



All Party Parliamentary Group on Extraordinary Rendition

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**Further Inquiry into the role of the UK Government and Security and
Intelligence Agencies in relation to detainee treatment and rendition**

Comments of the APPG on Extraordinary Rendition

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Executive Summary

- The APPG on Extraordinary Rendition welcomes the further inquiry of the ISC into the role of the UK Government and Security and Intelligence Agencies in relation to detainee treatment and rendition.
- The full extent of the UK's involvement in this programme is unknown. Until the scope and limits of our involvement are fully known, allegations of UK complicity in torture will continue to erode public confidence in our intelligence and security services.
- The ISC's oversight of the intelligence community must not only be effective, it also must be seen to be effective.
- A number of questions remain unanswered about the use of Diego Garcia in rendition operations, namely: (1) whether and to what extent UK airspace and territory had been used in rendition flights; (2) whether and to what extent the US detained terror suspects at a 'black site' on Diego Garcia with the full cooperation of the UK Government and possibly on US ships stationed outside the three mile territorial waters of Diego Garcia; (3) to what extent the Government mishandled Diego Garcia flight records.
- The Consolidated Guidance to Intelligence Officers and Service Personnel does not adequately cover the unlawful detention of detainees. It should also address more clearly the maintenance of records.
- The ISC has previously criticised the Intelligence and Security Services for poor record keeping, which impeded its investigation into British involvement in rendition. It is not clear whether adequate changes have been made to improve record keeping systems, nor whether the ISC has taken the steps necessary to provide an assurance about such changes.
- The criminal law appears ill-adapted to deal with extraordinary rendition.
- It appears that the UK took a passive approach of relying on US assurances, which turned out to be false.

Introduction

1. The prevention of terrorism is difficult and hazardous work. It requires strong intelligence and security agencies. These agencies deserve our full support. The public must also have confidence that the agencies respect high standards. Much will remain secret, so parliamentary oversight – exercised by the ISC – must ensure that those standards are not compromised.
2. The ISC has been given a huge responsibility in taking over the Detainee Inquiry's investigation into allegations of Britain's complicity in extraordinary rendition. It must show that it is up to the task and ensure its investigation is as independent and transparent as possible. This will be difficult, given the shortcomings of its earlier investigation. The public must have confidence that the ISC will get to the truth about Britain's past involvement in extraordinary rendition.
3. The APPG is disappointed that the Government has resiled from its commitment to hold a judge-led inquiry. The commitment was unequivocal, as articulated by then Secretary of State for Justice, Kenneth Clarke, on 18 January 2012, when he announced that the Detainee Inquiry would be stood down.¹
4. Furthermore, the Prime Minister has, in the past, expressed extreme scepticism of the ISC's capacity to investigate rendition. When he first announced the establishment of a judge-led inquiry on 6 July 2010, he stated his belief that the ISC was not the appropriate body to examine the issue of rendition and detainee treatment: "I do not think for a moment that we should believe that the ISC should be doing this piece of work. For public confidence, and for independence from Parliament, party and Government, it is right to have a judge-led inquiry."²

¹ Then Justice Secretary Kenneth Clarke stated that "The Government fully intend to hold an independent, judge-led inquiry, once all police investigations have concluded, to establish the full facts and draw a line under these issues."

<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120118/debtext/120118-0001.htm>

² <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100706/debtext/100706-0001.htm>.

5. Over a decade after the extraordinary rendition programme began, the extent and limits of Britain's involvements are still unknown. However, as a result of parliamentary pressure, investigations and court cases, there has been a slow but steady flow of revelations:
 - On two occasions in 2002, a rendition flight with a detainee onboard refuelled at the British island of Diego Garcia.
 - Two detainees captured by UK Forces in Iraq were handed over to US forces and subsequently rendered to Bagram Air Base in 2004.
 - Other involvement, including detainee handovers and 'facilitation' of the interrogation of British resident Binyam Mohamed, held incommunicado and subject to ill-treatment between 2002 and 2004, has been confirmed by the Secretary of State for Defence and the High Court, respectively.
 - Documents discovered after the fall of the Gaddafi regime in Libya in 2011 indicated the involvement of the British Government and intelligence services in the rendition of Gaddafi's opponents to Libya and subsequent maltreatment.
6. There may have been other occasions.
7. On 4 March 2014, the APPG wrote to the ISC with six proposals to increase the likelihood of an effective investigation. The APPG hopes that these will be carefully considered.³

The All-Party Parliamentary Group on Extraordinary Rendition

8. The All Party Parliamentary Group on Extraordinary Rendition was established in December 2005. It has two main objectives: to get to the truth on rendition and British involvement in it, and to ensure that the framework in place to prevent further British involvement in rendition is sufficiently rigorous.
9. The UK needs to get to the truth to bring closure to this issue and to restore public trust and regain the moral high ground. A more robust framework of law

³ A copy of the letter is included in the Appendix.

and practice is required to give the public confidence that the UK will not be involved in extraordinary rendition in the future.

10. Since 2005, the APPG has raised concerns in Parliamentary Questions and submissions to Select Committees, including the Foreign Affairs Committee and the Defence Committee, about the use of UK territory or airspace in rendition operations, and the adequacy of procedures in place to ensure the proper treatment of detainees captured by UK Forces in Iraq.

Shortcomings of the ISC

11. The establishment of the ISC was a major step forward in exercising some level of parliamentary scrutiny over the intelligence agencies. However, its record in getting to the truth on rendition is poor. It produced a report on rendition in 2007 which concluded that “*The Committee has therefore found no evidence that the UK agencies were complicit in any ‘extraordinary rendition’ operations.*” This conclusion, and the report itself, have since been discredited by confirmation of the use of Diego Garcia and the High Court’s findings in the case brought by Binyam Mohamed: “*The ISC report could not have been made in such terms if the 42 documents had been made available to it.*”⁴
12. At the time, the intelligence and security agencies were not under any statutory obligation to provide the ISC with all relevant information in their possession. On the contrary, the agencies were entitled to reach their own decision as to what to provide. The ISC subsequently insisted that it had not been denied evidence from the agencies, but it is unclear how it knows this. Inadequate record keeping of flights was blamed for its failure to discover that Diego Garcia had been used, but after documents were unearthed in the Binyam Mohamed court case that were not provided to the ISC in its investigation, then Director General of the Security Service Jonathan Evans wrote to the ISC, stating that he “*cannot fully explain why [the information] was not discovered*

⁴ R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office [2009] 1 WLR 2653.

in...our...records... Service systems in place at the time should have located this information.”⁵

13. In the past, the ISC has appeared unwilling to challenge the information it receives from the intelligence and security agencies. For example, in 2009, the Joint Committee on Human Rights found the ISC’s 2007 report on rendition to be “opaque” and too readily accepting of the accounts presented by the Agency heads without sufficient justification. The first Open Evidence session reinforced this impression. In November 2013, in the session with the heads of MI6, MI5 and GCHQ, the Committee did not challenge assurances from the head of MI6 that his organisation had not been involved in rendition, despite ample evidence, including High Court judgments, that it has.

Diego Garcia: ‘Black Site’ and Flight Records

14. Concerns that the US had used Diego Garcia as part of its rendition operations emerged as early as 2002. Allegations have been made – and continue to be made – that: (1) UK airspace and territory had been used in rendition flights;⁶ (2) the US detained terror suspects at a ‘black site’ on Diego Garcia with the full cooperation of the UK Government and possibly on US ships stationed outside the three mile territorial waters of Diego Garcia;⁷ (3) the Government mishandled Diego Garcia flight records. These allegations need to be thoroughly examined.

⁵ Letter from the Security Service to the ISC – 30 June 2008. Quoted in ISC Annual Report 2008-2009.

⁶ Abdul Hakim Belhaj, a Libyan who is suing the British Government for its alleged role in his rendition from Hong Kong to Libya, has stated that he believes the plane in which he was transported stopped in Diego Garcia.

⁷ In April 2014, Al Jazeera America reported that the CIA detained high-value suspects on Diego Garcia with the full cooperation of the British Government. <http://america.aljazeera.com/articles/2014/4/9/senate-cia-torture.html>

Refuelling of rendition flights at Diego Garcia

15. In 2006 and 2007, the Government assured Parliament that Diego Garcia had not been used in the rendition programme.⁸ However in 2008, then Foreign Secretary David Miliband admitted that, contrary to explicit US assurances, two rendition flights had refuelled at Diego Garcia in 2002.⁹ It subsequently emerged, as a result of the APPG's Freedom of Information requests to the Foreign Office, that inaccurate assurances had been provided by the US in relation to Diego Garcia on at least eight separate occasions.

Allegations of a 'black site'

16. In March 2008, Manfred Novak, the then UN Special Rapporteur on Torture, said that he had received credible reports of detainees being held on Diego Garcia in 2002 and 2003. Nowak said he did not know how many suspects had been held on the island, but prisoners were purportedly kept at Diego Garcia for "short periods of time".¹⁰
17. In April 2014, Al Jazeera America reported that the forthcoming report of the US Senate Intelligence Committee alleged that the CIA detained 'high-value suspects' on Diego Garcia and operated a 'black site' on the island with the UK's 'full co-operation.'¹¹

Handling of Diego Garcia flight records

18. The Government's lack of transparency concerning Diego Garcia has subjected it to criticism for over a decade. The Government appears to have made contradictory and/or incomplete statements on the availability of Diego Garcia flight records from 2002. In February 2012, the FCO stated that the UK did not hold flight records from March 2004 but the BIOT held immigration cards

⁸ Written Answer, 26 October 2006, Hansard, col 2076W; Written Answer, 11 October 2007, Hansard, col 703W.

⁹ Statement of Foreign Secretary David Miliband on Terrorist Suspects (Renditions), Hansard, 21 February 2008, col 547.

¹⁰ *Terror Suspects 'Held' on Diego Garcia*, 4 March 2008, The Australian, <http://www.theaustralian.com.au/archive/news/terror-suspects-held-on-island/story-e6frg6tf-1111115701577>

¹¹ See footnote 7.

for civilians for that period.¹² Furthermore, it acknowledged that the records covering the two rendition flights in 2002 were destroyed. In July 2014, the Government stated that the BIOT did, in fact, hold records on flight departures and arrivals on Diego Garcia from 2002 to 2008, but these were reportedly subjected to ‘water damage’.¹³ Eurocontrol, the Civil Aviation Authority, and the Department of Transport have separately confirmed to the APPG that the latter holds the flight records in question.

Consolidated Guidance to Intelligence Officers and Service Personnel

19. There is no doubt merit in improving the Consolidated Guidance. Suggestions are made below. Nonetheless, more important is the culture of the organisation itself, an issue on which only the ISC can investigate on Parliament’s behalf. Strict or legalistic adherence to Guidance is no substitute for the right culture.
20. Between October 2010 and March 2011, the APPG wrote to the Prime Minister expressing its concerns about the Consolidated Guidance and its failure adequately to cover ‘unlawful detention’. The APPG’s concerns remain.¹⁴
21. The table at paragraph 11, which officers should use when considering whether to proceed with action in specified circumstances, makes almost no reference to unlawful detention. It leaves open the possibility that despite concluding, through application of the annex, that a detainee was being held incommunicado, officers could nonetheless proceed without consulting Ministers.

¹² Written Answer, Henry Bellingham MP, 1 February 2012, Hansard, col 671W.

¹³ Written Answer, Mark Simmonds MP, 8 July 2013, Hansard, col 172W.

¹⁴ The APPG has attached to its submission correspondence between Andrew Tyrie and the Prime Minister from October 2010 to March 2011 regarding detailed suggestions to improve the Consolidated Guidance.

Record Keeping

22. In its 2008-2009 Annual Report, the ISC criticised the Intelligence and Security Services for poor record keeping, which was identified as the primary reason that the ISC was not supplied with important documents in its rendition investigation. As a result, the ISC was not able to establish the facts regarding British involvement in rendition. Both agencies and a number of Government departments have since agreed to invest in improvements to its records management system to improve their ability to retrieve information. Clearer guidance appears to be needed for officers and service personnel with respect to the maintenance of records, including copying, storage and oversight.

Adequacy of Legislation

23. The APPG remains concerned that current criminal law is not well-adapted to deal with extraordinary rendition.
24. In 2009, the APPG developed a proposal with Freshfields Bruckhaus Deringer to change the law, to prevent a repetition of British complicity in rendition and to give the public confidence that the United Kingdom does not tolerate the transfer of detainees to places where they face a real risk of torture or of cruel, inhuman and degrading treatment.¹⁵
25. While aspects of extraordinary rendition are criminalised, including kidnap, the APPG is concerned that there is inadequate protection against extraordinary rendition as a whole, which is systematic, international and carried out in secret. Specifically, the law relating to kidnap does not adequately address the transfer of an individual without his consent across an international boundary, which lies at the heart of extraordinary rendition. Individuals who carry out extraordinary rendition often cannot, in practice, be apprehended. The advice

¹⁵ The Group's initial proposals were set out in *Extraordinary Rendition: Closing the Gap*, published for consultation in November 2009, which is included in the Appendix. Meetings with the Ministry of Justice enabled the APPG to achieve significant progress towards their acceptance by government, but officials felt that further decisions should await the recommendations of the Detainee Inquiry.

that the APPG has received concluded that the ‘turning of a blind eye’ to rendition activity is not addressed effectively in English law.

26. A specific, comprehensive and easily identifiable criminal offence could be created based on the concept of an international kidnapping, or the transfer of an individual (other than pursuant to accepted legal processes such as extradition, prisoner transfer or deportation) from an environment where he was, as a matter of jurisdiction, subject to the protection of the English Courts, to one where he had no such protection. The adequacy of the existing criminal legislation should be examined and recommendations made, if necessary.

Assurances from the United States

27. The APPG believes that the UK adopted a policy of passive reliance on US assurances and that this approach failed. Indeed, in its 2007 Human Rights Report the Foreign Affairs Committee concluded that US assurances - that it does not use torture - were unreliable.¹⁶
28. In June 2007, the APPG, in conjunction with a group of leading public lawyers and a number of pressure groups, recommended a more proactive approach to take responsibility for Britain’s own international obligations, rather than subcontracting them out to the US. The UK should require basic information concerning any rendition: the destination, the legal regime that will apply when the person has been transferred, the legal safeguards that are available in that state, and evidence that the detainee was provided with an opportunity to challenge his or her transfer on the basis of his or her reasonable fear of being tortured or suffering ill treatment. It should also be a legal requirement that those requests, and the information obtained, are recorded and retained.

¹⁶ Foreign Affairs Committee, Human Rights Report 2007, para 53.

Improvements to the ISC

29. The APPG on Extraordinary Rendition welcomes the ISC's efforts to increase its capacity to function as an effective tool of parliamentary scrutiny.
30. The ISC has, in the past, recognised its need for greater independence from the executive, putting forward proposals in 2010 to distance itself from the Cabinet Office, recruit independent staff and separate out its budget. It has now been given new powers under the Justice and Security Act 2013. These are steps in the right direction, but are probably insufficient to restore confidence.
31. Recent improvements include: expanding the ISC's remit to give it the power to probe recent operations by the agencies; and moving the power to withhold information from the ISC from the agency heads to the Secretary of State responsible for that agency.
32. A number of further steps are appropriate in order to rebuild that confidence. These are set out in *Neither Just Nor Secure*.¹⁷
33. The Government should also adopt the proposals of the 2009 Wright Committee on parliamentary reform, by which the ISC chairman would be elected by MPs, subject to a prime ministerial veto over initial nominations. This would both bolster accountability to Parliament and provide the appropriate safeguards. It would derive benefit from the perceived success of the election of Departmental Select Committee chairmen.

Access to Information and Conduct of the Inquiry

34. In conducting its inquiry, it is important that the ISC have unfettered access to rendition-related documents and that it operates in as transparent a manner as is consistent with national security. Parliament and the public will expect answers to the following questions:

¹⁷ Andrew Tyrie MP and Anthony Peto QC, *Neither Just Nor Secure*, Centre for Policy Studies, 2013, pp. 87-89.

- What additional resources has the Committee requested and received from the Government to carry out its investigation?
- What is the ISC's budget for its investigation?
- The Department of Transport confirmed that it holds all records of aircraft landing at Diego Garcia between 1 September and 31 December 2008. Will the ISC have access to these documents for its investigation?
- Will the ISC appoint an investigator?
- Will it also seek out additional documents that the Inquiry may not have seen?
- Does the Committee's staff have the power to request information from Government departments (not just the Agencies) and inspect their files?
- Will the ISC conduct any open evidence sessions?
- How will it deliver its findings and recommendations?
- When will it start?

Conclusion

35. It is now ten years since allegations emerged of Britain's involvement in extraordinary rendition. After two failed investigations into rendition, it is crucial that the ISC get to the truth. This should not emerge as a result of a drip-drip of revelations, such as we have experienced. The public need to be confident that all allegations have been fully and independently investigated. Only full transparency over the past will give the public confidence that all reasonable steps have been taken to ensure that such complicity does not happen again.
36. Moreover, the Intelligence and Security Agencies, in particular, deserve better. They do not want to be involved in these practices. The Services also want the public to have confidence in them. Accountability is to their benefit. That is why the ISC must get to the bottom of this, and as soon as reasonably possible. Only then can a line be drawn under this sorry episode, so damaging to Britain's international reputation.