Torture and Modernity[1]

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Abstract

This article examines the on-going relationship between torture and democracy. It provides a comprehensive analysis of the history and development of the international prohibitions of torture, examining the philosophical, moral and legal tenets of what is termed, "Humanity's Law". In doing this, the author considers some of the methods by which governments continue to involve themselves in torture, and suggest that the challenge is to evolve the reach of Humanity's Law into places that that have been put beyond it.

The purpose of this article is to examine the on-going relationship between torture and democracy. Such a relationship exists despite the fact that the prohibition on torture was a fundamental constitutional development that made the emergence of democracy possible,[2] and despite the fact that the prohibition features in all of the global and regional human rights instruments as a non-derogable right which alone with slavery countenances no conceivable exception under any circumstances. As of 1945, the determination to end torture became the touchstone for what it meant to be civilised in the aftermath of total war. The resort to torture under the pressure of contemporary insecurities therefore profoundly unsettles that project.

A starting point for understanding present predicaments is not the terrorist attacks on the East Coast of the United States in September 2001, but the experience of world war in the middle of last century and the extremely bloody end to colonial power. In the first two sections below "History" and "Identity", some historical anomalies are looked at because that helps us to comprehend our present situation. The latter sections "Denial" and "Complicity", describe some of the methods by which our governments continue to involve themselves in torture on our behalf. In the concluding section "Reaffirmation", the post-holocaust(s) shift in civilisation symbolised by the global prohibition on torture is returned to. In the

[1] Principal thanks are due to Edward Fitzgerald QC for whom I have written this present piece. Almost every English case cited here bears Edward's mark, because if he was not the lawyer himself, then the lawyers involved were his students and fellow travellers. Edward has taught us all to think of law as both cosmopolitan and interdisciplinary. Above all else, he has taught us that humanity is sovereign over state. Parts of this article are taken from or otherwise prompted by work that I have done on the Baha Mousa Inquiry and on various terrorism-related cases over the last decade and therefore I owe specific thanks to those who worked on those cases with me. On the text, I was especially helped by Mick Gordon, Jonathan Cooper, Richard Hermer QC, Tessa Hetherington, Charlotte Kilroy, Jonathan Lipkin, Daniel Reisel and Gerard Kilroy.

[2] This article is a companion piece to "Torture and the Common Law" [2005] 2 E.H.R.LR. 180, which considers the extent to which the prohibition against torture was critical to the development of the common law. As Blackstone put, torture was "occasionally as an engine of state, not of law" (Sir William Blackstone, *Commentaries on the Laws of England*, Vol.IV, Ch.25, pp.320–321 (1765)): that the early common law writers from at least the fifteenth century rejected torture as a method of proof and distinguished themselves from the continent where torture was integral to the trial process; that there was a period of torture warrants issued by English monarchs between 1540 and 1709 (well documented by the research of John Langbein in *Torture and the Law of Proof—Europe and England in the Ancien Regime* (University of Chicago, 1977, re-issued 2006), but that those warrants were distinguishable by the fact that they were the product of an exercise of the royal prerogative as opposed to the common law courts; and that the dying out of the warrants during the course of the English Revolution came to symbolise a movement that established the rule of law, as against the rule of Kings or Queens. Even if these propositions on paper are too neat a way of summarising a much more complex historical process, as the House of the Lords accepted in *A. (No.2) v Secretary of State for the Home Department* [2006] 2 A.C. 221, this myth of the common law setting its face against torture enjoys a necessary archetypal status. In Lord Hoffmann's words ([2006] 2 A.C. 221 at [83]) the prohibition has "a special iconic importance as a touchstone of a humane and civilised legal system". See also Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 *Columbia Law Review* 1681. Other parts of the present article are strongly indebted to Waldron's collected essays in *Torture, Terror and Trade Offs: Philosophy for the White House* (Oxford University Press, 2010).

near instant aftermath of untold lawlessness, human society put its faith in a certain type of law. Reaffirmation of the prohibition in the face of breach is part of the way we live now; and must go on living.

History

In the Preamble to the 1945 UN Charter the "people of the United Nations" determined that it was time "to reaffirm faith in fundamental rights [and] in the dignity and worth of the human person". The total descent into global war and the price paid for European and Asian empires meant that the protection of rights could no longer be left exclusively to sovereign states. This was a moment for international law. With hindsight, we can call it the global beginning of what Ruti Tertel has termed Humanity's Law.[3] The Convention-based Treaties, beginning with the UN Charter in 1945, (the non-binding) Declaration of Human Rights in 1948, the Four Geneva Conventions of 1949, the Refugee Convention in 1950, the regional Human Rights Conventions, firstly in holocaust destroyed Europe in 1950, and the first global human rights conventions of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights in 1966, embodied the lessons learned of total war. All of them are premised upon the reaffirmation of faith in fundamental human rights and the dignity of the human person contained in the Charter's Preamble.

Cumulatively these instruments represent an extraordinary global investment in the principle of humanity. Since 1945, the drive of international law has been to declare these treaties as largely representing customary norms binding on all states regardless of signature. The language of the International Court of Justice refers to the norms in shibboleth terms. They are the "minimum yardstick", "the elementary considerations", not of just of law, but of humanity.[4] Moreover, in war or in peace, these treaties act as mutually reinforcing sources of each other, with an increasingly integrated regime of *Lex Humanitatis* promising to trump any remaining reliance on *Lex Specialis* as a limiting interpretative device.[5]

Of course this narrative moves the story further forward: through further wars and further violations bringing into being most notably the Convention against Torture in 1984, but also the discrete Conventions prohibiting racial discrimination (1966) providing special protection to women (1979) and children (1989), creating the ad hoc war crimes tribunals for the Former Yugoslavia, Rwanda and Sierra Leone, and setting up the International Criminal Court (1999). From the invasion of Grenada,[6] through Palestinian walls,[7] temporary incursions into foreign territories[8] and full-scale occupations from Cyprus[9] to Iraq[10] there has also been a dismantling of the narrow concepts of jurisdiction that are limited to the physical territory of a state. Human rights duties follow the exercise of power over the person or an area wherever that may be.[11] Finally the human rights Conventions have been recognised as capable of reaching back in time to require the investigation of human rights abuse pre-dating the ratification of a treaty by individual states,[12] provided the events post-date the actual ratification of the treaty.[13] This temporal flexibility is justified

[3] Ruti G. Teitel, *Humanity's Law* (Oxford University Press, 2011).

[4] *Nicaragua v United States (Military and Paramilitary activities in and against Nicaragua)* [1986] I.C.J. 114 at [218].

[5] *Lex Humanitatis* (law of humanity) is prompted by Teitel's thesis. One might also use *Lex Humanis (law for human beings)*. For the theory behind the broader principle of interpretation that consolidates the aims of treaties, see Campbell McLaghlan, The "Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279.

[6] *Coard v United States*, Case No.10.951, Report 109/99 (September 29, 1999), Inter-American Commission of Human Rights (1999) 9 B.H.R.C. 150.

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep. 136.

[8] *Issa v Turkey* (2004) 41 E.H.R.R. 567.

[9] *Cyprus v Turkey* (2001) 35 E.H.R.R. 731.

[10] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18.

[11] For the first full recognition of this under UK law with regard to the travelling soldier and his or her personal human rights protection, see *R. (Susan Smith) v Secretary of State for Defence* [2013] 3 W.L.R. 69, SC.

[12] *Šilih v Slovenia* (2009) 49 E.H.R.R. 996 and *Moiwana Village v Suriname*, IACHR, June 15, 2005 and *Re McCaughey* [2012] 1 A.C. 725.

[13] *Janowiec v Russia* (App. Nos 55508/07 and 29520/09), judgment of October 21, 2013 (GC) and *Sankara v Burkina Faso*, HRC Comm. No.1159/2003, March 28, 2006.

where the state is complicit in failing to establish the truth about the original abuse on a continuing basis across the point in time when the Treaty became binding.[14] Taken together the developments suggest that we are witnessing at least a partial change of legal regime, departing from the pre-existing interstate regime to Teitel's concept of "humanity's law"—that is the law of persons and peoples.[15]

However long the gestation of Humanity's Law might be, and continues to be, the end of the Second World War can still be properly designated as a catalyst. Those who had experienced total war were wise. Again in the words of the Preamble to the Charter, they were able to recite that twice in their lifetime, "the scourge of war…had brought untold sorrow to mankind". Before the dust could settle, and knowing that the justice of going to war would come again, they chose to voluntarily bind their arms for the next war. As Israeli jurists seeking to draw bright lines between security and liberty a generation later would express it, the price of democracy meant just war theorists voluntarily tying one hand behind their own backs.[16]

Poetics and teleology of this kind are important. Just as it was worthy of the constitutional revolutionaries of the seventeenth and eighteenth centuries to panegyrise the common law,[17] these fundamental rights expressed in archetypal terms are critical to the Humanity's Law revolution of the post-war period. That is why the great irony of this catalytic drive to transform the protection of humanity under international law in 1945 is what happened next. The principles were then savagely violated by the Allied powers, the British especially in Palestine, Malaya, Kenya, Cyprus and Aden, the French in Algeria, the Soviets on their own people and across the Eastern bloc and the United States in Latin America, Africa and South East Asia. To try to write such a list merely exposes its incompleteness.

Identity

Taking the United Kingdom as a case study, the crimes committed while the ink on the treaties was still drying is in obvious tension with the image of common law wisdom that the British brought to the drafting and ratification of the various Conventions prohibiting the very treatment in which it then engaged. Screening this reality out was for a long time part of (Great) British identity. Coming to terms with it, is part of a more contemporary national project.

The dominant narrative of British involvement in the drafting of these Treaties has always been to emphasise the pragmatism and common sense that lay behind them. Those on the British side of things who negotiated and first signed the European Convention on Human Rights were not seeking to provide a blueprint for the ideal society. They described themselves as formulating a statement of very basic rights and freedoms which, it was believed, were very largely observed by the contracting states, certainly all available under the common law, and essentially a statement of good existing practice.[18] Such narratives are amply documented in the contemporary papers.[19] But consider the following motion that was proposed in the *Travaux préparatoires* for the ECHR by the UK delegate, Mr F.S. Cocks, at the first session of the Consultative Assembly in Strasbourg on September 8, 1949 (as Jeremy Waldron reminds us, it indicates the sacred aspect for many of those who introduced the prohibition of torture into the secular age):

[14] For a UK case that will test the combination of jurisdictional and temporal reach of Humanity's Law, see *Chong Nyok Keyu v Secretary of State for Foreign Affairs* [2012] EWHC 2445 (concerning the massacre at Batang Kali , Malaya, in 1948, further discussed below).

[15] See fn.3, Preface (x).

[16] *Public Committee Against Torture in Israel v Israel*, September 16, 1999, (1999) 7 B.H.R.C. 31 at [39].

[17] Friedman, "Torture and the Common Law", citing Sir John Fortescue, *De Laudibus Legum Angliae*, Ch.XXII, pp.47–53 (1460s); Sir John Smith, *De Republica Anglorum, A Discourse on the Commonwealth of England*, Bk II, p.105 (1584); Sir Edward Coke, *The Second Part of the Institutes of the Laws of England: Concerning the Magna Carta*, first published in 1642, p.48, and *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*, first published in 1644, pp.34–7.

[18] *Dyer v Watson* [2004] 1 A.C. 379 at [48] (per Lord Bingham).

[19] A.W. Simpson, *Human Rights and the End of Empire, Britain and Genesis of the European Convention* (Oxford University Press, 2001). One Foreign Office official cited by Simpson noted in 1953 that the actual articles in the Convention were "too loosely drafted to provide the effective guarantee of the rights they contain" (National Archives FCO 371/95868, quoted Simpson, *Human Rights and the End of Empire*, p.5).

> "The Consultative Assembly takes this opportunity of declaring that all forms of physical torture…are inconsistent with civilized society, are offences against heaven and humanity and must be prohibited. It declares that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State. It believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain."

Lamenting the rise of torture in the twentieth century, Mr Cocks added this in his speech moving the proposal:

> "I feel that this is the occasion when this Assembly should condemn in the most forthright and absolute fashion this retrogression into barbarism. I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit of man. I say that it is a sin against the Holy Ghost for which there is no forgiveness."[20]

Although unanimous applause is recorded for the motion the Delegates thought it wise to leave it out of their final report. References "to crimes against high heaven and humanity" and "the sin and the Holy Ghost" do not reside easily in modern legal discourse. It would be difficult to say this language was put on, but clearly it stands in conflict with what was happening at the same time it was being said, and would continue to happen in decades to come.

In trying to understand this particular historical conundrum there is a potential distraction. It is a myth that was important to post-war British identity that only the Nazis resorted to torture and that the Allies, at least the Western ones, did not. A relatively more recent example of this framing of history can be found in Lord Gardiner's well-intentioned conclusion to his minority report into the use of the five techniques during internment in Northern Ireland in 1971. He was faced with the willingness of the Lord Parker (the retiring Lord Chief Justice) and Mr Boyd-Carpenter to condone the use of the techniques in their majority report. They relied on the emergency facing British troops and the RUC in Northern Ireland to find that there was "no reason to rule out these techniques on moral grounds". Their only quibble was that statutory authority had to be created in order to both validate and regulate their future use "in a manner consistent with the highest standards of our society".[21] It was necessary for Gardiner, as the dissenter, to deploy a particular narrative about the recent past:

> "The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe to be still the greatest democracy in the world."[22]

Whatever the product of the "well-tried and highly successful wartime interrogation methods", Britain undoubtedly did use darker methods against perceived threats to national security during that period. It did so in both this country and in occupied Germany. Documents on several torture sites are now available, including the London Cage in Kensington[23] and the British run facility in Bad Nenndorf, near Hannover.[24] In the former, the censored parts of the memoirs of the commanding officer, Alexander Scotland, described

[20] Council of Eur., *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* 36–38 (1975), quoted in Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) pp.1710–1711.

[21] *Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism Chairman*: Lord Parker of Waddington Presented to Parliament by the Prime Minister by Command of Her Majesty March 1972, Majority Report, at [34]. For the classic account of what it was like to be subjected to these techniques, see Dennis Faul and Raymond Murray (eds), *The Hooded Men: British Torture in Ireland* (Association for Legal Justice, 1974).

[22] Minority Report, at [21].

[23] Ian Cobain, *Cruel Britannia, A Secret History of Torture* (Portabello, 2012), Ch.1.

[24] Cobain, *Cruel Britannia*, Ch.2.

the forcing of prisoners to stand to attention for more than 26 hours, forcing them to kneel while they were beaten about the head, and threatening to have men shot for failing to disclose information. The MI5 legal adviser who examined the ultimately unpublished parts of the Scotland manuscript said that they disclosed a clear breach of the Geneva Conventions.[25] The events at Bad Nenndorf reverberated across the Allied Theatre, only because its inmates were ultimately transferred to other facilities, often near dead because of starvation, or in one case actually dead. Other contemporary documents tell of prisoners being woken twice a night and told to put on wet clothes. Temperature extremes were resorted to. There was wall standing, forced walking and stress positions. As the war progressed the British also started to detain Russian and communist suspects. In London the Government were well aware of the similarities with Gestapo methods. Yet the Minister of State for the Foreign office, Hector McNeill, ultimately wanted to cover the matter up, "if the substantial facts are given any currency it will cause us grave trouble in the House, will be a propaganda stick with which the Russians will beat us for a long time and will damage heavily the reputation of our Intelligence Services".[26]

Malaya

Across the global landscape of British controlled territories in the following two decades there was often a blatant tension between the declared post-war commitment to universal human rights and the subjection of local populations to torture and other crimes. The declarations of 1945 and after were qualified both geographically and racially. Two recent pieces of legacy human rights litigation adjudicated upon by the High Court in London are helping to document this.[27] In December 1948, a 14-man patrol of the 7th Platoon, G Company of the 2nd Battalion of the Scots Guards took control of a village of residential huts on the Batang Kali rubber plantation, during the Malayan emergency.[28] During the night the Platoon who were seeking information about the Communist insurgents conducted mock executions as part of their interrogations. One of the victims collapsed in nervous shock. Another was in fact shot. It was later said by the soldiers that he was running away. Others saw him taken outside and murdered. After a terrifying night the women and children were loaded on to a lorry, but the men were kept behind, only for 23 of them to be shot, for the village to be burnt to the ground, the corpses left in situ, and one surviving man's statement to the police to be concealed during the subsequent outcry about the event. Despite claiming to investigate exhaustively the Attorney General of the Federation of Malay later admitted that "No enquiries [were] made of [Batang Kali's] inhabitants, [and] none questioned, for a very good reason, because they were most unlikely to talk, and if they did talk to tell the truth". By January 1949, an official account articulated by the Colonial Secretary, Arthur Creech Jones, before the House of Commons was that "after careful consideration of the evidence" it had been concluded that "had the Security Force not opened fire, the suspect Chinese would have made good an attempt at escape which had been obviously pre-arranged".[29] The act was deemed justified and lawful.

Aside from the fact that this use of force was grossly disproportionate, therefore constituting a crime of murder under the common law by reference to authority dating back to 1879,[30] the official account of

[25] Cobain, *Cruel Britannia*, p.32 (citing National Archives WO 71/1176B). Other papers from men who acted as guards tell of being required to forcefully awaken detainees every 15 minutes around the clock (Cobain, *Cruel Britannia*, p.29 citing National Archive FO 371/53).

[26] Cobain, *Cruel Britannia*, p.62. (Citing National Archives FO 371/70828).

[27] What follows has been prompted by the case of *Chong Nyok Keyu* concerning pre-independence Malaysia and *Mutua* concerning pre-independence Kenya.

[28] The following facts have been provisionally established in the decision of *Chong Nyok Keyu v Secretary of State for Foreign Affairs* [2012] EWHC 2445. The case seeks a definitive final investigation of the killings and the subsequent efforts to cover up their unlawful nature.

[29] HC Debs, January 26, 1949, Series 5, Vol.460, col.138w. A discrete aim of the litigation is to urge the Government to officially withdraw the statement to Parliament.

[30] *R. v Clegg* [1995] 1 A.C. 482. As the Divisional Court would put it in *Chong Nyok Keyu v Secretary of State for Foreign Affairs*, "No consideration was given … as to whether the actions of the soldiers in shooting the inhabitants of the village was necessary and proportionate in circumstances where every single person was killed rather than some being wounded" [143] and "It is difficult to see" how the general order to shoot escaping prisoners extant at the time could be justified under the common law position prevailing at the time [145].

what happened in Batang Kaili is unsustainable, not least because in 1970, five out of 11 surviving patrol members confessed to the perpetration of the mock executions and murder, and ultimately repeated these confessions under police caution, many in the presence of lawyers. The concealed 1948 statement of the surviving man also confirmed that he saw from his hiding place that the men were taken out of the huts and marched towards the jungle at a walking pace.[31] There was no prosecution, because the Director of Public Prosecution, Sir Nigel Skelhorn QC, did not regard it as worthwhile to make contact with any Malaysian witnesses. When in 2012 the evidence was considered by a court in London for the time after 64 years, it was established that "[i]t can no longer be permissible to conclude, in our view, on the evidence available at the present time which was before the court, that the 24 men were shot when trying to escape".[32]

Kenya

In 1957, the Colonial Administration decided to subject Mau Mau detainees to a torture regime known as "the dilution technique".[33] A line of correspondence in June 1957 between the Colonial Administration, under Evelyn Baring, and Alan Lennox-Boyd, the Secretary of State for the Colonies,[34] indicates that the Minister and those under him knew he was sanctioning a system where those who dissented could be beaten into submission. According to a letter from Baring to Lennox-Boyd dated June 25, 1957, the hard cases "dyed-in-the-wool Mau Mau" would have to be dealt with in a "rough way". Some of them must be subjected to "violent shock". An ICRC representative "who had spent his whole life working with Africans" had left Baring in no doubt "that if the violent shock was the price to be paid…we should pay it". The description of the detainees' reception into the dilution process was contained in an attached dossier written by the Kenyan Minister for Legal Affairs, Eric Griffiths-Jones. It is worthy of quoting here (not least because before giving final authorisation in the face of a report that contained this passage, Lennox-Boyd, would initially respond "Frankly this is a difficult one"):

> "The detainees were ordered to squat in two rows, one at each side of the catwalk. The 'receptionists' from the last intake then handed out camp clothing to each man and set about shaving their heads with their hair-clippers … The detainees were ordered to change into the camp clothes. Any who showed any reluctance or hesitation to do so were hit with fists and/or slapped with the open hand. This was usually enough to dispel any disposition to disobey the order to change. In some cases, however, defiance was more obstinate, and on the first indication three or four of the European officers immediately converged on the man and 'rough-housed' him, stripping his clothes off him, hitting him, on occasion kicking him, and, if necessary, putting him on the ground. Blows stuck were solid, hard ones, mostly with closed fists and about the head, stomach, sides and back. There was no attempt to strike at testicles or any other manifestations of sadistic brutality; the performance was a deliberate calculated and robust assault, accompanied by constant and imperative demands that the man should do as he was told and change his clothes.

[31] A window into why this was allowed to happen is contained in a cable from the High Commission to the Colonial Office on January 1, 1949. An assurance was given that the patrol "did everything that it was possible for them to do to stop the escaping Chinese before resorting to force". However, the difficulty of the situation was that "we have a war on terrorism on our hands and we are at the same time endeavouring to maintain the rule of law". It was urged on all to be "conservative in our criticism of the [British soldiers] who are undoubtedly carrying out a most arduous and dangerous job".

[32] [2012] EWHC 2445 at [142]. The presently available evidence in relation to Batang Kali is set out in the Claimants' written submissions which are available at *http://www.bindmans.com/news-and-events/news-article/the-batang-kali-massacre-trial-end-of-a-very-british-cover-up1* [Accessed September 30, 2013]. See also Ian Ward and Norma Miraflor, *Slaughter and Deception at Batang Kali* (Media Masters, 2008).

[33] Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Henry Holt & Company, 2005), esp. Chs 3, 9, 10, pp.319–324 and the epilogue. See also David Anderson, *Histories of the Hanged and the End of Empire* (Phoenix, 2006). This work, together with the claimants' further researches, formed the basis for litigation brought by Kenya survivors. The Claimants established prima facie causes of action against the Foreign Office in *Mutua v Foreign and Commonwealth Office (No.1)* [2011] EWHC 1913, overcame limitation disputes in *Mutua v Foreign and Commonwealth Office (No.2)* [2012] EWHC 2678 (primarily on the basis that the key documents were only released for historians to study in the previous decade), and ultimately resulted in a settlement, for which see the statement of the Foreign Secretary on June 6, 2013, *https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims* [Accessed September 30, 2013].

[34] The original documents are reprinted in Appendix B to *Mutua v Foreign and Commonwealth Office (No.1)*.

> In each of these cases which the visiting party witnessed on this occasion (and it watched the reception of all four parties of 20), the man eventually gave in and put on the camp clothes. Gavaghan [the Officer in charge of the Mwea camps] explained, however, that there had, in past intakes, been more persistent resistors, who had to be forcibly changed into the camp clothing; that some of them had started the 'Mau Mau moan', a familiar cry that was promptly taken up by the rest of the camp, representing a concerted and symbolic defiance of the camp authorities; that in such cases it was essential to prevent the infection of the moan spreading through the camp, and that accordingly a resistor who started it was promptly put on the ground, a foot placed on his throat and mud stuffed in his mouth; and that a man whose resistance could not be broken down was in the last resort knocked unconscious."

After some expressed doubts and hesitation the Colonial Office, all the more knowingly for having overcome any concerns, did provide authorisation and thereafter approved the extension of the dilution technique to other camps. In short, the dilution technique was used as part of an orchestrated regime of systemised violence which had been approved at the highest levels of the British Government and which resulted in grave injuries and, in many cases, death.[35]

Reviewing the papers on a preliminary basis at a London High Court hearing in 2011, Lord Justice McCombe found "There is ample evidence even in the few papers I have seen suggesting that there may have been systemic torture of detainees during the Emergency".[36] He also held that the Colonial Office "played a distinctly 'hands on role' in the management of the Emergency. It was not standing aloof merely offering advice and assistance when the local government asked for it".[37] It was, at the very least, arguable that the British Government could have stopped the torture at any time.[38] On June 6, 2013, the Foreign Secretary, William Hague, recognised that "the colonial authorities had sanctioned harsh prison so-called 'rehabilitation' regimes" and that it was a matter of sincere regret "that these abuses took place, and that they marred Kenya's progress towards independence". He added, "Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn".

Denial[39]

Politics

Each of the above episodes had their discrete contexts, but there were clearly some general trends. Before the Second World War had ended the Cold War had begun. The Western powers were denying their own atrocities in synchronicity with the Soviet Union doing the same.[40] The recognition in art.1(2) of the Charter

[35] Relatively late in the conflict, ten detainees were killed at the Hola concentration camp. The Colonial Office at first claimed that they had died from drinking polluted water. The Resident Magistrate, W.H. Goudie, who was commissioned to conduct an internal investigation concluded, "In each case death was found to have been caused by shock and haemorrhage due to multiple bruising caused by violence"…"There was no serious combined attempt by detainees to attack warders… [and] there was a very considerable beating by warders with batons solely for the purposes of compelling them to work or punishing them for not working". No one was charged, in part because of Goudie's conclusion that it was impossible to determine beyond reasonable doubt which blows were unjustifiable and who had administered them: Elkins, *Imperial Reckoning*, pp.344–353. William Hague mentioned the infamous Hola Camp killings in his statement to the house after the case of *Matua* was settled.

[36] *Mutua v Foreign and Commonwealth Office (No.1)* at [125] and [128].

[37] *Mutua v Foreign and Commonwealth Office (No.1)* at [132].

[38] *Mutua v Foreign and Commonwealth Office (No.1)* at [143].

[39] This section is indebted to the Written Opening of the victims in the Baha Mousa Inquiry and can be found at *http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/openings/opening_pil.pdf* [Accessed September 30, 2013]. Further references are also given to the Report of the Baha Mousa Inquiry, Rt Honourable Sir William Gage, HC 1452-II (*http://www.bahamousainquiry.org/report/index.htm* [Accessed September 30, 2013]), hereafter the 'BMIR'.

[40] Despite Politburo direct instruction to kill several thousand prisoners in Katyń Forrest in Poland in April and May 1940, the Allied Powers relented to Soviet insistence to indict the massacre against the Nazi war criminals at Nuremburg. See William Schabas, *Unimaginable Atrocities* (Oxford University Press, 2012), Ch.6, "History, International Justice and the Truth". When one British Diplomat queried how this could be just based on a substantial amount of evidence to the contrary even then, a Foreign Office response noted that the "doubts may be well founded—and shared by many others—but there could be no question of 'blowing' the Russian case either in public or in private and, in many ways, it might be as well that Katyń should be disposed of once and for all on to the Germans". The Nuremburg Tribunal, including the Russian judge, failed to comment on this feature

of a primary purpose of the United Nations "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" inevitably created an impetus to liberation struggle. The Declaration of Human Rights would go a step further in its Preamble regarding it "as essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". In 1960, Prime Minister Macmillan felt compelled while travelling to Apartheid South Africa just after the Sharpeville massacre to recognise that "the winds of change" were "blowing through Africa…whether we like it or not".[41] Parliamentarians began to call their own and other governments to account. Enoch Powell's speech in Parliament in condemnation of the Hola Camp massacre[42] is extraordinarily relevant today. We could not "pick and choose where and in what parts of the world we shall use this or that kind of standard," he told the House in July 1959. "We cannot say, 'We will have African standards in Africa, Asian standards in Asia and perhaps British standards here at home'. We have not that choice to make. We must be consistent with ourselves everywhere."[43] In 1961 Amnesty International was founded by the British solicitor, Peter Benenson, after writing an article in the Observer entitled *The Forgotten Prisoners*.

Manners changed slowly. In one of Amnesty's first ever campaigns in Aden, it tiptoed into critique, beginning its report, "The people of Britain value freedom above all else. They have a long and honourable record of opposition to all forms of physical cruelty".[44] Yet it described a number of techniques that would be used in Northern Ireland in 1971, nearly five years later. The use of the techniques was concealed from an investigation conducted on behalf of the Labour Government by the barrister Roderick Bowen.[45] When the use of the techniques did emerge in Northern Ireland, together with the recognition that they had featured in colonial campaigns in Palestine, Malaya, Kenya, Cyprus, and more recently in the British Cameroons (1960–61), Brunei (1963), British Guyana (1964), Aden (1964–67), Borneo/Malaysia (1965–66), the Persian Gulf (1970–71),[46] Edward Heath was forced to set up the Parker Privy Council inquiry. In a meeting between Lord Parker and Heath at Downing Street in November 1971, that is before the Inquiry began to hear evidence, the recently retired Lord Chief Justice would describe Amnesty's position as "extreme" and the Prime Minister would describe the organisation as "disreputable".[47] Despite the recommendations of the majority opinion to continue with the methods under statutory authorisation, the minority opinion prevailed.

The available Cabinet documents suggest that an important reason for the political decision not to follow the majority was the Security Adviser to the Cabinet, Sir Dick White. White was the only person to ever lead both MI5 and MI6.[48] He would have known of the war-time use of some of these techniques and he also would have been aware of the impact of sensory deprivation techniques on American soldiers in

of the indictment. As Schabas puts it, the Tribunal to its credit "did not distort the historical record". The issue continues to ventilate brightly in the legal sphere, because the Fifth Section of the European Court of Human Rights, recognised that that Russia's investigatory obligation under art.2 of the ECHR could theoretically extend back to occupied Poland in 1940 (*Janowiec v Russia* (App. Nos 55508/07 and 29520/09), judgment of October 21, 2013 (GC)). It also found a violation against Russia under art.3 for failing to disclose sufficient materials to the bereaved through seven decades of campaigning. The Grand Chamber judgment of October 21, 2013 disagreed, holding that a period going back decades could neither be said to constitute a "genuine connection" to any existing acts or omissions by the state, or to otherwise be compelled by "Convention values" given that the trigger event occurred at a time when the Convention did not exist (at [140] to [161]). The Court also did not find a violation of art.3 because the Russian state had begun to disclose information about the massacre after 1998 once the Treaty had been adopted. The art.3 obligation could not reach back beyond that date ([177] to [189]). The judgment is significant because it clearly concludes that where the trigger event is a post November 1950 act of a heinous or grave nature, such as a war crime, then the investigatory obligation will apply.

[41] Elkins, *Imperial Reckoning*, pp.364–365.

[42] See fn.34 above.

[43] HC Deb. July 27, 1959, Series 5, Vol.610 cols 232–238.

[44] Peter Benenson, *Amnesty International: Aden* (1963–1966) (November 11, 1966).

[45] Report by Mr Roderic Bowen QC, on *Procedures for the Arrest, Interrogation and Detention of Suspected Terrorists in Aden*, November 14, 1966, Cmnd 3165. Although the Report describes some evidence of injury to prisoners, it is silent with regard to the techniques. See BMIR Vol.II, para.4.28, p.418.

[46] *Parker Inquiry Report*, para.10.

[47] The letter is quoted the BMIR Vol.II, para.4.41, p.422 (and can be downloaded in the original by clicking on the footnote).

[48] *The Independent*, February 23, 1993, "Obituary, Sir Dick White"; The New York Times, February 23, 1993, "Obituary—Sir Dick White, 87, Ex-British Intelligence Chief". See also, Tom Bower, *The Perfect English Spy: Sir Dick White and the Secret English War* (Mandarin, 1995).

Korea in causing them to give false confessions. White consistently maintained in correspondence that he had come to doubt whether these methods worked. Having specifically reviewed the interrogations notes of the Northern Irish detainees, he made that finding.[49] He was concerned about the Cold War implications of British practices being exposed in this way.[50] It was White who proved critical in his advice to Ministers, despite the protestations of the MOD mandarin Sir James Dunnett.[51]

Methodology

Democratic states prefer torture that does not leave marks. This allows them to deny its legality while at the same time continuing to use it. In his extraordinary study, *Torture and Democracy*, Darius Rejali has called this *stealth torture*.[52] Rejali's thesis is that there is an affinity between public monitoring and stealth torture in a context of increasing democratic supervision. Moreover, if one considers the public spectacle of much of the violence in Kenya and Cyprus against the techniques behind closed doors in Aden and Northern Ireland, it is apparent that there had been a change in national practices. He describes this generically as a change from "scarring" to "clean" methods.[53] The methods have a pre-democratic use in slavery and military and naval discipline. In both contexts human chattel or fighting personnel could not be damaged. Due to Britain's substantial involvement in both of those areas, Rajali describes certain methods like stress positions, hooding and shouting as having a certain Anglo-Saxon heritage.

A history of these methods suggest that they have by and large remained a craft, developed very little, if at all, through top-down training, but through *backroom apprenticeship* that itself leaves little trace. Along the way there has been an element of formalisation. Mid-century interest in sensory deprivation has given the practices a (pseudo) scientific dimension.[54] Some of the "science" found its way into the CIA manuals that were drafted to assist friendly Latin American states in the 1980s. It resurfaced again in the freelance advisers to the CIA in Afghanistan and Guantanamo Bay.[55] There is also clearly a cross-over from the survival after capture training and the turning of such simulated cruelty on to real prisoners.[56] It is not difficult to imagine informal conversations between country experts. Especially among allies, it is apparent that national practices mimic and inherit from one another over time.

Through this analysis we can chart the development of a number of techniques that have become well known in the modern democratic world. Sleep deprivation, sight deprivation, stress positioning, rationing, noise, shouting, forced exercising, temperature variation, body blows to flesh, and humiliation. We find them in the London Cage, in Ballykelly, West Jerusalem, Guantanamo Bay and Basra.

While the methodology conceals the pain, the language chosen to describe it conceals its moral consequences from the perpetrators and those who authorise it. The regime adopted in Kenya in 1957 was called "dilution". The methods used in Northern Ireland in 1971 were termed "interrogation in depth". From the 1980s onwards the Israelis authorised techniques described to inquiries and courts as "moderate

[49] In one report to the Cabinet he wrote, "I take leave to doubt that the remarkable results achieved were more than marginally affected by the prolonged use of the three controversial techniques and I think that the interrogators produced their results mainly because of their skilful conduct of the interrogation itself"."Prisoner Handling in Interrogation Centres in Northern Ireland: Report by the Intelligence Coordinator", December 2, 1971, attached Annex, dated November 26, 1971 (National Archives WO 32/21776) .

[50] In tense correspondence with the Permanent Secretary to the MOD, Sir James Dunnett, White put it in more stringent terms, "… I therefore believe…it to be in our best interests to clarify our rules of procedure in such a way as to remove all possibilities of charges being made in the future that we are engaged in 'brain washing' and 'mind bending'. These are undoubtedly real techniques which the Russians and Chinese use to produce mostly phony confessions to be used in phony trials. *Our* interest is not in confessions *but in the extraction of true information* upon which the Security Forces can make their arrests and searches (emphasis added)", December 2, 1971 (National Archives CAB 0912/898).

[51] BMIR Vol.II, paras 4.43–4.54. For detailed quotations from the Cabinet and other papers, see Victims' Written Opening submissions in the Baha Mousa Inquiry, at [77]–[91].

[52] Darius Rejali, *Torture and Democracy* (Princeton, 2007).

[53] Rejali, *Torture and Democracy*, p.4 and see, more generally, pp.1–63.

[54] For this see Alfred W. McCoy, *A Question of Torture* (Holt, 2006) and Cobain, *Cruel Britannia*, Ch.4.

[55] Jane Mayer, *The Dark Side. The Inside Story of How the War on Terror Turned into a War on American Ideals* (Anchor, 2009) and Ali H. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (Allen Lane, 2011).

[56] For the analysis of this in recent US practices, see Mayer, *The Dark Side*. For the same with regard to British practices, see BMIR Vol.II, Pt VI, pp.599–610.

physical pressure".[57] In 2002, Donald Rumsfeld signed an authority to conduct "counter-resistance techniques" in Guantanamo Bay.[58] In 2003, the word that the British Army used to describe its combination of hooding, stress positions, "harsh" shouting and forced walking, was "conditioning".[59] To use Orwell's famous indictment the language used facilitates "the defence of the indefensible", deploying "euphemism, question-begging and sheer cloudy vagueness". This is done to "name things without calling up mental pictures of them".[60]

Lawyers

Of great challenge to the profession, is the fact that lawyers are often involved, and increasingly so, in providing legal cover for such techniques.[61] Their principal role is to suggest scales along which the coercion can go before it becomes unlawful. Waldron at this juncture raises an argument that at first blush appears professionally counter-intuitive.[62] His point is that legal advice as to how far to press up close to a relevant norm is sometimes neither legitimately sought nor given:

> "An example of someone who has such a legitimate interest might be a taxpayer who says, 'I have an interest in arranging my affairs to lower my tax liability as much as possible, so I need to know exactly how much I can deduct for entertainment expenses.' Another example is the driver who says, 'I have an interest in knowing how fast I can go without breaking the speed limit.' For those cases, there does seem to be a legitimate interest in having clear definitions. Compare them, however, to some other cases: the husband who says, 'I have an interest in pushing my wife around a bit and I need to know exactly how far I can go before it counts as domestic violence'; or the professor who says, 'I have an interest in flirting with my students and I need to know exactly how far I can go without falling foul of the sexual harassment rules.' *There are some scales one really should not be on*, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go."

There are legal reasons to follow this line of moral philosophy. First, a system that runs a real risk of giving rise to unlawful conduct is itself arguably unlawful.[63] Those who do advise in good faith upon coercive psychological and physical treatment short of what they believe to be unlawful, ignore that the operational reality of this area has, not one, but three slippery slopes. It increasingly takes in more suspects than those approved, leads to harsher methods than those authorised, and leads to greater fragmentation within the chain of command.[64] Abu Ghraib, amongst every thing else, is a classic example of such "force drift".[65] So too is the kicking to death of Baha Mousa, while he was ostensibly subject to conditioning techniques under the supervision of subject matter experts.[66]

Secondly, the effort to calibrate coercive standards downwards in order to escape human rights prohibition is in conflict with evolving jurisprudential standards.[67] Techniques that were described by the European

[57] *Public Committee Against Torture in Israel v Israel*, September 16, 1999, (1999) 7 B.H.R.C. 31 and Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (the "Landau Commission") [1989] 23 *Israel Law Review* 141.

[58] Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), pp.227–228.

[59] BMIR Vol.II, Pt VI, pp.544–598.

[60] George Orwell, "The Politics of the English Language" (first published in 1946), in *George Orwell: Essays* (Penguin, 2000), p.356.

[61] See Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005, see fn.2) and Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

[62] Waldron, see fn.61, p.1701.

[63] *R. (C (A minor)) v Secretary of State for Justice* [2009] Q.B. 657, CA.

[64] Rejali, *Torture and Democracy*, p.24.

[65] Sands, *Torture Team*, p.161. The phrase is attributable to Mike Gelles, a senior psychologist of the US Naval Criminal Investigative Service, who visited Guantanamo Bay during 2002 and 2003, and witnessed first-hand some of the authorised techniques that were being used there.

[66] BMIR Vol.1, Pt 2, pp.47–494. See also A.T. Williams, *A Very British Killing: The Death of Baha Mousa* (Vintage, 2012).

[67] *Selmouni v France* (2000) 29 E.H.R.R. 403 at [95]-[96] and [101]. See also the concurring opinion of Sir Nicholas Bratza in *Jalloh v Germany* (2007) 44 E.H.R.R. 3 that "the borderline between the various forms of ill-treatment is neither immutable nor capable of precise definition".

Court of Human Rights in *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25 as illegal but short of torture would now undoubtedly be described as torture.[68] Increasingly, the prohibition on cruel, inhuman and degrading treatment is characterised as bearing customary law and non-derogable status.[69] Waldron has written of these words that they provide a *cordon sanitaire*—a fence around the wall of the prisoner—not just to keep the spies, soldiers and police from subjecting him to torture—but to keep them from even approaching it. More work is needed to give these words meaning that is practical and effective.[70]

However, the focus on the prohibition on torture and inhuman and degrading treatment alone, fails to recognise the positive duty to treat prisoners *humanely*, meaning with respect for the dignity of the person. This is where a further fence is called for. The requirement that those detained be treated with respect for human dignity responds to the special vulnerability of prisoners. The point is well documented in the Strasbourg case law,[71] but it has an expansive moral heritage: "A prisoner is a 'collective responsibility'". When he is confined to prison: "We are free to do something about him; he is not."[72] That is why the ICCPR contains both a prohibition on torture and cruel inhuman or degrading treatment under art.7, *but also* a positive duty to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the person" under art.10. Likewise, Common art.3 of the Geneva Conventions does not use "inhuman". Instead it says that "persons taking no active part in hostilities … shall in all circumstances be treated humanely …". Other parts of the Geneva Conventions and the Additional Protocols refer to the same positive duty, extending to prisoners of war and civilians in equal measure.

The positive duty is not simply the obverse of the prohibition on "inhuman treatment" that is contained in the Human Rights Conventions and otherwise described as a war crime in the Geneva Conventions and the Rome Statute. "Inhuman" does not have the same dictionary definition as "inhumane". According to the Oxford English Dictionary "inhumane" in its modern use is "a word of milder meaning than inhuman", defined as "destitute of compassion for misery of suffering in men or animals".[73] The duty in art.10 of the ICCPR, which would now be read into art.8 of the ECHR,[74] therefore provides a broader *condon sanitaire* around the prisoner when it comes to extracting information from them. This overriding principle of humanity (echoed in the Geneva Convention), is actually the dominant and non-derogable norm[75] with regard to interrogating the *hors de combat* prisoner (whoever he is and whatever he is suspected to know).[76]

Complicity

It is an increasing feature of modern life that the agents in democratic states are not necessarily the ones that carry out the torture. They do not participate in it, but they are complicit in it.

Complicity is a complicated term that has not exactly settled in English common law discussion. A recent decision striking out an attempt to bring British personnel visiting and otherwise providing questions to a British citizen who was arbitrarily detained in Pakistani custody described "complicity" as "being a party to" the actions complained of. This matches the dictionary definition. The current edition of the

[68] *A (No.2) v Secretary of State for the Home Department* at [53] (per Lord Bingham), [97] (per Lord Hoffmann) and [126] (per Lord Hope).

[69] UN CAT General Comment (No.2), January 24, 2008, CAT/C/GC/2, §3; and *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* [2010] I.C.J. 639, 671 at [87].

[70] J. Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves" in *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010), pp.277–278.

[71] *Keenan v United Kingdom* (2010) 33 E.H.R.R. 38 at [116]; *Salman v Turkey* (2002) 34 E.H.R.R. 17.

[72] Chief Justice Burger, cited with approval by Justice Blackmun in *Farmer v Brennan* 511 US 825 at 854 (1994) and adopted by Elias C.J. in *Taunoa v Attorney General* [2008] 1 NZLR 429 at [78].

[73] See Waldron, *Torture and Positive Law*, pp.303–304 and *Taunoa v Attorney General* at [79].

[74] *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 at [65] recognises that protection under art.8 includes as a matter of general principle that "the very essence of the Convention is the respect for human dignity".

[75] UNHRC General Comment (No.29), August 31, 2001, CCPR/C/21/Rev.1/Add.11, s.13(a); and Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol.1, Rule 87 "Civilians and persons hors de combat must be treated humanely", pp.306–308 (ICRC).

[76] For a case that has raised this issue unsuccessfully to date, but is now pending before the English Court of Appeal, see *Haider Ali Hussein v Secretary of State for Defence* [2013] EWHC 95 (Admin).

Oxford Dictionary defines complicity as the state of "being an accomplice; partnership in an evil action".[77] However, the French variant of the word, *complicité*, conjures up more of an idea of how parties who intimately understand each other can be more easily involved in each other's designs without formally agreeing to be so. To mix the metaphors, French *complicité* more readily conjures up Nelsonian blindness.

Consent, acquiescence, concealment

Further development of the concept is necessary. The United Nations Convention Against Torture and Cruel, Inhuman or Degrading Treatment (UNCAT) includes a range of ways of describing unlawful involvement in torture that overlap with the common law principles of joint and secondary liability, albeit using somewhat different language.[78] The definition of torture in art.1 refers to "acts inflicted by or at the instigation of or with the consent, *or acquiescence* of a public official or another person acting in an official capacity". Article 4 of the Convention requires criminal law to extend to "an act by any person that constitutes *complicity* or participation in torture".

Commentary and case law on UNCAT suggests the following. First, although "complicity" is not defined in art.4, a number of the most eminent commentators on UNCAT have said that any such instigation, consent or acquiescence, contemplated by art.1 should be considered to be included in the term "complicity or participation" used in art.4.[79] Secondly, the preparatory work in the development of UNCAT provides strong support for the conclusion that "complicity or participation" includes acts relating to cover up or concealment of incidents of torture. This was the conclusion of the Working Group that drafted art.4. A discussion arose as to whether the English phrase "complicity or participation" embraced the concept of *encubrimento* (roughly: "concealment") under Spanish law. It was agreed that it did.[80] Thirdly, the Committee Against Torture has confirmed that complicity will arise with senior officials if they knew or should have known that torture was being practised by persons under their command. The 2003 Conclusions and Recommendations by CAT on Azerbaijan held that the state did not comply with art.1 because it failed to "provide for criminal liability of officials who have given tacit consent to torture".[81]

There are other parts of UNCAT that prohibit acquiesce in the risk of torture without being directly involved in or desiring of it. That is the well-established prohibitions on removing a person to a country where there is a substantial risk that they will be exposed to torture (art.3),[82] or admitting evidence in legal proceedings which has been established to be derived from it (art.15).[83] Both of those prohibitions, in their own way constitute another form of *cordon sanitaire* around the potential victim. They require states to forestall torture rather than to tolerate its risk.

After September

These considerations could not be more pressing than in democratic legal cultures after September 11, 2001. People have been detained and/or transferred around the world without recourse to legal process, in circumstances where Third Party State agents seek to benefit from that situation by providing questions at arm's length or actually attending sites of unlawful detention to interrogate in their own right. The "guest" agents do not necessarily participate in the torture, but when they send the questions or personally ask them they know, or ought to know, that the host country tortures on a systemic and widespread basis.

[77] *Amin v Director General of the Security Service (MI5)* [2013] EWHC 1579 at [37].

[78] For the latest summary of the common law case law, see *Fish & Fish Ltd v Sea Shepherd Conservation Society* [2013] EWCA Civ 544.

[79] H. Danelius and H. Burgers, *UNCAT—A Handbook* (Martinus Nijhoff, 1988), 130; M. Nowak and A. McArthur, *The United Nations Convention Against Torture—A Commentary* (Oxford University Press, 2008); and C. Ingelse, *UNCAT—An Assessment* (Kluwer Law International, 2008), 237.

[80] Danelius and Burgers, *UNCAT—A Handbook*, p.57.

[81] CAT/C/CR/30/1, May 14, 2003, para.5(b).

[82] *Saadi v Italy* (2009) 49 E.H.R.R. 30 and *AS (Libya) v Secretary of State for the Home Department* [2008] H.R.L.R. 705, CA.

[83] *Othman (Abu Qatada) v United Kingdom* (2012) 55 E.H.R.R. 1, *El Haski v Belgium* (2013) 56 E.H.R.R. 31 and *Secretary of State for the Home Department v Othman (Abu Qatada)* [2013] EWCA Civ 277.

That this was done by MI6 and MI5 in Libya is now well documented.[84] The allegations of the same in Pakistan, especially after the July 7, 2005 bombings in London, are also well documented,[85] although the details of what actually occurred are subject to court orders.[86]

Sometimes, and notably not always, these collaborations are accompanied by some form of assurance that human rights will be respected. These one-line undertakings that arise in the correspondence between intelligence agencies do not involve the sort of package that would comply with judicial scrutiny if the suspects were being extradited or deported from the United Kingdom.[87] Although the European Court of Human Rights regards assurances as evidence to be considered as part of its overall risk assessment, it has applied exacting standards to them.[88] Whether the assurances are given or not, the context in which the collaboration takes place is one of diplomacy and intelligence sharing, which operate on the basis of flexibility and secrecy.[89] Whether to enforce such assurances, or even to ask whether they have been complied with, is (to echo Blackstone) generally regarded as a question of state, not law.

When interrogating detained persons either via questionnaires or in person, executive agencies have to date relied on various largely untested legal narratives: They say they are not legally responsible for the detention. They rely on a long-standing principle that it is not the role of the courts to mandate the conduct of foreign relations. They make it plain, notwithstanding some relatively isolated proven examples, that British agents have not participated in the torture.

The practice of interrogating arbitrarily detained individuals in foreign places of detention, especially when they are also acutely at risk of ill-treatment, has thus far escaped definitive legal judgment. Certain well-known cases have been settled without admissions of liability.[90] Two criminal cases have sidestepped the issue in that they drew a distinction between the motives to interrogate in the interests of public safety, as opposed to furthering a criminal investigation, and then decided not to stay subsequent prosecutions as an abuse of process. In both cases it was established that there was no nexus between any product of the foreign detention and the evidence upon which the indictments were based.[91] That is different to saying that the practice of the British agents in asking the questions of the unlawfully detained person either in person or by correspondence was lawful.

What screams out in these cases is that the British authorities have become involved in a common design to interrogate a person who is arbitrarily detained. They are, at the very least, doing something to encourage the continuation of that state of affairs. To that extent they are jointly responsible for the false imprisonment. Prolonged incommunicado detention of itself has been deemed to violate the prohibition

[84] Human Rights Watch, *Delivered Into Enemy Hands. US-Led Abuse and Rendition of Opponents to Gaddafi's Libya*, September 2012 (the report refers also to UK involvement and reprints some of the British intelligence documents discovered in Tripoli after the 2011 revolution in Libya).

[85] Human Rights Watch, *Cruel Britannia. British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan*, November 3, 2009.

[86] *Re A* [2006] 1 W.L.R. 1361, *R. v Rangzeib Ahmed* [2011] EWCA Crim 18 and the redacted judgment in *Amin v Director General of the Security Service (MI5)*.

[87] See the decision of the Special Immigration Appeals Commission in *AS and DD v Secretary of State for the Home Department*, April 27, 2007 (SC/42 and 50/2005). It provides an example of the judicial scrutiny and ultimate rejection of the effort to deport Libyan dissidents back to their country of origin at almost the very time that the CIA and MI6 were cooperating with the Libyans to interrogate victims of extraordinary rendition who had been kidnapped and sent back to Libya. SIAC's decision was upheld on appeal (*AS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289).

[88] *Othman (Abu Qatada) v United Kingdom* at [189] and the line of authorities exemplified by *Ismoilov v Russia* (2009) 49 E.H.R.R. 42 holding that pithy written promises between agents of one country to another to ensure the protection of the prisoner's rights is not good enough.

[89] Diplomacy is also something that UK courts have been profoundly shy to interfere with, even if diplomatic relations are relied on to prevent the prosecution of a crime committed by a private state actor (*R. (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] 1 A.C. 756), or in failing to intervene in a matter that the United Kingdom is partially responsible for (*Rahmatullah v Secretary of State for Defence (JUSTICE intervening)* [2013] 1 A.C. 614, SC).

[90] Most notably in Britain, the case of *Al Rawi v The Security Service* [2012] 1 A.C. 531, although it is to be noted that the case settled before the Government lost its legal battle to get the House of Lords to endorse CLOSED evidence procedures under the common law, and not after it.

[91] *R. v Khyam* [2008] EWCA Crim 1612 and *R. v Rangzeib Ahmed* [2011] EWCA Crim 18.

on torture or other ill-treatment[92] and to be contrary to international law.[93] The British agents are not the primary tortfeasor because the decision of another state will determine release. However, rather than taking appropriate action to end a matter that is unlawful under international law, these agents have joined in with it. It is one thing for a court to refrain from dictating the extent to which one state must protest to another.[94] It is quite something else for the courts to stand by in the face of a collaboration to maximise the information secured from the unlawfully detained (and often forced disappeared) subject. As to whether the use of torture by the detaining state is foreseen by the British agents and the implication of that foresight, a common theme appears to be that the Security Services do not ask and the detaining party does not tell. In the face of overwhelming evidence that certain countries practise torture on a systemic basis, such silence is the evidence of the knowledge. The Grand Chamber of the European Court of Human Rights has recently condemned many of these acts of omission that Macedonia was guilty of in terms of its complicity in an American rendition of the complainant from its territory.[95]

What happens to the information once procured? Its inadmissibility in criminal proceedings has been relatively straightforward at least since the abolition of the Star Chamber in 1641. Yet the situation remains undoubtedly more complicated as far as administrative law is concerned. In Britain, intelligence derived from so-called detainee reporting has been relied upon by Ministers to make executive orders that curtail liberty, including internment,[96] deportation[97] and control orders.[98] *A (No.2)*[99] ruled that before evidence relied upon by a Minister can be admitted in an English court in order to justify an administrative decision, the question of whether it was obtained by torture must be the subject of an investigation. As a result of that ruling, whenever the reporting derives from suspect states, Ministers have for "practical reasons" no longer elected to rely on such material at the courtroom stage.[100] The *vires* status of the original Ministerial decision to make the order based on the suspect evidence has to date been largely left unanalysed. The House of Lords said that a Minister could look at what he liked,[101] and that the executive could take various actions based on it, such as ordering arrests and searches, albeit in the knowledge that it would be unable to justify its action before a court in any future challenge.[102] But that is different to concluding that a Minister may make any order as a result of material that s/he believes was obtained by torture, in any circumstances, including when the British have been involved indirectly in obtaining the evidence. There are now a range of administrative orders that fundamentally interfere with liberty on a prolonged basis. The responsibility for those orders lie exclusively with the executive. Courts might be called upon to

[92] *Megreisi v Libyan Arab Jamahiriya* (1994) UN Doc. CCCPR/C/50/440/1990 (held incommunicado for three years and then for an additional two years—breach of art.7 of the ICCPR—"torture"); *Aber v Algeria* (2007) UN Doc. CCPR/C/90/D/1439/2005 (held incommunicado for 21 months and then five months—breach of art.7—HRC "recognises the suffering of being held in incommunicado detention") and *Poloy Campos v Peru* (1994) UN Doc. CCPR/C/61/D/577/1994 (eight months incommunicado held to breach art.7—inhuman treatment). See also *El-Masri v The Former Yugoslav Republic of Macedonia* (App. No.396330/09), Grand Chamber judgment of December 13, 2012, at [202] (the combination of secret incommunicado detention in a hotel for 23 days combined with interrogation and an indication at one point that the applicant would be shot if he tried to leave, amounted to inhuman and degrading treatment contrary to art.3 of the ECHR).

[93] *Tehran Hostages Case* [1980] ICJ Rep. 3 at [90]-[91]. The issue was considered without being decided upon by the Court of Appeal in *XX v Secretary of State for the Home Department* [2013] Q.B. 656.

[94] *R. (Abassi) v Secretary of State for the FCO* [2003] U.K.H.R.R. 76 [106iii].

[95] *El-Masri v The Former Yugoslav Republic of Macedonia*.

[96] History now confirms that the very *in absentia* convictions in Jordan that prevented Abu Qatada from being lawfully deported for so long, were relied upon by the Secretary of State as an original justification to intern him under the Anti-Terrorism Crime and Security Act 2001 (*A v Secretary of State for the Home Department*, Generic Determination, October 29, 2003, para.153; *Othman v Secretary of State for the Home Department*, SC/15/2002, March 8, 2004, para.2).

[97] *AS and DD v Secretary of State for the Home Department*, April 27, 2007 (SC/42 and 50/2005), at [20] (in the Libyan deportation cases, it was conceded that Secretary of State had originally relied on statements taken from two men who had been the subject of a rendition from Asia to Libya).

[98] *Secretary of State for the Home Department v CC and CF* [2013] 1 W.L.R. 2171.

[99] See [2006] 2 A.C. 221, fn.2 above.

[100] This principle was recognised for the first time in the Abu Qatada case: *Othman v Secretary of State for the Home Department*, SC/15/2005 at [74]-[75] and [207].

[101] Lord Hoffmann at [93].

[102] See also [47]-[48] (per Lord Bingham), [69] (per Lord Nicholls) and [119] (per Lord Hope).

supervise the orders, but they do not make them. Control orders, TPIMs[103] and Asset Freezing[104] cannot therefore be regarded as lawful until such time as they are challenged in court. The executive must insure that they are lawful from the outset or face the legal consequences.

Once in court it remains acutely possible that the intelligence dossiers presented, invariably under statutory closed evidence proceedings in the absence of the Claimants, screen out the origins of intelligence having anything to do with detainee reporting. Proving such laundering is a tall order. Even when the dossiers refer to free-standing real evidence, albeit discovered as a result of original detainee reporting, the position mandated under art.6 of the ECHR, unlike the common law, is that when it comes to torture, there can be no fruit from the poison tree.[105]

The right to the truth

At present, the truth is often concealed, either because no one is in a position to ask, or by virtue of judges sanctioning secrecy. Why they do this in an individual case is obviously beyond public scrutiny, but other than to save lives, a standard basis for doing so is the so-called "control principle". This refers to spies from different states having agreed to share information on the basis that it will remain in confidence and it is a presumption of international relations affecting the way in which courts construe public interest that this system of sharing would collapse if judges overly interfere with it.[106] The counter-point is that courts are co-opted into the concealment of torture by the very making of the order. The analogy is with the lawyer who claims legal professional privilege for what ultimately amounts to the concealment of a crime. The common law has never tolerated this.[107]. Ultimately, the preference for secrecy over accountability runs the risk of taking us back to the Malayan jungle or the Kenyan valleys.

Both victims and wider society only develop through the truth. Hence the emerging customary law language concerning "the right to the truth", that began in the South American human rights cases designed to achieve just satisfaction,[108] and which have now been adopted by Strasbourg,[109] and beyond. There is now a rich landscape of legal culture around the world that embraces the principle that human rights protection requires effective, independent and public ventilation, with special status given to the victims in order to pursue that truth as part of their own healing and on behalf of wider civil society.[110] Recent practices in the United Kingdom, albeit with some exception with regard to inquiring into abuse in Iraq, run damagingly in the wrong direction. Protocols adopted by the now suspended inquiry into the Security Services treatment of foreign detainees consigned its work to a largely private and non-participatory process. An unprecedented community of NGOs and victims refused to cooperate. Meanwhile Parliament passed the Justice and Security Act 2013, which anticipates the capacity of state agents who are sued for complicity in rendition, torture and arbitrary detention being able to defend allegations against them in

[103] The case law on control orders is that they must be justifiable both at the time they are made and at the subsequent review stage before the courts. Otherwise they would be construed as unlawful *ab initio* (*AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 at [29]). A deficiency in the original making of the order also cannot be remedied at a later stage (*BM v Secretary of State for the Home Department* [2011] EWCA Civ 366 and *AW and AT* [2009] EWHC 512 (Admin)).

[104] In *R. (Youssef) v Foreign Secretary* [2013] 2 W.L.R. 904 at [89], Toulson L.J. held *per incuriam* that the argument that it was acceptable for the Minister to have relied on evidence which he had reason to suppose was obtained by torture in agreeing to an indefinite freeze of the Claimant's assets was "inherently repugnant". This view was not departed from by the Court of Appeal ([2013] EWCA Civ. 1303).

[105] *Gäfgen v Germany* (2010) 52 E.H.R.R. 1 at [70], [74], [147] and [179]-[180].

[106] See the analysis of the issue in *R. (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* in the Court of Appeal ([2011] Q.B. 218) and in the Administrative Court ([2009] 1 W.L.R. 2653).

[107] *R. v Cox and Railton* (1884) 14 Q.B. 153

[108] *Bámaca Velásquez v Guatemala*, February 22, 2002, IACtHR, (Ser.C) No.91 (2002) at [75] and [77].

[109] *El-Masri v The Former Yugoslav Republic of Macedonia* at [175] and [191]-[192].

[110] Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol); UN General Assembly Res. 60/147 of December 16, 2005, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/Res/60/147; United Nations Committee Against Torture, *General Comment No.3 (2012)*, December 13, 2012, CAT/C/GC/3; Ben Emmerson QC, Special Rapporteur on human rights and counter-terrorism, *Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*, April 17, 2013, A/HRC/22/52 §§23–26.

secret from the Claimants. The Act points to an entirely different concept of justice and security from that which the concept of "the right to the truth" has been forged under international law in order to serve.[111]

Conclusion (re-affirmation)

Looking at what has happened after September 11, 2001 there can be little doubt that there is an arm's length methodology towards foreign-held detainees that includes an instrumental involvement in the continuation of their human rights abuse, which in Britain, at least, may only begin to end when judges call a stop to it. For our military, sent to fight in Iraq and Afghanistan for longer now than the two world wars put together, soldiers (often young, poorly trained, and in want of real command) have committed sometimes atrocious abuse. To date, on all fronts, pretty much everyone has got away with it.

Though modern British torture practices, especially those of the Security Services, do not amount to the mass cruelty of the British in Kenya or the French in Algeria, they are in Pierre Vidal-Naquet's terms, no less cancerous for democracy.[112] The opening passage of his classic study of the war against terror in Algeria could not be more poignant for those who care about everything that modern democratic life has to offer:

> "Can a great nation, liberal by tradition, allow its institutions, its army, and its system of justice to degenerate over the span of a few years as a result of the use of torture, and by concealment and deception of such a vital issue call the whole western concept of human dignity and the rights of the individual into question? That is the question that I wish to discuss in this book."

In a small way that is what I have tried to do here, but the history of the present is still being written and much of the factual and legal truth is presently being kept beyond reach. What we know is that humanity is at all times and in all places (not just the Gestapo and Al Qaeda) fallible, liable to slip into cruelty; and that democracy and the rule of law can easily give way to individual fear and state insecurity. As individuals and as states we then face the threat of being undone; all the more so, if we remain in denial.

Though the circumstances are not the same, the example provided by Edward Fitzgerald to a later generation of English and commonwealth lawyers grappling with the challenges of modernity, brings to mind the observation of J. Glenn Gray in his Second World War memoir.[113] Gray was an American student in philosophy who in the same mail that brought him news of his doctorate received his draft papers to go to Europe. He later wrote of his experience:

> "The enemy was cruel, it was clear, yet this did not trouble me as deeply as did our own cruelty. Indeed their brutality made fighting the Germans much easier, whereas ours weakened the will and confused the intellect. Though the scales were not at all equal in this contest, I felt responsibility for ours much more than theirs."

Gray was a close friend of Hannah Arendt.[114] They spent time together at Wesleyan University in the period that overlapped with Arendt's publication of *Eichmann in Jerusalem*.[115] For that book she would be particularly castigated from some parts of the Jewish community both in and outside Israel.[116] In defending herself publicly, Arendt emphasised in similar terms to Gray that "[the] wrong done by my

[111] See Emmerson, fn.108 above and *Concluding Observations of the United Nations Committee Against Torture on the fifth periodic report of the United Kingdom*, adopted by the Committee on May 31, 2013.
[112] Pierre Vidal-Naquet, *Cancer of Democracy: France and Algeria 1954–62* (Penguin, 1963), p.15.
[113] J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (1967), (reissued Bison Boooks, 1998), p.6.
[114] Arendt wrote the Foreword to the 1970 re-publication of *The Warriors*.
[115] See Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World*, 2nd edn (Yale, 2004), p.336 discussing Arendt's, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, reissued 1994).
[116] Young-Bruehl, *Hannah Arendt*, pp.328–378.

own people naturally grieves me more than the wrong done by other people".[117] Though she brilliantly condemned the *banality* of Eichmann's *evil*, she strongly queried the adverse cultural and legal consequences for Israel arising out of how Eichmann came to be tried and executed on Israeli soil. The legacy of those consequences remains today with Israeli jurisprudence bogged down in a managerial role in the Occupied Territories.[118] The recognition of a necessity defence to torture,[119] and a failure hitherto to develop effective independent mechanisms to investigate torture complaints[120] are experienced as part of the cruelty of what Aharon Barak in all good faith described as "defensive democracy".[121] Arendt stands with a generation of Jewish European thinkers, many of whom were lawyers, most of whom were refugees, who were enormously important in developing international law after 1945.[122] Their endeavours cast a light on the present contortions of Israel's conduct,[123] particularly because they cared for the wellbeing of that country so much. To say these things is not necessarily to be biased against Israel. In fact it is just as equally possible to say them because you are partial in her favour. One can trace this form of bi-polarity between cruelty and humanity through other cultures, but the post-Holocaust Jewish drama provides a diagnostic tool for us all.

No culture or community, large or small, can wait on any other to reciprocate. We must stand up in our mosques, our synagogues, our Parliaments and courts and remind ourselves of what is really worth fighting for.

Here we have taken the United Kingdom as a case study. In the wake of September 11, major British jurists deeply concerned about the wellbeing of this country and its allies reached back to the seminal moment in legal history, when the world took upon itself through the UN Charter "to reaffirm faith in fundamental rights [and] in the dignity and worth of the human person".[124] To ask why from 1945 did this extraordinary event in the history of civilisation take place, is a classic example of a question that invites criticisms of the underlying premise of its asking. From the Hague conferences beginning in 1899 to the Geneva meetings of 1925 and 1929, to the judgments of the Nuremburg and Tokyo Tribunals explaining why the defendants had offended against custom, it was taking place already. We have seen that it was far longer in gestation thereafter. Much of what has been written above recalls that for all their piety, these norms have become best known for their transgression, often in contexts that underscore the difference between the powerful and the powerless.

And yet the shift from 1945 remains unmistakable and one thing it speaks to, for the secular and the religious alike, was the painful need to "reaffirm faith" in human society (for some God's creation) in the face of the death camps. The inescapable burden to ask such questions began in the darkest of places. Consider the stance of Jürgen Habermas, whose efforts to champion a project of enlightenment and reason

[117] Young-Bruehl, *Hannah Arendt*, p.344.

[118] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2003) and Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18 *European Journal of International Law* 1.

[119] *Public Committee Against Torture in Israel v Israel* at [33]-[38]. This aspect of the case is often overlooked, but for Palestinians has probably been much more significant than the other part of the ruling that held that the GSS technique could not be the subject of prior authority. See Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (Oxford University Press, 2008).

[120] For an attempt to shift this position under Israeli law, see Amichai Cohen and Yuval Shany, "Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts" [2011] 14 *Yearbook of International Humanitarian Law* 37 and Part II of the The Public Commission to Examine the Maritime Incident of May 31, 2010 (Chaired by Justice Turkel).

[121] A. Barak, "A Judge on Judging: The Role of the Supreme Court in a Democracy" [2002] 116(16) *Harvard Law Review* 37. The phrase "defensive democracy" was used by Justice Sussman in *Yardov v Chairman of Central Elections Committee for Sixth Knessett*, 19(3) P.D. 390 (Isr.).

[122] See more generally Philippe Sands, "The Memory of Justice: The Unexpected Place of Lviv in International Law—A Personal History" (2011) 43 *Case Western Reserve Journal of International Law* 739.

[123] A poignant example of this is the legal advice written by Theodore Meron in September 1967 when he was Counsel to the Israeli Foreign Ministry, explaining why civilian settlement in the newly occupied territories would constitute a violation of art.49(6) of the Fourth Geneva Convention, the terms of which he described as "categorical and…not conditioned on the motives and purposes of the transfer…" (Gershom Gorenberg, *The Accidental Empire, Israel and the Birth of the Settlements, 1967–1977* (Holt, 2006), pp.97–102).

[124] In Britain, we were particularly indebted to the extra-judicial writing of Lord Steyn "Human Rights: The Legacy of Mrs Roosevelt" [2002] *Public Law* 473, Lord Steyn, "Guantanamo Bay: The Legal Black Hole", Twenty-Seventh F.A. Mann Lecture: November 25, 2003. Lord Bingham "Personal Freedom and the Dilemma of Democracies" [2003] 52 I.C.L.Q. 841 and Lord Hope "Torture" [2004] 53 I.C.L.Q. 807.

after the Holocaust and the Gulag are critical to the post-war commitment to what he has called "the normative taming of political power through law".[125]

> "As the shock of those images and reports reached me, I was sixteen years old. I knew that, despite everything, we would live on in the anxiety of regression, that we would have to carry on in that anxiety. Since then I cast about, sometimes here, sometimes there, for traces of reason that unites without effacing separation, that binds without unnaming difference, that points out the common and the shared among strangers, depriving the other of otherness."[126]

Then compare his position to Ellie Wiesel, who was also a teenager, but who witnessed these matters in real time in Auschwitz. According to the preface of his play the *Trial of God*, "Inside the kingdom of night, I witnessed a strange trial. Three rabbis—all erudite and pious men—decided one winter evening to indict God for allowing his children to be massacred. I remember: I was there, and I felt like crying. But nobody cried."[127] These Talmudic scholars found God guilty. They then promptly recited *Maariv*, the evening prayers.

Just as the theodicy question asks how (if at all) can we understand God to be just and good in light of the innocent suffering pervasive in the world, its secular equivalent is how (if at all) can we believe in the benefits of enlightenment and modernity if the same such suffering results? Are these not different variants of something often incapable of seeing itself as the same question? It is a question that was once asked in exclusively sacred terms, but as part of modernity has taken on a wider lexicon: *How can we go on together?* Whether you are secular or religious (and whatever religion you are) an answer to this question lies in the evolution of Humanity's Law after 1945. That law is one of the great revelations of modernity, although its sovereignty would seem to begin with the creation of the world.

Torture's use, as much as its prohibition, exemplifies what it means to be modern. Yet the imperative to *reaffirm faith* in Humanity's Law is also an inescapable feature of the times that we live in. The challenge is to evolve the reach of this law into places that have been put beyond it. Win or lose, I know what Edward Fitzgerald would say. *"We fight on"*.

[125] Jürgen Habermas, *The Divided West* (Polity Press, 2006), p.116.
[126] Jürgen Habermas, "What Theories Can Accomplish", in *The Past as the Future* (Polity Press, 1994), p.119.
[127] Ellie Wiesel, *The Trial of God: (as it was held on February 25, 1649, in Shamgorod)*, (Schocken, 1995)