 44 (per Lord Judge), 287 (per Sir Anthony May).

⁴⁴¹ *Ibid*, para. 46 (per Lord Judge).

balancing the competing public interests in restraining and disclosing the information in question.⁴⁴²

However, central to the court's decision was the fact that a US court had already published the paragraphs in question in habeas corpus proceedings related to Mohamed's detention in Guantanamo Bay; given this, the court held that the paragraphs did not comprise of genuinely secret material which might risk national security if published.⁴⁴³ Lord Neuberger and Sir Anthony May especially put great weight upon this factor, holding that *but for* the US publication of said paragraphs, they would have deferred to the Foreign Secretary's assessment of the potential national security risks associated with their publication, regardless of whether they thought that such a risk was significant or not.⁴⁴⁴ Lord Judge was less certain about whether he would have found in favour of the Foreign Secretary if there had not been prior publication of the paragraphs. Although Leigh upheld the Court of Appeal's judgment as evidence of a, 'more sceptical judicial mood'⁴⁴⁵, he also recognised that the substantive decision turned upon its particular facts⁴⁴⁶, and therefore is not perhaps indicative of the judiciary's general approach to intelligence and national security.

In *Al Rawi v others*, the Supreme Court considered an appeal brought by the executive against a decision not to allow a closed material procedure to be conducted in a civil claim for tortious damages, where a considerable amount of the evidence was said to be sensitive

⁴⁴² Leigh in Born, Leigh and Wills (n 99), 240-241.

⁴⁴³ *Ibid*, paras. 57 (per Lord Judge), 191 (per Lord Neuberger MR), 295 (per Sir Anthony May).

⁴⁴⁴ *Ibid*, paras. 131, 137, 172 (per Lord Neuberger MR), 290 (per Sir Anthony May).

⁴⁴⁵ Leigh in Born, Leigh and Wills (n 99), 240.

⁴⁴⁶ *Ibid*, 241.

intelligence. By this, a procedure was envisaged in which special advocates could be appointed to represent a party on the basis of closed material which only the special advocate, and where appropriate the court, could see⁴⁴⁷; therefore proceedings in which closed and open hearings, considering closed and open evidence, and resulting in closed and open judgments, could occur. The court's judgment did not specifically examine the allegations of complicity in detail, but considered rendition only as a background to analysing the potential use of the closed material procedure in civil proceedings. Lord Brown, for example, proclaimed that, 'claims of the sort made here...ought not simply to be swept under the carpet.'⁴⁴⁸ By confining itself only to consideration of the legal issues involved, and by not participating in discussion of the substantive allegations made, it is arguable that the Supreme Court somewhat limited the impact of its judgment, in terms of its wider role in overseeing the agencies' actions.

In *Al Rawi and others*, the government contended that the right to a fair trial, whilst absolute, depended upon the particular circumstances, and that therefore the court could order a closed material procedure where necessary to achieve a fair trial.⁴⁴⁹ Here, it was asserted that the only way by which the executive could properly defend the claim was for the court to order a closed material procedure. Generally, in such cases, a balancing exercise is undertaken in the form of public interest immunity (PII), in which the potential public injury if disclosure occurs must be weighed against the potential harm to the administration of justice if

⁴⁴⁷ Zuckerman, A, 'Closed material procedure – denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34' (2011) 30(4) Civil Justice Quarterly 345, 345.

⁴⁴⁸ *Al Rawi and others* (n 22), para. 87 (per Lord Brown).

⁴⁴⁹ *Ibid*, para. 8 (per Lord Dyson).

disclosure is refused.⁴⁵⁰ The difference between PII and the proposed closed material procedure is therefore that in the event of the latter, a party to proceedings may have no knowledge of the content upon which the relevant claim is brought or defended. They are effectively excluded from part of the trial.⁴⁵¹ The original proceedings in question were brought by numerous alleged former victims of extraordinary rendition, with the executive estimating that a full PII balancing exercise might be required in respect of as many as 140,000 documents, meaning that it might take three years to conclude such an exercise before beginning substantive proceedings.⁴⁵² The executive's arguments therefore also rested upon the assertion that in this case the PII procedure would be both time consuming and resource-heavy.

The court's majority decision was that it had no power under the common law to order a closed material procedure, given that to do so would essentially deviate from the fundamental common law rights to natural and open justice.⁴⁵³ As discussed above, the consequences of the closed material procedure upon a party's ability to participate in proceedings were seen to be too far reaching for the court to implement. If there were to be such developments in the future, these should be brought about by Parliament, not the judiciary.⁴⁵⁴ Through this judgment, therefore, the Supreme Court once again demonstrated its refusal to simply deviate from longstanding common law principles, and defer to the executive, without specific justification. The court paid less deference to the executive than the Court of Appeal in

⁴⁵⁰ Zuckerman, 'Closed material procedure – denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34' (n 447), 350.

⁴⁵¹ *Al Rawi and others* (n 22), para. 35 (per Lord Dyson).

⁴⁵² *Ibid*, para. 135 (per Lord Clarke).

⁴⁵³ *Ibid*, paras. 67 (per Lord Dyson).

⁴⁵⁴ *Ibid*, para. 47 (per Lord Dyson).

Binyam Mohamed (No 2), although this is no doubt attributable to the fact that the subject matter of the judgment fitted far more comfortably into the judiciary's remit. The conduct of legal proceedings, and evidential processes, are more obviously within the realm of the judiciary's expertise than matters of national security and political policy. In this way the Supreme Court's decision, when considered alongside that of the Court of Appeal in *Binyam Mohamed (No 2)*, perhaps demonstrates a backlash against what may be called the, 'legislative creep'⁴⁵⁵; that is, the trend that once a power is granted by the executive, it gradually and stealthily extends its influence within the justice system until it is no longer considered as only to be employed in exceptional circumstances.⁴⁵⁶

However, the *Al Rawi* judgment demonstrates the difficulty of accommodating intelligence issues within the legal system, given that the PII process is demonstrably not the most efficient means by which to balance the public interest in disclosing, or alternatively restraining evidence. In this case, it would have taken considerable time, money and resources to conclude. This may have been a reason why the government decided to settle the case before it proceeded further.⁴⁵⁷ Indeed, Lord Brown considered that cases involving intelligence are, 'quite simply untriable by any remotely conventional open court process.'⁴⁵⁸ This echoes arguments that the courts are, 'ill suited as an institution for holding intelligence agencies to account'⁴⁵⁹, which are largely influenced by the need for secrecy and restraint of intelligence, and the fact that intelligence general does not attain evidential standards. His

⁴⁵⁵ Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' (n 396), 370.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Zuckerman, 'Closed material procedure – denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34' (n 447) 346.

⁴⁵⁸ *Al Rawi and others* (n 22), para. 86 (per Lord Brown).

⁴⁵⁹ Leigh in Born, Leigh and Wills (n 99), 233.

Lordship proposed two alternative options; either channelling such cases through an adapted judicial mechanism, such as the IPT, or to strike them out as unjusticiable.⁴⁶⁰ Given that there is undoubtedly a public interest in such cases, and that the judiciary may only have a role within intelligence oversight if they actually consider cases within which matter of intelligence are raised, the former would be the preferred option.

The Court of Appeal explicitly considered the relationship between intelligence and diplomatic relationships within legal proceedings in *R (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs*⁴⁶¹, in which former detainees and their families sought judicial review of the Foreign Secretary's decision not to make diplomatic representations as to the men's release. The individuals were non-British nationals who were resident in the UK, some of whom had refugee status. Although the court proceeded on the basis that the men had indeed suffered at least inhuman and degrading treatment⁴⁶², it refused to make any specific findings as to alleged wrongdoing.⁴⁶³ It found that although the Foreign Secretary was empowered to make diplomatic representations, they did not have to in respect of non-nationals.⁴⁶⁴ The Court of Appeal's decision was largely influenced by the fact that the proceedings asked it to consider issues related to foreign policy and diplomatic relations, which it considered non-justiciable areas.⁴⁶⁵ Although the case also involved questions relating to human rights, in the form of the HRA 1998, ECHR and Race Relations Act 1976, the court confined its role to ensuring, 'that the Government...strictly complies with all

⁴⁶⁰ *Al Rawi and others* (n 22), para. 86 (per Lord Brown).

⁴⁶¹ *Al Rawi [2006]* (n 434).

⁴⁶² *Ibid*, para. 3.

⁴⁶³ *Ibid*, para. 26.

⁴⁶⁴ *Ibid*, para. 102.

⁴⁶⁵ *Ibid*, para. 131.

formal requirements, and rationally considers the matters it has to confront.⁴⁶⁶ Its largely unquestioning acceptance of the executive's arguments relating to the inviolability of foreign diplomatic and intelligence relationships led to Leigh criticising the decision for maintaining the 'decidedly ambivalent position of governments supposedly subject to the duty of diplomatic protection.'⁴⁶⁷ It is to be noted, however, that the UK government did subsequently make representations to the US regarding the detainees in questions, despite their success before the Court of Appeal.⁴⁶⁸ This perhaps demonstrates the importance of court proceedings as a means by which Claimants may have their cases publicised, and thereby influence executive policy, even if not successful.

The recent use of mediation in order to resolve a claim brought against the UK government by former Guantanamo Bay detainees⁴⁶⁹ is interesting in the context of the judiciary's role within intelligence oversight. It might be viewed as a sign of a forward looking, facilitative and collaborative approach to responding to alleged agency misconduct whilst maintaining the secrecy of intelligence information. However, it might otherwise be seen as a deliberate attempt to prevent details of alleged complicity from entering the public domain. The government has characterised the decision to make a settlement as being necessary in order to prevent the disclosure of sensitive information, and to save millions of pounds on potential court costs; in other words, it made the decision to pursue a private settlement based on its regard for protecting *national security*. Whether this justification is one which has been

⁴⁶⁶ *Ibid*, para. 148.

⁴⁶⁷ Leigh in Born, Leigh and Wills (n 99), 243.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ See, for example, P Wintour & M Weaver, 'Guantanamo Bay prisoners to get millions from British government' *The Guardian*, 16 November 2010 <<http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-prisoners-compensation?intcmp=239>> last accessed 31/05/2010; I Cobain, 'Guantanamo Bay prisoner payouts a first step to ending legacy of torture' (n 230).

vindicated is uncertain, given the extent of general information relating to alleged complicity which already exists in the public domain.

5.5 Conclusion

Within the separation of powers framework there will always inevitably be some tension between the various branches of the state. This is especially true considering the contrasting roles of an executive making political decisions on behalf of its citizens, and the courts regulating the propriety and lawfulness of actions pursued in the name of security. However, it is essential to emphasise that, ‘civil liberties and national security are not at odds with each other but...human rights and fundamental freedoms contribute to security – especially if one takes the position that security means the protection of the fundamental values of a society against any possible threat.’⁴⁷⁰ This must act as a guiding principle to both the executive and judiciary within the context of judicial decision-making in cases involving intelligence issues. Although the branches of state perform very specific roles based on various different objectives, each must act as robustly as possible, within their particular remit, in order to balanced and effective intelligence oversight. To this end, the judiciary must accept their duty in, ‘stimulating and invigorating responsible government’⁴⁷¹, given that by doing so, they

⁴⁷⁰ Born & Caparini, (n 7) ‘Preface’.

⁴⁷¹ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 356; Feldman, ‘Human Rights, Terrorism and Risk: the Roles of Politicians and Judges’ (n 396) 376.

enable other critical elements of the state and society to protest against executive measures in an informed manner.⁴⁷²

Aldrich asserts that, ‘intelligence exchange between these organizations is a world within a world, governed by its own diplomacy and characterized by elaborate agreements, understandings and treaties.’⁴⁷³ The practice of extraordinary rendition is itself typified by an overlapping of foreign affairs, intelligence liaisons and the law, especially given states’ use of intelligence cooperation as a means of, ‘assuring security’⁴⁷⁴ by justifying restraint upon the disclosure of sensitive information. Given this, it is inevitable that the courts will face difficulties in accommodating analysis of intelligence and foreign liaisons within the legal process. This is especially so where it is asserted that a legal judgment may affect the relationship between states, as was the government’s contention in *Mohamed (No 2)*. The decisions of both the Court of Appeal and Supreme Court indicate that within the intelligence oversight framework, the balance of power falls both to the legislature and especially the executive for such reasons. Although the judiciary has asserted its constitutional role of scrutiny⁴⁷⁵, in reality it is likely to defer to the executive in matters which have traditionally been non-justiciable. This means that in practice the judiciary generally do not oversee the agencies’ actions to any great extent, and appear to be the least effective branch of the intelligence oversight framework, despite the fact that they exist to uphold the rule of law and individuals’ rights. For these reasons, it is submitted that although recent examples of

⁴⁷² Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24), 356.

⁴⁷³ Aldrich, R, ‘Transatlantic Intelligence and Security Cooperation’ (2004) 80(4) *International Affairs* (Royal Institute of International Affairs 1944-) 731, 737.

⁴⁷⁴ Aldrich in Born, Leigh and Wills (n 99), 23.

⁴⁷⁵ *Binyam Mohamed (No 2)* (n 23), paras. 46 (per Lord Judge), 132, 134 (per Lord Neuberger), para. 285 (per Sir Anthony May).

judicial activism are encouraging, the traditional legal process is not generally a suitable means by which complaints about the agencies may be sufficiently scrutinised. A body which has the expertise and confidence to properly scrutinise sensitive intelligence would more appropriately hold the agencies to account, and uphold the judicial role within intelligence oversight.

CHAPTER 6: THE ROLE OF NON-TRADITIONAL OVERSIGHT BODIES

6.1 Introduction

Although this thesis has examined the existing *state* institutions which oversee the UK intelligence and security agencies, the globalisation of intelligence has created an expanding role for non-state organisations acting on behalf of society *as a whole*, and providing an external means by which citizens may mobilise to raise concerns about intelligence agencies' activities.⁴⁷⁶ The phrase "civil society" refers to bodies who are formed by, led by, or work for, the *public*; newspapers and investigative journalists, charities and Non-Governmental Organisations (NGOs) therefore all categorise as Civil Society Organisations (CSOs). Although transnational organisations also have an increasingly important role in intelligence oversight they are inter-governmental in nature and therefore do not fit easily into the CSO category. Therefore, for the purposes of this chapter they will instead be considered as "non-traditional oversight bodies". Given the public aspect of their work, CSOs are a democratically legitimate means by which to ensure that the executive and agencies are questioned and held to account over alleged wrongdoing. Their work often specifically focuses upon the law as a means by which to promote change, which is important given the inherent propensity of intelligence to affect citizens' individual rights and liberties.

In recent years non-traditional oversight bodies have driven the public debate concerning the allegations of UK agencies' complicity in extraordinary rendition, through their

⁴⁷⁶ Aldrich in Born, Leigh & Wills (n 99), 36.

investigations, reports, and involvement in related law suits. Furthermore, sustained calls for a public inquiry have stemmed largely from such bodies, and have focused upon the means by which to ensure that such proceedings are as transparent as possible; revelations as to the remit and procedure of the Gibson inquiry led to certain NGOs refusing to participate in it. Such activism demonstrates the wider role of civil society in promoting transparency and good governance.⁴⁷⁷ It is, however, important to note that there are limitations to such bodies' involvement within intelligence oversight. They represent a relatively unexplored form of oversight which does not fit within the separation of powers model and therefore may obstruct the functioning of existing state oversight institutions. Furthermore the inherent secrecy of intelligence means that the accuracy and authority of the work completed by non-traditional oversight bodies may suffer from the limited material to which they have access.

This chapter will examine the role which civil society in general may play within intelligence oversight, analysing the advantages and limitations of such an approach, before considering the role of the three most prominent type of bodies falling within the “non-traditional” category; NGOs, the Press, and transnational bodies. It will analyse their individual contribution to the oversight of the agencies in relation to the complicity allegations, before examining how they fit within the existing intelligence oversight framework, in terms of how such bodies interact and strike a balance with the respective state oversight institutions.

⁴⁷⁷ Caparini, M, ‘Civil Society and Democratic Oversight of the Security Sector: A Preliminary Investigation’ in Bryden, A & Fluri, P (eds.) *Security Sector Reform: Institutions, Society and Good Governance* (Nomos Verlagsgesellschaft, Baden-Baden 2003), 153.

6.2 Civil Society and Intelligence Oversight

Although it has been argued that, '[c]ivil society is now frequently equated with a distrust of the state'⁴⁷⁸, in order for criticism to be constructive and not merely opportunistic, it should be provoked only if there is a valid perception that the State has acted wrongly. Distrust of CSOs' involvement in the intelligence process comes from the fact that it promotes transparency of process, and therefore requires openness on the part of the agencies, and other actors, in order to be meaningful. In the area of intelligence, which has previously operated on the basis that the less is publicly known about the agencies, the more secure the state will be, it is understandable that the agencies might not immediately embrace the concept of criticism for constructive, and not destructive, purposes.⁴⁷⁹ However, if the state is to actively recognise that, '[d]emocracy is founded on every citizen's right to take part in the management of public affairs'⁴⁸⁰, then it must welcome CSOs and non-traditional oversight bodies within the existing oversight framework, and thus allow citizens to more easily participate within the democratic process.⁴⁸¹

The relationship between CSOs and the executive is delicately balanced; the overriding goal of the former, within oversight, is to, 'function as a force for accountability, pressurising officials to inform the public about what they are doing and explain their decisions, and

⁴⁷⁸ Professor Ian Leigh, 'Civil Society, Democracy and the Law' (Foundation for Political Centrism, Moscow) May 22 2003 <http://www.iskran.ru/cd_data/disk2/tr/028.pdf> last accessed 19/03/2012, 1.

⁴⁷⁹ See Lustgarten & Leigh *In From the Cold: National Security and Parliamentary Democracy* (n 24) 221; that governments tend to view criticism as, 'carping and politically motivated: it is thought to be a compelling argument against making information more readily available that thereby criticism will be stimulated.'

⁴⁸⁰ DCAF, 'Intelligence Practice and Democratic Oversight – A Practitioner's View' (n 161), 1.

⁴⁸¹ Leigh, 'Civil Society, Democracy and the Law' (n 478) 3, 8; Caparini in Bryden & Fluri (n 477) 159.

holding them responsible for what they have done.’⁴⁸² The latter’s priority is to protect the intelligence process, and agencies’ operations, by seeking to control publication of sensitive material. As acknowledged above, it is inevitable that CSOs will criticise both the intelligence agencies and the government, else there would be little reason for their existence. However, in order to successfully cooperate with the executive, CSOs must act responsibly and base their conclusions upon sound research rather than mere conjecture.⁴⁸³ This could especially be a concern regarding CSOs with particularly obvious agendas, and media bodies who, as commercial entities, might seek to profit from sensationalizing stories. Therefore, a possible advantage of incorporating the role of transnational bodies within intelligence oversight is that they are created by state cooperation, and thus may be perceived as more legitimate forms of oversight.

As a parallel commitment ensuring effective cooperation, the executive itself must also encourage the involvement of non-traditional oversight bodies within intelligence oversight. The ISC has begun to do so, through consulting CSO reports, and questioning representatives from CSOs in order to produce ‘Rendition’.⁴⁸⁴ In ‘Rendition’, the ISC noted the contribution of such bodies, acknowledged the concerns they raise, and addressed them during the course of the report. However, the Committee rejected such concerns, which included the Council of Europe’s criticisms of the UK government’s handling of the Diego Garcia allegations,⁴⁸⁵ the European Parliament’s allegations regarding the treatment of Binyam Mohamed and Martin

⁴⁸² *Ibid* (Caparini), 160.

⁴⁸³ *Ibid*.

⁴⁸⁴ ‘Annex A: Other Inquiries’ in ISC, ‘Rendition’ (n 21) 70-73; also, see list of ‘Non-Government Witnesses’ in ‘Annex B: Witnesses’ 74-5.

⁴⁸⁵ *Ibid*, 71.

Mubanga,⁴⁸⁶ and Reprieve's evidence regarding Mohamed, Bisher al Rawi and Jamil el-Banna.⁴⁸⁷ It is encouraging that the ISC overtly acknowledged the work of a variety of oversight bodies, although the rejection of many of their conclusions, with seemingly little analysis of the facts, suggests that the substantive contribution of such bodies to 'Rendition' was not significant.

The government's announcement of the terms of the Gibson inquiry into allegations of agency complicity outlined that much of the process would take place in secret, with limited access for affected individuals. This suggested that the inquiry would not be sufficiently transparent as would be necessary in order to be authoritative and to facilitate CSO involvement. Indeed, in response to these announcements, several influential NGOs distanced themselves from the inquiry.⁴⁸⁸ Given that initial celebrations of the inquiry viewed it as increasing transparency within intelligence, it is tempting to view such developments as limiting the inquiry's impact. However, this would ignore the fact that certain material may be too sensitive to publish, and that the inquiry must investigate fully the allegations whilst respecting the agencies' operational capacity. Given such competing demands, it is debatable whether the boycott of the Gibson inquiry was necessary, or whether consultation could have occurred within the terms of the inquiry. Again, although the Gibson inquiry is no longer taking place as planned, it will now fully report back to the executive as to its findings before being wound down.

⁴⁸⁶ *Ibid*, 72.

⁴⁸⁷ *Ibid*, 73.

⁴⁸⁸ Letter from Liberty, Amnesty International et al to Sara Carnegie (Solicitor to the Detainee Inquiry) (3 August 2011) <<http://www.statewatch.org/news/2011/aug/uk-ngos-withdrawal-from-detainee-inquiry-letter.pdf>> last accessed 01/03/2012.

As purely external bodies, CSOs and transnational organisations do not have access to the, ‘sensitive and difficult’⁴⁸⁹ intelligence upon which the agencies’ work is based, which in turn creates the possibility that their work might fail to give sufficient weight to national security considerations. Caparini notes that the discretionary operational authority awarded to agents, and the doctrine of plausible deniability, contribute in creating an environment where much information is unknown, or restricted to certain few individuals.⁴⁹⁰ This makes it difficult for non-traditional oversight bodies to gain knowledge of the intelligence process, especially since its inherent secrecy means that few, ‘possess the technical expertise’⁴⁹¹ necessary to contextualise their criticisms. They may not fully comprehend the agencies’ operational difficulties, and the challenge of international intelligence cooperation; in consequence, the intervention and constant campaigning of CSOs on intelligence-related issues may frustrate the agencies’ ability to act. The ability of CSOs to access useful, or restricted information, is enhanced by whether such bodies boast extensive resources; for example, Reprieve, a well-known NGO working in the area of rendition, has teams dedicated to investigating UK complicity in torture, and to cases involving Guantanamo Bay detainees. The expertise of such bodies complements the official policy-making process, ‘since it gives policy-makers and legislators access to information that is credible but independent.’⁴⁹² Without using excessive state resources, the subsequent reports add to general public discourse in an area which has not always been so publicly accessible.

⁴⁸⁹ Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 10; also Caparini in Bryden & Fluri (n 477) 166.

⁴⁹⁰ *Ibid* (Caparini), 166.

⁴⁹¹ *Ibid*, 167.

⁴⁹² Leigh, ‘Civil Society, Democracy and Law’ (n 478), 5.

It is arguable that the emergence of ‘intelligence governance actors at the international level’⁴⁹³ is related to globalisation, which has facilitated cooperation between national and international organisations.⁴⁹⁴ This has allowed certain bodies, such as Amnesty International and Human Rights Watch, for example, to expand their membership and remit to a global scale. In this way, they may increase their influence upon the policy-making process and uphold legal norms to which states subscribe at both national and international level.⁴⁹⁵ The international dimension to their work has encouraged CSOs to ensure the protection of human rights within the intelligence process, which otherwise may be forgotten by state oversight institutions. The ISC, for example, focuses upon effectiveness, rather than *propriety*⁴⁹⁶, meaning that the contribution of CSOs may supplement the Committee’s work through their focus upon individual rights. CSOs have extensively publicised states’ obligations under the Convention Against Torture 1984, the European Convention on Human Rights, International Convention on Civil and Political Rights and the Geneva Conventions, amongst others. Through reinforcing the work of national CSOs, their international counterparts have, ‘functioned in effect as a sort of remote accountability mechanism at the local level’⁴⁹⁷ in both a presentational and legal sense; states are reminded that their accountability and responsibilities are owed at an international level, and that they are potentially legally liable for any wrongdoing in multiple jurisdictions.

⁴⁹³ Born and Wills in Born, Leigh & Wills (n 99), 201.

⁴⁹⁴ Aldrich in Born, Leigh & Wills (n 99), 36; Caparini in Bryden & Fluri (n 477) 156-7.

⁴⁹⁵ Caparini in Bryden & Fluri (n 477) 156.

⁴⁹⁶ See ‘Chapter 4: The Role of the ISC’, 63-89.

⁴⁹⁷ Caparini in Bryden & Fluri, (n 477) 157.

Given that civil society is an external, and relatively new, form of oversight, it, ‘lacks the legitimacy of elected bodies’⁴⁹⁸; in consequence, the authority of CSOs’ work can vary considerably. If such bodies wish to make a meaningful contribution to intelligence oversight, they must themselves ensure to be as transparent and independent as possible.⁴⁹⁹ Inevitably, such bodies investigate and report on such issues because they have a certain interest in them, which can affect the tone of their work. The overly-emotive tone of Reprieve’s reports, for example, detracts from the time and resources evidently invested in them, and the conclusions thus reached.⁵⁰⁰ Although rendition is inevitably an emotive issue, an overtly critical approach undermines the possibility of extensive cooperation between CSOs and the executive. In contrast, reports written with a more balanced, objective tone, backed up with extensive and solid evidence, might facilitate greater understanding between the two forms of intelligence oversight.

6.3 The Role of Non-Governmental Organisations

Although Non-Governmental Organisations (NGOs) do not fit within the separation of powers model of intelligence oversight, they provide a complementary role to the three branches of state, through providing external checks on their actions, decisions and reports, and thereby encouraging widespread transparency of process. However, through their non-

⁴⁹⁸ Leigh, ‘Civil Society, Democracy and Law’ (n 478) 4; also Venice Commission, ‘Report on the Democratic Oversight of the Security Services’ (n 191), para. 32.

⁴⁹⁹ *Ibid* (Leigh), 6.

⁵⁰⁰ See, for example, Reprieve, ‘“Human Cargo”: Binyam Mohamed and the Rendition Frequent Flyer Programme’ (n 83).

partisan nature, the contribution of NGOs to intelligence oversight may not always be sufficiently objective to constitute meaningful oversight of the intelligence agencies. This section will analyse the role of NGOs in specific relation to how such bodies responded to the allegations of complicity in extraordinary rendition, in order to consider the means by which the contribution of NGOs may be facilitated in intelligence oversight.

In terms of the allegations surrounding UK complicity in the US “renditions cycle”, the contribution of NGOs has been especially useful in an investigatory capacity. This has been due to the extensive research involved in producing their reports, through undertaking legal analysis, interviewing former detainees, and commissioning investigators around the world to help construct a coherent picture of every aspect of the “rendition cycle”. Reprieve, for example, traced the movements of the planes involved in the alleged rendition on Binyam Mohamed, in order link such aircraft to the actions of the intelligence personnel it says were involved in his rendition.⁵⁰¹ Through subsequently publicising the results of such research, these NGOs have mobilised the international community, as demonstrated by a plethora of campaigns and reports by international transnational bodies, such as the Council of Europe and Venice Commission.⁵⁰²

⁵⁰¹ *Ibid.*

⁵⁰² See, for example, Venice Commission, ‘Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners’ (n 88); Venice Commission, ‘Report on the Democratic Oversight of the Security Services’ (n 191); UN Human Rights Council, ‘Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances’ (13th session) (26 January 2010) A/HRC/13/42; Committee on Legal Affairs and Human Rights, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, (n 1).

The contribution of NGOs to the rendition allegations has also promoted greater transparency within the UK agencies, and the intelligence process as a whole. For example, early calls for an inquiry into allegations of agency complicity largely focused upon the means by which to ensure the authority of such an inquiry, in terms of it being, ‘prompt...independent... thorough...[and] subject to public scrutiny.’⁵⁰³ The credibility of an independent inquiry rests largely upon NGOs and interested bodies being able to participate in a meaningful way⁵⁰⁴ and therefore the announcement of the Gibson inquiry appeared to demonstrate the executive’s willingness to commission a transparent inquiry. However, the published Protocol preserved a certain margin of discretion as to the use of sensitive material, and restricted the persons who can be present during its sessions⁵⁰⁵; the resulting boycott by certain major NGOs demonstrated that the Inquiry lacked perceived legitimacy and transparency.⁵⁰⁶ It is disappointing that bodies with global influence distanced themselves from the inquiry, since this detracted from its legitimacy. Co-operation between the executive and civil society rests upon both factions acknowledging the competing arguments of secrecy and public knowledge of security affairs.

⁵⁰³ Letter from Redress et al to Sir Peter Gibson (8 September 2010), 1-2; Redress, ‘The United Kingdom, Torture and Anti-Terrorism: Where the Problems Lie’ (December 2008) 28, 40, 49.

⁵⁰⁴ *Ibid* (Letter from Redress et al to Sir Peter Gibson), 3-4.

⁵⁰⁵ HM Government, ‘Protocol for the Detainee Inquiry’ (July 2011) <<http://www.detaineeinquiry.org.uk/wp-content/uploads/2011/06/20110706-The-Detainee-Inquiry-and-HM-Government-Protocol.pdf>> last accessed 01/03/2012.

⁵⁰⁶ Letter from Liberty, Amnesty International et al to Sara Carnegie (Solicitor to the Detainee Inquiry) (3 August 2011) <<http://www.statewatch.org/news/2011/aug/uk-ngos-withdrawal-from-detainee-inquiry-letter.pdf>> last accessed 01/03/2012. The full list of NGOs is: The AIRE Centre, Amnesty International, British Irish Rights Watch, Cageprisoners, Freedom from Torture, Human Rights Watch, JUSTICE, Liberty, Redress and Reprieve.

NGOs may contribute in the legislative process through lobbying and consultation, giving evidence to parliamentary committees, and by analysing their reports. Gill argues that this is especially important given that such bodies, ‘can produce highly relevant knowledge even in the uncompromising context of highly secret intelligence collaboration.’⁵⁰⁷ Furthermore, they may constructively criticise the UK agencies in an external capacity, without any political consequences,⁵⁰⁸ which could otherwise be a pressing concern for the parliamentary branch of oversight. Leigh notes that in order to be meaningful, NGO participation in the policy-making process must occur sufficiently early in order to influence state institutions, namely Parliament.⁵⁰⁹ With regards to rendition, it is doubtful that the contribution of NGOs and interested bodies occurred at such an early stage, and consequently, their reports have largely been overly retrospective rather than focusing on future recommended policy changes. However, given the secrecy surrounding intelligence affairs, and the slow release of information relating to rendition, this has been largely inevitable.

Although the contribution of NGOs to intelligence oversight has the potential to be a positive development, there is a, ‘risk that powerful, well-connected or well-funded groups can have disproportionate influence.’⁵¹⁰ Reprieve, Redress, Human Rights Watch and Amnesty International, amongst others, hold a particularly strong position of expertise regarding rendition, thus allowing them to, ‘speak on more than equal terms with governments and

⁵⁰⁷ Gill, ‘The Intelligence and Security Committee and the Challenge of Security Networks’ (n 16), 940; also, Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 7.

⁵⁰⁸ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24), 252; *ibid* (Leigh), 4-5

⁵⁰⁹ *Ibid* (Leigh), 7.

⁵¹⁰ *Ibid*.

international organisations.’⁵¹¹ However, this somewhat limits the opportunity for pluralism which underpins the contribution of civil society to intelligence oversight, given that only bodies with sufficient resources and previous experience will realistically have a voice. The list of ‘Non Government Witnesses’ consulted by the ISC in ‘Rendition’, for example, only includes Amnesty International and Liberty, although the Committee considered the reports, and written submissions, of certain other bodies.⁵¹²

Although certain NGOs may be particularly influential, they have not been immune to the risk of bias. The objectivity of Amnesty International, for example, was disputed as a result of its association with Moazzam Begg, a former detainee at Guantanamo Bay, who was later associated with the controversial group “Cageprisoners”.⁵¹³ Similarly, although Reprieve is a well-known NGO on matters relating to torture and rendition, its reports often appear to be partisan; its definition of extraordinary rendition, for example, rests on the assertion that, “rendition” is actually a synonym for “kidnapping.”⁵¹⁴ However, generally, NGOs’ reports have demonstrated a critical approach to the ISC’s reports. Redress, for example, has been sceptical about the conclusions reached in ‘Rendition’, noting that, ‘[t]he UK litigation has since revealed a great deal more than emerged from the ISC report.’⁵¹⁵ Similarly, Amnesty International has disputed that the ISC’s report was independent and transparent⁵¹⁶, pointing

⁵¹¹ *Ibid*, 45.

⁵¹² The only NGO included within this category was Reprieve, although the reports of other CSOs were considered; see ISC, ‘Rendition’ (n 21) 70-73.

⁵¹³ R Kerbaj, ‘Amnesty International is ‘damaged’ by Taliban link’ *The Guardian*, 7 February 2010 <<http://www.timesonline.co.uk/tol/news/world/afghanistan/article7017810.ece>> last accessed 14/08/2011.

⁵¹⁴ Reprieve, ‘Human Cargo: Binyam Mohamed and the Rendition Frequent Flyer Programme’ (n 83), 4.

⁵¹⁵ Redress, ‘The United Kingdom, Torture and Anti-Terrorism: Where the Problems Lie’ (n 503), 47.

⁵¹⁶ Amnesty International, ‘The case of Binyam Mohamed: ‘championing the rule of law?’ (Amnesty International Public Document) (AI Index: EUR 45/001/2009) 10 February 2009 <<http://www.amnesty.org/>

to the fact that the 2008 High Court judgement, ‘confirmed what had long been suspected – that the ISC failed to turn up large amounts of evidence which was highly relevant to Binyam Mohamed’s case.’⁵¹⁷ Such criticisms relate both to the ISC’s structure and the substantive conclusions reached in ‘Rendition’, therefore calling into question the extent to which consulted NGOs contributed to the report, and whether their involvement was merely presentational.⁵¹⁸ This latter suggestion is perhaps strengthened by the fact that although the ISC acknowledged the work of NGOs in helping to frame the terms of ‘Rendition’, the extent of their contribution is not apparent from the report’s substantive content.

The role of NGOs within intelligence oversight also extends to upholding and complementing the judicial function of oversight by driving litigation through the courts. NGOs working in this capacity have two purposes; firstly, asserting the specific rights and liberties of the individual in question and secondly, using their example to campaign for changes to policy.⁵¹⁹ The first of these objectives is particularly important, given that the wrongdoing alleged against the UK agencies was primarily committed against *individuals*. Therefore, although evidence relating to a CIA-led “renditions cycle” focuses attention upon the “bigger picture” of potential widespread complicity, those directly affected must have first recourse to the courts. NGOs may assist such individuals, who may not have the means or expertise themselves, to bring an action themselves before the courts.⁵²⁰ Reprieve explicitly states that

en/library/asset/EUR45/001/2009/en/ad3580df-f797-11dd-8fd7-f57af21896e1/eur450012009en.pdf> last accessed 16/08/2011, 4.

⁵¹⁷ *Ibid*, 3.

⁵¹⁸ For example, Leigh notes the risk that, ‘the government may engage in consultation as a token exercise’ in Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 7.

⁵¹⁹ *Ibid*, 8, 20-21.

⁵²⁰ *Ibid*, 20.

its purpose is to, '[use] the law to enforce the human rights of prisoners...'⁵²¹, and has assisted in the preparation of numerous individuals' rendition claims. Similarly, counsel instructed by JUSTICE and Liberty have made submissions in a case involving numerous former detainees, and that of Binyam Mohamed, before both the Court of Appeal⁵²² and the Supreme Court.⁵²³

The second strand of NGO involvement within the legal system uses court cases as a means by which to highlight *overall* alleged agency wrongdoing, in order to seek policy change. By channelling their complaints through the legal channels in this way, NGOs are also able to test them in a court of law, and according to the rule of law, rather than circulating unsubstantiated theories; pursuing complaints in legal form, 'invests them with added legitimacy and helps to enlist a wider range of support behind campaigns to remedy injustice.'⁵²⁴ An application for judicial review brought by the Equality and Human Rights Commission (EHRC), for example, challenges the recent guidelines on the handling of detainees by UK agencies⁵²⁵ on the basis that they are inconsistent with both national and international law, through giving officers an expectation that they are not liable for situations where they are aware of a "serious risk of torture" but interview the detainee, relying on caveats or ministerial authority to do so.⁵²⁶ By bringing this action, the EHRC have drawn

⁵²¹ Reprieve website <<http://www.reprieve.org.uk/>> last accessed 16/08/2011.

⁵²² *Binyam Mohamed (No 2)* (n 23).

⁵²³ *Al Rawi and others* (n 22).

⁵²⁴ Leigh, 'Civil Society, Democracy and the Law' (n 478) 21.

⁵²⁵ 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' (n 172).

⁵²⁶ Equality and Human Rights Commission, 'Commission to argue that Government torture guidance violates the law' 27 June 2011 <<http://www.equalityhumanrights.com/news/2011/june/commission-to-argue-that-government-torture-guidance-violates-the-law/>> last accessed 16/08/2011.

public attention to the potential deficiencies of the guidance, by relating it to a substantive cause of action.

However, it is otherwise arguable that whilst upholding the judicial function by channelling their complaints through the courts in this way, NGOs may obstruct the functioning of other oversight institutions. This has been particularly evident throughout the *Binyam Mohamed* litigation, where Mohamed's complaints were supported and publicised by numerous NGOs, especially JUSTICE and Liberty, who made written submissions as interested parties in both the Court of Appeal and Supreme Court. As a result, the finding of the Court of Appeal that certain paragraphs relating to the treatment of Mohamed could be published⁵²⁷, and subsequent publication of Lord Neuberger's criticism of the agencies, was alternatively celebrated as a triumph of justice for civil society⁵²⁸, and as disappointing for the executive.⁵²⁹ Although oversight must be looked at in a holistic way, in terms of how the individual institutions work together, such instances demonstrate that the role of civil society may be viewed as alternatively positive or negative, depending upon whose opinion one is considering. As ever, the correct balance between oversight institutions is near impossible to achieve, but must rely upon increased trust and cooperation in order to further the mutual goals of increased transparency of process ensuring more effective intelligence.

⁵²⁷ *Binyam Mohamed (No 2)* (n 23), para. 57 (per Lord Judge CJ); paras. 203-7 (per Lord Neuberger MR); paras. 295-6 (per Sir Anthony May).

⁵²⁸ Liberty, 'Press Release: Foreign Secretary loses torture suppression case' 10 February 2010 <<http://www.liberty-human-rights.org.uk/media/press/2010/foreign-secretary-loses-torture-suppression-case.php>> last accessed 01/03/2012.

⁵²⁹ P Naughton, 'Home Secretary Alan Johnson attacks judges over MI5 criticism' *The Times*, 26 February 2010 <<http://www.timesonline.co.uk/tol/news/uk/article7042683.ece>> last accessed 16/08/2011.

6.4 The Role of Transnational Organisations

Transnational bodies such as the Council of Europe, Venice Commission and UN Human Rights Committee have also played a significant role in uncovering and interpreting the alleged complicity of various states, including the UK, in relation to the practice of extraordinary rendition. It is perhaps useful to consider such bodies as somewhat representative of *international* civil society, although they hold a unique place within intelligence oversight; transnational organisations are *not* non-governmental, given that their existence comes about through the consent of states as members. However, the multi-state membership, and global agenda of such bodies means that they are able to consider issues on a relatively critical level, as evidenced by reports such as those by the UN Special Rapporteur, and by the UN Human Rights Council, which have been highly critical of the UK's role within rendition.⁵³⁰

The European Convention on Human Rights (ECHR) and European Court of Human Rights (ECtHR) have both made significant contributions to intelligence oversight. Cases brought before the ECtHR include *Malone v UK* and *Harman & Hewitt v UK*, which paved the way for a, 'regulatory revolution'⁵³¹ in the form of domestic intelligence oversight legislation. At the same time, ECHR provisions have ensured the prominence of the concepts of

⁵³⁰ Scheinin, M, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (UN Human Rights Council, 10th session) (4 February 2009) A/HRC/10/3, paras. 52, 54-6, 59; UN Human Rights Council, 'Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances' (n 502), paras. 159, 282-91.

⁵³¹ Aldrich in Born, Leigh & Wills (n 99), 35.

proportionality and necessity within domestic courts when considering intrusion by state agencies.⁵³² However, Cameron notes that the contribution of the ECtHR to intelligence oversight is somewhat limited by the fact that, as an incidental form of review, it can only consider intelligence oversight as and when it arises indirectly before the court.⁵³³ In turn, the ECtHR cannot be part of a holistic oversight system, but is tightly bound by its procedural rules, therefore limiting its overall contribution to the UK system, which relies upon a series of flexible checks and balances by various institutions.⁵³⁴

The involvement of transnational bodies within intelligence oversight generally lends the discussion concerning rendition and torture greater credibility, and global censure to any criticism, given that these are bodies to which multiple states belong and contribute. The international dimension of their work similarly means that the consequences of negative reports are more widespread than in a domestic context, especially given that ‘[h]aving a reputation for good intelligence is a factor in national diplomatic weight abroad.’⁵³⁵ The anticipatory effect of transnational bodies’ contribution to intelligence oversight therefore may to some extent encourage states to take their responsibilities, in terms of transparency and accountability, more seriously. In this way, although such bodies have not been able to enforce formal sanctions against states,⁵³⁶ through the publication of their reports they have demonstrated, ‘an ability to generate pan-European awareness about the issues of rendition and secret detention.’⁵³⁷

⁵³² Aldrich, ‘Transatlantic Intelligence and Security Cooperation’ (n 473) 734-5.

⁵³³ Cameron in Born, Johnson, & Leigh (n 9), 38.

⁵³⁴ *Ibid.*

⁵³⁵ Herman, *Intelligence Power in Peace and War* (n 10), 214.

⁵³⁶ Born and Wills in Born, Leigh & Wills (n 99), 216.

⁵³⁷ *Ibid.*, 215.

Transnational bodies face the same difficulties as national bodies with regards to their access to intelligence and information, with Born and Wills observing that inquiries by both the European Parliament and Parliamentary Assembly of the Council of Europe were, ‘consistently stonewalled by many European governments.’⁵³⁸ However, such bodies have greater investigatory capacities than domestic bodies, given their extensive resources, and the numbers of state members which may contribute to any research. The multi-jurisdictional nature of rendition has facilitated the involvement of transnational bodies in investigating, and piecing together, multi-state involvement in the practice. Similarly, the fact that such bodies operate on a global level means that they have more informed international legal expertise, which lends greater authority to their reports. The Council of Europe reports into secret detention, for example, provide a, ‘graphic account of the rendition process’⁵³⁹, and have contributed greatly to subsequent investigations, whilst a Venice Commission report into the law relating to rendition flights has similarly informed the debate on the matter.⁵⁴⁰

However, the very fact that such bodies are transnational alternately means that their contribution to the *UK* intelligence oversight framework is not comprehensive; their reports identify general instances of wrongdoing across member states, and consider issues of *international* rather than domestic law. The conclusions of transnational bodies are therefore either not state-specific, or, if they are, are not sufficiently informed about UK intelligence oversight to make specific suggestions for reform. In terms of their treatment of transnational intelligence cooperation, as Gill notes, ‘the problem is much clearer than the solution’⁵⁴¹; it is evident that cooperation is both necessary and welcome, but the means by which to formalise

⁵³⁸ *Ibid*, 210.

⁵³⁹ Gill, ‘The Intelligence and Security Committee and the Challenge of Security Networks’ (n 16) 939.

⁵⁴⁰ Venice Commission, ‘Report on the Democratic Oversight of the Security Services’ (n 191).

⁵⁴¹ Gill, ‘The Intelligence and Security Committee and the Challenge of Security Networks’ (n 16) 939.

such agreements whilst maintaining the secrecy of cooperation liaisons, as necessary for reasons of foreign policy and diplomacy, is rather more difficult.⁵⁴² For such reasons, it appears that the contribution of transnational bodies to remedying any “accountability gaps” will be most significant if incorporated within, ‘a pluralistic accountability structure’⁵⁴³ comprising of national and international bodies.

6.5 The Press⁵⁴⁴

Given that the Press is, ‘the main means by which the population is informed about the actions of government’⁵⁴⁵, it inhabits a position of relative power regarding the dissemination of news relating to the UK intelligence and security agencies, and matters of national importance.⁵⁴⁶ This is strengthened by media bodies’ financial resources, investigative ability and access to a diverse international audience.⁵⁴⁷ Traditionally, the role of the press in reporting intelligence matters was constrained by the fact that, ‘[i]ntelligence was the last taboo of British politics...protected from public gaze and parliamentary scrutiny.’⁵⁴⁸ However, in recent years enhanced cooperation between the UK agencies and the Press has

⁵⁴² Gill, ‘The Intelligence and Security Committee and the Challenge of Security Networks’ (n 16) 939.

⁵⁴³ Born and Wills in Born, Leigh & Wills (n 99), 220.

⁵⁴⁴ See ‘Chapter 10: The Role of the Press’ in Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 249 – 290.

⁵⁴⁵ Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 11; Caparini in Bryden & Fluri (n 477) 158.

⁵⁴⁶ Gill in Born, Johnson & Leigh (n 9), 15; *ibid* (Leigh), 11.

⁵⁴⁷ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 251.

⁵⁴⁸ Andrew (n 24) 753; Caparini in Bryden & Fluri (n 477) 161.

attempted to, ‘blow away’ myths about the Service.’⁵⁴⁹ This section will therefore look at the means by which the Press may contribute to intelligence oversight, and has done so in response to the allegations of UK complicity in extraordinary rendition.

Within the limits of the inherent secrecy of intelligence, and need to protect operational details, the Press contributes to intelligence oversight through publishing matters of public interest; without the publication of such articles, even less would be known about intelligence, leading to a less informed and critical citizenry, and a greater propensity for agency wrongdoing to go unchallenged. In recent years, there has been increasing judicial recognition of the Press’s right to publish matters of public interest, due in part to the entrenched right to freedom of expression under Article 10 ECHR. In *Observer and The Guardian v UK*⁵⁵⁰, relating to the UK *Spycatcher* litigation, the ECtHR recognised that the media, ‘has a legitimate interest in reporting on and drawing the public’s attention to deficiencies in the operation of Government services, including possible illegal activities.’⁵⁵¹ The role of the Press is therefore seen to enhance transparency. Within the existing oversight framework, this means that Parliament’s activities, and reports, are publicised, that the executive is held to account where necessary, and that the judiciary’s role is upheld through the reporting of court cases involving intelligence. At its most effective, the Press may thus function as, ‘an essential cog in the mechanism of responsible governance.’⁵⁵²

⁵⁴⁹ Andrew (n 24) 774, 776.

⁵⁵⁰ *Observer and The Guardian v United Kingdom* (1992) 14 E.H.R.R. 153

⁵⁵¹ *Ibid*, para. 75.

⁵⁵² Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 251.

Investigative journalism, especially, may contribute meaningfully to intelligence oversight, given that it relies upon extensive preparation which ensures that the journalists involved are well equipped to understand, and explain in more accessible terms, certain aspects of the technical intelligence process.⁵⁵³ Their expertise makes them perfectly placed to know, ‘which questions to ask...[and] whom to approach.’⁵⁵⁴ Stephen Grey, especially, has done important investigative work on the subject of rendition flights; his book, *Ghost Plane*, for example, was the result of time-consuming research into tracing and linking the use of particular airplanes in order to construct an overall picture of the US-led programme.⁵⁵⁵ Certain newspapers have journalists dedicated solely to matters of intelligence; most notable, perhaps, are Ian Cobain and Richard Norton-Taylor of *The Guardian*, although free-lance journalists such as Stephen Grey and Dana Priest have also contributed valuably to discussions about extraordinary rendition. The existence of dedicated intelligence journalists therefore allows for papers to build up a wealth of expertise and report consistently upon intelligence affairs. Such individuals’ relative expertise in the realm of intelligence also promotes trust from both the UK agencies and representatives from the other branches of intelligence oversight.

In order to ensure that they report matters of intelligence responsibly, media bodies must have, as far as is possible, access to information; the alternative might lead to sensationalized and inaccurate reporting which fails to contextualise the issues reported upon.⁵⁵⁶ In a

⁵⁵³ Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 11.

⁵⁵⁴ Caparini in Bryden & Fluri (n 477) 158.

⁵⁵⁵ Grey, S, *Ghost Plane: The True Story of the CIA Torture Program* (1st edn., St. Martin’s Press 2006).

⁵⁵⁶ Caparini in Bryden & Fluri (n 477) 168.

globalised world which relies upon the constant, and international, dissemination of news⁵⁵⁷, it is difficult for governments to, ‘conceal news from their populations.’⁵⁵⁸ With regards to intelligence especially, the desire, and pressure, to seek exclusive leading stories could lead to the publication of unsecure information, which might, in turn, jeopardise sources or operations. This is an especially pressing concern given that media bodies are essentially commercial entities which report stories in order to sell newspaper copies; in turn, this means that media bodies are not impartial and seek, through their choice of stories and reporting of incidents, to promote a certain agenda, however subtly or unconsciously.⁵⁵⁹

In order to produce informed reports, journalists must also have good working relationships with the UK intelligence agencies, perhaps through the form of regular security briefings and general training about operational difficulties. Formal press enquiries are handled by government departments, and, theoretically, only certain senior officials may have contact with the media.⁵⁶⁰ However, previously, some government ministers have briefed favoured journalists about intelligence developments seeking to influence subsequent media reports.⁵⁶¹ However, the Press must be free from political pressures or the threat of censorship, as far as is practicable, in order for it to operate as an alternate and complementary form of intelligence oversight.⁵⁶² In this sense, Lustgarten and Leigh argue that the commercial power of media bodies can be considered an advantage in the face of governmental opposition, since

⁵⁵⁷ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 261; Rifkind (n 175) 9.

⁵⁵⁸ Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 12.

⁵⁵⁹ Gill in Born, Johnson & Leigh, (n 9), 15.

⁵⁶⁰ *Ibid*, 27.

⁵⁶¹ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 226.

⁵⁶² Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 12.

they possess, ‘the political and economic power to face down legal threats and to fight actions resolutely if they do occur.’⁵⁶³

Informal relationships between journalists and agency officials have previously allowed both sides to benefit from media publicity whilst ensuring the effective protection of sources.⁵⁶⁴ However, the agents concerned tend to be either “rogue” agents, or internal whistleblowers, which are unorthodox avenues by which to discover information, and may not yield sufficiently objective information. Agents may leak information for their own personal gain⁵⁶⁵, and so journalists must be vigilant about verifying such information, especially where extensive “damage” is done by the revelations, in terms of compromising the identity of sources, or the success of a planned operation.⁵⁶⁶

The Press must also negotiate the legal framework which regulates the publication of sensitive information, in order to report responsibly and accurately. This affects its relationship with the judicial branch of the state, given that procedural court restrictions such as public interest immunity (PII), closed material and special advocate procedures restrict what information they may publish about cases involving the intelligence agencies. A recent Supreme Court decision in *Al Rawi and others v Security Service*⁵⁶⁷ upheld the Court of Appeal’s finding that the court had no inherent common law jurisdiction to order a closed material procedure in a civil claim for damages brought by former Guantanamo Bay

⁵⁶³ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 251, 265.

⁵⁶⁴ Gill in Born, Johnson, & Leigh (n 9) 27.

⁵⁶⁵ *Ibid*, 225.

⁵⁶⁶ *Ibid*, 226.

⁵⁶⁷ *Al Rawi and others* (n 22).

detainees against MI5. *The Guardian*, the BBC and *The Times* appeared as second interveners in the case, in both courts, seeking to uphold the principle of open justice, which was found to extend beyond individuals to the public at large.⁵⁶⁸ If the courts had found otherwise, the ability of the media to report information in such matters would have been severely constrained.

Given the necessity for open justice to be preserved, in relation to the media's ability to publish articles relating to intelligence, certain sections of the media have actively pursued openness within the legal system, in relation to rendition. In the Binyam Mohamed litigation, *The Guardian* and *The Times*, as interested parties, argued that certain paragraphs relating to Mohamed's treatment should be made public as part of the court's judgement. Their submissions were founded upon the rights of the media to report matters of public interest under Art 10 ECHR, and court judgements under Art 6 ECHR.⁵⁶⁹ In the Court of Appeal judgement, Judge LCJ expanded upon the principle of open justice in as far as it includes the role of the media.⁵⁷⁰ Much of his comments have been covered in this chapter; that open justice requirement encompasses the media's ability to scrutinise the judicial process⁵⁷¹, contribute to democratic accountability⁵⁷² and report independently of outside influence.⁵⁷³ However, of particular interest are his observations that the ability of the Press to report on intelligence is in no way constrained by the investigations of other bodies, such as the ISC.⁵⁷⁴ This reinforces that the relationship between the media and the ISC, within the intelligence

⁵⁶⁸ *Ibid*, para. 84 (per Lord Brown).

⁵⁶⁹ *Binyam Mohamed (No. 2)* (n 23) 229.

⁵⁷⁰ *Ibid*, paras. 37 – 42 (per Judge LCJ).

⁵⁷¹ *Ibid*, para. 38.

⁵⁷² *Ibid*, para. 39.

⁵⁷³ *Ibid*, para. 40.

⁵⁷⁴ *Ibid*, para. 42.

oversight framework, may be complementary and mutually reinforcing rather than necessarily antagonistic. It is encouraging to observe media bodies acting as interested bodies in court cases, given that this demonstrates their interest in upholding the free press and right to report, whilst also respecting the rule of law and the supremacy of the judiciary in such a forum.

6.6 Conclusion

This chapter has demonstrated that, although a less traditional form of oversight, civil society has a definite and expanding role within intelligence oversight, and may complement the functioning of existing state institutions.⁵⁷⁵ These existing branches of oversight must welcome the contribution of non-traditional oversight bodies as necessary in ensuring greater transparency and accountability, whilst CSOs and transnational organisations must themselves be objective in their consideration of intelligence-related issues, and prepared to recognise their technical limitations. Through increasing the involvement of non-traditional bodies within intelligence, Gibson states that the resulting change in the intelligence hierarchy, ‘may be the key to the delivery of balanced assessments.’⁵⁷⁶

The investigatory capacity of NGOs has been very important in contributing to the discussion surrounding the allegations of complicity, although in the future the ISC must ensure that its

⁵⁷⁵ Schreier, *Fighting the Pre-Eminent Threats with Intelligence-Led Operations* (n 17) 102.

⁵⁷⁶ Gibson, ‘Future Roles of the UK Intelligence System’ (n 124) 921.

consultation with NGOs is meaningful and not merely presentational. Similarly, although the Gibson inquiry appeared to be a positive development in terms of the executive acknowledging NGOs' campaigns, the subsequent boycott of the inquiry was disappointing. Although the inquiry has been wound down, it remains to be seen what impact any NGO collaboration had on its investigations and findings. Rather than merely criticising the agencies and the executive, NGOs might be welcomed by such actors if they devised practical solutions to the problems they perceive to exist. However, it has been encouraging to observe NGOs using the legal system as a means by which to uphold the rights of the individual, and to add legal weight to their criticisms of the agencies' policies in general.

The role of transnational bodies within intelligence oversight comes with limitations; although the global level at which such bodies operate lends its reports greater credibility and censure, its criticism can never be state specific, and it subsequently offers little in the way of national solutions. However, the increasing involvement of such bodies is testament to the fact that, '[t]he level of interest, comment and scrutiny [in the agencies' actions] is relentless... and growing'⁵⁷⁷, and that the consequences of any wrongdoing will be felt at both national and international level.

Finally, the Press has been shown to be crucial in investigating and disseminating intelligence-related material to the public, and thereby providing another means by which to scrutinise the state. It is true that there are possible limitations to the contribution of media bodies, by reasons of their potential bias, inaccuracy, and the lack of journalists' technical expertise. However, providing that there is sustained competition between various media

⁵⁷⁷ Rifkind (n 175), 9.

outlets, the chances of the public being exposed to biased information is lessened.⁵⁷⁸ Furthermore, the fundamental position that the Press holds in relation to the principle of open justice has been unequivocally upheld by both the Court of Appeal and the Supreme Court, thus proving the desire for, ‘a vigorous, probing, and critical Press.’⁵⁷⁹

⁵⁷⁸ Leigh, ‘Civil Society, Democracy and the Law’ (n 478) 12.

⁵⁷⁹ Lustgarten & Leigh, *In From the Cold: National Security and Parliamentary Democracy* (n 24) 251.

CHAPTER 7: CONCLUSION

This thesis has sought to analyse how the existing UK intelligence oversight mechanisms have responded to the allegations of the intelligence and security services' complicity in extraordinary rendition. These allegations have provided the biggest challenge to the agencies in modern times, and this thesis has therefore treated them as foundations from which to consider broader questions relating to the effectiveness, powers and limitations of the existing oversight mechanisms. This method of analysis has been adopted because the way in which states have responded to, and engaged with, the allegations signifies their attitude towards accommodating accountability and transparency of process more generally within the intelligence machinery. Although the inherent secrecy of intelligence necessitates a more nuanced approach to oversight than would be the case with other public organisations, it does not provide a justification for failing to address or, 'covering up mismanagement, failure or corruption.'⁵⁸⁰

It has been necessary to approach the issue of intelligence oversight from an understanding of the legal principles and legislation underpinning the existing framework, since these provide a starting point from which oversight and accountability can take place, and become meaningful.⁵⁸¹ Furthermore, the multi-jurisdictional nature of extraordinary rendition means that an understanding of international law is required in order to bring UK intelligence oversight up to date with the consequences of increasing cooperation between foreign agencies. Since the events of 9/11, the agencies' move from, 'mere 'finding' towards more

⁵⁸⁰ Schreier in Born & Caparini (n 7), 38.

⁵⁸¹ *Ibid*, 42.

‘fixing’ and ‘enforcing’,⁵⁸² has been accompanied by a parallel expansion in international intelligence cooperation. Collectively, these factors somewhat explain why the existing legislative framework does not specifically provide guidance for the agencies’ expanding activities and responsibilities, especially concerning the treatment and detention of detainees.

Having established the context within which a debate about intelligence oversight is situated, this thesis then analysed the bodies which currently oversee the agencies’ actions, both in terms of their powers, and how they specifically responded to and engaged with the allegations of complicity. The strength of an oversight framework modelled on the separation of powers is that the branches of state have complementary roles and therefore, when operating concurrently, their collective strengths, ‘may mitigate their individual weaknesses.’⁵⁸³ However, this rests upon the assumption that all the branches of state work collaboratively and have sufficient powers to exercise effective oversight. At present the balance of power firmly lies with the executive, due to their control over foreign affairs, national security and disclosure of sensitive information. In turn, this leads to “accountability gaps” in respect of the UK agencies’ activities, such as their liaisons with other foreign intelligence and security agencies.⁵⁸⁴

The key to ensuring a more balanced relationship between the UK oversight bodies rests upon the legislation which established their roles and powers; the Security Service Act 1988 and the Intelligence Service Act 1994. Currently this legislation fails to cater for the ISC’s experience and knowledge of intelligence, whilst allowing too much deference to the

⁵⁸² Aldrich in Born, Leigh and Wills (n 99), 20.

⁵⁸³ Caparini in Born & Caparini (n 7), 23.

⁵⁸⁴ Born & Wills in Born, Leigh and Wills (n 99), 200.

executive. It is therefore encouraging that the ISC has advocated changes to the legislation, including that it have both a formal remit to consider the agencies' operational activities, and the power to require information to be provided.⁵⁸⁵ Any developments implemented will assist in entrenching the perception that the ISC is capable of providing a secure arena within which the UK intelligence and security services' actions may be scrutinised. However, the effectiveness of any legislative changes rests upon a relationship of mutual trust between the branches of the state, including a recognition that it is in the interests of the state, the agencies and the oversight bodies themselves that they work collaboratively; 'oversight is a process, not an event.'⁵⁸⁶

It has been said that, 'if there are no enforcement measures for accountability, there is no democracy.'⁵⁸⁷ The judiciary provides a means of *ex post facto* and incidental review, and a means by which judgments against the agencies may be given and enforced, although relatively few legal actions have been brought to date. However the executive's traditional margin of discretion concerning national security has somewhat hindered the judiciary's ability to act as a free, informed and independent source of oversight to date. This has been exacerbated by existing evidential protections for intelligence, in the form of public interest immunity and closed evidence procedures. It is unarguable that some redaction of truly sensitive information is necessary to accommodate intelligence within the legal system, preferably carried out by an expert tribunal. However the process by which such a balancing exercise is carried out should be sufficiently transparent. This is especially the case given the outcome of the decision in *Mohamed (No 2)*, in which intelligence held by the executive to be

⁵⁸⁵ ISC, 'Annual Report 2010-2011' (n 78), 82.

⁵⁸⁶ Schreier, *Fighting the Pre-eminent threats with Intelligence-led Operations* (n 17), 108.

⁵⁸⁷ Schreier in Born & Caparini (n 7), 42.

sensitive was found not to be so by the Court of Appeal, who subsequently published it. A system in which an individual may not access intelligence which they seek to rely upon to either uphold or defend a legal complaint frustrates the concept of an open and public legal system.

A government Green Paper which considered the use of secret evidence within court proceedings was published in October 2011 and more recently finished its consultation process.⁵⁸⁸ Although it has not been discussed in the course of this thesis, due to the constraints of time and word limits, it will almost inevitably impact upon the evidential restraints outlined in this thesis. Depending upon the outcome of this process, it may be the judiciary who are relied upon as the primary means by which to uphold and enforce the rule of law in respect of matters involving intelligence which arise. If so, some encouragement should be taken from the wealth of domestic and international legal obligations which regulate the intelligence and security agencies' actions, and the judiciary's recent unwillingness to defer to the executive on national security without firstly conducting a proportionality exercise.

As well as the executive, ISC and judiciary, it has been necessary to consider the expanding role of non-traditional actors within the intelligence process, who have emerged as a complementary and external form of oversight. Although they lack the democratic legitimacy and independence of the other oversight bodies, these non-traditional forms of oversight are often the primary means by which the public is informed about the UK intelligence and security agencies' actions, and purported wrongdoing. In relation to allegations of their

⁵⁸⁸ HM Government, 'Justice and Security Green Paper' (October 2011) Cm 8194.

complicity in extraordinary rendition such organisations, which include transnational, non-governmental and media bodies, invested time and resources in uncovering coherent evidence relating to the CIA-led renditions cycle. A more collaborative approach between non-traditional bodies and the other branches of state, especially the ISC, must therefore be encouraged in order to entrench the perception that intelligence oversight is an accessible area of public discourse. Concerns relating to such bodies' relative lack of objectivity, and lack of appreciation for the secrecy of intelligence, may be mitigated by the contribution of the other branches of state to intelligence oversight, and the terms and extent of their collaborative relationships.

It is in the agencies' own interests to be subjected to effective and comprehensive oversight; this will reduce discourse about their perceived wrongdoings and keep citizens informed about their activities. For that reason, the heads of both MI5 and MI6 must recognise the importance of effective external oversight, whilst entrenching ethical behaviour within the agencies themselves. Criticism must not be viewed as solely negative and politically motivated, but as an opportunity for the agencies to adapt and improve, and thus better represent the state's interests. It is encouraging that the government has taken some steps to update the current oversight framework, including originally commissioning the Gibson inquiry and producing specific guidance for the treatment and detention of detainees within UK custody. It is to be hoped that developments such as these will help the agencies to appropriately engage with and respond to the allegations made against them. However, more must be done to ensure that the future of intelligence oversight is provided for. If it is true that intimate knowledge of the agencies lies at the heart of effective oversight⁵⁸⁹ then there are several traditional and non-traditional institutions and actors within the UK intelligence

⁵⁸⁹ Schreier in Born & Caparini (n 7), 44.

framework which are equipped to promote intelligence oversight and accountability. The true test, for these bodies and the UK intelligence and security services, will therefore be how they work together to ensure a collective and cohesive system of oversight within which the rule of law is at the centre.

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