CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0)20 7957 5700 E: contact@chathamhouse.org.uk
F: +44 (0)20 7957 5710 www.chathamhouse.org.uk
Charity Registration Number: 208223

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Extraordinary Rendition

A summary of the Chatham House International Law Discussion Group meeting held on 27 March 2008.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.

Speakers:

- Andrew Tyrie MP, Chairman of the All Party Parliamentary Group on Extraordinary Rendition
- Richard Gardiner, University College, London

The discussion following the speeches was held under the Chatham House Rule. The event was sponsored by Clifford Chance.

Background

Rendition is the transfer of an individual outside the jurisdiction. It is a generic term used to describe transfers for various purposes, such as to face justice in another State. The meeting focused on extraordinary rendition i.e. the transfer of an individual to face detention and interrogation outside the jurisdiction where there is often a real risk that the individual will be the victim of torture or cruel or inhuman treatment. Extraordinary rendition, an issue of enduring relevance, was brought back to the fore in February 2008 when the Foreign Secretary acknowledged that Diego Garcia had been used on two occasions for US rendition flights.

Extraordinary rendition engages international law in three principal ways. First, it involves a breach of international law by the transferor State, for example the obligation under Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT) not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Secondly, because extraordinary rendition involves a transfer outside the transferor's jurisdiction, third States may become complicit and, in turn, also in breach of their obligations under international law, either in assisting rendition flights

or in being responsible for the ill-treatment of the transferees. Finally, international law may be used to prevent or curtail extraordinary rendition. For example, international aviation law, which regulates the passage of foreign aircraft within States, could be used to restrict the progress of extraordinary rendition flights.

US Practice since 9/11

Although rendition has become infamous as a tool in the US war on terror, it is not a purely twenty-first century phenomenon. Rendition has been used by previous US administrations, including the 1993-2001 Clinton administration, but only in exceptional and isolated cases. Mr Tyrie noted that the current US administration has institutionalised the practice by adopting a programme of rendition as part of its post-9/11 anti-terrorism strategy. There are widespread allegations that since 2001 a substantial number of individuals have been transferred to detention and interrogation under torture outside the United States.

Mr Tyrie reported on his discussions on extraordinary rendition with John Bellinger, Legal Adviser to the US Secretary of State. Mr Bellinger refutes allegations that the US has rendered several hundred individuals and regards such figures as widely exaggerated. Moreover, he insists that the US does not transfer individuals outside its jurisdiction so that they may be interrogated under torture. Mr Bellinger has maintained that the US does not breach international human rights law when transferring individuals outside the jurisdiction because the US obtains assurances from recipient States that the transferee will not be tortured.

Mr Tyrie questioned US reliance on assurances in light of contemporary US State Reports that document the endemic use of torture in such recipient States. He also reminded the meeting that the US operates under its own particular definition of torture. First, the US

maintains that is only liable under Article 3 of UNCAT if it is "more likely than not" that the individual will be tortured.[1] This is a significantly higher probability than the "real risk" test that triggers the United Kingdom's liability under Article 3 of UNCAT and the European Convention on Human Rights (ECHR). Furthermore, the US Military Commissions Act of 2006 bans the use of torture but defines the term so narrowly as to permit many acts that what would be recognised as torture by the United Kingdom.

Practical and Moral Arguments

In Mr Tyrie's opinion, the complex nature of the legal debate meant that it was easy to lose perspective of the broader issues. He therefore addressed three key practical questions relating to extraordinary rendition.

Question 1: Does the West benefit from extraordinary rendition?

George W Bush has publicly stated that the US use of controversial interrogation techniques, such as waterboarding, has saved lives. Indeed, in March 2008 the President vetoed legislation that would have prohibited the CIA from using waterboarding in its interrogation of suspected terrorists. In respect of rendition, John Bellinger has suggested that Europeans should stop complaining about the practice because they have actually benefited from the US programme. Mr Tyrie identified three practical arguments that refute this claim. First, extraordinary rendition corrodes the United Kingdom's best export in its anti-terrorism campaign, namely its claim to stand for better values than the terrorists. For example, moral arguments were undermined when billboards in Tehran showed posters of the abused Abu Ghraib detainees. Secondly, extraordinary rendition alienates the very domestic groups that a government most needs to assist it to reduce terrorism i.e. in the context of the present terrorist threat, moderate Muslims. Thirdly, information gleaned from torture is often of poor quality.

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[1] See the United States' reservation to UNCAT.

Mr Tyrie then queried why anyone would want to live in a society that condoned kidnap and torture, which were always morally wrong. In light of the overwhelming moral abhorrence, he considered that arguments that extraordinary rendition was detrimental because it undermined and weakened the corpus of international law should not be overstated; they almost seemed to invite the conclusion that international law was of no effect.

Question 2: What action is implied if the West does benefit from extraordinary rendition?

Mr Tyrie considered what should be the proper approach if, contrary to the above, a democratic government did conclude that it benefited from extraordinary rendition. The first step for a government would be to explain the position to the electorate. It should then seek to amend the domestic law to allow for kidnap and torture in certain extreme circumstances. This approach was akin to Alan Dershowitz's proposal that torture should be legalized in certain limited situations. Mr Tyrie noted that the current US administration does not intend to amend the domestic law to permit torture and kidnap; hence it persists with an extra-territorial policy. As far as Mr Tyrie was aware, the United Kingdom has not created any similar extra-legal or extra-territorial loopholes.

Question 3: What action is implied if the West does not benefit from extraordinary rendition?

In light of his conclusion to Question 1, Mr Tyrie called for the US to acknowledge that it had made a mistake and to announce that it would abandon its rendition programme. With respect to the United Kingdom, he was heartened by the recent statements by the Foreign Secretary, David Miliband, acknowledging that two US rendition flights had transited through Diego Garcia. He urged the Foreign Secretary to make prompt disclosure of any further details not yet in the public domain and to establish immediately an enquiry into the UK's involvement in US rendition flights.

Future Progress

Mr Tyrie explained that extraordinary rendition was best described as a unilateral over-reaction by the US to the atrocities of 9/11. The imminent change in administration presented an opportunity for a revision of US policy. Mr Tyrie was optimistic about the prospects for a future change in attitude towards extraordinary rendition and unilateral action, particularly if either Democratic candidate won the presidential election. He noted Samantha Powers' confirmation in her Newsnight interview that Obama would ban extraordinary rendition and close Guantanamo Bay. (Although Ms Powers is no longer an influential Obama aide, there was no reason to doubt that her statement reflected the position of Senator Obama.) He was less confident that a new Republican administration would reverse the policy. Mr Tyrie could not confirm the veracity of reports that when he had introduced his anti-torture bill John McCain had known that it would be vetoed.

Mr Tyrie was also optimistic about future UK practice. The United Kingdom had previously turned a blind eye to extraordinary rendition, despite deep misgivings and embarrassment in private. There was, however, activity behind the scenes to prevent the United Kingdom from being complicit in extraordinary rendition and to protect it from allegations of involvement in the US rendition programme. In particular, his discussions with British security services had unearthed scant support for any form of collaboration with the United States in this area. Indeed, some of those consulted blamed current problems with intelligence collation and recruitment on the spectre of extraordinary rendition.

Some participants were more sceptical than Mr Tyrie about the approach of the United Kingdom. The Foreign Secretary's recent condemnation of waterboarding as torture and statement on Diego Garcia appeared inconsistent with the United Kingdom's continued wholehearted support of the United States in Iraq. Mr Tyrie argued that whilst the current US administration remains in office the Foreign Secretary has scant room for manoeuvre in respect of the US and

Iraq. The opportunity for a policy shift in this area would only be available once the new US president took office.

One participant queried whether the United Kingdom's commitment to eradicate torture could be relied on in light of its position on the deportation of non-national terrorist suspects who might face torture in their countries of origin. The United Kingdom still seeks diplomatic assurances from recipient States known to practise torture that they will not torture such deportees on return.[2] Furthermore, in its 2007 intervention in *Saadi v Italy*[3] the United Kingdom had argued (unsuccessfully) that the prohibition against torture should not be absolute in cases which involve the deportation of a non-national who is regarded as a security threat. Such arguments appeared incongruous beside condemnation of the extraordinary rendition of terrorist suspects.

The majority of the meeting appeared encouraged by the United Kingdom's increased openness in respect of the Diego Garcia renditions. It was, however, noted that Mr Miliband's letter to Mr Tyrie of 18 March 2008 appeared contorted in order to avoid offending the US.[4] The Foreign Secretary first identifies waterboarding as torture and condemns all torture. He then, however, suggests that we can rely on US assurances that it does not practise torture even though the President recently vetoed a bill banning waterboarding.

One participant was not comforted by the Diego Garcia disclosure. In his statement to Parliament the Foreign Secretary had appeared to provide the fact that neither individual involved was a British resident or citizen as some form of solace. This concerned the participant,

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[2] But see the Court of Appeal decision of 9.4.08 in respect of DD and AS.

[3] *Saadi v Italy* European Court of Human Rights (No. 37201/06)

[4] Available at www.extraordinaryrendition.org

particularly given that one individual was now in Guantanamo Bay and the location of the other was unknown. Whilst the United Kingdom could not offer diplomatic protection to such individuals, it is able to, and on occasions does, act in a humanitarian capacity in respect of such persons.

The participant also noted that, despite Mr Miliband's statement in his March letter that as the Diego Garcia individuals were not part of the CIA's high value terrorist interrogation programme they would not have been subjected to waterboarding or similar interrogation techniques, many detainees outside the high value programme have been tortured. It was disappointing that much information on renditions remained secret. Further disclosure was necessary, for example Manfred Nowak had received reports of other individuals being held in ships off Diego Garcia. Moreover, it appeared that a large number of rendition flights may have passed through the United Kingdom, including planes that refuelled in Scotland en route to collecting detainees. She noted that the United Kingdom had an obligation under human rights law to conduct such an enquiry where such planes passed through its jurisdiction.

The meeting briefly discussed European initiatives to eradicate extraordinary rendition. The Secretary General of the Council of Europe had proposed measures to prevent future renditions through member States, in particular by the increased monitoring of security services and safeguards to control air traffic. Mr Tyrie noted with disappointment that various member States, in particular the United Kingdom, had prevented the proposals from being discussed by the Committee of Ministers. One participant explained that this may have been because some States did not regard the proposals, which extended to the regulation of the security services, as entirely practical.

Interplay with International Aviation Law

International aviation law has the (largely unexploited) potential to hamper the progress of extraordinary rendition flights. Richard Gardiner noted that international aviation law is not deficient when faced with extraordinary rendition flights; that it has not been widely used was due to a lack of practical willingness on the part of States rather than flaws in the law itself. Mr Gardiner did, however, identify two areas of the law which required clarification, the distinction between State and civil aircraft and the responsibility of civil contractors employed by the State to provide air transport.

The flight of civil aircraft is governed by international treaty, currently the Chicago Convention.[5] This sets out the circumstances in which civil aircraft may fly through or land in a State's territory and delimits the relationship between a State and foreign civil aircraft within its jurisdiction. State aircraft are excluded from the Chicago Convention regime and may only enter the airspace of another State if authorised under special (ad hoc or standing) agreements concluded with that State.

The Chicago Convention appears to prohibit rendition flights from passing through the territory or airspace of a third State. This is because it is assumed that the use of civil aircraft for extraordinary rendition would be a breach of the rights granted by a State under the Chicago Convention. Similarly, where State aircraft is being used for rendition there is an assumed violation of the sovereignty of the third State's airspace i.e. no State would knowingly, and in breach of its obligations under international human rights law, grant another the right for its State aircraft to transit rendition flights through its jurisdiction.

[5] Convention on International Civil Aviation, signed at Chicago on 7 December 1944

Whilst distinct legal regimes govern civil and State aircraft, the terms are not clearly defined. Mr Gardiner discussed three possible approaches to distinguishing between civil and State aircraft.

Option A: Command/Control Test

The first option was to use a test that considered whether the aircraft was being commanded by a State or civilian operator. For example, under this test an aircraft commanded by the military would be a State aircraft, as would an aircraft piloted by an employee of a company engaged by a State.

Option B: Purpose/Use Test

The Chicago Convention itself distinguishes between civil and State aircraft through a purpose test. This means that, even if an aircraft is registered as civil, the Chicago Convention will regard it as a State aircraft if it is used in "military, customs and police services".

The Paris Convention of 1919,[6] the predecessor to the Chicago Convention, distinguished between civil and State aircraft through a combination of Options A and B. The Paris Convention, more detailed in this respect than the Chicago Convention, looked at whether an aircraft was in the service of a State (as a military, customs or police aircraft) or under the command of armed forces or the State. Aircraft not so used or commanded were, by default, civilian. This approach was not carried into the 1944 Chicago Convention. One participant suggested that the test had been abandoned in the interests of flexibility and on the suggestion of the socialist States.

Option C: Registration

A third option would be to consider whether the aircraft is on a civil or State register. Although the Chicago Convention does provide for the registration of civil aircraft it does not set out a regime as to how the

[6] Convention relating to the Regulation of Aerial Navigation, signed at Paris on 13 October 1919

registration of aircraft should operate. This has made it increasingly easy for operators to switch their aircraft from one registration category to another. For example, it would be possible for an aircraft to leave the country registered as a British aircraft but to switch to US aircraft registration on arrival in the United States.

B/C Hybrid

Mr Gardiner proposed a hybrid approach that combined Options B and C. There would be a presumption that an aircraft on the civil register was civil. A correlative obligation would also be introduced requiring operators to remove an aircraft from the civil register if it was being used for a State purpose. This would significantly improve the purpose/use test under the Chicago Convention as it would be possible to identify whether an aircraft was civil or State on the face of the register.

The advantage of Mr Gardiner's proposal in respect of rendition flights was that it would be clear that the onus was on the operator to determine whether it was operating a civil or State aircraft and amend the registration accordingly i.e. a transit State would know which legal regime applied. The proposal was not, however, an immediate panacea. The detail would require elaboration to prevent abuse of the switching system and further clarification provided on the meaning of a State purpose. There were also practical considerations, such as the need for the amendment of the Chicago Convention, a multilateral treaty, and the introduction of a new register for non-military State aircraft.

Monitoring of Aircraft

Mr Gardiner considered the legal mechanisms for the control of aircraft once they were within the jurisdiction. He cited cases where the UK authorities had been uncertain of their legal power to board foreign civil aircraft at UK airports. It was difficult to understand how such concerns had arisen given that Article 16 of the Chicago Convention grants States the right to search aircraft which have landed in their

territory. However, in some cases there may have been practical difficulties with the operation of Article 16. For example, it was reported that in 2005, in addition to uncertainty as to their jurisdiction, police armed with a warrant to arrest an Israeli general did not board an Israeli plane on the runway at Heathrow because they feared a confrontation with armed personnel on board. Mr Gardiner noted that it would usually be possible to board an aircraft. In the 1970s the right to board an Aeroflot plane that had landed at Heathrow en route to the USSR had been enforced by blocking its path with lorries, thus physically preventing the plane from taxiing or taking off.

Monitoring was inherently more difficult in respect of aircraft in flight. The Tokyo Convention[7] limits interference by a State wishing to exercise its criminal jurisdiction over a foreign aircraft in flight. A State may interfere if the offence on board the aircraft falls into one of five exceptional categories. As these include the exercise of jurisdiction to ensure the observance of any State obligations under a multilateral international agreement, extraordinary rendition would entitle a State to interfere. This did not, however, solve the practical problem of monitoring aircraft in flight. In respect of State aircraft, it was suggested that governments should ensure that their bilateral special agreements provided for in-flight monitoring.

In response to a query, Mr Gardiner explain that the United Kingdom could be liable for individuals rendered through its territory as it is obliged to secure to everyone within its jurisdiction the rights and freedoms of the EHCR. He reminded the meeting of the facts of the *Soblen* case in the 1960s.[8] Mr Soblen, a dual American/Israeli national was being extradited by plane from Israel to the US. He attempted suicide on board, resulting in the plane being diverted to the UK. Mr Gardiner noted that if there was a risk of torture or inhuman or

[7] Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963.

[8] See *Ex parte Soblen* [1963] 2 QB 243.

degrading treatment UK liability would be engaged under the ECHR[9] (and under the draft articles on State responsibility).

Domestic Legislation

Mr Tyrie concluded the meeting with an invitation to those lawyers participating in the meeting to assist with proposals for legislation for the monitoring of aircraft that pass through UK airports. He advocated a sample-based checking mechanism akin to the green customs channel. Some such procedure would increase public confidence that extraordinary renditions would not take place through the United Kingdom. He conceded that the existing law almost certainly covered most instances but it was not working particularly well. Mr Gardiner was not convinced that legislating to enforce legislation was either required or viable. Improved monitoring was primarily a question of the executive's will to use the existing law. He noted that the US has standing aviation agreements with certain States which require specific clearance for certain controversial or political flights. The law could be improved if the United Kingdom included a similar provision in its standing agreements with the US.

[9] See also *Soering v United Kingdom* (App. no. 14038/88) [1989] ECHR 14038/88 which found that "the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".