

Extraordinary Rendition: Closing the Gap

A Proposal to Criminalise UK Involvement



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1. Foreword and acknowledgements

- 1.1 I had never intended to get involved in all this. When I first started asking questions about Guantanamo Bay in 2004 I was concerned that the United States was overreacting to the threat from dangerous extremism in a counter-productive way. The answers I received did not reassure me. Further allegations, of ‘ghost flights’ and ‘black sites’, and claims that the UK may have been involved, led me to establish the All-Party Parliamentary Group on Extraordinary Rendition in December 2005. In the four years since then I hope that we have contributed to public knowledge and awareness of the debate surrounding rendition and Britain’s involvement in it.
- 1.2 The US programme of extraordinary rendition is now very widely seen to have been a profound mistake. Two important tasks ahead are getting to the truth, and doing what is necessary to give us more confidence that such a programme would not be reconstructed. The first task involves transparency. We can’t have closure without disclosure. The second may require changes in law and administrative practice in order to make the protections afforded against such activities more robust. These proposals are intended as a contribution to a debate that is already underway about how best to improve the law.
- 1.3 In February 2008 the All-Party Parliamentary Group on Extraordinary Rendition asked Freshfields Bruckhaus Deringer whether the law of England and Wales preventing extraordinary rendition was adequate, and if not, how it could be improved. This paper is based on their response

and the APPG gratefully acknowledges their assistance in the preparation of this paper. I would particularly like to thank Paul Lomas, Patrick Doris, Deba Das, Po-Laine Goh and Clarissa O’Callaghan at Freshfields for all their hard work.

1.4 I would like to thank Lord Carlile QC, William Clegg QC, Professor James Crawford SC, Tom Hickman, Lord Hodgson, Professor Vaughan Lowe QC, Chris Mullin MP, Mark Pallis, Clive Stafford Smith, Bankim Thanki QC, Stuart Wheeler, BAA and the Civil Aviation Authority for their comments and advice at various stages of the drafting process. I would also like to thank the Foundation Open Society Institute (Zug), the Oak Foundation and the Persula Foundation for their financial support. Finally, I would particularly like to thank Stuart McCracken, the Coordinator of the APPG, for all his work on this paper and for the Group generally.

1.5 This is a consultation paper and I am eager to have responses for improvements to the proposals. I’d be grateful for these by the end of the year.

Yours sincerely,



Andrew Tyrie

Chairman, All-Party Parliamentary Group on
Extraordinary Rendition

2. Introduction

The All Party Parliamentary Group On Extraordinary Rendition

- 2.1 This consultation document has been prepared by the All Party Parliamentary Group on Extraordinary Rendition (the **APPG**) following consultation with Freshfields Bruckhaus Deringer. The APPG is a cross-party grouping of over 60 MPs and Peers from the British Parliament who have come together to examine extraordinary rendition and related issues. It was established by Andrew Tyrie MP in December 2005, in response to allegations that the United Kingdom had been involved in the United States rendition programme. The Chairman of the APPG is Andrew Tyrie MP, the Vice-Chairmen are Chris Mullin MP and Norman Lamb MP, and the Treasurer is Lord Hodgson.
- 2.2 All Party Parliamentary Groups are informal, cross-party groupings of Parliamentarians. They have no official status within Parliament. The APPG does not receive any money from any government. The APPG's entry in the Register of All-Party Groups can be viewed at <http://www.publications.parliament.uk/pa/cm/cmllparty/memi01.htm>.
- 2.3 The APPG aims to collect, examine, and publicly disseminate information about rendition, the involvement of the UK in such practices, and related issues. It publishes almost all of the information that it obtains on its website, www.extraordinaryrendition.org.
- 2.4 Some of the aspects of extraordinary rendition of most concern to the APPG are summarised below. However, it considers generally that the process is illegal, immoral, a

stark breach of the rule of law and ineffective as a counter-terrorism tool.

2.5 In particular, the APPG seeks to determine whether:

- (a) UK territory has been used to facilitate rendition programmes, in particular the US programme, in any way, including by allowing the facilitation, over-flight or refuelling of rendition flights through or on UK territory or airspace;
- (b) the UK has assisted in renditions of British nationals or residents;
- (c) UK officials or Armed Forces have conducted or facilitated renditions; and
- (d) the UK has in place adequate procedures that can give the public confidence that the UK will not be involved in extraordinary renditions in the future.

2.6 The Obama Administration in the US initially signalled positive steps to curtail practices on the part of US military and intelligence personnel in connection with extraordinary rendition. The APPG welcomes this development, for which it has been campaigning (although it remains very concerned as to whether these steps are being sufficiently implemented so as to bring about a substantive change). However, the APPG does not believe that it is appropriate for the UK to allow the regulation of rendition conduct on UK territory to occur through changes in the policies of whichever Administration happens to be in power in Washington D.C. US executive

decisions do not absolve the UK of its obligations under its own domestic law and under international law.

- 2.7 Extraordinary rendition has allowed authorities to circumvent the proper procedures imposed under international and domestic law for the protection of suspected terrorists; has led to a denial of justice and has exposed those individuals to physical mistreatment and torture, and to the risk of such treatment. The APPG considers it right that there be effective legislation to ensure that the UK does not facilitate or support such a practice now or in the future. Existing domestic criminal law does not sufficiently address the issue. It is not focussed on the necessary acts for extraordinary rendition and its requirements make prosecution extremely difficult. There have been no prosecutions to date.
- 2.8 Positive and identifiable steps by the UK Government to prevent UK involvement in extraordinary rendition, conducted by any country, are, and remain, critical. They enable the UK to underline its commitment to meeting its international legal obligations, to set a standard in the international community and to make a clear statement about the way in which governments should conduct themselves, even in the face of the threat of global terrorism.

Objective

- 2.9 The purposes of this Consultation Paper (CP) are:
- (a) to examine the current weaknesses in the legal framework in the UK for dealing with the phenomenon of extraordinary rendition;

- (b) to examine those weaknesses in the international context; and
- (c) to propose a practical legislative route to ensure both that the UK is not used for the purposes of extraordinary rendition, and that organisations or individuals in the UK do not facilitate this practice in any way.

This CP does not attempt to deal with all the purposes, consequences, or results of extraordinary rendition, some of which are fully addressed by other legal provisions, Rather it proposes a route to stamp out the phenomenon itself, at least so far as the infrastructure of the UK and its Overseas Territories are concerned.

2.10 The APPG believes that its proposals will be effective in preventing the use of UK facilities for the purpose of extraordinary rendition. It would, however, welcome the comments of consultees as to how these proposals can be improved.

Consultation process

2.11 This CP reviews the elements of domestic and international law applicable to conduct constituting extraordinary rendition. It considers the issues arising from trying to apply the UK's domestic law to extraordinary rendition. It then considers possible amendments to existing statutory offences to strengthen the law in this respect, before setting out, in detail, the new offences the APPG considers to be necessary. The recommendations are intended to:

- (a) provide coherent and clear new offences which protect individuals and society and provide clarity for investigators and prosecutors by focusing on identifiable and provable acts necessary for extraordinary rendition involving the UK;
- (b) enable relevant conduct to be appropriately sanctioned;
- (c) be, and be apt to be, applied in a manner which is fair and non-discriminatory, in accordance with the UK's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Treaty on European Union and the Treaty establishing the European Community, the UK's other international obligations, and the obligations of UK public authorities under the Human Rights Act 1998; and
- (d) continue to ensure consistency with the UK's international obligations in the field of international transport.

2.12 This CP is part of a process that is open, inclusive and evidence-based. It involves:

- (a) a review structure that will look to include those affected (for example, key players in the UK transport infrastructure are being contacted directly and asked for their views on the proposals, in addition to this wider consultation);
- (b) consultation with criminal justice practitioners, academics, parliamentarians, non-governmental

organisations, victims of rendition and the wider public.

Next steps and contact details

- 2.13 This CP is circulated for comment and criticism. It does not necessarily represent the final views of the APPG. Following its review of the responses to this consultation it will, where appropriate, amend its recommendations. The APPG's present intention is to submit its proposal for consideration by Parliament.
- 2.14 Recipients of this CP are invited to submit their responses in writing to Andrew Tyrie MP by **31 December 2009**. Comments may be sent either –

By post to:

Andrew Tyrie MP
Chairman, APPG on Extraordinary Rendition
House of Commons
London
SW1A 0AA
United Kingdom

By email (with subject heading 'Response to Consultation') to:
<mailto:mccrackens@parliament.uk>

- 2.15 It would be helpful if, where possible, responses sent by post could also be sent to the APPG in electronic format: either on disk, or by email to the above address.
- 2.16 The APPG will treat all responses as public documents in accordance with the Freedom of Information Act and it may attribute comments and include a list of all respondents' names in any final report it publishes. Those

who wish to submit a confidential response should contact the APPG before sending the response.

2.17 This consultation paper is available on the APPG's website at: <http://www.extraordinaryrendition.org>

2.18 The APPG thanks you for your attention to this CP, and for any response you may choose to submit.

3. Executive summary

- 3.1 There is cogent and broad-based evidence that extraordinary rendition has been taking place for a considerable period of time. However, the APPG is particularly concerned that extraordinary rendition has become more frequent in the context of the US-led 'War on Terror' and current related geo-political concerns.
- 3.2 Extraordinary rendition, broadly the secret transfer of people from one country to another, against their will and without due process of law, is linked with torture, with cruel, inhuman and degrading treatment, with protracted detention without trial and without access to legal or medical help, and with related human rights abuses. It operates in breach of criminal and international law. That the Obama Administration has commenced a review of the legality of certain of its detention policies is recognition of this.
- 3.3 In May 2009 the APPG visited Washington DC for meetings with the new Administration and on Capitol Hill. There is a real determination to clear this up but the Administration has been left with a difficult legacy. It is currently wrestling with the dilemmas of reconciling the requirements of justice with the need to protect itself and other western democracies.
- 3.4 The APPG considers that involvement in extraordinary rendition has significant adverse implications for a country's reputation and international standing. It is concerned that, to the extent that the UK may be condoning, or turning a blind eye to, or be implicated in

such practices, it increases the terrorist risk that the UK faces. Moreover, as extraordinary rendition is, by definition, taking place outside any legal structure, it is fundamentally inconsistent with the rule of law, a fact that has been consistently recognised by our courts, and has been affirmed most recently in the case of Binyam Mohamed (discussed at paragraph 4.18 below). Indeed, it is the opinion of the Eminent Jurists Panel of the International Commission of Jurists (the **EJP**) that by eroding international humanitarian law and human rights law standards, aspects of the ‘War on Terror’, including rendition, States “*have put the possibility of short term gains from illegal actions over the more enduring long term harm that they cause*”.¹ This has been the APPG’s view from its inception.

- 3.5 It is quite possible that UK citizens have been directly involved in the apprehension, detention and/or physical mistreatment of those subjected to extraordinary rendition. Moreover, there is clear evidence that aspects of the process of extraordinary rendition have involved the UK’s transport infrastructure and there is a strong likelihood that people acting within the UK (or its Overseas Territories) have directly, or indirectly, facilitated or supported this process. There is no specific offence in English law that criminalises the extraordinary rendition process.
- 3.6 The APPG recognises that criminal offences exist in English law which do criminalise certain elements of

¹ EJP Report on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (the **EJP Report**), 16 February 2009, at Chapter 7, page 160.

extraordinary rendition (in particular, kidnap, false imprisonment, certain statutory offences against the person and involvement in torture). However, those offences only apply effectively to those who have directly committed particular acts which may form part of the process of extraordinary rendition. Those people are, in practice, very difficult to apprehend and the legal requirements for a conviction are not well suited to the facts of extraordinary rendition. No prosecutions have taken place to date. It is clear that English criminal law, as it stands, is not well adapted to the task of prohibiting the practice effectively. Further, to the extent that the principal actors in an extraordinary rendition case are members of foreign (or even UK) military, paramilitary, intelligence or police forces operating clandestinely, it is difficult for UK authorities to identify, arrest and prosecute them. English criminal law is constrained in pursuing secondary participants in the extraordinary rendition process who are within the UK (i.e. those who aid, abet or assist extraordinary rendition).

- 3.7 Consequently, the APPG considers that the UK should take appropriate steps to reform its criminal law to criminalise extraordinary rendition involving the UK (and its Overseas Territories). Doing so would penalise conduct which is identifiable, reprehensible and contrary to the public interest.
- 3.8 Moreover, the UK's international obligations under both treaty and general international law both prohibit it from participating in extraordinary rendition and require it to take appropriate steps to detect and deter extraordinary

rendition. Enhancing the criminal law to target such behaviour, and then applying it, will hold the UK to compliance with its international obligations. It also distinguishes the UK in the international community by making a clear statement in this respect as to its credentials in connection with the rule of law and the protection of human rights. In so doing, it offers the prospect of creating higher standards globally.

3.9 The APPG therefore proposes reforms to the criminal law that seek to prohibit:

- (a) specifically the use of transport facilities in the UK or any of its Overseas Territories for the purpose of extraordinary rendition;
- (b) the use of such transport facilities for the purposes of facilitating extraordinary rendition;
- (c) appropriate failures by controllers of transport facilities to prevent the use of those facilities for the purpose of extraordinary rendition (subject to an effective system of safe harbours to protect those undertaking their usual activities in the transport sector); and
- (d) ‘circuit flights’ (where the UK is used as part of an itinerary for extraordinary rendition purposes but without a detainee being transported through the UK) by extending the proposed criminal liability in certain circumstances where the actual transfer of the individual is not through the UK but the overall process is, itself, enabled by the use of UK transport infrastructure.

- 3.10 It is proposed that extraordinary rendition is defined by reference to the transport of an individual without his consent where the transfer is without lawful excuse (i.e. in effect, not subject to a recognised legal process capable of being controlled by the courts). This clearly imports a rule of law approach to deterring the process itself, rather than simply the mistreatment at the destination.
- 3.11 This approach does not include any concept of risk of torture or inhuman or degrading treatment. Although these issues are commonly associated with extraordinary rendition, introducing such a requirement complicates the proposed offence and raises very considerable problems of evidence and achieving a successful conviction. It risks creating legislation which satisfies the emotional response to rendition, and its context, but which may not be sufficient effectively to change behaviour.
- 3.12 For related reasons, the proposal does not change the law relating to the conduct of British armed forces or security services in the field. To the extent that they might (say) seize an individual in country A and then transfer him to the custody of another country or to be held in country B, without involving the territory of the UK, it would not be caught by the proposed legislation. This is a very important topic and raises very serious issues of international and national law and their impact on the UK's operations overseas which involve such conduct. The APPG would welcome comments in the consultation as to whether these issues should also be encompassed in this proposal or addressed through other means.

- 3.13 The APPG wishes to ensure that liability should not be imposed on those going about their normal jobs. It is proposed that the necessary mental element for the offence is, therefore, set high so that only those who are sufficiently involved and culpable are exposed to liability.
- 3.14 The exception to this is the ‘failure to prevent’ offence. This is intended to ensure that those in the management or control of the critical transport infrastructure which is used in extraordinary rendition do take the necessary steps to ensure that their facilities could not be used for this purpose. However, to protect them from inappropriate risk, there would be an extensive ‘safe harbour’ requiring the existence of adequate procedures to identify individuals being transferred against their consent and, if so, whether that any such transfer is without lawful excuse. The APPG recognises that this is a more difficult area but believes that it is important that, if the UK’s performance in the area of extraordinary rendition is to be materially improved, those who control the essential facilities should not be permitted to turn a blind eye but must take reasonable steps to avoid abuse of their facilities.
- 3.15 This CP focuses on the law of England and Wales. It does not specifically cover Scotland and Northern Ireland, which have their own separate legal systems. Parliament has the power to legislate for Scotland and Northern Ireland (although under the Sewel Convention, the consent of the Scottish Parliament is sought if the legislation relates to a

devolved matter).² However, the general principles set out in this CP are of broad application and similar policy considerations would apply to extending the proposed legislation to Scotland and Northern Ireland. Indeed, the APPG seeks such an extension, regarding it as particularly important given the reputed role of Prestwick Airport in Scotland in rendition activity.

² Schedule 5 of the Scotland Act 1998 provides that matters relating to international relations (Part I, paragraph 7) and matters relating to the regulation, security and safety of air and other forms of transport (Part II, Head E) are reserved to the UK Parliament.

4. Factual and political background

Defining 'extraordinary rendition'

- 4.1 Our research indicates that no formal or legal definition of extraordinary rendition has been adopted in the UK, or elsewhere. However, consistent themes can be discerned from the views of legislative,³ quasi-legislative⁴ and academic and non-governmental sources,⁵ that extraordinary rendition should be defined as an extra-judicial practice involving the apprehension and transfer of persons from one jurisdiction to another outside the parameters of lawful processes. Extraordinary rendition also frequently connotes that persons so transferred face the risk of torture or other cruel, inhuman or degrading treatment. It is a process that by its inherent nature operates outside the law; and the English courts have consistently asserted that involvement in rendition operations is an affront to the rule of law.⁶
- 4.2 The following working definition captures the popular, inclusive sense:

³ Congressional Research Service Report for U.S. Congress, *Renditions: Constraints Imposed by Laws on Torture*, 12 October 2007.

⁴ Council of Europe, Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, 28 February 2006, at paragraph 22.

⁵ *UK Involvement in Extraordinary Rendition*, Joint Supplementary Submission to the Joint Committee on Human Rights, Liberty/Justice, December 2005.

⁶ See *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2008] EWHC 2048 (Admin) at paragraph 9(iii), citing *R v Mullen* [2000] QB 520.

Extraordinary rendition is the apprehension and forced transfer of persons from one State to another, outside the due process of law, where there is a risk that such persons will be exposed to torture or inhuman or degrading treatment.

‘Due process of law’ is to include extradition pursuant to treaty or ad hoc arrangements, deportation or prisoner transfers. The definition is also in line with the Council of Europe’s working definition reflecting the European Convention on Human Rights (the *ECHR*).

4.3 However, the proposal discussed in the CP is focussed on certain aspects of this definition. Because of the fundamental difficulties in defining whether an individual has been exposed to torture or inhuman or degrading treatment (or that people involved in any act of rendition were sufficiently aware at the relevant time that this would be the case), the proposal concentrates on prohibiting the specific elements of the practice which can be subject to simple and effective criminal control in the UK and for which it is realistic that a credible prosecution can be brought. In this way, it is intended to ensure that the use of UK infrastructure to assist in rendition is prohibited.

The recent context – the US detention programme and the risk of torture

4.4 The 21st Century practice of extraordinary rendition is closely linked to the conduct of the US government as it pursues its policies in combating what it has defined as the global ‘War on Terror’. The US has a longstanding policy of using rendition as a counter-terrorism tool. Under

President Reagan, rendition was used to bring people to justice in the US, and under President Clinton the use of rendition included transferring detainees to third countries in which they were wanted for terrorism offences.⁷ Both former US Secretary of State Condoleezza Rice and former President Bush acknowledged that the US carries out rendition as a matter of policy, and vigorously defended the programme as a vital component in US counterterrorism strategy. Secretary Rice set out the policy in the following terms:

*For decades, the United States and other countries have used ‘renditions’ to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.*⁸

4.5 However, as the EJP has stated, there is a difference in nature between rendition operations as historically understood, and those carried out presently, in that “*the main objective now is intelligence gathering, with its focus on interrogation and detention*” as opposed to transferring persons for criminal prosecution.⁹

⁷ Stephen Grey, *Ghost Plane*, (Hurst & Co, London, 2006), 119; Michael Scheuer, ‘Testimony to the House Foreign Affairs Committee’, 17 April 2007, available online at <http://foreignaffairs.house.gov/110/34712.pdf>.

⁸ Secretary Condoleezza Rice, ‘Remarks Upon her Departure for Europe’, 5 December 2005, emphasis added, available at <http://www.state.gov/secretary/rm/2005/57602.htm> (retrieved on 26 November 2008).

⁹ EJP Report at Chapter 4, Section 3.1, page 80.

- 4.6 The places to which people have been transferred include States known to practice torture, and cruel, inhuman or degrading treatment on people in their custody, including Uzbekistan, Pakistan, Morocco and Syria.¹⁰ Destinations also include US detention facilities, such as Guantánamo Bay and military facilities in Iraq and Afghanistan.
- 4.7 The Council of Europe has commented on the likely existence of secret CIA detention facilities in Eastern Europe.¹¹ It has also endorsed the findings of the report of the Council of Europe's rapporteur on extraordinary rendition, Senator Dick Marty (the *Marty Report*), as to the alleged conduct of extraordinary rendition operations.¹² On the basis of concurring testimony from persons alleged to have been subject to rendition, Senator Marty suggests that such operations carried out by intelligence personnel demonstrate a great deal of consistency, reflecting the highly trained nature of the operatives allegedly involved.

¹⁰ The Explanatory Memorandum to the 2006 draft report of Senator Dick Marty to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states* (the *Marty Report*), names Tashkent and Rabat as 'Category D' detainee transfer or drop-off points. A Canadian Commission of Inquiry has accepted in the case of Maher Arar (discussed at paragraph 4.9 of this CP) that renditions have occurred to Syria. The US State Department, in its 2007 Country Reports on Human Rights Practices published on 11 March 2008, documented instances and allegations of torture in Morocco, Syria and Uzbekistan. See <http://www.state.gov/g/drl/rls/hrrpt/2007/>.

¹¹ Marty Report, Section Two and Resolution 1507 (2006) of the Parliamentary Assembly of the Council of Europe, and Recommendation 1754 (2006) of the Parliamentary Assembly recommending the Committee of Ministers introduce a minimum standard of human rights protection in respect of extraordinary rendition.

¹² Marty Report, Section Two, at paragraphs 84-86, and Resolution 1507 (2006) and Recommendation 1754 (2006), cited above.

In most cases, terrorist suspects are asked to step aside for a 'security check'. This is the start of the extraordinary rendition process, colloquially referred to as 'black-bagging'. Those taken aside are then normally taken to a small room at the relevant transport facility where they are blindfolded, and stripped by teams of up to six intelligence officers. Senator Marty suggests that detainees are then shackled, subject to intimate searches, a hood is placed over their head and headphones or earmuffs are used to deprive them of visual and auditory sensation. They are then transferred, directly or indirectly, to detention sites, normally by aircraft.

4.8 President Bush publicly elaborated on the detention programme in September 2006:

In addition to the terrorists held at Guantánamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency... Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged... But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.¹³

¹³ President George W Bush, 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', 6 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

4.9 There is no doubt that those subject to extraordinary rendition may face torture. As one example, a Canadian Commission of Inquiry has determined that a rendered individual, Maher Arar, a Canadian citizen, was subjected to torture in Syria having been rendered to that country following his arrest by US officials at New York's JFK airport in September 2002, partly on the basis of inaccurate and over-stated intelligence furnished to the US by the relevant Canadian services. He received an apology from the Canadian Government and was awarded \$10.5m in compensation.¹⁴ The EJP views the Arar case as emblematic of the risks to human rights that extraordinary rendition operations (carried out with the cooperation of different intelligence services) present.¹⁵ In addition, the British High Court has accepted in the case of Binyam Mohamed, a British resident rendered to Guantánamo Bay (discussed in detail at paragraph 4.18 below), that there is, at a minimum, an “*arguable case...that cruel, inhuman or degrading treatment had been inflicted.*”¹⁶

¹⁴ Office of the Prime Minister, 'Prime Minister Releases Letter of Apology to Maher Arar and his Family and Announces Completion of Mediation Process', 26 January 2007, <http://news.gc.ca/web/view/en/index.jsp?articleid=270739&keyword=maher+arar&> (retrieved on 26 November 2008); 'Canada offers rendition victim compensation', The Guardian, 26 January 2007, <http://www.guardian.co.uk/world/2007/jan/26/usa.ciarendition>.

¹⁵ EJP Report at Chapter 4, Section 3.2, pages 83-84.

¹⁶ *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2009] EWHC 152 (Admin) at paragraph 20.

4.10 Moreover, the Convening Authority for the Department of Defense Office of Military Commissions has accepted¹⁷ that the US Joint Task Force at Guantánamo Bay, which the Marty Report also identifies as a rendition drop-off point¹⁸ has engaged in coercive interrogation techniques, the totality of which amount to torture as understood in domestic and international law. This represents quasi-judicial acceptance that US personnel have committed acts of torture. President Bush also acknowledged that “*an alternative set of [interrogation] procedures*” were being practiced by the CIA, and had been used on Abu Zubaydah, an alleged Al Qaeda senior strategist captured in Spring 2002 at the inception of the secret detention programme. Several US Government memoranda and legal opinions are now in the public domain, and document the US Administration’s restrictive view of its anti-torture obligations.¹⁹ This includes the Bybee Memorandum

¹⁷ Her Honor Judge Susan J. Crawford made this admission in an interview with the Washington Post on 14 January 2009 (Washington Post, 14 January 2009 at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>). Judge Crawford refused to refer the case of suspected 9/11 conspirator Mohammed al-Qhatani to a military commission on the basis of ill-treatment amounting to torture. The Department of Defense has confirmed that the treatment of al-Qhatani was contrary to the Army Field Manual (see Department of Defense press release of 14 January 2009, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=52680>).

¹⁸ See Marty Report at paragraph 43.

¹⁹ See a Joint Task Force Memorandum of 11 October 2002, setting out three categories of ‘lawful’ interrogation techniques, and requesting that they be authorised, including: “(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family... (3) Use of a wet towel and dripping water to induce the misperception of suffocation”, available at http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf (retrieved on 26 November 2008).

(known colloquially as the ‘Torture Memo’) of August 2002. This adopted what has been widely accepted as an overly narrow view of what amounted to torture in US law implementing State obligations under the Geneva Conventions and the UN Convention Against Torture.²⁰ Many interrogation techniques implemented by the US are illegal under English law.²¹

The extent of extraordinary rendition and the US detention programme

- 4.11 CIA Director Michael Hayden has publicly clarified certain aspects of the US rendition programme. He has elaborated on the number of people rendered to third countries, and to CIA secret detention, since the programme’s inception in spring 2002 with the capture of Abu Zubaydah:

in the life of this [CIA secret detention] program it’s fewer than a hundred, with regard to [enhanced] interrogation techniques it’s fewer than a third, and the

²⁰ Memorandum from Jay Bybee, Assistant Attorney General for the Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, of 1 August 2002 on the interpretation of torture for the purposes of 18 U.S.C. 2340 (available at <http://f1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>). This Memorandum suggested that an act would only constitute torture “[w]here the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure”. This Memorandum has now been rescinded by the Office of Legal Counsel and was repudiated by Attorney General Michael Mukasey at his 2007 Senate confirmation hearings (reported in *The Boston Globe*, 17 October 2007).

²¹ Professor James Crawford, Whewell Professor of International Law at Cambridge University, and Kylie Evans, Research Fellow at the Lauterpacht Centre for International Law, *Opinion: Extraordinary Rendition of Terrorist Suspects through the United Kingdom*, 9 December 2005, paragraphs 10-13. The Foreign Secretary has stated publicly that waterboarding is torture.

*number of renditions [to third countries] is actually smaller than that, mid-range, two figures.*²²

Of these “fewer than a third”, three were subjected to the technique known as waterboarding: Khalid Sheikh Mohamed, Abu Zubaydah, and Abd al-Rahim al-Nashiri.²³ Other organisations believe that the number of extraordinary renditions carried out by the US Administration is much higher.²⁴

4.12 On 14 February 2008, Steven Bradbury, Assistant Attorney General for the Office of Legal Counsel, testified that the CIA programme was being run in accordance with a new executive order from the President, which was issued on 20 July 2007.²⁵ In March 2008, US intelligence officials admitted holding Muhammad Rahim, currently detained at

²² CIA, ‘Transcript of Director Hayden’s Interview with Charlie Rose’, 24 October 2007, available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/interview-with-charlie-rose.html>. Director Hayden has stated that the capture of Abu Zubaydah in spring 2002 marked the start of the CIA’s programme of secret detention and interrogation. See Council on Foreign Relations, ‘A Conversation with Michael Hayden’, 7 September 2007, http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_service.html.

²³ BBC, ‘CIA Admits Waterboarding Inmates’, 5 February 2008, <http://news.bbc.co.uk/1/hi/world/americas/7229169.stm>.

²⁴ Amnesty International USA stated in April 2007 that “[t]he number of renditions cases currently appears to be in the hundreds”. Amnesty International USA, ‘Statement submitted for the record by Amnesty International USA’, Extraordinary Rendition in US Counterterrorism Policy: The Impact on Transatlantic Relations, Joint Hearing of the US House of Representatives Committee on Foreign Affairs, 17 April 2007, <http://foreignaffairs.house.gov/110/34712.pdf>.

²⁵ Steven G. Bradbury, ‘Prepared Statement of Steven G. Bradbury before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties’, 14 February 2008, 4, <http://judiciary.house.gov/hearings/pdf/Bradbury080214.pdf>.

Guantánamo Bay, in secret CIA custody for at least six months previously. He was the first detainee in almost a year that US intelligence officials admitted to holding in CIA secret detention.²⁶

4.13 President Obama, by Executive Order on 22 January 2009, ordered the closure of the US detention facility at Guantánamo Bay within one year.²⁷ He has also ordered the closure of CIA detention facilities across the globe²⁸ and instituted a high-level review of lawful options for the apprehension, detention, interrogation and prosecution of suspects.²⁹ These steps, if they were effectively implemented, would undoubtedly have an impact on extraordinary rendition and its associated practices. However, it is currently unclear what impact these steps, however welcome at the time they were announced, will in fact have.

4.14 We note, however, that there has been no specific executive or legislative prohibition on extraordinary rendition; indeed it is apparent that US Governments of both stripes have engaged in forms of rendition since the late 1990s. Nor is the President's Order protected from future amendment or repeal. Moreover, on its face the relevant Order merely provides that the Administration shall "*identify such [detention] options as are consistent with the national security and foreign policy interests of the United*

²⁶ Mark Mazzetti, 'C.I.A. Secretly Held Qaeda Suspect, Officials Say', 15 March 2008, <http://www.nytimes.com/2008/03/15/washington/15detain.html?ref=asia>.

²⁷ Executive Order 13492 of January 22, 2009.

²⁸ Ibid.

²⁹ Executive Order 13493 of January 22, 2009.

States and the interests of justice” and “*there shall be established a Special Task Force on Interrogation and Transfer Policies (Special Task Force) to review interrogation and transfer policies*”.³⁰ This does not preclude a form of rendition continuing. In addition, the closure of Guantánamo Bay and CIA detention facilities does not address the transfer of detainees to third States where they may be subject to ill-treatment, as in the Arar case described in paragraph 4.9 of this CP. Therefore the opportunities for a continuation of past practice still exist. Indeed, CIA Director Leon Panetta has affirmed before the US Senate that the use of third States would remain an option for the US.³¹ In addition, we cannot state with any certainty that the new Administration will acknowledge past misdeeds and move forward in a transparent manner – we note that Director Panetta and Attorney General Holder have suggested that Department of Defense officials that relied on the dubious legal authority of opinions such as the Bybee Memorandum are unlikely to face investigation or prosecution.³² In addition, the Department of Justice has affirmed the Bush Administration’s position of an arguably overbroad state secrets privilege in respect of a US civil action against those allegedly involved in extraordinary

³⁰ Ibid, at Section 1(e).

³¹ Testimony of CIA Director-designate, the Honorable Leon E. Panetta to the Senate Intelligence Committee, 6 February 2009.

³² Testimony of Director-designate Panetta to the Senate Intelligence Committee, 6 February 2009; written response 3C of Attorney General Eric H. Holder Jr. to Senator John Kyl (R-AZ), 28 January 2009.

rendition. This claim of privilege has been rejected by the US Ninth Circuit Court of Appeals.³³

The United Kingdom's role

Confirmed involvement

- 4.15 There is no doubt that the UK has been involved in the US rendition programme. In February 2008, the Foreign Secretary disclosed to the House of Commons that, on two occasions in 2002, a rendition flight with a detainee onboard had refuelled at the British island of Diego Garcia. This was despite regular and explicit US assurances to the contrary.³⁴ To date, the Government has failed to disclose the identities of the two individuals concerned and the locations to and from which they were rendered (although it was disclosed at the time of the Foreign Secretary's Statement that one of the individuals had been released and one was being held at Guantánamo Bay). Subsequent Parliamentary Answers have confirmed that both have now been returned to their country of nationality.³⁵

³³ *Mohamed et al. v Jeppesen DataPlan, Inc.* 563 F.3d 992 (9th Cir. 2009), Opinion of Circuit Judge Hawkins, rejecting the oral submissions of the Department of Justice of 9 February 2009.

³⁴ Rt Hon David Miliband MP, 'Terrorist Suspects (Renditions) Statement', 21 February 2008, available at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0007.htm#08022198000007>. The full list of assurances on this issue was released to the APPG on Extraordinary Rendition by the Foreign Office on 2 September 2008, and is available at www.extraordinaryrendition.org. The information shows that on seven separate occasions the US provided inaccurate assurances on Diego Garcia. It also shows that the first such assurance was in June 2003, just nine months after the second rendition flight had refuelled on Diego Garcia.

³⁵ Bill Rammell MP, 'Written Answer to Andrew Tyrie MP', 11 February 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090211/text/90211w0007.htm>.

- 4.16 There have been five further acknowledged occasions since 1997 when the US has sought permission from the UK to render someone through UK territory or airspace: on two occasions in 1998, permission was granted for the rendition of suspects to trial in the US; on a further two occasions in 1998, permission was refused;³⁶ in 2004, an approach was made by the US for permission to conduct a rendition, but the UK indicated that permission would be refused if they were asked to give it.³⁷
- 4.17 In February 2009, the Defence Secretary disclosed to the House of Commons that, in 2004, two individuals captured by UK Forces in Iraq, and transferred to US detention, had subsequently been rendered to Afghanistan.³⁸ Parliamentary Answers subsequently confirmed that both individuals were rendered to Bagram Air Base.³⁹

Binyam Mohamed

- 4.18 In August 2008, the High Court held in the case of Binyam Mohamed that information passed from the UK Security Service had “*facilitated*” the interrogation of Binyam

³⁶ Rt Hon Jack Straw MP, ‘Rendition Allegations (Inquiries) Statement’, 20 January 2006, available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060120/wmstext/60120m01.htm>. The two rendered detainees were Mohammed Rashid and Mohamed Rashed Daoud Al-Owhali. See letter from Kim Howells MP to Andrew Tyrie MP, available at www.extraordinaryrendition.org.

³⁷ Rt Hon Jack Straw MP, ‘Letter to Rt Hon William Hague MP’, 6 February 2006.

³⁸ Rt Hon John Hutton MP, ‘Records of Detention (Review Conclusions) Statement’, 26 February 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090226/debtext/90226-0008.htm#09022651000004>.

³⁹ Rt Hon Bob Ainsworth MP, ‘Written Answer to Andrew Tyrie MP’, 6 July 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090706/text/90706w0010.htm#09070625001975>.

Mohamed by US authorities at times when they knew he was being held incommunicado and without access to a lawyer by providing information and questions to their US counterparts.⁴⁰ Mr Mohamed is a British resident who was detained in Pakistan in April 2002 and detained incommunicado at various undisclosed locations until May 2004. He was subsequently rendered to Morocco, where he alleges he was severely tortured; then to Afghanistan; and finally to Guantánamo Bay where he was held until his release on 23 February 2009. He alleges that he was subjected to serious torture whilst in US military custody. The Court has ruled that “*the relationship between the United Kingdom Government and the United States authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing*”.⁴¹ The Foreign Secretary has accepted that there is an arguable case that Mr Mohamed had been subject to torture and cruel, inhuman and degrading treatment by or on behalf of the United States authorities during the his two year period of incommunicado incarceration.⁴²

4.19 UK intelligence services have conceded that they have used information obtained from detainees who had been rendered and/or held in CIA secret custody.⁴³ Indeed, in the

⁴⁰ *R (on the application of Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2008] EWHC 2048 (Admin) at paragraph 88(i).

⁴¹ *Ibid.* at paragraph 88(v).

⁴² *R (on the application of Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2009] EWHC 152 (Admin) at paragraph 2.

⁴³ See, for example, ISC, ‘Report into Rendition’, 28 June 2007, at paragraph 28, quoting the Director General of the Security Service: “*When [Khalid Sheikh Mohammed] was in*

case of Binyam Mohamed, the Security Service was found to have provided questions for Mr Mohamed's interrogation, and UK officials have been alleged to have been present at such interrogations.⁴⁴ The Attorney General, in consultation with the Director of Public Prosecutions, has referred the alleged complicity of an MI5 officer in Binyam Mohamed's case to the police for investigation.⁴⁵ In July 2009, the Metropolitan Police confirmed that they would investigate these allegations.⁴⁶ Notwithstanding whether there is any eventual finding of

detention in 2003, place unknown, he provided [the pseudonyms of] six individuals... who were involved in [Al Qaeda] activities in or against the UK. The Americans gave us this information... These included high-profile terrorists – an illustration of the huge amount of significant information that came from one man in detention in an unknown place”; and the speech of President George W. Bush, ‘President Discusses Creation of Military Commissions to Try Suspected Terrorists’, 6 September 2006, stating that information obtained by the CIA's secret detention programme “*helped stop a plot to hijack passenger planes and fly them into Heathrow or the Canary Wharf in London... It's helped our allies protect their people from deadly enemies.*”

- ⁴⁴ The High Court has ordered that closed portions of its initial judgment in Mr. Mohamed's case, which may cast light on whether domestic security services were involved in the mistreatment of Mr. Mohamed, should now be made public, there being no compelling interest in maintaining secrecy over the closed portion, when balanced against considerations of the rule of law and the need to ensure democratic accountability over the British Security Services. See *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549, in particular at paragraphs 101-109. At the time of publication, this information had not yet been released, pending appeal.
- ⁴⁵ Written ministerial statement of the Attorney General, Baroness Scotland QC, on Binyam Mohamed, dated 26 March 2009, available at <http://www.attorneygeneral.gov.uk/NewsCentre/Pages/AttorneyGeneralDecisionOnBinyamMohamedInvestigation.aspx>.
- ⁴⁶ James Sturcke, ‘Police launch investigation into Binyam Mohamed torture allegations’, *The Guardian*, 10 July 2009, <http://www.guardian.co.uk/world/2009/jul/10/binyam-mohamed-torture-investigation-police>.

liability for the direct involvement of MI5 officers in such conduct, to the extent that UK intelligence services actively sought and used such information where there was a real risk that detainees were subject to torture, the APPG notes the strong criticism of the use of torture evidence by the House of Lords in the *A* case⁴⁷ and the view of the EJP that the systematic use of such intelligence renders a State “*complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism*”.⁴⁸ The Joint Committee on Human Rights recently considered the concept of complicity in its Report on Allegations of UK Complicity in Torture. The Committee concluded that the systematic receipt of information known or thought likely to have been obtained from detainees subjected to torture would amount to complicity in torture.⁴⁹

Further allegations – facilitating rendition

- 4.20 The foregoing demonstrates that UK territory has been used for the purpose of rendition; the UK Government has, historically, actively consented to a form of rendition; that the UK Government was involved in the rendition of a British resident; and that the UK Government was involved in the rendition of two individuals captured by UK Forces in Iraq and rendered to Afghanistan. There are, however,

⁴⁷ *A v Secretary of State for the Home Department* [2005] UKHL 71. In particular, see the judgment of Lord Bingham of Cornhill at [10] – [45].

⁴⁸ EJP Report at Chapter 4, Section 3.2, page 85.

⁴⁹ Joint Committee on Human Rights, ‘Allegations of UK Complicity in Torture’, 4 August 2009, Conclusion 5, available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm>.

allegations that the extent of UK involvement may run deeper.

- 4.21 Documents disclosed by the Foreign Office in respect of the claim for judicial review of Bisher al-Rawi and Jamil el-Banna, two British residents who travelled to the Gambia in November 2002 and were subsequently detained, transferred to US authorities and rendered to Afghanistan and Guantánamo Bay, indicate the Security Service had passed information to the US authorities that may have facilitated their detention.⁵⁰ While there is no indication that this was the intention of the UK Security Service, nonetheless the Intelligence and Security Committee (the *ISC*) found that “*greater care*” could have been exercised by the Service, and noted “*a lack of regard, on the part of the US, for UK concerns*”.⁵¹
- 4.22 On 25 February 2008, former SAS soldier Ben Griffin alleged that UK Forces in Iraq had been capturing people who were handed over to US forces, and subsequently rendered or mistreated.⁵²

⁵⁰ Several telegrams sent by the Security Service to US authorities in relation to al-Rawi and el-Banna were released to the APPG. These telegrams set out intelligence in relation to al-Rawi and el-Banna, and their travel plans. They are available at <http://www.extraordinaryrendition.org/index.php/information-sessions/bisher-al-rawi-a-jamil-el-banna>.

⁵¹ ISC, ‘Report on Rendition’, July 2007, conclusions U and V, available at http://www.cabinetoffice.gov.uk/intelligence/special_reports.aspx. See also paragraphs 111-147.

⁵² Statement of Mr Ben Griffin, 25 February 2008, available at http://www.stopwar.org.uk/index.php?option=com_content&task=view&id=533.

4.23 On 11 September 2009 MI6 referred one of its own officers to the Attorney General over allegations of complicity in torture.⁵³

Further allegations – use of UK territory

4.24 The APPG was also concerned by the conclusion of the Marty Report, that Prestwick Airport is a ‘Category A’ stopover facility for rendition flights, providing refuelling and support services.⁵⁴ This conclusion was based on evidence in the form of detainee testimonies, exhibits placed before judicial and parliamentary enquiries, information obtained under Freedom of Information legislation, interviews with legal representatives and insider sources, the accounts of investigative journalists and research conducted by non-governmental organisations.⁵⁵ Senator Marty has also reported “*concurring confirmations*” that Diego Garcia had been used in the ‘processing’ of detainees.⁵⁶

4.25 These findings have been endorsed by the Parliamentary Assembly of the Council of Europe.⁵⁷ Moreover, questions

⁵³ Richard Norton-Taylor and Ian Cobain, ‘MI6 officer investigated over torture allegation’, The Guardian, 11 September 2009, <http://www.guardian.co.uk/world/2009/sep/11/mi6-investigated-over-torture-allegation>.

⁵⁴ Marty Report, at paragraph 43.

⁵⁵ Marty Report, at paragraph 43, footnote 38.

⁵⁶ Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, 11 June 2007, page 16, <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>.

⁵⁷ Resolutions 1507 (2006) and 1562 (2007) of the Parliamentary Assembly of the Council of Europe.

have been raised by the European Parliament in respect of over 100 flights made by planes linked to renditions that have transited the UK or its Overseas Territories.⁵⁸ We also note that Manfred Nowak, the UN Special Rapporteur on Torture, has claimed to have received “*credible evidence from well-placed sources familiar with the situation on the island that detainees were held on Diego Garcia between 2002 and 2003*”.⁵⁹ Similar allegations have been made by NGOs and the mainstream media.⁶⁰

4.26 The APPG notes that, as highlighted by the ISC, inadequate record-keeping means that it will be difficult to discern the full extent of any such involvement.⁶¹

⁵⁸ European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, ‘Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners’, 30 January 2007, The European Parliament referred to “*170 stopovers made by CIA-operated aircraft at UK airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees*”. See http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm. See also the list of flights sent by the Foreign Secretary to the US Administration for specific assurances that they were not involved in renditions, available at www.extraordinaryrendition.org.

⁵⁹ Jamie Doward, ‘British island “used by US for rendition”’, The Guardian, 2 March 2008, <http://www.guardian.co.uk/world/2008/mar/02/ciarendition.unitednations>.

⁶⁰ See Reprieve, ‘Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories’, <http://www.reprieve.org.uk/documents/FinalReprieveSubmissionFASC.pdf> (retrieved on 26 November 2008); Adam Zagorin, ‘Source: British Territory Used for US Terror Interrogation’, Time Magazine, 31 July 2008, <http://www.time.com/time/world/article/0,8599,1828469,00.html>; BBC 2, ‘Newsnight’, 31 July 2008, <http://news.bbc.co.uk/1/hi/programmes/newsnight/7536477.stm>.

⁶¹ ISC, ‘Report into Rendition’, conclusion B. The then Foreign Secretary Jack Straw confirmed in a Written Answer to Sir Menzies Campbell that much of the information

The UK government's position

4.27 The Foreign Secretary has stated that “[t]he Government never uses torture for any purpose, nor would we instigate or encourage others to do so. Our allies are fully aware of our rejection of torture”.⁶² The Government has maintained this position in the light of allegations relating to Binyam Mohamed discussed above, but has accepted that the current allegations merit police investigation.⁶³ The Prime Minister has undertaken to make public guidelines on interrogation procedures to be followed by UK intelligence services, with compliance to be monitored by the Intelligence Service Commissioner, but has stopped short of establishing an independent judicial inquiry into such allegations.⁶⁴ In relation to extraordinary rendition specifically, the Government has described the existing measures applicable to the granting of permission to rendition flights in the following terms:

We would expect the US authorities to seek permission to render detainees via UK territory and airspace, including overseas territories, and we will grant permission only if we are satisfied that the rendition

on rendition flights through UK airspace was based on the recollections of officials. Sir Menzies Campbell WPQ 12 December 2005 [36414].

⁶² Rt Hon David Miliband MP, ‘Letter to Andrew Tyrie MP’, 5 June 2008, available at www.extraordinaryrendition.org.

⁶³ Remarks of the Prime Minister, the Rt Hon Gordon Brown MP, to the press on 26 March 2009, available at <http://www.independent.co.uk/news/uk/home-news/statement-due-in-torture-row-1654668.html>

⁶⁴ Rt Hon Gordon Brown MP, ‘Detainees Statement’, 18 March 2009 at Col 55WS.

*would accord with UK law and our international obligations.*⁶⁵

4.28 It is apparent from the allegations and reports discussed above that this system has failed. The two Diego Garcia rendition flights discussed at paragraph 4.15 of this CP demonstrate that rendition flights are able to use UK territory and airspace apparently without seeking authorisation. Clearly, expecting the US to seek permission for rendition flights does not provide adequate protection against UK involvement.

4.29 In order to legitimise its practice of rendition, the US Government has provided repeated assurances that those rendered are not subject to torture. It has also provided assurances that rendition flights have not used UK territory. The Diego Garcia admissions suggest that the UK cannot rely on such assurances. Nonetheless, the Government has indicated it will continue to accept US assurances in good faith.⁶⁶ The Foreign Secretary compiled a list of almost 400 flights, which was submitted to the US State Department on 15 May 2008 for specific assurances that they had not been involved in renditions. No such assurances were given. Furthermore, the Foreign Secretary has refused to seek assurances in respect of ‘circuit flights’⁶⁷

⁶⁵ Andrew Tyrie WPQ 20 March 2006 [59974]. The government has confirmed that this is a legal requirement and that it derives from “*an aspect of the principle of State sovereignty over territory*”, Andrew Tyrie WPQ 18 April 2006 [61538].

⁶⁶ Rt Hon David Miliband MP, ‘Terrorist Suspects (Renditions) Statement’, 21 February 2008 at Col 553.

⁶⁷ The US provided renewed assurances that referred only to rendition flights that had landed at the UK, and not those that had transited the UK. In an earlier letter to the

notwithstanding the recommendation of the Foreign Affairs Committee (the *FAC*) that he should do so, based on its finding that there is a legal obligation to prevent flights to or from a rendition using UK airspace.⁶⁸ It reiterated this conclusion in its Human Rights Annual Report 2008.⁶⁹

Criticism of the UK Government's position

- 4.30 The FAC has criticised reliance on assurances in respect of torture given the conflicting standards adopted by the US and the UK in this area. It has also strongly condemned the inaccurate assurances given to the UK Government in respect of rendition flights using UK territory. It has criticised the Government's lack of transparency on rendition, and called for the publication of further information on the Diego Garcia renditions, the renditions from Iraq to Afghanistan and the historical guidance given to intelligence officers.⁷⁰ The ISC has noted that “[a]lthough the US may take note of UK protests and concerns; this does not appear materially to affect its strategy on rendition.”⁷¹ The Joint Committee on Human Rights has concluded that “[i]n view of the large number of unanswered questions, we

Foreign Affairs Committee the Foreign Secretary had stated that the Government's purpose in sending the list of flights was: “to identify whether rendition (i.e. of an individual) through UK territory or airspace in fact occurred”.

⁶⁸ FAC, ‘Human Rights Annual Report 2007’, paragraph 47.

⁶⁹ Foreign Affairs Committee, ‘Human Rights Annual Report 2008’, 9 August 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmffaff/557/55702.htm>.

⁷⁰ FAC, ‘Human Rights Annual Report 2008’, Conclusions and recommendations.

⁷¹ ISC, ‘Report into Rendition’, conclusion Y.

conclude that there is now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK's complicity in torture".⁷²

- 4.31 Moreover, a Legal Opinion prepared by Michael Fordham QC and Tom Hickman, and published by the APPG in September 2008⁷³, suggests, in line with the view of the European Court of Human Rights, that it is improper for the UK Government to rely on US assurances on this issue.
- 4.32 The UK Government's refusal to address the issue of extraordinary rendition, openly and transparently, has been widely criticised. The European Parliament "*deplore[d] the manner in which the UK Government, as represented by its Minister for Europe, cooperated with the Temporary Committee*". The Council of Europe cited the UK's acceptance of assurances on Diego Garcia "*without independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner*". The Foreign Affairs Committee has criticised the Government's "*policy of obfuscation*" on rendition.⁷⁴

⁷² JCHR, 'Allegations of UK Complicity in Torture', paragraph 99.

⁷³ FAC, 'Human Rights Annual Report 2007', 20 July 2008, paragraph 53, available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/533/53306.htm#a8>; Michael Fordham QC et al, 'Joint Legal Opinion in the Matter of the Human Rights Responsibility Arising from Military Detainee Handovers in Iraq', available at www.extraordinaryrendition.org.

⁷⁴ European Parliament, 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners'; Council of Europe, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', page 16; Foreign Affairs Committee, 'Foreign Policy Aspects of the War

Prosecutions in the United Kingdom

- 4.33 We examine in more detail at Section 5 the limitations of domestic law as it currently stands. However, we note here that, despite the known instances of UK involvement in rendition and further credible allegations, to date, no UK prosecutions have been brought against any UK or US officials. In response to a request from Liberty, the human rights NGO, the Association of Chief Police Officers asked Chief Constable Michael Todd to examine whether there was a basis under English law for a police inquiry.⁷⁵ His response in June 2007 indicated that there was not.
- 4.34 This UK assessment is in clear contrast to that of other European countries, including Italy and Germany, both of which have initiated prosecutions against officials involved in renditions using their territory. These prosecutions and the applicable law in other key jurisdictions are examined in more detail in Section 7 below.

against Terrorism', 5 April 2005, paragraph 98, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmfaff/36/3607.htm#a14>.

⁷⁵ Letter from Chief Constable Michael Todd to Shami Chakrabarti, available at <http://www.liberty-human-rights.org.uk/news-and-events/pdfs/er-acpo-response-june-07.pdf>, stating: "*none of the information available contributes to the evidential base to support allegations that offences have been committed on UK territory. The material is put together and draws conclusions on a wholly different basis to that needed for the criminal process here in the UK. Much of the information is circumstantial and without any means of testing or corroborating the claims made. Original sources are either outside UK jurisdiction, anonymous or otherwise unavailable for interview to a standard that would support a case brought in this Country... None of the accounts given by those involved include allegations that such operations transited UK soil... there are considerable practical difficulties dealing with these matters, in particular, in bringing the facts together with the law/procedure in this area.*"

5. A summary of the current domestic law

Introduction

- 5.1 In this part, we provide a summary of the domestic law relating to extraordinary rendition, as it currently stands.
- 5.2 Certain constituent elements of extraordinary rendition are already substantively criminalised at common law and by statute. These offences apply in the first instance to those directly involved in extraordinary rendition. We discuss the limitations of this at paragraph 5.26 of this CP, before turning to the scope of accessory liability for secondary participants in offences related to extraordinary rendition. We then examine briefly the limited deterrence of rendition offered by the Human Rights Act 1998 and the writ of habeas corpus. We conclude by assessing the weaknesses of the current legal position and the problems of bringing a prosecution, and by briefly outlining how the proposal set out in Section 8 addresses those weaknesses.
- 5.3 In essence, our domestic law fails to provide for the effective criminalisation, and hence deterrence, of extraordinary rendition activity. This is primarily because those parties that have committed primary offences (being frequently intelligence or military personnel) cannot, in the event, be apprehended. The law on secondary liability (i.e. aiding and abetting) is too uncertain and too rarely applied, even in more obvious cases, to act as an effective (as opposed to theoretical) sanction. Further, English criminal law does not, currently, address corporate liability. Finally, English criminal law does not effectively address the ‘turning of a blind eye’ to rendition activity when, by its

very covert nature, it is an activity in relation to which it is not, in practice, realistic to establish either the necessary acts or the necessary mental state in the absence of a new targeted, specific offence.

Common law offences of general application

- 5.4 At common law, the offences of kidnapping and false imprisonment will, in the absence of legal authority for such practices, prohibit the extra-judicial apprehension of those subjected to extraordinary rendition and their subsequent detention on board aircraft or other forms of transport that may pass through the UK or an Overseas Territory.

Kidnapping

- 5.5 Kidnapping is a common law offence which consists of the taking or carrying away of one person by another by force (or fraud⁷⁶) without the consent of the person so taken or carried away and without lawful excuse.⁷⁷ For the purposes of this offence, ‘taking or carrying away’ merely means a deprivation of liberty, coupled with the physical removal of the victim from a place he wishes to be.⁷⁸ ‘Force’ is also broadly construed, relating not merely to physical force, but any conduct which, together with the carrying away of the victim, is such as to override the consent of the victim.⁷⁹

⁷⁶ *R v Cort* [2004] 1 Cr App Rep 199.

⁷⁷ *R v D* [1984] AC 778.

⁷⁸ *R v Wellard* [1978] 3 All ER 161. It is, thus, unnecessary to prove that the kidnapper had carried the victim to the place he intended.

⁷⁹ The exercise of a mental or moral power or influence to compel or force another to do something against his will would suffice if it is sufficiently compelling to overcome that person's will: *R v Singh*, *R v Southward* [1995] 8 Archbold News 3, CA.

Such conduct will, however, be ‘lawfully excused’ where it is pursuant to a valid power of arrest or court order.⁸⁰

- 5.6 Consequently, the initial detention of persons then subjected to extraordinary rendition (so-called ‘black-bagging’)⁸¹ will amount to kidnapping under English law, and where such operations are carried out in the UK, the military, intelligence or other personnel directly involved may be subject to prosecution as principal offenders. We are unaware of any provision of domestic law that would give any such conduct the cloak of lawful excuse.
- 5.7 The offence of kidnapping is punishable by a fine or imprisonment at the discretion of the court. The sentencing guideline indicates that, in cases involving violence or prolonged detention, a sentence of more than eight years’ imprisonment will be appropriate.⁸² Consequently, it is likely that kidnapping as part of the process of extraordinary rendition would attract a significant custodial sentence.

False imprisonment

- 5.8 A person is guilty of the offence of false imprisonment at common law where he or she unlawfully restrains the victim’s freedom of movement from a particular place.⁸³ ‘Restraint’ for these purposes is broadly construed, and encompasses the physical restraint of an individual, as well

⁸⁰ *Greaves v Keene* (1879) 4 Cox D 73, *Mee v Cruickshank* (1902) 20 Ex CC 210.

⁸¹ As discussed at paragraph 4.7 of this CP.

⁸² *R v Spence and Thomas* (1983) 5 Cr.App.R. (S) 413.

⁸³ *R v Rahman* (1985) 81 Cr App Rep 349, CA.

as circumstances in which the victim submits to intimidation or commands.⁸⁴ An ‘unlawful’ restraint simply means restraint without lawful authority.⁸⁵

5.9 The accused must have intended to restrain the victim, or to have been subjectively reckless⁸⁶ as to the risk that the victim would be so restrained (i.e. the accused knew there was such a risk, but nonetheless ran that risk).

5.10 Consequently, in the absence of legal authority for their detention, rendered persons that are detained on planes that transit through UK territory are falsely imprisoned on such planes. We are unaware of any provision of English or Welsh law that accords UK or US personnel any law enforcement status that would entitle them to detain persons in this manner. Those military, intelligence or other personnel that are directly involved in such a rendition and secure detainees held on a rendition transport will clearly have sufficient intent or knowledge to satisfy the mens rea requirement for this offence.

5.11 False imprisonment is punishable by a fine or imprisonment at the discretion of the court, on its determination of the seriousness of the offence. In so determining, the court will have regard to the purpose for which the imprisonment was carried out. It is likely, on this basis, that persons found guilty of false imprisonment in

⁸⁴ *R v Linsberg and Leies* (1905) 69 JP 107, CCC) and *R v James* (1997) Times, 2 October, CA. Indeed, a restraint may consist simply of being prevented from proceeding in a particular direction (2 Co Inst 482 at 589).

⁸⁵ As discussed in relation to kidnapping, at paragraph 5.5 of this CP.

⁸⁶ *R v James* (1997) Times, 2 October, CA.

relation to extraordinary rendition would also face a substantial sentence of imprisonment.

Statutory offences of general application

- 5.12 Statutory offences will apply in respect of any violent conduct towards persons subject to extraordinary rendition while in the UK. Thus, persons involved in the renditions process are susceptible to prosecution for assault and battery, actual bodily harm and grievous bodily harm. The principal statutory offences are set out in the Offences Against the Persons Act 1861 (the *OAPA*).

Battery or assault occasioning actual bodily harm

- 5.13 Battery is a summary offence under Section 39 of the Criminal Justice Act 1988 (the *CJA 1988*), committed where any person touches or applies unlawful force to another. The level of force required is relatively superficial – minor bruising will suffice.⁸⁷ However, where more significant harm is caused, for example extensive bruising, the accused may be charged with assault occasioning actual bodily harm under Section 47 of the *OAPA*.⁸⁸
- 5.14 For both offences, a person is guilty of the offence where he intends to inflict unlawful force or is subjectively reckless as to the infliction of unlawful force. It is unnecessary that a person charged with the more serious offence of assault

⁸⁷ The Charging Standards for the offence state “*grazes, scratches, abrasions, minor bruising, swellings, reddening of the skin, superficial cuts, black eye*” are sufficient to engage liability.

⁸⁸ In *Boyea* [1992] Crim. LR 574, the Court held that “*any hurt or injury calculated to interfere with the health or comfort...[provided it is more than] trifling or transient*” was sufficient.

occasioning actual bodily harm intended or foresaw the more serious harm that occurred.

- 5.15 Consequently, the appropriate UK authorities may prosecute those (including military, intelligence or related personnel) that inflict minor or moderate ill-treatment on any person subjected to extraordinary rendition whilst being held in the United Kingdom or an Overseas Territory (for example to subdue a detainee). Assault occasioning actual bodily harm is punishable by up to five years' imprisonment.

Wounding and grievous bodily harm

- 5.16 Where military, intelligence or other personnel inflict more serious injury to any person subject to extraordinary rendition, they may face prosecution under Sections 20 and 18 of the OAPA that relate to wounding or grievous bodily harm. For the purposes of these offences, 'wounding' merely requires all layers of the skin to be pierced. 'Grievous bodily harm' has been broadly defined in case law as encompassing serious harm, with regard to the totality of injuries inflicted.⁸⁹ A person will be guilty of the Section 20 offence where he is merely subjectively reckless as to the risk of inflicting some minor bodily harm. Where a person intends to wound or inflict grievous bodily harm, he will be guilty of the offence under Section 18, which carries a maximum penalty of life imprisonment.

⁸⁹ *R v Grundy* [1977] Crim. LR 543.

Military law

- 5.17 Under English law, members of the Armed Forces do not obtain immunity from the ordinary law applicable to citizens by virtue of their uniformed status.⁹⁰ Consequently, UK service personnel that have committed any offences in support of renditions are liable to be prosecuted under any applicable domestic law. In addition they may be guilty of offences under the uniformed services' Disciplinary Codes, as set out in the Naval Discipline Act 1957, Part II of the Army Act 1955 and the Air Force Act 1955.⁹¹ In particular, each Code makes it an offence to act in a manner amounting to “*disgraceful conduct of a cruel, indecent or unnatural kind*”, punishable by up to two years' imprisonment following trial by court-martial.⁹² It is also an offence to aid, abet, encourage or assist in the commission of any offence contrary to a service Disciplinary Code.⁹³

Aviation law

- 5.18 Pursuant to Article 148 of the Air Navigation Order 2005 (as modified)⁹⁴ (the *ANO*), it is a criminal offence, punishable by fine or imprisonment, to contravene certain of the provisions regulating air transport. Article 149 of the

⁹⁰ *Burdett v Abbot* (1812) 4 Taunt 401 at 449–450. In addition the Human Rights Act 1998 applies to a member of the armed forces as it applies to a civilian.

⁹¹ As set out in the Naval Discipline Act 1957, Part II of the Army Act 1955 and the Air Force Act 1955.

⁹² Section 37 Naval Discipline Act 1957; Section 66 Army Act 1955; and Section 66 Air Force Act 1955.

⁹³ Section 41 Naval Discipline Act 1957; Section 68A Army Act 1955; and Section 68A Air Force Act 1955.

⁹⁴ SI 2005/1970.

ANO makes clear that the terms of the ANO extend to non-UK registered planes when transiting the UK. Whilst the majority of these provisions relate to the observance of proper technical and safety standards, particular actions by those operating rendition flights (to the extent that such flights use civil aircraft)⁹⁵ could be caught on specific occasions.

5.19 Specifically, pursuant to Article 94 of the ANO, it is an offence for any person with intent to deceive to file or use any certificate, licence, approval, permission, exemption or other document issued or required by the ANO which has been forged, altered, revoked or suspended, or to which that person is not entitled. A person found to violate this provision is liable on indictment to a term of imprisonment of two years, or an unlimited fine, or both.

5.20 In addition, Article 148(5) and Schedule 14, Part A, of the ANO makes it an offence, punishable on summary

⁹⁵ The Marty Report observes that rendition flights operated by the CIA have used civilian aircraft (see the individual case studies contained in Section 3 of the Explanatory Memorandum to the 2006 draft report, which refer, in particular, to “rendition planes” designated N313P and N379P, which were privately owned). It has also been alleged that certain rendition planes were chartered from the US company Jeppesen International Trip Planning (see Jane Mayer, ‘The CIA’s Travel Agent’, *The New Yorker*, 30 October 2006 (http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer) and Jeppesen DataPlan Inc. case noted at footnote 33, above). Pursuant to the Chicago Convention (see paragraph 6.18 below), “State” as opposed to “civil” aircraft require prior authorisation to overfly a State party to the Convention and must abide by the terms of such authorisation. While the Convention makes clear that it is the nature of the flight that is determinative of whether it enjoys State or civil status it has been argued that the use of privately chartered plans is part of a strategy to ensure that such flights are deemed “civil” and as such benefit from fewer overflight restrictions. The corollary of this is that such flights should be considered civil for the purposes of the ANO.

conviction by a Level 4 fine, to breach the Civil Aviation (Rules of the Air) Regulations 2007 (the *Rules of the Air*).⁹⁶ The Rules of the Air govern, inter alia, the proper filing of flight plans. Consequently it is an offence under the ANO to file false flight plan information.

- 5.21 To the extent that those persons operating rendition flights provide false information to mask their activities, they will fall foul of the air transport regulatory framework, and face enforcement action by the Civil Aviation Authority (the CAA). However, it is apparent that the sanctions available are weak, and the CAA would face significant difficulties in collecting satisfactory evidence of infringing conduct on the part of persons operating rendition flights through UK territory and then prosecuting such persons. Moreover, it is not clear that a rendition flight would necessarily violate these provisions. The deterrent value and effect of these regulatory offences, has not been, and is not, sufficient to deter rendition.

Torture

- 5.22 Individual criminal liability for the offence of torture is provided for under the CJA 1988, which gives effect to the prohibition on torture set out in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the *Torture Convention*). The substantive obligations imposed on the UK by the Torture Convention are discussed in paragraphs 6.4 to 6.6 of this CP.

⁹⁶ SI 2007/734.

- 5.23 Section 134 of the CJA 1988 provides that it is an offence for a public official intentionally to inflict severe pain or suffering on another in the performance or purported performance of his official duties or for any other person to inflict such pain with the consent or acquiescence of a public official. The act of torture must, therefore, be intentional and covers treatment inflicted for the purpose of obtaining information or a confession. For these purposes, the term ‘public official’ is construed relatively broadly, and will include persons acting in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.⁹⁷ The offence under the CJA 1988 is of universal jurisdiction, thus any act amounting to torture committed anywhere may be prosecuted by UK authorities. The offence is punishable by a maximum of life imprisonment.
- 5.24 The focus of the Section 134 offence is, thus, the substantive act of torture. Consequently, any prosecution under the CJA 1988 would most likely be directed at any ill-treatment that a rendered person is subjected when interrogated at the end of the rendition process.⁹⁸
- 5.25 We note, however, that the process of extraordinary rendition in and of itself arguably amounts to conduct theoretically contrary to the Torture Convention, as

⁹⁷ *Prosecutor v Furund'ija* (ICTY) (10 December 1998/IT-95-17/1-T).

⁹⁸ We note that the only prosecution as yet undertaken for the Section 134 offence targeted the most direct and egregious form of the systematic and physical mistreatment of individuals (see *R v Zardad* (2005) (unreported)).

recognised by the Eminent Jurists Panel,⁹⁹ and as such could conceivably be prosecuted directly under the CJA 1988, although no such prosecution has yet been attempted.¹⁰⁰ It is also possible that persons who provide support or clearance to rendition flights or other rendition transports may be liable as accessories to the Section 134 offence. The possibility of a successful prosecution on this basis is discussed in more detail below.

Analysis of the principal offences

5.26 The foregoing survey of applicable offences under English law demonstrates that specific aspects of the process of extraordinary rendition, from initial detention through to the alleged mistreatment of interrogated persons, are, arguably, substantively criminalised. However, the offences discussed in paragraphs 5.4 to 5.25 apply only to those who are directly involved as principals in the elements of extraordinary rendition identified. The involvement of UK citizens (whether members of the Armed Forces, Security Services or otherwise) and UK territory is thought to have largely been, to the extent that information is available, a

⁹⁹ EJP Report at Chapter 4, Section 3.1, page 81.

¹⁰⁰ This point is discussed in more detail at paragraphs 6.4-6.6 of this CP. The Attorney General, Baroness Scotland QC, in concert with the Director of Public Prosecutions, Keir Starmer QC, has invited the Commissioner of the Metropolitan Police to investigate the allegations made in the case of Binyam Mohamed (as discussed at paragraph 4.18 above). Baroness Scotland had previously indicated that the role of British officials in facilitating conduct linked to torture would form part of any investigation she may subsequently invite the police to initiate (see letter of Baroness Scotland to the Rt. Hon. Andrew Dismore MP, Chairman of the Joint Committee on Human Rights relating to the Binyam Mohamed case, dated 12 February 2009, and available at <http://www.attorneygeneral.gov.uk/attachments/Attorney%20General%20letter%20re%20Binyam%20Mohamed%20case.pdf> (retrieved on 1 June 2009).

less direct involvement in the apprehension, detention and physical mistreatment of those subjected to extraordinary rendition. However, as discussed in Section 4 of this CP, UK territory has been used for the transit of persons to detention and for rendition ‘circuit flights’. Consequently, conduct on UK territory, and possibly the conduct of UK nationals, has supported the passage of rendition transports through the United Kingdom or an Overseas Territory. The provision of assistance to such flights will be governed by principles of accessory liability but it is ill-adapted to prosecutions for extraordinary rendition.

Complicity in the offence

5.27 It is unlawful to aid, abet, counsel or procure the commission of a criminal offence.¹⁰¹ These terms are given their ordinary meaning and so will cover circumstances in which a person (the *accessory*) assists in or encourages the commission of a crime by the offender (the *principal*).¹⁰² An accessory that is proven to have aided or abetted an offence may be tried as a principal offender, and faces the same penalties as the principal offender. Thus, as described above, an accessory to a rendition transport may face penalties up to and including life imprisonment.

Accessory liability – the conduct element

5.28 A non-technical approach should be taken in determining what conduct engages accessory liability. Thus ‘assistance’ as it is generally understood will be sufficient to engage

¹⁰¹ Section 8 Accessories and Abettors Act 1861 in relation to indictable offences, and Section 44 Magistrates’ Courts Act 1980 in relation to summary offences.

¹⁰² *A-G’s Reference (No 1 of 1975)* [1975] QB 773.

accessory liability. Although the commission of the principal offence must be proved, it is not necessary to demonstrate that the principal would not have committed the offence but for the assistance given by the accessory.¹⁰³ It is not necessary, thus, that the assistance given is significant, nor does the principal have to be aware of the assistance.

5.29 Consequently, it is theoretically conceivable that the provision of technical support, refuelling and any necessary clearances for rendition flights or other transports that transit the UK would amount to assistance for the substantive offences committed by the principal perpetrators of a rendition (i.e. the military or intelligence personnel that participate in kidnap, false imprisonment or physical mistreatment as discussed above). It is not necessary that the principal offenders on board the plane know that they have received such assistance, or from whom that assistance emanates. However, the use of accessory liability in such circumstances is problematic and there has been no tradition of seeking to apply it in cases analogous to extraordinary rendition.

Accessory liability – the mental element

5.30 For an accessory to be convicted it must be proved that his assistance was done:

(a) intentionally, in the sense that he did it deliberately (and not accidentally), knowing that his act was capable

¹⁰³ *A-G v Able* [1984] 1 QB 795 per Woolf J.

of encouraging the commission of the principal offence; and

(b) with intent to assist the principal offender (and not to obstruct or hinder him).¹⁰⁴

5.31 In addition, an accessory cannot be convicted unless he was aware of all the essential circumstances which make the principal offence a crime, which is to be assessed on the evidence in the case.¹⁰⁵ Where the defendant is wilfully blind to the circumstances, he will be judged as having knowledge.¹⁰⁶ Lastly, a secondary party must be proved to have foreseen as a real possibility that the principal is acting, or may act, with the mental element required for the principal offence.¹⁰⁷

5.32 It is not necessary, then, that the principal offender and the accessory have a shared intention or criminal plan as to rendition.¹⁰⁸ It is technically possible that any person providing, say, airside services to a plane, knowing that rendered persons are held on that plane and that those persons have been ill-treated or face ill-treatment, could be guilty as an accessory.

¹⁰⁴ *R v Bryce* [2004] 2 Cr App Rep 592, CA.

¹⁰⁵ *Johnson v Youden* [1950] 1 KB 544. It is however not necessary that the accessory knows as a matter of law that the principal offence is a crime.

¹⁰⁶ *R v Griffiths* (1974) 60 Cr App Rep 14 at 18.

¹⁰⁷ *R v Powell, R v English* [1999] 1 AC 1.

¹⁰⁸ *A-G's Reference (No 1 of 1975)* [1975] QB 773.

Circuit flights – accessory liability and universal jurisdiction under Section 134 CJA 1988

- 5.33 While domestic judicial interpretation of the Section 134 offence is limited, Article 4 and 5 of the Torture Convention clearly establish that universal jurisdiction for complicity in torture was intended at the international level.¹⁰⁹
- 5.34 Consequently, providing any assistance to extraordinary rendition that involves transit through the UK of persons who may be subject to mistreatment at the hands of foreign nationals outside of the UK could be prosecutable here. It is also theoretically conceivable that providing such assistance to an empty plane, which is used to subsequently transport a rendered person to a site where that person is tortured, may similarly engage such accessory liability on an identical basis to that described in paragraphs 5.27 to 5.32 above (i.e. where that assistance enabled the torture to occur and where the defendant intends to assist torture).

Analysis of the scope of accessory liability

- 5.35 Accessory liability is essentially parasitic. It requires the facts amounting to the principal offence to be demonstrated (though it does not actually require someone to be prosecuted for that offence). Thus, to be convicted as an accessory, it must be demonstrated that the elements of rendition amounting to kidnap, false imprisonment, offences against the person or torture existed, and that the accessory had knowledge of those circumstances.

¹⁰⁹ As to which, see paragraphs 6.4-6.6 of this CP.

5.36 This clearly presents a significant evidential hurdle to a successful prosecution. By their very nature, rendition flights operate clandestinely. It is unlikely that persons operating UK transport facilities know of the purpose of such flights. Moreover, it will likely only be in the most egregious of cases (for example where a detainee tries to escape a flight) that airside personnel providing simple refuelling, maintenance and hangaring to the exterior of a plane would become sufficiently aware of the circumstances surrounding the principal offence to warrant the imposition of accessory liability.

5.37 These difficulties are manifest in respect of circuit flights. In order for accessory liability to be established, it would be necessary to establish that, subsequent to the overflight of an empty plane, a rendered individual was then detained and transferred for torture. This will be very difficult given the lack of specific evidence, even in respect of planes carrying persons. In addition, the requirement that the person giving the assistance intended that someone be subjected to ill-treatment is a high threshold and would effectively capture only those persons who were intimately involved in the rendition process with sufficient knowledge that the purpose of the flight in question was to torture. This would not, then, cover assistance in the form of refuelling, maintenance and hangaring that is given by employees at aerodromes in the absence of knowledge of

the true purpose of such flights, including the treatment that any captive would receive.¹¹⁰

5.38 At common law, a legal person may incur secondary liability where he, she or it has a legal duty to act or is entitled to exercise control over or prevent the actions of the principal offender, but fails to do so.¹¹¹ The latter has been applied to the owner of a motor vehicle whose car may have been driven dangerously by a fellow traveller,¹¹² a licensee that allowed customers to drink outside of licensed hours¹¹³ and, most recently, to a company manager that failed to prevent employees being racially harassed.¹¹⁴

5.39 These extensions of accessory liability could theoretically inculcate those in positions of responsibility or seniority at airports, aerodromes and logistics suppliers, rather than mere employees. Liability for omissions, though generally treated negatively in English law, is justified in respect of those with special responsibilities that are in a position to prevent extraordinary rendition.

¹¹⁰ Note that the proposal in this CP does not criminalise innocent behaviour by people involved in such activities.

¹¹¹ *Russell v Russell* (1987) 85 Cr App R 388 at 397 per Lord Lane CJ, referring to the responsibility of parents in relation to children. Academic authorities suggest that the principle may extend to employment cases, where, for example, a security guard has deliberately omitted to lock a door, enabling burglars to enter, and where a store detective has deliberately ignored thefts by customers (Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd ed. 2003) at page 204).

¹¹² *Du Cros v Lambourne* [1907] 1 KB 40.

¹¹³ *Tuck v Robson* [1970] 1 WLR 741.

¹¹⁴ *R v Gaunt* [2004] 2 Cr App R 37.

5.40 However, the scope of any extensions is extremely uncertain and there is no established line of precedent for such extension. The examples that have been established to date are based on particular and clear facts.¹¹⁵ Given the substantial practical problems involved in the rendition area, there is no credible basis for suggesting that accessory liability provides a control on extraordinary rendition processes generally or that it is capable of deterring behaviour by those in a position of control over transport facilities.

Corporate liability

5.41 It is possible to extend criminal liability to companies for acts committed by employees acting in the course of their employment. However corporate liability cannot arise where imprisonment is the only sanction. Consequently, corporate liability is not available for the most serious offences discussed above (wounding or grievous bodily harm with intent and torture). Moreover, as a company can only act through its employees, a criminal prosecution against a company will only proceed successfully, in practice, where the requisite conduct was carried out by an employee of sufficient seniority to be identified as a directing mind of the company.¹¹⁶ While there have been strong judicial statements supporting a widening of this position, so that a company may be liable for the acts of more junior employees, it is nonetheless likely that the

¹¹⁵ The Law Commission has stated “*the ambit of the exception is unclear and it is questionable whether it represents a general principle.*” (Law Commission, *Participation in Crime*, Law Com No. 305, at paragraph 2.29).

¹¹⁶ *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127.

involvement of senior management is required.¹¹⁷ This may capture UK companies in the unlikely case that they have entered into very specific agreements to provide material support to rendition flights, where those agreements were concluded by those of sufficient authority to represent the company.¹¹⁸ However, it is unlikely that such senior management would be involved in more general support roles in relation to rendition flights. Consequently, the impact of corporate liability under existing law appears limited.

Prospects for prosecution

- 5.42 While individuals committing acts forming part of the process of extraordinary rendition could theoretically be prosecuted as principal offenders or accessories for a range of offences, it is highly unlikely that such prosecutions will be pursued. The Code for Crown Prosecutors stipulates that a prosecution should only be brought where the evidence is such that there is a real likelihood of securing a conviction.¹¹⁹ Given that the principal offenders are likely to be foreign military, paramilitary or intelligence personnel,¹²⁰ the prospects of identifying such persons and securing their

¹¹⁷ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918.

¹¹⁸ We are, however, unaware of any such agreements, which are most likely to have been concluded in secret.

¹¹⁹ Paragraph 5.2 of the CPS Code.

¹²⁰ The Marty Report makes clear that rendition flights are likely to have been operated by CIA personnel. In the case of Abu Omar, the Milanese court issued arrest warrants for 26 US nationals (including a number of alleged CIA agents) for his alleged rendition on 17 February 2003.

presence for investigation and subsequent arrest and trial must be viewed as slender.¹²¹ In the absence of specific information on particular rendition transports, it is unlikely that the CPS will initiate such a prosecution. The position is particularly stark in respect of accessory liability for circuit flights. The strict requirements of knowledge and intention would require convincing evidence to be presented before personnel could be prosecuted. As the Association of Chief Police Officers has made clear, the direct and specific evidence currently available in respect of prosecution under the existing offences in cases of rendition involving the UK falls far below the required standard.¹²²

5.43 It is the view of the APPG that English criminal law, as it currently stands, is ineffective to penalise the practice of extraordinary rendition involving the UK or any Overseas Territory. The common law extension of accessory liability to omissions where persons have a legal duty to act or are entitled to exercise control over other persons does not create sufficient pressure on those controlling transport facilities to ensure that they are not used to facilitate

¹²¹ The APPG notes, in this regard, the fact that of the above-mentioned 26 US nationals whose arrest was ordered in the Abu Omar case, none have been brought before the Italian authorities. It should also be noted that in limited circumstances a member of the Intelligence Services may be immune from prosecution for criminal or civil offences under Section 7 of the Intelligence Services Act 1994 (the *ISA 1994*). In particular, he will not be liable for an act done outside the British Islands if his act was authorised by the Secretary of State. Authorisations will only apply to acts that are “*necessary for the proper discharge of a function of the Intelligence Service or GCHQ*” (section 7(3) *ISA 1994*). An authorisation may then cover enhanced interrogation techniques that could amount to cruel, inhuman or degrading treatment, as long as it is carried out outside the British Islands.

¹²² As discussed at paragraph 4.33 of this CP.

extraordinary rendition. The uncertain scope of this doctrine provides neither sufficient clarity for the conduct of business, nor sufficiently rigorous protection for those who may be subjected to processes in flagrant violation of domestic and international laws. In the absence of any realistic prospect of prosecution, let alone conviction, the criminal law fails to operate as an adequate deterrent for involvement in extraordinary rendition. The APPG considers that, to be effective, the legal framework should require those operating transport facilities to act proactively with greater diligence to ensure their facilities are not used to provide logistical or other support to rendition transports.

Other domestic avenues of redress – Human Rights Act 1998 and Habeas Corpus

- 5.44 Section 6 of the Human Rights Act 1998 (the *HRA*) prohibits public authorities from acting in a manner that is incompatible with those rights under the ECHR that are scheduled to the HRA.¹²³ A ‘public authority’ is defined as an entity whose functions are “*of a public nature*”,¹²⁴ and as such encompasses military and government personnel. In addition, the HRA requires domestic courts to have regard to the principles and case law of the European Court of Human Rights in determining cases that involve a Convention right.

¹²³ Articles 2-12 and 14-18 of the ECHR, Articles 1-3 of the First Protocol to the ECHR, and the Sixth Protocol to the ECHR.

¹²⁴ Section 6(3)(b) HRA.

5.45 We discuss at Sections 6.3-6.11 of this CP certain of the Convention rights that are affected by extraordinary rendition. In particular, Articles 2 (the right to life), 3 (freedom from torture and other cruel, inhuman or degrading treatment) and 5 (freedom from unlawful deprivation of liberty) are likely to be engaged. Under the HRA framework, such rights are directly applicable in domestic law. Consequently, if military or other governmental personnel act in a manner that infringes any such rights through participation in extraordinary rendition, a domestic court may provide relief (in the form of a court order to restrain such conduct, or, in certain cases, an award of damages). Moreover, consistent with the jurisprudence of the European Court on the ambit of the Convention, the HRA will apply to the conduct of UK military or other governmental personnel abroad, where the territory in question is within the jurisdiction of the UK. Consequently the activities of military or governmental personnel at, for example, UK military bases abroad, are susceptible to challenge on HRA grounds.¹²⁵

5.46 However, the HRA does not impose criminal liability on those that may act inconsistently with Convention rights: it only gives rise to civil compensation or restraint. Moreover, given the extra-legal nature of extraordinary rendition, it is very unlikely that persons with sufficient standing will have

¹²⁵ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 and *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 relating to UK military bases in Iraq, and most recently *R (on the application of Al-Saadoon and another) v Secretary of State for Defence* [2008] EWHC 3098 (Admin) where it was held that the claimants in an HRA claim were within the jurisdiction of the United Kingdom for the purposes of the HRA, though on the facts no breach was found.

the opportunity to challenge the process on HRA grounds through judicial review. In addition, the APPG views the availability of damages as providing only limited ex post censure of actions that can be readily established. Accordingly, its deterrent value must be viewed as limited.

5.47 The common law writ of habeas corpus ad subjiciendum is an ancient remedy available in all cases of wrongful deprivation of personal liberty to secure the release of any such person unlawfully detained. The protection of the writ extends not only to subjects of the Crown, but to all persons within the United Kingdom under the protection of the Crown and entitled to resort to the courts to secure their rights, even where they are alien enemies. As such the writ would be available to persons temporarily resident in the United Kingdom that have been subject to extraordinary rendition, or persons that are held in private detention in the United Kingdom or its territory. Consequently persons that are alleged to be detained in UK territory at Diego Garcia may be entitled to the protection of the writ. However, it does not apply to protect people who were subject to extraordinary rendition within the UK but are then held outside the jurisdiction of the UK courts.

5.48 Section 11 of the Habeas Corpus Act 1679, provides that UK subjects that are transferred outside of the United Kingdom to be illegally imprisoned will nonetheless be able to bring a claim of false imprisonment before the UK courts against all or any person or persons that authorised such transfer or advised, aided or abetted any such transportation. Moreover, the persons that knowingly unlawfully detain, imprison or transport such persons, or

authorise, advise, aid or assist such conduct, shall be subject to a maximum of life imprisonment.¹²⁶ This is an anti-avoidance provision aimed against conduct that may take persons outside the protection of the writ of habeas corpus.¹²⁷

5.49 The APPG does not consider that this (albeit ancient and noble) provision is appropriate to control extraordinary rendition in the modern world. In particular:

- (a) the Section 11 offence appears limited to UK ‘subjects’ that “*now or hereafter shall be an inhabitant or resident*” of England and Wales. Whilst Section 11 could apply to UK nationals or residents, it is unlikely that it would extend to persons with no connection to the UK that are merely transited through UK territory or to people who were in the UK on a more temporary basis but ‘kidnapped’ and rendered from the UK;
- (b) more importantly, the parts of the section 11 offence which are more relevant to the issues arising in extraordinary rendition are essentially secondary ‘aiding or abetting’ offences, albeit statutorily defined. Thus, it is subject to the same deficiencies as outlined above in relation to secondary offences and, arguably, at least, requires proof of the underlying primary offence;

¹²⁶ Criminal Law Act 1967, Sections 10(2), 13(2) and Schedule 3 Part III and Schedule 4, Part III.

¹²⁷ It seems that Section 11 was originally designed to prevent Charles II from sending political opponents to Scotland to be tortured (see P.R. Chandler, *Praemunire and the Habeas Corpus Act*, (1923) Columbia LR 273 at 276)

- (c) the Section 11 offence does not deal with either circuit flights, or the wider ‘failure prevent’ issues which are addressed in the proposal and which the APPG considers are necessary to create a comprehensive and effective UK criminalisation of the practice;
- (d) the mental element is the relatively strict one of ‘knowing’ which would be too limiting to give rise to an effective prohibition;
- (e) so far as can be identified, the provision has never been used (and certainly not in modern times) and there is room for a more defined and focussed provision that takes account of the developments in the law over the past 330 years;
- (f) the extra-legal and secret nature of detention under the process of extraordinary rendition would inhibit in practice successful recourse to the court under this provision.

The draft legislative proposal

5.50 The APPG considers that its legislative proposal, set forth in Section 8, remedies the key weaknesses in English criminal law outlined above.

- (a) By establishing a specific primary offence that criminalises the use of transport facilities for the transfer of persons without lawful excuse (and which thus focuses on extraordinary rendition itself), the proposal clearly addresses the conduct that forms the core of extraordinary rendition, insofar as that process involves the UK or its Overseas Territories. As such,

the APPG's view is that this proposal provides for the first time a proper deterrent to extraordinary rendition.

- (b) By clearly prohibiting the facilitation of extraordinary rendition, the proposal avoids the difficulties of relying on the theoretical and unclear possible extension of accessory liability to prosecute those that have provided support to extraordinary rendition. It provides clear definitions of criminal behaviour and avoids the current unsatisfactory position of a low but uncertain risk of being prosecuted as an accessory when the necessary acts and mental state are difficult to establish and where there will, almost certainly, be no prosecution for the primary offence. In addition, the creation of a specific offence relating to circuit flights avoids reliance on the limited scope of accessory liability in relation to the statutory offence of torture under the CJA 1988.
- (c) The imposition of liability on those who manage or control transport facilities, subject to various defences, places the common law extension of accessory liability for certain omissions on a clear statutory basis. This strengthens the regulation of persons and organisations that may find themselves in a position to support extraordinary rendition. As such it will provide a more practical bar to extraordinary rendition than the current domestic legal framework.

6. International law framework applicable to extraordinary rendition

Introduction

- 6.1 This part of the CP seeks to examine the international law framework within which the practice of extraordinary rendition operates. In so doing, it provides an overview of international law applicable to the practice of extraordinary renditions, and the related obligations of the UK in this regard, including the obligations under international law to take steps domestically to prohibit and deter extraordinary rendition, and then tests the legislative proposal (set out in full in Section 8) against these obligations.

The United Kingdom's obligations under international law

- 6.2 The practice of extraordinary rendition violates international human rights law, international criminal law and international aviation law. The obligations of the UK under each of these are considered in turn below.

International Human Rights Law

- 6.3 The UK is party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the *Torture Convention*), the International Covenant on Civil and Political Rights (the *ICCPR*), the United Nations Convention Relating to the Status of Refugees (the *Refugee Convention*), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the *ECHR*). Further, although it has not yet ratified it, the UK has signed the United Nations Convention for the Protection of all Persons from

Enforced Disappearance (the *Disappearance Convention*), and has indicated that it hopes to move towards ratification. Each of these treaties prohibits practices contained in extraordinary rendition.

- 6.4 The Torture Convention is of particular relevance in the context of extraordinary rendition. It contains a broad definition of torture which encompasses:

*...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*¹²⁸

- 6.5 Article 3 of the Torture Convention imposes a complete prohibition on *refoulement* i.e. the transfer of persons to States where there are “*substantial grounds*” to believe that they are more than likely to be tortured. The *jus cogens* principle of *non-refoulement* underpins the provisions of the Torture Convention as it imposes an unconditional obligation not to transfer any person to a country where he or she may face torture or ill-treatment. The Torture Convention’s prohibition on *refoulement* pertains only to

¹²⁸ Article 1 of the Torture Convention.

torture and does not extend to cruel and inhuman treatment. Under Article 4 of the Torture Convention, States Parties are obliged to ensure that all acts of torture (as defined in Article 1) and complicity in these acts are criminalised under domestic law.

6.6 To ensure that no perpetrator goes unpunished, Article 5 of the Torture Convention imposes an obligation to “*establish jurisdiction*” over acts of torture and complicity in acts of torture. In substance, this creates a universal jurisdiction over torture. Article 6(1) of the Torture Convention flows directly from Article 5. It states that where alleged offenders are “*present*” in its territory, a State has an obligation to subject such persons to custody and commence a preliminary investigation into the facts.¹²⁹ However, this obligation arises only where the State is “*satisfied, after an examination of information available to it, that the circumstances so warrant*” which means that the State has latitude in assessing case by case scenarios.

6.7 The ICCPR outlaws torture, cruel and inhuman treatment (Article 7), arbitrary arrest or detention (Article 9) and upholds the principle that people deprived of their liberty should be treated with dignity and humanity (Article 10). The Human Rights Committee (the **HRC**) has noted that it will not be deemed sufficient for State Parties to prevent and criminalise such acts, but they will also have to present the HRC with reports on the judicial and legislative

¹²⁹ Article 6 was proposed by the United States (United States Draft of the Convention Against Torture (19 December 1978) (E/CN.4/1314).

measures adopted to prevent and punish such acts.¹³⁰ The ICCPR imposes an obligation on State Parties to protect persons present on their territory (Article 2). The notion of territory has been broadly interpreted to include all individuals on the territory of a State Party and anyone in the power or effective control of a State Party even when outside its physical territory. Another obligation imposed on States Parties to the ICCPR is the *non-refoulement* principle (protecting an individual from transfer to a State where he or she may face torture or cruel and inhuman treatment – see above). In the area of extraordinary rendition, it is worth noting that the HRC has condemned enforced disappearances as violations of Articles 7, 9 and 10 of the ICCPR.¹³¹

6.8 The Refugee Convention also contains a prohibition on *refoulement* (Article 33). The Refugee Convention does not refer to torture or cruel or inhuman treatment, but is wider in scope as it covers fear of persecution on the basis of religion, race or nationality. Article 33 of the Refugee Convention is more targeted in its geographical reach than the Torture Convention, which applies to the *refoulement* of any person to any State; whereas the Refugee Convention prohibits *refoulement* only to the refugee's home State. In addition, it is more restrictive with regard to the ambit of

¹³⁰ General Comment No. 20: Replaces General Comment 7 concerning the prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/92. CCPR General Comment No. 20 (General Comments).

¹³¹ General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13 (General Comments).

its protection as it does not offer refugee status if there are “reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted... of a particularly serious crime, constitute a danger to the community of that country.” Article 1F further curtails the applicability of the Refugee Convention in cases where a refugee has committed “a crime against peace”, “a serious non-political crime” or “has been found guilty of acts which are contrary to the purposes of the United Nations”. It is evident that it will be hazardous to try to use the Refugee Convention as a basis for attack on extraordinary rendition as State Parties to the Convention will argue that the refugees concerned fall within the net of Article 1F as they are terrorist suspects. The protections afforded by the ICCPR and the Torture Convention are clearly more robust.

- 6.9 Even though there have been no allegations of extraordinary renditions carried out at the behest of a member state of the Council of Europe, it is worth noting that Article 3 ECHR contains a prohibition on torture. The ECHR does not contain a prohibition on *refoulement per se*, but the European Court of Human Rights (the **European Court**) has interpreted Article 3 as containing such a prohibition. In the case of *Soering v United Kingdom*, which related to the extradition of a German citizen accused of murder to the US where he would face the death penalty, the European Court held that the alternative of allowing such a person to be extradited would be incompatible with the underlying values of the Convention, and that consequently the prohibition on torture “*extends to cases in*

*which a fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.*¹³² Moreover, where death or ill-treatment is alleged to have occurred in particular at the hands of State actors, Articles 2 and 3 ECHR have been interpreted as imposing a positive obligation of prompt and effective investigation on the State.¹³³

6.10 As a matter of international law, the UK is obliged to observe these standards. The ECHR framework also provides limited direct recourse for those subjected to extraordinary rendition, subject to the requirement of ‘victim’ status, to appear before the European Court of Human Rights.¹³⁴ Consequently, only a rendered individual or their family is likely to be able bring a case alleging a violation of Articles 2 or 3 ECHR. In addition, it is likely that the jurisdictional limitations of the ECHR, which extends only to the conduct of Council of Europe States in territory under their control, will inhibit claims.¹³⁵ To the

¹³² *Soering v United Kingdom*, 161 Eur. Ct. H.R. (ser.A) (1989), paragraph 88. See also *Chahal v United Kingdom* (1997) 23 EHRR 413 which affirms that this is an absolute prohibition that admits no exception on national security grounds.

¹³³ See, for example, *Jordan v United Kingdom* (2003) 37 EHRR 2, in the context of the deaths of detainees in custody.

¹³⁴ Article 34 ECHR. Accordingly there is no *actio popularis* under the ECHR framework. The position is however ameliorated in the UK through the Human Rights Act 1998, which imposes a direct obligation on public authorities to refrain from conduct that is incompatible with the principal ECHR rights. This is discussed in more detail at paragraphs 5.44 to 5.46 of this CP.

¹³⁵ Article 1 ECHR provides that the signatory States will secure the ECHR rights to all persons “*within their jurisdiction.*” The European Court of Human Rights has

extent that extraordinary rendition was brought about by countries that were not parties to the Convention, the only remaining claim against a Council of Europe State would be for the support and facilitation of rendition within their territory in a manner that is inconsistent with ECHR rights. While this might cover such cases as the use of Diego Garcia (as discussed at paragraph 4.15 of this CP) the secret nature of extraordinary rendition and the paucity of specific information available in respect of particular rendered individuals will frustrate recourse to Strasbourg in the majority of cases, particularly those concerning circuit flights.¹³⁶ Moreover, this recourse under the ECHR does not impose criminal penalties or, thereby, create effective sanctions to control the practice of extraordinary rendition.

- 6.11 In addition to the rights enshrined in the ECHR itself, various protocols, to which only the States that have ratified them are bound, have added further protections. For instance, Protocol No.7 1984 covers the non-expulsion of aliens except in accordance with law.¹³⁷ However, the UK has neither signed nor ratified this Protocol.

emphasised the essentially territorial nature of this provision (see *Bankovic & Others v Belgium* (2001) 11 BHRC 435, at paragraph 59).

¹³⁶ We note that the European Court of Human Rights has developed case law on disappeared persons, particularly in Turkey (see for example *Kurt v Turkey* [1998] 27 EHRR 373) extending the positive duty on the State under Articles 2 and 3 ECHR. However those cases concerned the direct conduct of State organs clearly within the territory of the State. As such the difficulties relating to facilitation of rendition operations conducted outside of the territorial reach of the ECHR led by a non-Council of Europe State are not addressed.

¹³⁷ CETS No. 117. It was opened for signature on 22 November 1984 and entered into force on 1 November 1988.

6.12 The Disappearance Convention imposes a series of interwoven duties analogous to the requirements of the Torture Convention. As with the Torture Convention, the aim of its provisions is clear: to combat impunity. It should, however, be noted that to date an insufficient number of signatory States have ratified the Disappearance Convention for it to come into force (the UK and the US being among these States). Nonetheless, the Disappearance Convention is the first international human rights instrument to affirm a non-derogable right not to be subjected to enforced disappearance and secret detention (Article 1 and Article 17 respectively). Article 2 defines enforced disappearance as “*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*” Further, Article 1 states that no “*exceptional circumstance*”, including war, may be invoked as a justification for enforced disappearance. Clearly, then, acts of extraordinary rendition as defined in this CP will fall within the ambit of this Convention.

6.13 Article 3 of the Disappearance Convention requires States Parties to investigate acts as defined in Article 2. Article 4 requires States Parties to criminalise such behaviour in their domestic law. Article 6 elaborates that this includes accomplices and those who have given superior orders in respect of such acts.

- 6.14 Pursuant to these international treaties, the UK is (or will be) obliged:
- (a) to prevent torture (and inhuman and degrading treatment);
 - (b) to investigate allegations of such treatment within the UK; and
 - (c) to prevent individuals being transported by a third party to a State in which there will be a real risk that the individual will be exposed to torture or inhuman or degrading treatment.

International Criminal Law

- 6.15 Under the framework of the Rome Statute of the International Criminal Court (the *Rome Statute*), there is the possibility of individuals facing criminal liability directly under international law before the International Criminal Court (the *ICC*) should the ICC Prosecutor initiate an inquiry into rendition. Article 7 of the Rome Statute establishes that a crime against humanity is one of an enumerated list of offences, “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”. The list includes torture and the enforced disappearance of persons, which are defined in broad consistency with the international legal instruments discussed above.
- 6.16 Article 8 of the Rome Statute also states that it is a war crime when torture is carried out in the context of international or non-international armed conflict against certain persons, including civilians and captured members

of armed forces. In addition, ‘unlawful deportation, transfer or unlawful confinement’ is contrary to Article 8 when committed in the context of an international armed conflict. Article 8 could relatively easily be applied to persons subject to extraordinary rendition from areas such as Iraq and Afghanistan although it would not necessarily extend to all terrorist related renditions. Indictments issued pursuant to Article 8 would not need to meet the intricate ‘systematic or widespread attack’ or ‘civilian population’ tests that are part of crimes against humanity, and may lead to simpler prosecutions with an increased prospect of conviction against a narrow class of rendition activity.

6.17 Under the Rome Statute, were extraordinary rendition to be considered to be a crime against humanity by the ICC Prosecutor, the fact that flights transited UK territory or that refuelling occurred on UK territory could impose on the UK an obligation to investigate those persons whose conduct is alleged to have amounted to extraordinary rendition. Should the UK unreasonably delay in investigating such crimes, the ICC would be entitled to initiate an investigation. While theoretically possible,¹³⁸ there are considerable technical problems with this approach associated with the requirement that the offence is ‘widespread or systematic’ and ‘directed against a civilian population’.¹³⁹ In addition, we consider it at present unlikely

¹³⁸ The application of crimes against humanity to extraordinary rendition would be novel. However, we do note that the Eminent Jurists Panel of the International Commission of Jurists considers it a possibility that a government policy of extraordinary rendition may amount to a crime against humanity (see EJP Report at Chapter 4, Section 3.1, page 81).

¹³⁹ The established judgments of the relevant competent international tribunals have interpreted these concepts relatively broadly (see *Prosecutor v Kunarac and others*, Case

that the ICC Prosecutor Luis Moreno Ocampo will initiate an investigation into extraordinary rendition.¹⁴⁰ Consequently, we do not consider the issue further here.

International Aviation Law

- 6.18 The Convention on International Civil Aviation (the *Chicago Convention*), ratified by both the UK and 188 other Contracting States, is also applicable to the practice of extraordinary renditions as it provides the regulatory regime for civil aircraft and civil aviation. Pursuant to the Chicago Convention, every State has complete and exclusive sovereignty over the airspace above its territory. Pursuant to the Chicago Convention, States have the power to require aircraft to land “*if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention*”. Since the aims of the Chicago Convention include “*cooperation between nations*” and “*friendship and understanding between nations*”, the practice of extraordinary rendition is arguably incompatible with such aims. Any other interpretation of the Chicago Convention would render it inapplicable, given the status of the prohibition on torture as *jus cogens* and Articles 53 and 64 of the Vienna Convention on the Law of Treaties.

No. IT-96-23 and 23/1-A, Judgment (ICTY Appeals Chamber, 12 June 2002) at paragraph 86) and it is foreseeable that the law might move in this direction (see *Prosecutor v Mrksic and others*, Case No. IT/95/13-1, Judgment (ICTY Trial Chamber, 27 September 2007), at paragraphs 448-464 where the point is on appeal).

¹⁴⁰ We are unaware of any pronouncements made by Prosecutor Ocampo in support of commencing an investigation into extraordinary rendition.

6.19 Accordingly, as summarized in the opinion from Bankim Thanki QC, leading Counsel in respect of aviation law matters, in “*circumstances where the relevant UK authorities have reasonable grounds to believe that aircraft in UK airspace are involved in extraordinary rendition*”, the UK is obliged to exercise its powers to prevent such rendition of suspects through the UK. There is no evidence to suggest that the UK has ever required a plane to land on these grounds.

The draft legislative proposal

6.20 The APPG considers that the legislative proposal, set forth in Section 8 of this CP, would be entirely consistent with the UK’s obligations under international law as discussed above. Moreover, the proposal will assist in ensuring that the UK has fully and clearly implemented the obligations that it has undertaken at the international level, in particular by:

- (a) creating a primary offence of using transportation infrastructure to transport a person without lawful excuse. This meets the UK’s obligations under the ICCPR in relation to arbitrary detention and treating detainees with humanity and dignity. It also reinforces the UK’s meeting of its *non-refoulement* obligations under Article 3 of the Torture Convention and Article 33 of the Refugee Convention;
- (b) creating a primary offence of using transportation infrastructure to transport a person without lawful excuse which would meet the UK’s obligation in the event it chose to ratify the Disappearance Convention;

- (c) creating a primary offence which clearly meets the UK's obligations under the Chicago Convention; and
- (d) creating a facilitation offence which meets and goes beyond the UK's international legal obligations.

7. Comparative analysis

Introduction

- 7.1 The APPG believe it is useful to have regard to the approach taken in key European and common law jurisdictions. An understanding of the strengths and weaknesses of the legal position relating to extraordinary rendition in those jurisdictions, and the success or otherwise of specific actions or reforms relating to extraordinary rendition, provides a valuable benchmark for our proposals. In addition, given the global nature of extraordinary rendition operations, the position in the UK cannot be viewed in isolation.
- 7.2 We outline below, following liaison with local lawyers, the applicable criminal law in respect of extraordinary rendition in Australia, Belgium, Canada, Germany, Italy, Spain, The Netherlands and the United States. We do not contend that this review has been exhaustive; our intention is to identify the main offences and approaches taken in those jurisdictions, and the success or failure of any prosecutions, in order to inform our proposal as set out in Section 8 of this CP.

Australia

- 7.3 Whilst extraordinary rendition is not criminalised *per se* under Australian Commonwealth law, aspects of the extraordinary rendition process are substantively criminalised by the common law offences of kidnap, false imprisonment, battery and assault, as under English law.

- 7.4 In addition, the Criminal Code Act 1995 (the *Australian Criminal Code*) sets out various prohibitions that may encompass extraordinary rendition. In particular, under Chapter 8 of the Australian Criminal Code, it is an offence if a person protected under the Geneva Conventions is unlawfully deported or transferred to another country or location (Section 268.32), unlawfully confined (Section 268.33) or tortured (Section 268.25). Consequently it is arguable that the offences under Chapter 8 prohibit certain extraordinary rendition operations involving combatants taken from the acknowledged battlefields of Afghanistan and Iraq, where US, UK and NATO forces are required to operate under the Geneva Conventions.
- 7.5 However, as with English law, the main offences apply, in the first instance, to those persons directly involved in the substantive acts of extraordinary rendition. Section 11.2 of the Australian Criminal Code does extend liability to defendants who intended to aid, abet, counsel or procure the commission of an offence and, if such an intention is shown to exist, liability may also arise in circumstances where a defendant acted recklessly as to the commission of further offences. Provisions also exist in relation to agency, incitement and conspiracy. As with English law, while the conduct element for accessory and inchoate liability is broad, the mental element is relatively strict.
- 7.6 Outside of the sphere of lawful extradition,¹⁴¹ and the criminalisation of substantive acts of torture,¹⁴² there is no

¹⁴¹ See the Extradition Act 1988, which imposes an obligation of non-refoulement.

¹⁴² Under the Crimes (Torture) Act 1988.

express provision under Australian law criminalising the transfer of individuals out of the jurisdiction where they would face torture, nor any substantive investigative obligation on the State or any entities that may facilitate rendition. Moreover, Australia does not have a charter for the protection of fundamental rights and freedoms, unlike the UK and Council of Europe States which bear certain positive obligations under the ECHR, as discussed at paragraph 6.9 of this CP. The current legal position in Australia must, then, be viewed as weak, and the Australian Human Rights and Equal Opportunity Commission has advocated the introduction of a clear legislative prohibition to ensure compliance with international human rights obligations.¹⁴³

7.7 There has been limited judicial consideration of extraordinary rendition in Australia. Mamdouh Habib, who was rendered to Egypt in 2001 and then held at Guantánamo Bay until 2005, has brought proceedings against the Commonwealth,¹⁴⁴ alleging that officers of the Australian government, with the authority of the government, were complicit in his mistreatment and/or took inadequate steps to prevent it when effective steps may have been taken to assist him.¹⁴⁵ His claim is ongoing and it

¹⁴³ Human Rights and Equal Opportunity Commission, *Australia's Compliance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, April 2008 at paragraph 16.

¹⁴⁴ *Habib v Commonwealth of Australia* [2008] FCA 489 (16 April 2008) and FCA 1494 (7 October 2008).

¹⁴⁵ Mr Habib's case has attracted significant NGO comment. See for example the report of the Australian Human Rights Law Resource Centre, *Australia's Failure to Investigate Torture*, available at <http://www.hrlrc.org.au/>, and the 2005 report of Human Rights

is unclear whether it has any likelihood of success. However, we note that the previous Administration had consistently maintained it had not acted unlawfully in its conduct relating to Mr Habib.¹⁴⁶

Belgium

- 7.8 Extraordinary rendition is not criminalised under Belgian law as such, though, as with English law, its constituent elements may amount to offences against the person under the Belgian Criminal Code. This includes, in particular:
- wilful injury against life (broadly analogous to offences of assault, and actual and grievous bodily harm under common law and the OAPA);
 - involuntary offences against life (broadly analogous to gross negligence manslaughter in English law); and
 - wilful or involuntary offences against physical integrity (such term including intentionally inflicted acts of torture as understood under the Torture Convention or the reckless wounding of those subject to detention).
- 7.9 As with English law, these offences would apply, in the first instance, to those directly involved in an extraordinary rendition operation. However, pursuant to Article 66 of the Belgian Criminal Code, persons that instigate the offence or provide “*indispensable assistance*” may face liability as a ‘co-perpetrator’, and be held fully liable as a principal offender.

Watch, *Torture Worldwide*, available at <http://www.hrw.org/en/news/2005/04/27/torture-worldwide>.

¹⁴⁶ Statement of then Prime Minister, the Rt Hon John Howard MP, 12 January 2005.

Article 67 of the Belgian Criminal Code states that a person that provides minor assistance is held as an ‘accomplice’ and subject to less severe penalties. In each case, the co-perpetrator or accomplice must act in order to obtain a wrongful advantage (“*dol general*”).

7.10 Whilst Belgium has in the past asserted a universal jurisdiction in respect of certain international crimes,¹⁴⁷ it appears from our preliminary analysis that its current domestic criminal law does not adequately address the facilitation of extraordinary rendition. Our review indicates that no persons have been prosecuted for offences related to extraordinary rendition, nor has any investigation into such conduct been initiated. Moreover we note that there have been no proposals for reform of the current law to prohibit more effectively conduct associated with extraordinary rendition.

Canada

7.11 Conduct amounting to extraordinary rendition is criminalised at the federal level by the criminal code of Canada (the *Canadian Criminal Code*). In particular, the Canadian Criminal Code sets out offences of torture (Section 269), assault (Section 265), kidnapping (Section 279) and forcible confinement (Section 279(2)).

¹⁴⁷ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3, concerning the 1993 Belgian law on universal jurisdiction that granted the relevant Belgian authorities to issue international arrest warrants in respect of serious international crimes (war crimes, crimes against humanity and genocide). This was repealed in 2003.

- 7.12 In addition to the Canadian Criminal Code, a number of other federal statutes contain similar prohibitions against such conduct. The Corrections and Conditional Release Act deals with the torture of detainees in Canadian facilities. The Crimes Against Humanity and War Crimes Act provide further protection against torture, establishing it as a crime against humanity and a war crime. The Immigration and Refugee Protection Act asserts that asylum seekers may not be returned to a country where they allege that they would be tortured.
- 7.13 The aforementioned offences thus would substantively criminalise aspects of extraordinary rendition if directly committed in Canada by Canadian or other military or intelligence personnel. Our research indicates that Canada has not played any such active role in respect of extraordinary rendition beyond its acquiescence in the US-led rendition of Maher Arar, discussed at paragraph 4.9 of this CP. The scope for prosecuting those facilitating extraordinary rendition operations by allowing them to land at Canadian airports and providing servicing facilities¹⁴⁸ will be governed by ordinary principles of accessory liability as set out in Sections 21 and 23 of the Canadian Criminal Code. This essentially replicates the position under English law and requires intention on the part of an alleged accessory. Consequently the prospects for prosecution of those providing assistance to extraordinary

¹⁴⁸ It has been alleged, but strenuously denied by the Canadian Government, that rendition flights operated by the US have used Canadian airport facilities. See Jim Bronskill, 'Seven mystery planes landed in Canada', *Globe and Mail* (5 December 2005), at A10.

rendition as accessories to the substantive offence discussed above must be viewed as slim.¹⁴⁹

7.14 However, lessons may be drawn from the sophisticated approach taken towards human trafficking offences (which do not cover extraordinary rendition operations *per se*, but share characteristics with rendition). Section 279.01(1) of the Criminal Code provides that “[e]very person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an offence”. The broad and commendably clear approach taken here would cover direct participants in trafficking and those that provide logistical support to such conduct with requisite intent. Similarly, Section 148 of the Immigration and Refugee Protection Act prohibits trafficking in persons and imposes obligations upon operators of vehicles and facilities. In effect this imposes liability for omissions on those persons that may, even unknowingly, assist human trafficking. As such this creates a practical and effective restriction on trafficking.

Germany

7.15 Chapters 17 and 18 of the German federal criminal code (the *German Criminal Code*) set out several offences against bodily integrity and personal freedom that may

¹⁴⁹ We note in addition that Canadian aviation law and regulations (in particular the Canadian Aviation Regulations, the Canadian Aviation Security Regulations and the Aeronautics Act) provide general conditions on air transport and aviation security, but do not expressly criminalise conduct constituting extraordinary rendition.

criminalise aspects of the process of extraordinary rendition including:

- Sections 223 and 224 of the German Criminal Code, which establish the offences of ‘bodily harm’ and ‘dangerous bodily harm’ broadly equivalent to offences against the person under the OAPA 1861, as discussed at paragraphs 5.13 to 5.16 of this CP; and
- Section 239 of the German Criminal Code, which establishes the offence of ‘unlawful imprisonment’ broadly equivalent to the offence of false imprisonment in English law, as discussed at paragraphs 5.8 to 5.11 of this CP; and
- Section 240 of the German Criminal Code, which establishes the offence of ‘unlawful compulsion’ which prohibits the use of force or threat of appreciable harm to compel a person to commit, acquiesce in, or omit an act.

7.16 In order to be liable for the above-mentioned offences a person must act with direct or contingent intention.¹⁵⁰

7.17 A further offence under Section 234a of the German Criminal Code criminalises what may be referred to as abduction for political reasons (such term being broad enough to encompass military and intelligence operations), that neatly covers the process of rendition. However, prosecution for this offence must be brought by the Federal

¹⁵⁰ Section 15 of the German Criminal Code. Contingent intention, in essence, is analogous to subjective recklessness in English law

Attorney General, who has declined to exercise jurisdiction in the cases of Khalid-el Masri and Abu Omar, who were alleged to have been rendered through German territory.¹⁵¹ Prosecution has thus far been limited to the above-mentioned conventional offences, with limited success.

7.18 German criminal law extends to accessory liability in the same manner as English law. Thus an instigator or abettor¹⁵² or accessory or aider¹⁵³ is guilty of an offence. Consequently those providing airside services can be prosecuted for complicity in an act of rendition, provided intention can be established. However, the net of German liability is drawn wider than English law in that liability for omissions is expressly codified in the German Criminal Code. In particular, a person under a “*guarantor’s obligation*” (i.e. a legal responsibility) is liable where that person fails to avert a result that amounts to a criminal offence. It is conceivable that this will extend liability to air traffic officials and police services, though there are clear difficulties in attributing responsibility to such authorities.¹⁵⁴ In addition, Section 138 of the German Criminal Code places a reporting obligation on persons that “*credibly*” learn of the planning or execution of certain crimes, including crimes against

¹⁵¹ This was on the basis that the Section 234a offence applies only to dictatorships, a controversial interpretation that reflects the roots of this offence in the Cold War practice of Stasi abduction of German nationals from the Federal Republic of Germany to the German Democratic Republic.

¹⁵² Section 26 of the German Criminal Code.

¹⁵³ Section 27 of the German Criminal Code.

¹⁵⁴ Whilst German regional police services have a responsibility for public safety, it is unclear, for example, at what stage this would supersede an air traffic controller’s legal responsibilities towards aircraft.

personal freedom, discussed at paragraph 7.15. Where such a person does not report the planned offence to the relevant public authorities, he or she is guilty of an offence.

Italy

- 7.19 Under Italian criminal law, persons who directly participate in the process of extraordinary rendition may be held liable for kidnapping and, depending on the circumstances, for violence, rape, injury, etc. No criminal liability for torture exists under Italian law, as this conduct is not specifically criminalised (except pursuant to Article 185 of the Military Code which applies only in a time of declared war).
- 7.20 Where the person participating in the extraordinary rendition is a public official, liability for crimes is imposed by the criminal code of Italy. Such offences include abuse of authority (Article 608), illegal limitation of personal freedom (Article 607) and illegal seizure (Article 606). An offence is provided for those who supply means of transportation to persons participating in a criminal association (Article 418) or in an armed band (Article 307).
- 7.21 Where direct involvement is not in issue, the facilitation of extraordinary rendition operations will thus be governed by principles of accessory liability. It should be noted, however, that the Italian position appears to be broader than that under English criminal law – it suffices that the accused had merely “*concurred*” in the crime. This term has been left open; thus, under Italian law all and any conduct contributing to (and thus facilitating) the crime may be criminalised, provided the requisite intention is found.

7.22 The Court of Milan has attempted to prosecute extraordinary rendition through existing statutory offences. In 2007 it commenced criminal proceedings into the rendition of Nasr Osama Mustafa Hassan (aka Abu Omar) in 2001. Arrest warrants have been issued against 26 CIA agents, the Director and Vice Director of the Italian Secret Services and several Italian intelligence agents. These proceedings were stayed whilst the Italian Government took a state secrets privilege argument to the Constitutional Court, and resumed in July 2009. A verdict is expected shortly. We are unable to comment on the likelihood of a successful prosecution. However, we note that the facts appear to be clear and egregious in Abu Omar's case, and the Milanese prosecutors were able to obtain sufficient information to identify the CIA agents allegedly involved. Consequently, straightforward prosecutions for kidnap were an appropriate course of action. It is unclear, given its reluctance to criminalise torture, whether Italian law may be used to prosecute more remote conduct, such as rendition circuit flights.

7.23 In addition, we note that Italian law has extended liability for omissions to companies and other legal persons in limited circumstances. Article 5 of the Law 231/2001 provides, inter alia, that a legal entity including a company, having a duty to control and prevent possible crimes, is liable for crimes (such as, for example, corruption, terrorism, or corporate crimes) committed by its representatives, executives or directors. However, it is a requirement that any such crime be for the company's "*benefit*", which may preclude those companies that provide support services to extraordinary rendition flights

in the absence of any knowledge as the presence or otherwise of a rendition detainee. Moreover, Italian law states that a company will not be held liable for the acts of its directors or representatives if it had in place a system of independent checks and a “*model of organisation*”.

The Netherlands

7.24 Dutch law does not specifically criminalise extraordinary rendition, but criminalises its constituent elements in a more extensive way than is the case under English law. In particular, the Criminal Code of the Netherlands (the ***Dutch Criminal Code***) provides that the following are offences:

- The extra-judicial apprehension and transfer of persons from one jurisdiction to another jurisdiction (Section 278 of the Dutch Criminal Code, known colloquially as “*manstealing*”). This was extended by the Dutch Supreme Court in 2001 to include the transfer of someone from abroad into the Netherlands;¹⁵⁵
- Kidnapping (Section 282 of the Dutch Criminal Code, which is analogous to the common law offence under English law);
- Mistreatment of persons (Section 300 of the Dutch Criminal Code, which covers torture and cruel and inhuman and degrading treatment, which gives effect to the Netherlands’ obligations under the Torture Convention); and

¹⁵⁵ HR 20 November 2001, NJ 2003, 632; Tekst & Commentaar Strafrecht, artikel 278, no. 8f.

- Section 385b of the Dutch Criminal Code, which lays down a specific offence of mistreatment against someone aboard an aircraft in flight or vessels and installations at sea.

7.25 As with other jurisdictions, these offences would relate primarily to the direct participants in a rendition operation. We note that the Section 385b offence, which clearly targets mistreatment of persons aboard aircraft, usefully and clearly addresses a key aspect of extraordinary rendition. However, as with English law, in order to prosecute the facilitation of such acts, it is necessary to rely on the complicity provisions of the Dutch Criminal Code (Sections 57 and 48). Whether this extends to the facilitation of extraordinary rendition through the provision of logistical services and the use of transport facilities will be a question of fact in each case.

7.26 Under Section 51(2)(ii) of the Dutch Criminal Code, those who ordered or supervised ‘prohibited activities’ (i.e. criminal offences) undertaken by legal persons can be prosecuted for the offences subsequently committed. The Dutch Supreme Court has held that this is made out where any such supervisory person was reasonably obliged but failed to take measures to prevent these activities.¹⁵⁶ However there is a stringent mental element to such a supervisory offence, which would not apply in circumstances in which a supervisor did not intend to assist in a rendition even where the circumstances may put a

¹⁵⁶ HR 16 December 1984, NJ 1987, 321 and 322 (Slavenburg).

reasonable person on notice.¹⁵⁷ This offence is unlikely to substantially deter the facilitation of rendition through the provision of logistical support.

Spain

7.27 While there is no strict legal prohibition on extraordinary rendition *per se* under Spanish law, Spain has taken relatively strong steps with the intention of curtailing rendition activity. The European Parliament has expressed concern over 68 aircraft, linked to the CIA, which stopped over in various Spanish airports between 2001 and 2006, some of which were alleged to have been involved in rendition.¹⁵⁸ The Marty Report suggests that a rendition circuit flight involved in the el Masri case referred to at paragraph 7.17 originated from Majorca. In addition, between 2002 and 2007, 12 military flights with a recorded origin or destination in Guantánamo Bay stopped over at two Spanish military bases, following the streamlined procedure set out in the 1988 Convention between the US and Spain for cooperation in defence.¹⁵⁹ Whilst such flights were not necessarily involved in extraordinary rendition operations (indeed our understanding is that rendition flights tend to use private jets so as to obtain non-State classification under the Chicago Convention), information on their nature and purpose has not been forthcoming.

¹⁵⁷ HR 19 November 1985, NJ 1986, 125 and 126.

¹⁵⁸ Report of the European Parliament of 14 February 2007 into extraordinary rendition in Europe.

¹⁵⁹ In particular Article 25.3 of this Convention sets out a process for the authorisation of military flights.

7.28 In response to perceived involvement in extraordinary rendition, in July 2005 Judge Serrano of the National Criminal Court began an investigation into the facilitation of rendition flights under Article 4 of the Torture Convention, which is fully and directly applicable in Spain. The Spanish interpretation of accessory liability under the Torture Convention is potentially broad enough to encompass air traffic controllers that may allow rendition flights to land at aerodromes.¹⁶⁰ In addition, the Spanish Constitution of 27 December 1978 provides that non-nationals are entitled to exercise the freedoms contained therein (Article 13), which includes the right to life and to physical and moral integrity (which prohibits torture or cruel, inhuman or degrading treatment) and the right to freedom and security, so that no one may be deprived of his freedom with the exceptions provided for in the Constitution as prescribed by law. However, no case has, as yet, been successfully prosecuted.

7.29 We also note the existence of certain regulatory provisions relating to airport security which provide that those with responsibilities in the aviation sector who fail to prevent or are reckless in respect of matters relating to the health and security of air travellers may be subject to disciplinary sanction.¹⁶¹ Whilst this provision is inapt to cover conduct of the nature and seriousness of extraordinary rendition,

¹⁶⁰ Several air traffic controllers have been investigated as part of Judge Serrano's inquiry.

¹⁶¹ See Article 65 of Law 209/1964, of 24 December, on Offences related to Aviation, Article 75 of Law 209/1964, of 24 December, on offences and procedures related to aerial navigation. See also Law 21/2003, of 7 July, on Aerial Security, which provides for the inspection of aircraft.

the principle that those in positions to manage the safety of persons in air transit should bear a special responsibility is, in the APPG's view, appropriate. We observe, in this regard, that Article 11 of the Spanish Penal Code provides that certain crimes may be committed by omission when the criminal has a specific legal or contractual obligation which a person fails to fulfil. This appears to offer greater clarity than the position under English common law.

7.30 Article 20 of Law 4/1985 on Passive Extradition provides that extradition transfers through Spain shall only be granted pursuant to a standard extradition procedure. In addition, under Article 318.1 *bis* of the Spanish Penal Code, those who instigate, favour or facilitate, either directly or indirectly, illegal people-trafficking or clandestine immigration from, in transit through or to Spain or any other EU Member State are guilty of a criminal offence, punishable by up to eight years imprisonment. We understand that the Spanish courts have taken an expansive view of this Article,¹⁶² though its application to extraordinary rendition operations has not been tested. In the event that this provision is taken to apply to such operations, the Spanish Supreme Court has held that *any* participation in such an offence (including instigation or facilitation) is criminalised. As such this may encompass the provision of logistical services.

¹⁶² In addition, the Directorate of Public Prosecutions will deem conduct to amount to unlawful people-trafficking where it violates regulations on border crossing by foreigners.

7.31 It appears then that Spain has had taken some steps in connection with using the Torture Convention to prosecute behaviour related to extraordinary rendition. Whilst the relevant authorities appear to have adopted a broad approach to accessory liability under that Convention, we are unable to comment, as yet, on the likelihood of success of prosecutions for the facilitation of extraordinary rendition operations. However the findings of the European Parliament suggest that even with such a robust prohibition in place, CIA flights that may be related to rendition have operated in Spanish airspace with a degree of freedom in the recent past. Whilst technical and disciplinary provisions related to air security and transit may provide a useful and practical bar to extraordinary rendition operations, in their current form they are inadequate to provide an effective deterrent.

The United States

7.32 As the conduct of US military and intelligence personnel is central to the modern phenomenon of extraordinary rendition, we look in more detail at the applicable US law in relation to this phenomenon. That there is a greater body of applicable law in the United States relating to extraordinary rendition is an indication on the one hand of efforts on the part of some US lawmakers to try to curtail practices that have come to light in recent years, and on the other, of the pernicious nature of secret rendition operations (to the extent that rendition operations have continued irrespective of such measures). An awareness, then, of the relaxations, restrictions and reforms that have been

adopted in the US is important in ensuring our proposals are effective.

7.33 A raft of statutory measures exist which, in their totality, would prohibit in principle the conduct of extraordinary rendition operations as we understand it. The majority of these measures are centred on the United States' international obligations under the Convention Against Torture and other international instruments. In particular, Congress has enacted legislation to ensure that violations of the Torture Convention may be prosecuted where committed by US nationals, or where the alleged offender is present in the US irrespective of his nationality and the nationality of the victim.¹⁶³ To the extent that an extraordinary rendition operation amounts to, or involves, conduct contrary to the Torture Convention, the US thus extends universal jurisdiction for the offence. Moreover, the War Crimes Act (WCA)¹⁶⁴ enables US courts to prosecute war crimes committed by US nationals and members of the US Armed Forces whether committed inside or outside of the US. It is arguable that this criminalises some, but not all, rendition operations that have taken place in international conflict zones.

7.34 Section 2, Title 18 of the US Code extends accessory liability to all offences under the US Code, including conduct contrary to the Torture Convention and war crimes. As such this may extend accessory liability to the

¹⁶³ The Torture Convention Implementation Act, 18 U.S.C. §§ 2340, 2340A.

¹⁶⁴ 18 U.S.C. §2441(a).

provision of logistical and other support to rendition flights.

7.35 In addition, there are strict statutory prohibitions on the transfer of persons from US territory by virtue of extradition to a country where they are more likely than not to face torture.¹⁶⁵ Whilst this Act does not deal with the transfer from a third country to another third country, it has been persuasively argued that Congress intended to legislate against the illegal rendering of prisoners outside the US.¹⁶⁶ We note that as a response to rendition, further legislation has been proposed, but not adopted, to prohibit the ‘outsourcing’ of torture to third States.¹⁶⁷

7.36 It is apparent, then, that the US prohibition on torture and war crimes, consistent with its international obligations, ought to provide a legal framework to combat extraordinary rendition. However, reliance on these international standards, which were not designed to address extraordinary rendition directly, has proven susceptible to legislative weakening. In particular, the Military Commissions Act 2005 (*MCA*)¹⁶⁸ narrowed the

¹⁶⁵ Foreign Affairs Reform and Restructuring Act 1998 (*FARRA*) “*It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.*” 18 U.S.C. §§ 2340, 2340A.

¹⁶⁶ ABCNY & CHRGI, *Torture by Proxy: International and Domestic Law Applicable to ‘Extraordinary Renditions’*, New York University School of Law (2004).

¹⁶⁷ The Torture Outsourcing Prevention Act 2007, HR 1352, introduced by Rep. Edward J. Markey (D-Mass) on 6 March 2007.

¹⁶⁸ Pub. L No. 109-366.

scope of WCA to cover only specified so-called ‘grave breaches’ of Common Article 3 of the Geneva Conventions, such as torture and cruel or inhuman treatment.¹⁶⁹ In addition the Detainee Treatment Act (*DTA*)¹⁷⁰, whilst expressly prohibiting cruel, inhuman, or degrading treatment or punishment, nonetheless afforded a safe harbour for those US Government personnel who believed they were acting lawfully.¹⁷¹ In the view of the EJP, the provision of broad defences in the MCA and other such statutes “*may result in indemnity for those involved in improper interrogation and detention practices.*”¹⁷²

7.37 Given the policy of the previous Administration, and the opacity of the statutory framework in relation to torture and war crimes that surrounds extraordinary rendition in the United States, it is unsurprising that there has been no successful criminal prosecution relating to a rendition. Moreover, civil suits on behalf of Maher Arar, Khalid el-Masri and Binyam Mohamed have been negatively viewed

¹⁶⁹ The MCA defines torture as “*an act specifically intended to inflict severe physical or mental pain or suffering... for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind*”. Cruel or inhuman treatment is defined as “*an act intended to inflict severe or serious physical or mental pain or suffering, including serious physical abuse.*”

¹⁷⁰ 42 U.S.C. §2000dd.

¹⁷¹ Including those officers who had operated under a restrictive view of torture, as set out in the Bybee Memorandum, discussed at paragraph 4.10 of this CP.

¹⁷² EJP Report at Chapter 4, Section 3.2, page 88.

by various US courts (though not all have been dismissed).¹⁷³

7.38 It should be noted that recent legislative reform proposals have sought to move away from the torture/war crime paradigm that currently governs the regulation of extraordinary rendition. In 2007, Senator Joseph Biden (as he then was) proposed a National Security with Justice Act¹⁷⁴ that contained a legislative ban on rendition, but entitled a federal officer, with the Attorney General's support, to apply to a judge for a rendition order for specified persons, having demonstrated whether ordinary legal procedures for the transfer of custody of the individual to be rendered had been tried, and failed, and subject to strict assurances as to the proper treatment of any such transferred person, which the Secretary of State would be obliged to monitor. This measure did not become law.

Conclusions

7.39 The foregoing brief survey of the legal position in various jurisdictions has demonstrated the following.

¹⁷³ See, *Arar v Ashcroft et al.*, No.06-4216 (2nd Cir. 2008) dismissing Arar's suit under the Torture Victim Protection Act 1991 that his rights under the US Constitution had been violated (the US Court of Appeals for the 2nd Circuit reheard the case in December 2008 and a decision is pending); *El-Masri v United States et al.*, 2007 WL 625130 (4th Cir. 2007) dismissing a claim of El-Masri and the ACLU on the 'state secrets doctrine'; *Mohamed et al. v Jeppesen DataPlan, Inc.* (563 F.3d 992 (9th Cir. 2009) discussed at paragraph 4.14 of this CP.

¹⁷⁴ S. 1876, introduced by Senator Joseph R. Biden (D-DE) in July 2007 and then referred to the Senate Committee on the Judiciary.

- (a) No jurisdiction has as yet established a clear specific prohibition on extraordinary rendition *per se*.
- (b) As with current English law, the prosecution of the facilitation of extraordinary rendition in the key States analysed relies, in practice, on accessory liability pegged to the commission of substantive offences by those directly involved in rendition.
- (c) The level of prosecutorial and investigative discretion, which has thus far inhibited a meaningful criminal inquiry into extraordinary rendition in the United Kingdom, is seen in other jurisdictions, for example in Germany where the Federal Attorney General has declined to exercise jurisdiction in the cases of Khalid el-Masri and Abu Omar. Similarly, the prosecutions in relation to the rendition of Abu Omar in Italy have foundered on political grounds (as the Italian Government has sought to delay proceedings by advancing a 'state secrets privilege' argument to the Constitutional Court to protect its relationship with the US) and practical grounds (as the Italian arrest warrants for the 26 CIA agents named have been summarily ignored). Moreover, we note with concern that where prosecutions have been initiated, they have only been commenced in the most straightforward of cases, such as that of Abu Omar, where there was direct evidence of kidnap within the jurisdiction of the relevant court. It appears extremely unlikely that more remote conduct, such as circuit flights, will be prosecuted.

- (d) The incorporation of international treaty obligations in respect of torture and war crimes into domestic law does not provide an adequate basis for the prosecution of relevant conduct. Jurisdictions such as Italy have yet to enact a domestic prohibition on torture. The United States has a sophisticated domestic apparatus that purports to give effect to its obligations under the Torture Convention and Geneva Conventions and Spain has made relevant Articles of the Torture Convention directly applicable in its domestic law, yet this has proven ineffective in practically curtailing extraordinary rendition. Moreover, in the United States, these standards have been implemented in an opaque fashion, and remain reliant on domestic principles of accessory liability to tackle the facilitation of extraordinary rendition. As such they do not directly address the practice of rendition.
- (e) Consequently, accessory liability in other jurisdictions also provides weak ex post censure of extraordinary rendition.

7.40 The analysis has also indicated areas of English law that could usefully be developed to more effectively combat extraordinary rendition.

- (a) Canada, Germany, Italy, The Netherlands and Spain have introduced liability for omissions on a statutory basis that may, to varying degrees, inculcate persons in a position to intervene and prevent extraordinary rendition or analogous offences. By placing such liability on a statutory footing the position in those

jurisdictions is arguably clearer than the common law imposition of liability for omissions under English law. By imposing such liability, it is arguable that there is a greater impetus on persons controlling facilities that may give support to extraordinary rendition to satisfy themselves that such support is not given. This may prove effective in practically restricting rendition.

- (b) We note also that under Italian law the liability of companies for failing to prevent directors from committing serious offences related to corruption and terrorism is mitigated where an appropriate system of independent checks is in place. Should omissions liability be extended under English law in respect of extraordinary rendition, such a safe harbour would be reasonable and proportionate.
- (c) We note that both Canada and Spain have put in place clear prohibitions on the facilitation and support of people-trafficking. Whilst such offences may be viewed as inappropriate for combating extraordinary rendition *per se* (a position we discuss in respect of the related English law at paragraphs 8.8 to 8.12 of this CP), the clarity of these offences, which cover a chain of conduct relating to the unlawful transfer of persons, is relevant, in the APPG's view, to the approach that should be adopted in relation to extraordinary rendition.

7.41 There is thus an opportunity for the UK to take the lead in crystallising an effective prohibition against extraordinary rendition. Given the weaknesses of parasitic accessory liability and the difficulties in directly applying

international standards related to torture and war crimes to such conduct, a new offence should be directly addressed at the core of extraordinary rendition. It should also consider how best to effectively limit rendition by regulating the conduct of those in a position to facilitate this practice.

8. The proposal

Introduction

8.1 The preceding sections have shown that:

- (a) UK transport facilities have been used by rendition flights;
- (b) although certain acts, including holding captives in planes on UK soil, are criminal offences under English law, the existing criminal law is inadequate in relation to the range of activities associated with extraordinary rendition in the 21st century;
- (c) in any event, there have been no prosecutions in the UK (although there are ongoing criminal prosecutions related to extraordinary rendition in Italy, Germany and Spain), in part because the evidential requirements for the current criminal offences are difficult to meet in the circumstances of extraordinary rendition;
- (d) the position under our domestic law is consistent with the position taken across European and common law States: there is no express prohibition on extraordinary rendition; criminal law prohibitions attach to elements of the extraordinary rendition process; there is over-reliance on narrow accessory liability to deter the facilitation of this process;
- (e) reliance on international standards, subject to idiosyncratic and restrictive interpretations in key States, have had little effect in curtailing extraordinary rendition;

- (f) UK government policy is stated to be against extraordinary rendition flights;
- (g) there is both:
 - (i) a gap in the UK criminal structure in that there has been a failure to prosecute, or to provide the tools to prosecute, behaviour that has occurred, which is abhorrent and which needs to be remedied; and also
 - (ii) the possibility for the UK to lead countries in taking a clear public stand against extraordinary rendition by the adoption of focussed criminal legislation which would seek properly to criminalise such behaviour.

8.2 Accordingly, we propose an extension to the current criminal law to criminalise certain actions forming an essential part of extraordinary rendition activities, insofar as they take place within the UK or its Overseas Territories. This would be achieved, as set out in more detail below, by four sets of measures which we propose:

- (a) a primary offence of using transport facilities in the UK or any of its Overseas Territories, for the purpose of transferring an individual, without his or her consent, to or from the UK (or any Overseas Territory) from or to another State, without lawful excuse.
- (b) it would also be an offence for a person to facilitate another person in carrying out the primary offence. Specifically, this offence would target the facilitation of the transfer of an individual, without his or her

consent, to or from the UK (or any Overseas Territory) from or to another State, without lawful excuse. The formulation of a facilitation offence, by way of primary legislation, would help obviate some of the evidential difficulties that exist in relation to accessory liability.

- (c) since, for the control of extraordinary rendition to be effective, criminal liability should also be extended to persons controlling transport facilities that are used for the purpose of extraordinary rendition, we propose that any legislation in this field should create a new offence of failing to prevent the transfer of an individual, without his consent, to or from the UK (or any Overseas Territory) from or to another State without lawful excuse. We propose that liability for such an offence should attach to any person, whether an individual or a body corporate, which has the ‘management or control of transport facilities’.
- (d) Finally, there should be a specific extension of this liability to so-called ‘circuit flights’ where UK facilities are used in a secondary way to support extraordinary rendition between third countries.

A preliminary draft of the legislation proposed to establish these offences is contained in Annex 1 to this CP. This draft is indicative only and the APPG welcomes comments on its terms.

- 8.3 This proposal does not address all the acts or events associated with extraordinary rendition, as discussed in Section 3 of this CP. In particular, the following aspects of extraordinary rendition are not captured by the proposal:

- the conduct of extraordinary rendition operations globally that do not involve the use of transport facilities in the UK or any Overseas Territory (as with the transfer of detainees from UK to US custody in Iraq, those detainees then being subject to later rendition, of the type recently admitted to by the Defence Secretary);
- the facilitation of extraordinary rendition by the provision of intelligence to third States (as in the Binyam Mohamed case); or
- the participation of UK intelligence or other personnel in the interrogation of detainees previously subject to extraordinary rendition and thus detained unlawfully.

8.4 The APPG also regards these practices as abhorrent. However, some of these acts (particularly the facilitation of rendition and participation in interrogations) are likely already substantively addressed by the UK's obligations under the Torture Convention (discussed at paragraphs 6.4-6.6 above) and the domestic offence of torture under Section 134 of the CJA 1988 (as discussed at paragraphs 5.22-5.25 above) – depending on their facts. In some cases, for example in connection with the case of Binyam Mohamed, they are currently the subject of criminal investigation by the authorities. The APPG is wary of creating new offences that serve to duplicate existing prohibitions where it is better enforcement, rather than new legislation, that is required. Accordingly, the proposal, as currently cast in the CP, represents a focussed step to deter extraordinary rendition, insofar as that process is likely to involve the UK or its Overseas Territories, in a way

that English law can effectively control. It is our intention to create a criminal framework that targets the essence of rendition activity, itself, involving the UK that is not otherwise effectively addressed. Our proposal does so in a fashion that will provide clarity to those potentially involved; that will effectively deter future involvement and which is readily prosecutable. It may, however, be necessary to give further consideration to behaviour not caught by the proposal, as discussed above, in the light of further experience.

- 8.5 We would welcome consultees' views on whether the criminal law should, nevertheless, be extended to criminalise certain actions usually connected with extraordinary rendition activities, either insofar as they take place within the UK or the Overseas Territories or, potentially overseas, provided that there is a sufficient connection with the UK, or, indeed, on a universal jurisdiction basis. If so, should such an extension be part of this proposal or a separate exercise?
- 8.6 We would also welcome consultees' views on whether the scope of the proposal, in directly targeting conduct related to extraordinary rendition through the UK and Overseas Territories, is appropriate, or whether it should be extended to cover other geographical areas.
- 8.7 We would also welcome consultees' views on whether administrative changes, such as the introduction of a Code of Conduct, could achieve an equally effective framework.

The alternative approach

- 8.8 We considered, but rejected, an alternative approach. This was to use a discrete amendment to Sections 4 and 5 of the Asylum and Immigration (Treatment of Claims, etc.) Act 2004 (the **2004 Act**) to address the issues arising from extraordinary rendition
- 8.9 Section 4(1) of the 2004 Act provides that a person commits the offence of trafficking people for exploitation where he arranges or facilitates the arrival into the UK of an individual, whom he intends to exploit within the UK or elsewhere (Section 4(1)(a)), or where he believes that another person is likely to exploit the individual in the UK or elsewhere (Section 4(1)(b)). Sections 4(2) and 4(3) of the 2004 Act replicate this offence in relation to assisting or facilitating transit to another part of the UK, or exit from the UK.
- 8.10 As of 31 January 2008, the Act has been widened to include entry, in addition to arrival, into the UK to capture conduct where there is an argument that those being trafficked have not formally arrived in the UK for immigration purposes. Section 4(4) provides that a person is “*exploited*” for the purposes of this offence if, among other criteria, he is the victim of behaviour that contravenes Article 4 of the ECHR concerning slavery and forced labour.
- 8.11 The alternative considered was to extend the definition of exploitation in Section 4(4) to cover conduct that is contrary to Articles 2 and 3 of the ECHR (the right to life and the right to freedom from torture, respectively).

8.12 Although this was attractive in terms of requiring very limited amendments, it was felt unsatisfactory in that:

(a) it would be a considerable extension of the scope of the 2004 Act and might be said to be inappropriate in that respect;

(b) critically, substantively, it would require the prosecution to prove that the defendant intended that an individual would be subject to treatment contrary to the right to life and the right to freedom from torture. This was thought likely to present real problems of evidence and definition for a criminal offence; and

(c) we felt that the scope of the offence was too narrow, in that it would not criminalise behaviour that was directly supportive of rendition flights (or not do so in a way that was likely to be capable of being effectively used by the criminal authorities, given the problems of prosecuting people for accessory liability). It was also felt that it did not make a sufficiently strong public statement, or create a sufficiently powerful prohibition to constitute a firm statement by the UK that it was against, and criminalising, extraordinary rendition activity.

8.13 We invite the views of consultees as to whether the use of a discrete amendment to Sections 4 and 5 of the Asylum and Immigration (Treatment of Claims, etc.) Act 2004 would be an appropriate way to criminalise extraordinary rendition.

The proposal

8.14 Accordingly, the proposal on which we seek consultation is that outlined at paragraph 8.2 of this CP. The reasoning is summarised below to assist in the consultation process.

8.15 The primary offence would be:

using transport facilities in the United Kingdom or any of its Overseas Territories, for the purpose of transferring an individual, without his or her consent, to or from the United Kingdom (or any Overseas Territory) from or to another State, without lawful excuse.

8.16 Any person, whether an individual or a body corporate, using transport facilities in this way would be exposed to liability.

The actus reus of the use of transport facilities offence

8.17 *Use of transport facilities* – ‘Transport facilities’ would be defined in the legislation in a very broad manner, encompassing all vehicles, vessels and craft, all transport installations, airports, ports, ground transport terminals and all ancillary facilities, including all facilities for refuelling, maintenance, and storage. ‘Use’ would be left undefined, on the basis that it is not needed and could be applied widely so that any substantive use whatsoever should be covered.

8.18 *In the UK or any Overseas Territory* – The intention here would not be that the UK should legislate for its Overseas Territories, but that it should extend criminal jurisdiction in the UK over acts of extraordinary rendition carried out

in Overseas Territories. This would mean that the use of facilities in, for example, Diego Garcia for the purposes of extraordinary rendition could be charged as an offence in any jurisdiction within the UK. Although there does not appear to be a specific precedent for this in English criminal law, a number of criminal statutes assert the criminal jurisdiction of the UK on an extraterritorial basis and there seems to be no theoretical reason why criminal liability should not be extended in this way.

- 8.19 *For the purposes of transferring an individual* – The primary focus of the offence would be to criminalise the specific acts whereby an individual is transferred. However, the offence would be broad enough to encompass acts preparatory or ancillary to the rendition itself.
- 8.20 *Without consent* – While the law in relation to the absence or presence of consent is extensive, the question of consent is capable of erecting a substantial obstacle to prosecution. Consequently, we propose that a provision be included to the effect that the absence of consent will be presumed in certain circumstances. These would include the omission of a passenger from the vessel’s official manifest or the non-presentation of an individual’s documentation in connection with a particular journey.
- 8.21 *To or from the UK or any Overseas Territory* – It will be necessary for the purposes of this offence that the individual is transited through the UK.
- 8.22 *From or to another State* – It will not be necessary for the purpose of establishing this element of the actus reus to show that the individual has been transferred from or to

any particular jurisdiction. It will be sufficient to show that he or she has been brought from, or taken outside of, the UK or the relevant Overseas Territory.

8.23 *Without lawful excuse* – This requirement is critical. The essence of the proposal is that all forced transit that is not conducted under recognised legal procedures that are capable of review and independent decision (such as extradition) should be illegal. The purpose of this criterion is to establish that any ‘extraordinary’ rendition other than by way of lawful extradition, deportation, prisoner transfer or removal direction (each of these forms of transfer being appropriately defined in the legislation) is covered by this offence, but that the offence does not extend to what might be termed ‘judicially-authorised rendition’. We have consciously adopted the term “*without lawful excuse*” so that the proposed offence is linked to the judicially developed concept that conduct be without lawful excuse as required in the common law offences of kidnap and false imprisonment, discussed at paragraphs 5.5-5.7 above. In this way, the APPG considers that the offence will capture conduct that falls outside of due process of law, but will benefit from developed case law for kidnap and false imprisonment, and so obviate difficulties relating to whether the transfer or conduct in question has a legitimate aim (for example the emergency transfer of sedated persons for medical treatment, or the exercise of reasonable parental discipline in transferring a difficult child). By importing this standard from the law relating to kidnap and false imprisonment, it is the APPG’s hope that the Court will be able to adopt a reasoned approach in assessing individual cases before it with regard to established

authority.¹⁷⁵ Moreover, the APPG notes that this requirement mirrors in tone the defence of “lawful authority, justification or excuse” that exists in respect of the domestic offence of torture.¹⁷⁶ The APPG is aware that this standard leaves open the possibility of overbroad claims of “lawful excuse” on the part of persons that may claim they are acting under the colour of explicit or tacit governmental acquiescence or instruction. The APPG considers that this can be judicially controlled by placing the onus on defendants to establish the basis for a claim of lawful excuse,¹⁷⁷ with regard to the approach taken to kidnapping and false imprisonment. However, the APPG would welcome consultees’ views on this point.

8.24 We have also considered, in this regard, whether it is necessary to include, as a constituent element in the offence, that the individual is being transferred for the purposes of or in connection with his interrogation, detention or trial in another jurisdiction (or that of any other person). However, it is thought that it is unnecessary to add to the complexity of the offence in this way. Such an additional hurdle would present a considerable obstacle to

¹⁷⁵ See in this regard *R v D* [1984] AC 778, setting out the criteria for the common-law offence of kidnap (discussed at paragraph 5.5 *et seq.* above), *R v Rahman* (1985) 81 Cr. App. R. 349 and *R v Faraj* [2007] 2 Cr. App. R. 25. It would appear from discussion in these cases that conduct that is “lawfully excused” includes lawful arrest, the use of reasonable parental force, and the reasonable defence of property.

¹⁷⁶ Section 133(4) CJA 1988.

¹⁷⁷ It would be a matter for the Court to interpret whether this provision would place an evidential or persuasive burden on the defendant in determining its consistency with Article 6(2) ECHR (see *R v DPP, ex p Kebilene* [1999] 4 All ER 801 at 842, per Lord Hope of Craighead; *R v Lambert* [2001] 1 All ER 1014 at 1022, per Lord Woolf CJ).

prosecution, and would, in any event, operate as a distraction from the principal intent of the proposed offence i.e. that any extraordinary rendition of an individual which involves the UK should give rise to criminal liability. Such an additional requirement would take the offence back into the territory of the alternative discussed above.

8.25 In addition, the APPG has concluded that the offence should not require the establishment of a risk of torture. While this risk is undoubtedly part of the backdrop of extraordinary rendition in its modern sense, it is our opinion that a requirement that a defendant intended or was reckless to the risk that an individual would be tortured would likely result in liability for the criminal offence of torture under Section 134 of the CJA 1988. The APPG's purpose in establishing a new offence is to strengthen, not repeat, existing criminal law. Moreover, as concluded at paragraph 7.39(d) above, the experience of some States has demonstrated that linking a domestic criminal prohibition to the international standards relating to torture in practice is difficult and raises significant evidence issues. Consequently, we consider it appropriate to focus on the more objective element that the individual's transfer is other than under due process of law. This conduct is at the core of extraordinary rendition as it might be facilitated in the United Kingdom. Moreover, it is the absence of legal process, and the erosion of the standards of the rule of law,¹⁷⁸ that give rise to the possibility of ill-treatment. As

¹⁷⁸ The APPG notes that the British courts have strongly criticised earlier instances of rendition on the basis that it is an affront to the rule of law, irrespective of whether there

such, addressing this aspect of extraordinary rendition and promoting a renewed respect for the rule of law will effectively curtail the mistreatment of persons in any event. Our approach is consistent with the key recommendation of the Eminent Jurists Panel that it is incumbent on States, at the national level, to review their legal frameworks and “*make such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse*”.¹⁷⁹

The mens rea of the use of transport facilities offence

8.26 It is proposed that a person be guilty of this offence where he knows that an individual is being transferred to another State, and:

- (a) either knows that the individual is being transferred without his or her consent, or is reckless as to whether the transfer is consensual; and
- (b) either knows that, or is reckless as to whether, the transfer is being made without lawful excuse.

In each of limbs (a) and (b) above ‘recklessness’ is the taking of an unreasonable risk of which the risk-taker is aware. Consequently, a person would be guilty of an

was in those cases a risk of torture. See, in particular, *R v Horseferry Road Magistrates’ Court ex p Bennett* [1994] 1 AC 42 per Lord Griffiths at 61-62: “...*the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law*”. That case concerned the unlawful transfer of an alleged criminal where there was no suggestion he faced torture.

¹⁷⁹ EJP Report, key recommendation 1(c) at Chapter 7, page 164.

offence where he is aware that there is a risk that an individual being transferred out of the UK is being transferred without his consent and without lawful excuse, and nonetheless proceeds with his involvement in the transfer of the individual.

8.27 We would welcome consultees' views on the following:

- (a) whether they agree with the proposed elements of the actus reus of the primary offence;
- (b) whether they agree with the proposed mens rea of the primary offence;
- (c) whether they are aware of any appropriate circumstances in which there should be a presumption of absence of consent;
- (d) whether they agree with the proposed definitions and, in particular, whether they are aware of any procedures which should be included in the definition of 'lawful excuse'.

The 'facilitation' offence

8.28 It is also proposed that it be made an offence for any person to facilitate another person in carrying out the primary offence referred to at paragraphs 8.2(a) and 8.15 above. Specifically, the offence would target the facilitation of the transfer of an individual, without his consent, to or from the UK (or any Overseas Territory) from or to another State, without lawful excuse.

8.29 It is thought that the formulation of a facilitation offence by way of primary legislation would reduce some of the

evidential difficulties that exist in relation to accessory liability. The facilitation offence would be intended to sanction, and therefore prevent, the support of extraordinary rendition by those who, whilst not actually carrying out the extraordinary rendition process, make it possible and so are complicit in the process.

The actus reus of the facilitation offence

- 8.30 We propose to define ‘facilitation’ in the legislation. The definition would include the provision of any material assistance (including material, technical, financial and logistical assistance) by any person (whether an individual or a body corporate) to any person, in connection with an extra-judicial transfer of a person. This would include simply permitting the use of any facilities for such purposes.

The mens rea of the facilitation offence

- 8.31 The mental element for the facilitation offence would adopt the same knowledge or recklessness standard as the primary offence. Consequently, a person would be guilty of an offence where he is aware that there is a risk that an individual being transferred in to, or out of, the UK (or the relevant Overseas Territory) is being transferred without his consent and without lawful excuse, and nonetheless proceeds to facilitate the transfer of the individual. An advantage of this approach is that an individual, being ‘put on notice’ of the risk, would come under an obligation to make due and proper enquiry if he or she were not to be reckless in permitting the use of transport facilities. This approach would also ensure that a person unknowingly or

non-recklessly providing services to a rendition flight would not be criminalised.

8.32 We invite consultees' views on the following:

- (a) whether they consider it appropriate to create a secondary offence of facilitating the primary 'use of transport facilities' offence;
- (b) whether they agree with the actus reus of the 'facilitation' offence;
- (c) whether they agree with the mens rea of the 'facilitation' offence.

The 'failure to prevent' offence

8.33 To achieve the purpose of effectively banning extraordinary rendition in the UK, we propose to extend criminal liability to persons controlling any transport facilities used for the purpose of extraordinary rendition, where those persons have not taken sufficient steps to prevent their use for this purpose. Consequently, we propose a new offence of failing to prevent the transfer of an individual, without his consent, from or to the UK (or any Overseas Territory) to or from another State without lawful excuse. Liability for such an offence will attach to any person, whether an individual or a body corporate, which has the 'management or control of transport facilities'.

8.34 It is critical, however, that the proper administration of the transport infrastructure is not criminalised, and unreasonable costs are not imposed on the parties undertaking that administration. We therefore propose a

general offence but with clearly defined ‘safe harbours’ for transport operators administering transport facilities to the required standard to prevent extraordinary rendition.

The actus reus of the failure to prevent offence

- 8.35 This offence would, subject to the safe harbours detailed below, be committed by any person managing or controlling any transport facilities used in the transfer of a person without his consent to or from the UK (or any Overseas Territory) from or to another State without lawful excuse (i.e. the primary offence must have occurred). The expressions ‘managing’ and ‘controlling’ would be defined broadly in the legislation. Liability would extend not only to those people with day-to-day oversight of the operation of facilities, but also to those individuals and companies with overall responsibility for ensuring that adequate regulatory and legal compliance safeguards are observed.

The mens rea of the failure to prevent offence

- 8.36 Liability for this offence will be strict, subject to the safe harbour defence set out at paragraph 8.37 below. Consequently, any person controlling transport facilities which are used in any act of extraordinary rendition will be liable for this offence unless they can show that they fall within the safe harbour.

‘Safe harbour’ defence in respect of the failure to prevent offence

- 8.37 The ‘failure to prevent’ offence would criminalise a controller of a facility for failing to put in place adequate procedures by way of safeguards against the facility being exploited for the purposes of extraordinary rendition, and/or failing to observe those procedures. It would be a

complete defence to a charge of failing to prevent the primary offence for the defendant to show the following:

- (a) there were in place, at the date on which the act of extraordinary rendition occurred, effective procedures requiring persons controlling vehicles, vessels or aircraft using the facilities for the purpose of transit from the UK to another State to identify any individuals being transferred outside of the UK against their will, and to confirm that those individuals are being transferred with lawful excuse (including by way of extradition, deportation, prisoner transfer or removal direction) ; and
- (b) the procedures required that any reasonable suspicion that such a transfer might be occurring was to be notified to individuals controlling the facilities and to the appropriate UK authorities. The notification was to be made sufficiently promptly to prevent the facilities being used for the purpose of a further transfer. In the meantime, steps were to be taken to prevent further transfer pending obtaining reasonable satisfaction that any such reasonable suspicion was unfounded.

The procedures would have to have been properly operated and carried out in good faith.

8.38 In substance, this is akin to a due diligence defence. We consider that it would promote a culture of compliance across the transport sector. The requirement for due diligence and on-site verification on the part of persons with responsibility in this sector, rather than reliance on government certification or diplomatic assurance, is

consistent with the view expressed by the Foreign Affairs Committee that greater active scrutiny was required on the part of the UK to avoid participation in the extraordinary rendition process.

8.39 We invite consultees' views on the following:

- (a) whether they consider it appropriate to criminalise persons managing or controlling UK transport facilities who fail to prevent the further transfer of an individual, without his consent, from or to the UK (or any Overseas Territory) to or from another State without lawful excuse;
- (b) whether they agree with the proposed actus reus of the 'failure to prevent' offence;
- (c) whether they agree with the proposed strict liability element of the 'failure to prevent' offence;
- (d) whether they consider the proposed safe harbour defence to be adequate and sufficient.

The 'circuit flights' offence

8.40 The APPG has been particularly concerned by so-called 'circuit flights', whereby a plane containing no captives uses UK transport facilities as part of a broader itinerary that involves picking up individuals in other jurisdictions and transporting them to third countries. We would like to see the conscious giving of assistance to extraordinary rendition activities in this way also criminalised.

8.41 However, we are acutely aware of the difficulties of drafting such a proposal in a way that avoids criminalising innocent

conduct. We therefore propose a separate, specific extension of the facilitation offence.

8.42 We propose that it would be also an offence in the UK to undertake the facilitation offence where the primary offence does not involve the transport facilities of the UK or its overseas territories but those of another country. The elements of that offence would be the same as for the UK-based facilitation offence.

8.43 However, the mens rea element would be different. A person would not be guilty of the offence unless he or she intended that the use of the facilities in the UK was to facilitate the conduct of the primary offence in relation to those overseas countries. Whilst setting the mens rea element at the level of intent imposes real hurdles for any prosecution, this seems appropriate given the genuine difficulties faced by those in control of transport facilities in the UK and the Overseas Territories in determining the purpose of a particular flight (or other journey). The unknowing provision of services to a circuit flight would not be criminalised by this proposal.

8.44 We invite consultees' views on the following:

- (a) whether they consider it appropriate to create an offence criminalising the use of UK transport facilities as part of a 'circuit flight' involving extraordinary rendition activities in other jurisdictions;
- (b) whether they agree with the proposed actus reus of the offence;

(c) whether they agree with the proposed mens rea of the offence.

Penalties

8.45 We provisionally propose that persons guilty of the primary and facilitation offences outlined above would be liable on indictment to imprisonment for a term of 8 years and/or an unlimited fine. This is consistent with the penalty recommended under current sentencing guidelines for aggravated forms of kidnap¹⁸⁰ and is thus, in our preliminary view, appropriate for the commission of an offence of recklessly or intentionally facilitating extraordinary rendition. In respect of the ‘failure to prevent’ offence, we recommend a penalty of five years’ imprisonment and/or an unlimited fine. We note that this latter penalty is equivalent to that imposed for failures to disclose in respect of money laundering,¹⁸¹ and may, thus, be thought appropriate for an offence related to the failure of responsible persons to respond adequately to reasonable suspicions.

8.46 **We invite consultees’ views on appropriate penalties for the proposed offences.**

Crown Application

8.47 Under the principle of Crown immunity, it is presumed that the Crown will not be bound by onerous legislation unless Parliament expresses a contrary intention. This presumption particularly applies to criminal legislation,

¹⁸⁰ See paragraph 5.7, above.

¹⁸¹ See Sections 330-334 of the Proceeds of Crime Act 2002.

and extends to all bodies and persons acting as servants or agents of the Crown, whether in its private or public capacity, including all elements of the Government, from Ministers of the Crown downwards. Government departments, civil servants, members of the armed forces and other public bodies or persons are, therefore, included within the scope of the immunity. Given the nature of extraordinary rendition operations as discussed in this CP, the APPG is of the view that those likely to be in a position to facilitate such operations include Crown servants, particularly military or intelligence personnel. It is therefore appropriate expressly to extend the scope of the legislation to the Crown.

8.48 We welcome consultees' views on whether it is appropriate to extend the scope of the legislation to the Crown.

Extent

8.49 As discussed in paragraph 3.15 of this CP, this analysis does not cover Scotland and Northern Ireland. However, it is recommended that it would also be extended, on analogous reasoning, to Scotland and Northern Ireland.

8.50 We welcome consultees' views on whether it is appropriate to extend the scope of the legislation to Scotland and Northern Ireland.

Annex 1 – draft legislation

Rendition Flight Offences

1. The offences

- (1) A person (A) is guilty of an offence if –
 - (a) A uses transport facilities located in the United Kingdom or any of its Overseas Territories for the purpose of transferring an individual (B) to or from the United Kingdom or any of its Overseas Territories from or to another State,
 - (b) B does not consent to the transfer,
 - (c) the transfer is without lawful excuse,
 - (d) A knows the transfer is without B’s consent or is reckless as to whether the transfer is without B’s consent, and
 - (e) A knows the transfer is without lawful excuse or is reckless as to whether the transfer is without lawful excuse.
- (2) A person (C) is guilty of an offence if –
 - (a) C facilitates a transfer in the circumstances of subsection (1) above,
 - (b) C knows the transfer is without B’s consent or is reckless as to whether the transfer is without B’s consent, and

- (c) C knows the transfer is without lawful excuse or is reckless as to whether the transfer is without lawful excuse,

provided that C shall not be guilty of an offence if the actions which would constitute the offence are necessary for the safety and proper administration of the transport facilities.

- (3) Subject to section 7, a person is guilty of an offence if he manages or controls the transport facilities that are used in an offence under subsection (1) above and fails to prevent the transfer.
- (4) For the purposes of this part –
 - (a) “transport facilities” means facilities for transport services (whether for passenger transport services or otherwise), including all vehicles, vessels, trains, aeroplanes, airports, ports, air traffic control systems, ground or air transport terminals, refuelling facilities, storage facilities and maintenance facilities;
 - (b) “consent” has the meaning given by sections 2 and 3;
 - (c) “facilitating” has the meaning given by section 5;
 - (d) “managing and controlling” has the meaning given by section 6.
- (5) To prove that an individual has been transferred ‘from or to another State’ it is sufficient to show that he or she has transferred from or to the United Kingdom or the

relevant Overseas Territory and it is not necessary to prove that he or she has been transferred to or from any specific or identified State.

2. "Consent"

- (1) For the purposes of this part a person consents if he agrees freely to the transfer, having the freedom and capacity to do so.

3. Evidence of Consent

- (1) If, in proceedings for an offence specified in this part, it is proved –
 - (a) that the defendant did the act specified in section 1(1), and
 - (b) that any of the circumstances specified in section 3(2) existed,

the individual will be deemed not to have consented to the transfer in the absence of positive evidence to the contrary.

- (2) The circumstances are that –
 - (a) the individual was physically constrained or concealed during the transfer;
 - (b) the individual's name was omitted from the papers relating to the transfer;
 - (c) the individual's identification or travel documentation was not presented during the transfer on any occasion when the documentation of passengers would usually be presented.

4. “Without lawful excuse”

- (1) Without limitation to section 1(1)(c) for the purposes of this part if an individual is transferred by way of the procedures specified in subsection (2) below, the transfer will not be without lawful excuse.
- (2) The procedures are any process prescribed in legislation in the United Kingdom for –
 - (a) extradition;
 - (b) deportation and removal direction; and
 - (c) prisoner transfer.
- (3) In any prosecution brought for an offence under section 1 it will be for the defendant to establish the basis on which he considers his conduct to be lawfully excused.

5. “Facilitates”

- (1) A person facilitates a transfer if he either makes it possible or makes it materially easier (irrespective of whether another person might otherwise have facilitated should the facilitation in question not have occurred) whether by the physical or administrative or legal acts that he takes.

6. “Managing and Controlling”

- (1) A person manages transport facilities if he takes operational decisions in relation to those transport facilities which could, directly or indirectly, affect whether they can be used for the purpose of the offence in section 1(1).

- (2) A person controls transport facilities if he can exercise a dominant influence over the management or strategic decisions taken in connection with those transport facilities.

7. Defences

- (1) In proceedings for an offence under section 1(3), it will be a defence if, at the time at which the offence under section 1(1) occurred –
 - (a) there were adequate procedures in place –
 - (i) to identify any individuals potentially being transferred to or from the United Kingdom or any of its Overseas Territories from or to another State without their consent, and
 - (ii) to confirm that any individuals being transferred without their consent were not being transferred without lawful excuse; and
 - (b) those procedures required –
 - (i) any reasonable suspicion that the acts specified in section 1(1) might be occurring to be notified to individuals controlling the facilities and to the appropriate UK authorities sufficiently promptly to prevent the facilities being used for the purpose of a further transfer,
 - (ii) steps to be taken to prevent further transfers pending obtaining reasonable satisfaction that any such reasonable suspicion was unfounded, and

(iii) the necessary administrative and operational powers to enable the prevention of further transfers to be granted;

(c) those procedures were being properly operated.

(2) The defence under subsection (1) only applies if the procedures were implemented and operated in good faith.

8. Circuit Flight Offence

(1) A person (*D*) is guilty of an offence if he knowingly uses transport facilities located in the United Kingdom or any of its Overseas Territories to facilitate the subsequent or prior transfer of any person (*E*) from a State other than the United Kingdom or any of its Overseas Territories to another State other than the United Kingdom or any of its Overseas Territories knowing that *E*:

(a) does not consent to the transfer; and

(b) the transfer is without lawful excuse.

9. Penalties

(1) Where a person is guilty of an offence under sections 1(1), 1(2) and 8 of this part, he shall be liable on conviction on indictment to imprisonment for a term not exceeding 8 years and/or an unlimited fine.

(2) Where a person is guilty of an offence under section 1(3) of this part, he shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years and/or an unlimited fine.

10. Crown application

(1) This Act binds the Crown.

11. Extent

(1) This Act extends to [.....] only.

12. Interpretation

In this Act –

“consent” has the meaning given by sections 2 and 3;

“facilitating” has the meaning given by section 5;

“managing and controlling” has the meaning given by section 6;

“Overseas Territories” has the same meaning that “British Overseas Territories” has in the British Nationality Act 1981;

“transport facilities” has the meaning given by section 1(4)(a).

Annex 2 – questions for consultees

Introduction

1. We welcome consultees' views on whether the criminal law should, nevertheless, be extended to criminalise certain actions usually connected with extraordinary rendition activities, either insofar as they take place within the UK or the Overseas Territories or, potentially overseas, provided that there is a sufficient connection with the UK, or, indeed, on a universal jurisdiction basis. It so, should such an extension be part of this proposal or a separate exercise?

[paragraph 8.5]

2. We also welcome consultees' views on whether the scope of the proposal, in directly targeting conduct related to extraordinary rendition through the UK and Overseas Territories, is appropriate, or it should be extended to cover geographical areas.

[paragraph 8.6]

3. We would also welcome consultees' views on whether administrative changes, such as the introduction of a Code of Conduct, could achieve an equally effective framework.

[paragraph 8.7]

The Alternative Approach

4. We invite the views of consultees as to whether the use of a discrete amendment to Sections 4 and 5 of the Asylum and Immigration (Treatment of Claims etc.) Act 2004 would be an appropriate way to criminalise extraordinary rendition.

[paragraph 8.13]

The Proposal

5. We would welcome consultees' views on the following:
 - a. whether they agree with the proposed elements of the actus reus of the primary offence;
 - b. whether they agree with the proposed mens rea of the primary offence;
 - c. whether they are aware of any appropriate circumstances in which there should be a presumption of absence of consent;
 - d. whether they agree with the proposed definitions and, in particular, whether they are aware of any procedures which should be included in the definition of 'lawful excuse'.

[paragraph 8.27]

The 'Facilitation' Offence

6. We invite consultees' views on the following:
 - a. whether they consider it appropriate to create a secondary offence of facilitating the primary 'use of transport facilities' offence;
 - b. whether they agree with the actus reus of the 'facilitation' offence;
 - c. whether they agree with the mens rea of the 'facilitation' offence.

[paragraph 8.32]

The 'Failure to Prevent' Offence

7. We invite consultees' views on the following:
 - a. whether they consider it appropriate to criminalise persons managing or controlling UK transport facilities who fail to prevent the further transfer of an individual, without his consent, from or to the UK (or any Overseas Territory) to or from another State without lawful excuse;
 - b. whether they agree with the proposed actus reus of the 'failure to prevent' offence;
 - c. whether they agree with the proposed strict liability element of the 'failure to prevent' offence;
 - d. whether they consider the proposed safe harbour defences to be adequate and sufficient.

[paragraph 8.39]

The 'Circuit Flights' offence

8. We invite consultees' views on the following:
 - a. whether they consider it appropriate to create an offence criminalising the use of UK transport facilities as part of a 'circuit flight' involving rendition activities in other jurisdictions;
 - b. whether they agree with the proposed actus reus of the offence;
 - c. whether they agree with the proposed mens rea of the offence.

[paragraph 8.44]

Penalties

9. We invite consultees' views on appropriate penalties for the proposed offences.

[paragraph 8.46]

Crown Immunity

10. We welcome consultees' views on whether it is appropriate to extend the scope of the legislation to the Crown.

[paragraph 8.48]

Extent

11. We welcome consultees' views on whether it is appropriate to extend the scope of the legislation to Scotland and Northern Ireland.

[paragraph 8.50]

Glossary of terms

General

- CP..... Consultation Paper
- Marty Report..... 2006 draft report of Senator Dick Marty to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly: Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states

Organisations

- ACPO..... Association of Chief Police Officers of England and Wales and Northern Ireland
- APPG All Party Parliamentary Group on Extraordinary Rendition
- CIA..... Central Intelligence Agency of the United States
- EJP..... Eminent Jurists Panel of the International Commission of Jurists
- European Court..... European Court of Human Rights

FAC	House of Commons Foreign Affairs Committee
HRC.....	United Nations Human Rights Committee
ISC	Intelligence and Security Committee of the United Kingdom
JCHR	UK Parliamentary Joint Committee on Human Rights

Treaties and legislation

ANO	Air Navigation Order 2005
Chicago Convention.....	Convention on International Civil Aviation (1944)
CJA 1988.....	Criminal Justice Act 1988
DTA.....	Detainee Treatment Act of 2005 (United States)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HRA.....	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights (1966)
MCA.....	Military Commissions Act of 2005 (United States)

OAPA.....	Offences Against the Person Act 1861
Rules of the Air	Civil Aviation (Rules of the Air) Regulations 2007
Refugee Convention.....	United Nations Convention Relating to the Status of Refugees (1951)
Rome Statute.....	Statute of the International Criminal Court (1998)
Disappearance Convention..	United Nations Convention for the Protection of All Persons from Enforced Disappearance (2006)
Torture Convention.....	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
WCA.....	War Crimes Act of 1996 (United States)

All Party Parliamentary Group on Extraordinary Rendition

The US programme of extraordinary rendition has involved the kidnap, unlawful detention and in some cases maltreatment, or torture, of individuals across the globe. Far from making us safer, as its proponents suggest, this has severely damaged the West's moral authority and served as a recruiting sergeant for dangerous extremism.

The UK has been involved in and has facilitated rendition. The disclosure that UK Overseas Territory has been used demonstrates that the deterrent value of existing domestic law is weak. A gap may exist in the criminal law. This has prompted the All Party Parliamentary Group on Extraordinary Rendition to examine how the law can be bolstered sufficiently to give the public confidence that British resources and territory are not being used to support extraordinary rendition. On this, the Group greatly benefited from pro bono advice from Freshfields Bruckhaus Deringer.

In order to close the gap, a new specific prohibition is required. The Group proposes a statutory framework that more effectively criminalises the use of transport facilities in the UK and its Overseas Territories for extraordinary rendition.

It is to be hoped that this proposal will find support in the UK and will also act as a beacon to those in other jurisdictions seeking to ensure that their countries are not involved in extraordinary rendition in the future.