

Dear Grace,

Detainees

Summary

1. An explanation of what is normally meant by “Rendition” and “Extraordinary Rendition”, though these are neither legal nor precise terms. Discussion also of their legality: Rendition could be legal in certain limited circumstances; Extraordinary Rendition is almost certainly illegal. Further advice, too, on what we and the US mean when we talk of “torture” and “cruel, inhuman and degrading treatment” (CID). And to what extent knowledge of, or partial assistance in, these operations (eg permission to refuel) constitutes complicity?
2. Advice too on handling. We should try to avoid getting drawn on detail, at least until we have been able to complete the substantial research required to establish what has happened even since 1997; and to try to move the debate on, in as front foot a way as we can, underlining all the time the strong counter-terrorist rationale for close co-operation with the US, within our legal obligations. Armed with Rice’s statement and the Foreign Secretary’s response, we should try to situate the debate not on whether the US practices torture (and whether the UK is complicit in it): they have made clear they do not – but onto the strong US statements in Rice’s text on their commitment to domestic and international instruments. A debate on whether the US test for torture/CID derives from their commitments under the US Constitution rather than international law is better ground than the principle of whether they practice torture.

Detail

3. You asked for further advice on substance and handling, following my letter of 5 December, including with a view to PMQs on 7 December. Specifics:

What do we mean by “Rendition”?

4. This is not a legally defined term. But it is normally understood to mean the transfer of a person from one jurisdiction to another, outside the normal legal processes such as extradition, deportation, removal or exclusion. It does not necessarily carry any connotation of involvement in torture.

“Extraordinary Rendition”?

5. The use of this term is even more varied. In its recent letters to Chief Constables and Ministers, Liberty has defined it as transfer from one third country to another. But it is normally used to connote the transfer of a person from one third country to another, in circumstances where there is a real risk (or even intention) that the individual will be subjected to torture or cruel,

inhuman or degrading treatment (CID). Indefinite detention without legal process could be argued to constitute CID.

Is Rendition lawful?

6. We need to look at the facts of each case. In certain circumstances, it could be legal, if the process complied with the domestic law of both countries involved, and their international obligations. Normally, these international obligations, eg under the International Covenant on Civil and Political Rights (ICCPR), would prevent an individual from being arbitrarily detained or expelled outside the normal legal process. Council of Europe countries would also be bound by the ECHR, which has similar obligations in this sense. Against this background, even a Rendition that does not involve the possibility of torture/CID would be difficult, and likely to be confined to those countries not signed up to eg the ICCPR.

7. Rendition could therefore be legal in certain tightly defined circumstances. Rice's Statement claimed two such examples (the World Trade Centre bomber, Ramzi Yousef, and Carlos the Jackal). But such cases will be rare.

Could Rendition ever be legal in the UK?

8. This depends how we are using the term "rendition". In most circumstances and in most uses of the term, it will not be legal, including if it contravenes the law of the state from which the individual is transferred. In some limited circumstances, eg where there is no extant extradition procedure between the UK and a third country, transfer without formal extradition might be legal.

Is Extraordinary Rendition legal?

9. In the most common use of the term (ie involving real risk of torture), it could never be legal, because this is clearly prohibited under the UN Convention Against Torture (CAT). But the CAT prohibition on transfer applies to torture only, not to CID. (This may explain the emphasis on torture in Rice's statement.)

10. The US government does not use the term "Extraordinary Rendition" at all. They say that, if they are transferring an individual to a country where they believe he is likely to be tortured, they get the necessary assurances from the host government (cf Rice's Statement: "The US has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the US seeks assurances that transferred persons will not be tortured"). (Comment: We would not want to cast doubt on the principle of such government-to-government assurances, not least given our own attempts to secure these from countries to which we wish to deport their nationals suspected of involvement in terrorism: Algeria etc).

What about the US reservation and "understandings" with respect to the CAT?

11. The US reservation to the CAT states that the US considers itself bound (Article 16) to prevent CID only insofar as this means the CID prohibited by the US Constitution, but not as defined in international instruments such as the ICCPR. So, for example, the US would not (logically enough) consider themselves bound by the ECHR findings in relation to UK practice in Northern Ireland in the 1970s which ruled that five types of treatment did constitute CID (eg sleep deprivation, constant exposure to loud noise).

12. An “understanding” stated by the US spells out what it understands by mental pain or suffering in the definition of torture. It is not clear whether in practice this gives the US scope to use techniques which would otherwise constitute torture.

Would cooperating with a US Rendition operation be illegal?

13. If the US were to act contrary to its international obligations, then co-operation with such an act would also be illegal if we knew of the circumstances. This would be the case, for example, in any cooperation over an Extraordinary Rendition without human rights assurances. Conversely, cooperation with a “legal” Rendition, that met the domestic law of both of the main countries involved, and was consistent with their international obligations, would be legal. Where we have no knowledge of illegality but allegations are brought to our attention, we ought to make reasonable enquiries.

How do we know whether those our Armed Forces have helped to capture in Iraq or Afghanistan have subsequently been sent to interrogation centres?

14. Cabinet Office is researching this with MOD. But we understand the basic answer is that we have no mechanism for establishing this, though we would not ourselves question such detainees while they were in such facilities.

What happened in 1998?

15. The Security Service have so far identified two cases:

- i) An individual, Mohammed Rashed Daoud AL-OWHALI, was suspected of involvement in bombing the US Embassy in Nairobi. The US asked on 24 August 1998 for assistance with his return from Kenya to the USA for trial. This was originally via Prestwick, but later changed to Stansted because of the flight range of the aircraft. The request was originally for Al-Owhali and one other, who in the event did not travel. The request was agreed by the Home Secretary, Jack Straw.
- ii) A similar request the same year was turned down, because the individual concerned was to be transported to Egypt (not yet clear what, if anything, the US said about assurances).

16. From the information we have at the moment, we are not sure in either case whether the individual’s transfer from the country in which he was detained was extra-legal.

17. The papers we have unearthed so far suggest there could be more such cases. The Home Office, who lead, are urgently examining their files, as are we. But we now cannot say that we have received no such requests for the use of UK territory or air space for "Extraordinary Rendition". It does remain true that "we are not aware of the use of UK territory or air space for the purposes of "Extraordinary Rendition"". But we think we should now try to move the debate on from the specifics of rendition, extraordinary or otherwise, and focus people instead on the Rice's clear assurance that all US activities are consistent with their domestic and international obligations and never include the use of torture.

Handling

18. As far as possible, we should stick to the terms of the Foreign Secretary's Statement in response to Rice's, and his letter to EU Foreign Ministers covering her reply. We should also try to bring out the other side of the balance, in terms of the huge challenge which the threat of terrorism poses to all countries, and the need to balance the rights of the suspected terrorist against those of his potential victims.

19. More broadly, we should try to move the debate on from concentrating on whether the US practice torture, which they have clearly said they do not, and try to focus on the US's constructive reassurance that, in all respects, they have acted in a way consistent with their domestic and international legal obligations, and with the sovereignty of those countries with which they have been working.

20. I am copying this letter to Nigel Sheinwald and Margaret Aldred (Cabinet Office), Ian Forber (MOD), Emma Churchill (Home Office), (Thames House), (Vauxhall Cross), and Sir David Manning (Washington).



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