



All-Party Parliamentary Group on Extraordinary Rendition
House of Commons, London, SW1A 0AA

**Response of the APPG on Extraordinary Rendition to
the Investigatory Powers Commissioner's
Consultation on the Consolidated Guidance**

October 2018

About the APPG

The APPG is a cross-party group of MPs and peers, chaired by Rt Hon Kenneth Clarke QC MP, and founded in 2005 by Rt Hon Andrew Tyrie MP (now Rt Hon Lord Tyrie), with two aims: to get to the truth of the UK's involvement in extraordinary rendition and to reduce the likelihood that the UK will take part in extraordinary rendition in the future.¹

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¹ See the APPG on Extraordinary Rendition's entry on the Commons Register: ww.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-all-party-parliamentary-groups/.

Executive summary

The APPG has previously voiced concerns about the Consolidated Guidance to Prime Ministers Cameron and May in 2010 and 2018 respectively and welcomes the opportunity to respond to the Investigatory Powers Commissioner's consultation. The APPG believes that, as currently drafted, the Guidance is unfit for purpose and insufficient to prevent a repeat of UK involvement in extraordinary rendition and torture, as shockingly revealed by the Intelligence and Security Committee reports published in June 2018.

Astonishingly, the Guidance lacks a clear prohibition on action (and ministerial authorisation of action) carrying a real risk of torture or cruel, inhuman or degrading treatment (CIDT). Furthermore, it fails to cover extraordinary rendition at all – an astonishing omission given the government's repeated condemnation of this practice and recent apology to Mr Belhaj and Ms Boudchar for the UK's role in their rendition to Libya. These flaws mean the UK and its officials risk action that is both morally wrong and illegal, putting officials at risk of prosecution. We recommend that a revised Guidance should:

- I. Contain an absolute prohibition on action (including ministerial authorisation of action) which carries a real risk of torture. "Real risk" should be explained with the use of real-life examples of when the relevant threshold is reached.
- II. Contain an absolute prohibition on action (including ministerial authorisation of action) which carries a real risk of CIDT, with detailed examples of CIDT given.
- III. Contain an absolute prohibition on action (including ministerial authorisation of action) which carries a real risk of extraordinary rendition, defined as "the removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention".
- IV. Be subject to an effective oversight mechanism, which should include formal reporting and whistleblowing systems.
- V. Apply to any UK body involved with those detained abroad.
- VI. Be re-named and merged with the Overseas Justice and Security Guidance for those bodies that are subject to both pieces of Guidance, creating a single, merged policy with clarity on the applicable standards and thresholds for Ministers and officers to avoid complicity in torture, CIDT and rendition.

Introduction

1. The APPG welcomed the publication of the Consolidated Guidance (the Guidance) in 2010, which was an important step forward for transparency in this area, but recognised at the time that the Guidance was flawed. Lord Tyrie wrote to then Prime Minister David Cameron in 2010 on this subject, and, in 2018, Kenneth Clarke MP wrote again on the topic to Prime Minister Theresa May.
2. Our concerns increased following the publication in June 2018 of the two Intelligence and Security Committee (ISC) Reports on detainee mistreatment and rendition,² which revealed shocking levels of UK involvement in rendition and torture – much greater than previously known. This is a shameful episode in the UK’s history and must not be repeated. The reports heavily criticised UK policy past and present in this area, cataloguing a series of failures in the Guidance. These policy failures have serious implications: the Guidance as currently drafted is insufficient to prevent UK officials once again being caught up in abuses carried out by our allies. With the current US President having voiced support for torture, and with Guantanamo Bay set to remain open indefinitely, this is an ever-present risk.
3. The APPG therefore welcomes the chance to respond formally to the consultation on the Guidance being held by the Investigatory Powers Commissioner’s Office. We believe the Guidance needs to be comprehensively re-written and suggest six key reforms. As the APPG on Extraordinary Rendition, our primary concern is to ensure that a revised Guidance contains an absolute prohibition on UK involvement in extraordinary rendition. It is astonishing that, as pointed out by the ISC, the Government has “no clear policy...for preventing UK complicity in rendition.”³ The government’s excuse that extraordinary rendition is too difficult to define⁴ holds little water and the APPG suggests the adoption of the widely accepted Council of Europe definition (see paragraphs 36 to 37 below.)

² ISC Report, *Detainee Mistreatment and Rendition: Current Issues*, 28 June 2018 (“ISC Report: Current Issues”) and ISC Report, *Detainee Mistreatment and Rendition: 2001 – 2010*, 28 June 2018 (“ISC Report: 2001-2010”).

³ ISC Report: Current Issues, p.87, paragraph OO.

⁴ See ISC, Press Release: *Detainee Mistreatment and Rendition: Current Issues*, 28 June 2018, available here: <http://isc.independent.gov.uk/>.

4. As extraordinary rendition frequently results in torture or cruel, inhuman or degrading treatment (CIDT) – and, indeed, is often considered to amount to CIDT or torture in and of itself - we also make recommendations as to the standards and guidance we believe should be put in place to prevent UK involvement in these practices.
5. Our final three recommendations concern measures to strengthen the application of, and adherence to, the revised Guidance in practice.
6. Where appropriate, we have taken legal advice on the relevant international and domestic legal standards and include this legal analysis in support of our recommendations.

APPG’s Suggested Reforms

I. An absolute prohibition on proceeding where there is a real risk of torture

7. The Guidance currently imposes an absolute prohibition on action where the relevant person “*knows or believes*” that torture will take place, in which case he or she is instructed to “*not proceed*” and, where possible, take steps to prevent the torture occurring.⁵ By contrast, where there is a “*serious risk*” of torture which cannot be mitigated, personnel are required only to consult ministers.⁶ This could imply that ministers have a discretion to authorise acts which will give rise to a real risk, but not a certainty, of torture. Further, “*serious risk*” is not defined or explained in the Guidance. As the ISC said in its 2010 Report on the Guidance (published for the first time as an annex to the ISC Report on Detainee Mistreatment and Rendition: Current Issues, 28 June 2018), “Leaving individuals to determine what constitutes a ‘serious risk’ of torture or mistreatment places an unacceptable burden on the individual officer.”⁷
8. Failure to define “*serious risk*” and the failure to include in the Guidance clear guidelines for Ministers on the decision-making process in this respect also leads to “dangerous

⁵ Consolidated Guidance, paragraph 11.

⁶ Ibid.

⁷ ISC Report: Current Issues, p.148.

ambiguities”⁸ in how Ministers interpret “serious risk”. This is borne out in the evidence by Ministers given to the ISC. For example, then Foreign Secretary Boris Johnson told the ISC that “If torture is a possibility then the Consolidated Guidance offers a very firm prohibition,”⁹ while then Home Secretary Amber Rudd suggested that she could authorise an action where there was a serious risk of torture.¹⁰

Legal position

9. The implication that Ministers can authorise acts which will give rise to a real risk of torture is contrary to both domestic and international law, for the following reasons:

10. First, it is unlikely that the “*knowledge or belief*” threshold contained in the Guidance will ever be met in practice. Foreign states almost never admit that they carry out torture.¹¹ It would be a very rare case where an officer knows or believes with certainty that his or her actions will result in torture. Nevertheless, an officer who proceeded in circumstances where there is a serious risk of torture would be in real danger of “*acquiescing*” in torture contrary to Article 1 of the UN Convention against Torture (“UNCAT”). This would not only be contrary to the United Kingdom’s criminal laws but it would also constitute an international crime for which there is universal jurisdiction.¹²

11. Secondly, it is unlawful under general international law and the ECHR for an officer to take action which would expose a person to a real risk of torture. Article 3 of UNCAT prohibits States parties from removing a person to another State where there are “*substantial grounds for believing that he would be in danger of being subjected to torture*”. The UN Committee Against Torture has found that a member state breaches Article 3 UNCAT by deporting an individual where the state knows or should know that there is “*a real risk*”

⁸ ISC Report: Current Issues, p.76.

⁹ ISC Report: Current Issues, p. 75.

¹⁰ ISC Report: Current Issues, p. 76.

¹¹ See Lord Bingham, dissenting, in *A v Secretary of State for the Home Department (no.2)* [2006] 2 AC 221: “the foreign torturer does not boast of his trade” [59].

¹² *R v Bow Street Stipendiary Magistrates, Ex parte Pinochet Ugarte (No 3)* [2001] 1 AC 147.

of torture.¹³ Although *Agiza* was a case about deportation, there is no reason in principle why it should not apply to other types of state action such as intelligence-sharing.

12. Similarly, in *Chahal v United Kingdom* (1997) 23 EHRR 413, the European Court of Human Rights held:

“... whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion” ([80]).

13. The judgment in *Chahal* has been affirmed in a number of cases.¹⁴ Indeed, in the recent case of *El Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, the ECtHR expressed the proposition in broad terms, which are clearly capable of applying to other types of state action such as intelligence-sharing (at [212]):

“Insofar as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State by reason of its having taken action which has, as a direct consequence, the exposure of an individual to proscribed ill-treatment”.

14. The real or serious risk threshold is the test applied in other jurisdictions such as Canada¹⁵ and New Zealand (albeit again in the specific context of deportation).¹⁶ Most recently, Canada adopted a Ministerial Direction to its Security Intelligence Service which contains a prohibition on using or requesting information which would result in a “*substantial risk*” of mistreatment.¹⁷ We consider that this Ministerial Direction is important state practice relevant to customary international law, and that a similar approach should be adopted by the UK in its revised Guidance.

15. In *R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389, which concerned two legal challenges to the Consolidated Guidance, it was held that the phrase

¹³ See eg. *Agiza v Sweden*, Case No. 233/2003 (24 2005) [13.4]. Article 3 U NCAT contains the ‘non-refoulement principle’.

¹⁴ See eg. *Saadi v Italy* (2009) 49 EHRR 30, *Othman (Abu Qatada & Ors v United Kingdom)* (2012) 55 EHRR 1.

¹⁵ See eg. *Suresh v Minister of Citizenship and Immigration* (Canada Supreme Court), 2002, SCC 1 January 11.

¹⁶ See e.g. *Attorney General v Zaoui* [2005] NZSC 38 at [90].

¹⁷ Available here: <https://www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-csis-scrcs-en.aspx>

“serious risk” in the Guidance has the same meaning as the phrase “real risk” used by the ECtHR.¹⁸

16. The Guidance as currently drafted, by prohibiting action only where the officer “knows or believes” that torture will take place, as distinct from when the officer considers there to be a real or serious risk that torture may occur, therefore purports to permit conduct which is prohibited in international law and by the ECHR. There is no reason in principle, and no support in international law, for the “knowledge or belief” standard in the Guidance.
17. Thirdly, the “knowledge or belief” standard puts the UK and its officers at an unacceptable risk of being complicit in acts of torture.
18. The UK will be responsible as a matter of international law for aiding or assisting another state to perpetrate torture. Article 16 of the International Law Commission’s Articles on State Responsibility provides that a state which “aids or assists” another state to carry out an internationally wrongful act commits an international wrong where the aid or assistance is given “with knowledge of the circumstances of the internationally wrongful act”, and where “the act would be internationally wrongful if committed by that State.”¹⁹ The International Court of Justice has held that this provision reflects customary international law.²⁰ In our view, “knowledge of the circumstances” of torture could include constructive as well as actual knowledge (see Agiza above). Consistently with this, in its Seventeenth Report on Counter-Terrorism Policy and Human Rights (Session 2009-10) the Joint Committee on Human Rights said that a state is complicit in torture where it has “constructive” knowledge that a foreign state will carry out torture, i.e. where the state “should have known of the use of torture” (paragraph 30).²¹

¹⁸ The first claimant’s contention in that case was that the phrase “serious risk” in the Guidance imposed a less demanding threshold than the “real risk” threshold required by law. This argument was rejected by the Court on the ground that there is no material difference between the two phrases ([61]).

¹⁹ The ILC’s Articles are available here:

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

²⁰ See Case Concerning the Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (2007) ICJ Rep 43, [420].

²¹ See similarly the Joint Committee on Human Rights’ Twenty-Third Report on Allegations of UK Complicity in Torture (Session 2008-09), paragraphs 35 and 37.

19. The report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has previously concluded that “*the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture*” (emphasis added).²² As a matter of law, if State agents proceed to act knowing or believing there is a real risk of torture (as distinct from knowing or believing that torture will occur) they therefore risk rendering the UK complicit in any act of torture which subsequently occurs.

20. Fourthly and relatedly, one of the purposes of the Guidance is to protect individual officers from the risk of legal liability and prosecution.²³ The Guidance in its current form does not meet that objective because it exposes officers to the risk of prosecution for complicity in torture. Pursuant to section 134 of the Criminal Justice Act 1998, torture is a criminal offence wherever it is committed and regardless of the perpetrator’s nationality.²⁴ As a matter of domestic criminal law, an individual is responsible as an accessory to a crime committed by another person where he or she assists or encourages the commission of the offence with knowledge that there is a “*real possibility*” that it will be committed.²⁵ An officer may therefore be exposed to criminal liability as an accessory to torture even if he or she complies with the Guidance in its current form. The ISC reports disclose (for the first time) that an authorisation under the Guidance is invariably accompanied by an authorisation under s.7 of the ISA 1994, which purports to make the underlying conduct legal. This provision cannot make torture lawful as a matter of domestic law as that would require the clearest possible Parliamentary authorisation which is (unsurprisingly) absent from s.7 ISA 1994 and it cannot make it lawful as a matter of international law. Given that torture is an international crime for which jurisdiction is universal, the Guidance may also

²² A/HRC/10/3 (4 February 2009), paragraphs 54-5. Available here: https://www.securitycouncilreport.org/atf/cf/%7b65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/Terrorism%20A_HRC_10_3.pdf

²³ Paragraph 1 of the Consolidated Guidance.

²⁴ Since Article 4 UNCAT requires the criminalisation of torture, similar offences exist in almost all foreign legal systems.

²⁵ Section 8 of the Accessories and Abettors Act 1861. See *R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389 [37]-[43], citing in particular *R v Rook* (1993) 97 Cr App R 327.

expose officers to a risk of prosecution internationally for complicity in torture or for acquiescing in torture. By contrast, an outright prohibition on action which carries a real risk of torture by another official would protect officials from prosecution.

APPG's recommendations

21. **The Guidance should be brought into line with the UK's legal obligations under the ECHR and/or international law by stating that no person may take action where there is a real risk of such action resulting in torture. This should include a statement that ministers have no power to authorise such action.**

22. **Specific guidelines should be given in the Guidance to explain the concept of "real risk," including giving real-life examples of when the relevant threshold is reached. All officials and ministers should be obliged to refer to these guidelines when reaching a decision as to whether the "real risk" threshold has been reached.**

II. An absolute prohibition on proceeding where there is a real risk of CIDT

23. The Guidance acknowledges that there is an absolute prohibition on CIDT under international law (paragraph 5). However, whilst officers are instructed not to proceed where they "*know or believe*" that torture will take place, there is no such instruction in relation to action which will result in CIDT. Any suggestion that there is a distinction here between torture and CIDT is unjustified – the absolute prohibition under international law applies both to CIDT as to torture, as indeed does the government's own policy, as articulated at paragraph 6 of the Guidance: "*The United Kingdom Government's policy on such conduct is clear – we do not participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose.*"²⁶ The implied distinction between CIDT and torture is further unjustified because, as the current Guidance itself recognises, "*individual instances of mistreatment that might in isolation*

²⁶ We recommend that this policy be amended to insert the words "acquiesce in" after "participate in" to bring the policy in line with Article 1 of UNCAT.

constitute CIDT could amount to torture in circumstances in which e.g. they are prolonged or coincide with other measures.”²⁷

24. In addition, the current list of practices included as examples of CIDT in the Annex to the Guidance is inadequate. The ISC said in its 2010 report on the Guidance (published for the first time as an annex to the 2018 ISC Report: Current Issues) that, “If officers are to act with confidence, they must be given more clarity. At the very least the lower-level guidance must contain examples of treatment that would likely constitute CIDT.”²⁸ Further, the ISC Report: 2001-2010 makes specific findings of mistreatment where officers made verbal threats to detainees and criticises the fact that “the making of threats is not explicitly identified as prohibited in guidance available today.”²⁹

Legal position

25. CIDT is prohibited under international law. For example:

- a. Article 3 of the ECHR, Article 7 of the ICCPR, Article 5 of the American Convention on Human Rights and Article 5 of the African Charter of Human and Peoples’ Rights all prohibit CIDT as well as torture.³⁰ None of these instruments permits States parties to derogate from their obligations not to commit torture or CIDT.
- b. Article 16 of UNCAT obliges States parties to undertake to prevent acts of cruel, inhuman or degrading treatment or punishment. The UN Committee against Torture observed in General Comment 2, *“In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and*

²⁷ Paragraph 5 of the Consolidated Guidance.

²⁸ ISC Report 2001-2010, p.150.

²⁹ ISC Report: 2001 – 2010, p.28.

³⁰ Article 3 of the ECHR omits the word “cruel”. In *Reyes v R* [2002] UKPC 11, [30] Lord Bingham observed that, *“despite the semantic differences... the essential thrust of these [various] provisions, however expressed, is the same.”*

therefore the measures required to prevent torture must be applied to prevent ill-treatment.”

- c. Cruelty, inhumanity, degradation and related acts are prohibited by the four Geneva Conventions of 1949 and the Additional Protocols thereto. In certain circumstances the perpetrators of such acts may be liable to international criminal prosecution.
- d. The recent Canadian Ministerial Direction prohibits intelligence sharing that would lead to a substantial risk of “*mistreatment*”, which is defined broadly to include both torture and CIDT.³¹ As noted above, the Direction is said to be consistent with Canada’s international obligations.

26. Although there is no agreed international definition of CIDT, it has been held by national and international courts to include, *inter alia*, the following (alone or in combination): threats of torture;³² the use of excessive or gratuitous physical force;³³ prolonged standing;³⁴ sleep deprivation;³⁵ deprivation of food and/or water;³⁶ prolonged solitary confinement;³⁷ hooding;³⁸ and prolonged subjection to noise.³⁹

27. As already set out at paragraph 18 above, the UK would be responsible in international law for aiding or assisting another state to commit an internationally wrongful act “*with knowledge of the circumstances*” of the act where the act would be wrongful if committed by the UK. This includes constructive knowledge where the relevant actor should have known about the relevant circumstances. It follows that the UK would breach its international obligations if one of its officers aided or assisted action which resulted in

³¹ Paragraph 6. Available here: <https://www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-cbsa-asfc-en.aspx>

³² *Gäfgen v Germany* (2011) 52 EHRR 1 (GC).

³³ *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32; *Dedovskiy & Ors v Russia* (2011) 52 EHRR 30; *Bouyid v Belgium* (2016) 62 EHRR 32.

³⁴ *Ireland v United Kingdom* (1978) Series A no 25.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *A.B. v Russia*, App no 1439/06 (ECtHR, 14 October 2010); *Piechowicz v Poland*, App no 20071/07 (ECtHR, 17 April 2012).

³⁸ *Ireland v United Kingdom* (1978) Series A no 25.

³⁹ *Ibid.*

CIDT, in circumstances where the officer knew or should have known that this was a real risk.

APPG's recommendations

28. **As with torture, the Guidance should state that no person may take action where he or she “*knows or believes*” that CIDT will take place. This should include a statement that Ministers have no power to authorize such action.**
29. **Further, the APPG believes that, in light of (i) the absolute prohibition in international law on CIDT; (ii) the government’s own policy on CIDT as set out at paragraph 23 above; (iii) the recognition that individual instances of CIDT can easily amount to torture in various circumstances; and (iv) the international law rules on state responsibility, the Guidance should prohibit action (including ministerial authorisation of action) which carries a real risk of CIDT.**
30. **Finally, the current list of practices included as examples of CIDT in the Annex to the Guidance is inadequate and should be amended to contain a more comprehensive list.**

III. Application of the Guidance to extraordinary rendition and absolute prohibition on proceeding where there is a real risk of extraordinary rendition

31. Extraordinary rendition, a form of kidnap, is an abhorrent practice. By operating outside legal processes, it undermines the rule of law and opens the door to the use of torture and CIDT. Indeed, it is often considered to amount to CIDT or torture in and of itself.⁴⁰ The Consolidated Guidance does not expressly apply to rendition, and indeed the UK government has “no clear policy on and not even agreement as to who has responsibility for preventing UK complicity in rendition.”⁴¹ As the ISC states, it is “astonishing that, given

⁴⁰ See eg. North Carolina Commission of Inquiry on Torture Report, p.64, which states: “That horrific journey [ie. rendition flights] – in which detainees were deprived of sight, hearing and touch, diapered and even drugged, sexually or physically assaulted, unable to speak or see where they were, terrified and often in pain – was in itself torture.” The report is available here: <http://www.nctorturereport.org/>.

⁴¹ ISC Report: Current Issues, p.87, paragraph OO.

the intense focus on this issue ten years ago, the Government has still failed to take action".⁴² In the APPG's view, this is unacceptable.

32. It is particularly astonishing that the government has failed to put procedures in place to prevent UK complicity in rendition given their repeatedly stated position that, "We oppose any form of deprivation of liberty that amounts to placing a detained person outside of the law including so called extraordinary rendition..."⁴³ and again, "We are fundamentally opposed to unlawful rendition...and as such we do not use rendition."⁴⁴
33. The failure of the Government explicitly to address rendition is even more striking in light of the Prime Minister's letter of apology to Mr Belhaj and his then pregnant wife Ms Boudchar, read by the Attorney-General in a statement to the House of Commons on 10 May 2018. The letter acknowledged that, "The UK Government's actions contributed to your detention, rendition and suffering" and apologised unreservedly.⁴⁵
34. It is clear that extraordinary rendition must be subject to the same prohibition in the Guidance as torture and CIDT and that inclusion of such a prohibition in UK policy is long overdue. As the ISC states, "the government's excuse that [extraordinary rendition] is too difficult to define is nonsensical,"⁴⁶ particularly since the Council of Europe adopted a resolution defining extraordinary rendition in 2005, a definition which the APPG proposes be adopted by the Guidance (see further at paragraphs 36 to 37 below).⁴⁷
35. The APPG notes the ISC's formal request for the Government to publish its policy on rendition, including the steps that will be taken to identify and prevent any UK complicity

⁴² ISC Report: Current Issues, p.87, paragraph OO.

⁴³ Hansard, HC Deb, 29 June 2016, vol. 612, col. 422 ("UK Involvement in Rendition").

⁴⁴ Hansard, HC Deb, 2 July 2018, vol. 644, col 31 ("Detainee Mistreatment and Rendition").

⁴⁵ Hansard, HC Deb, 10 May 2018, Vol 640, Col 926.

⁴⁶ ISC, Press Release: Detainee Mistreatment and Rendition: Current issues, 28 June 2018 available here: <http://isc.independent.gov.uk/>

⁴⁷ Parliamentary Assembly of the Council of Europe, Resolution 1433 on lawfulness of detentions by the United States in Guantánamo Bay, adopted on 26 April 2005 at [99].

in unlawful rendition.⁴⁸ Such a policy on rendition could suitably be included as part of a revised and re-named Guidance.

Legal position

Definition of 'extraordinary rendition'

36. 17 years after the commencement of the Bush administration's extraordinary rendition programme, the views of legislative,⁴⁹ quasi-legislative⁵⁰ and academic and non-governmental sources⁵¹ show broad agreement 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. The English courts, most recently in *Belhaj & Anor v Straw* [2017] UKSC 3 (as referred to in more detail at paragraph 38.a below), have consistently asserted that involvement in rendition operations is an affront to the rule of law.⁵²

37. The APPG recommends that the Guidance should use the following definition of extraordinary rendition, as adopted in the Council of Europe resolution: "*[the] removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention*".⁵³ This definition not only achieved consensus within the Council of Europe, but is also in the APPG's view sufficiently clear to provide meaningful guidance to officers.

Domestic and international law

38. Extraordinary rendition is contrary to the common law, the ECHR and international law:

⁴⁸ ISC Report: Current Issues, p.87, paragraph OO.

⁴⁹ Congressional Research Service Report for U.S. Congress, *Renditions: Constraints Imposed by Laws on Torture*, 12 October 2007.

⁵⁰ 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.

⁵¹ UK *Involvement in Extraordinary Rendition*, Joint Supplementary Submission to the Joint Committee on Human Rights, Liberty/Justice, December 2005

⁵² 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, and *Belhaj and Anor v Straw* [2017] UKSC 3 3(v)(a)] (Lord Mance).

⁵³ Parliamentary Assembly of the Council of Europe, Resolution 1433 on lawfulness of detentions by the United States in Guantánamo Bay, adopted on 26 April 2005 at [99].

- a. In *Belhaj & Anor v Straw* [2017] UKSC 3, the Supreme Court held that the doctrine of foreign act of state could not apply to acts of rendition, detention and torture. Lord Sumption said at [278] that these acts “exhibit the same combination of violation of peremptory norms of international law and inconsistency with principles of the administration of justice in England which have been regarded as fundamental since the 17th century”.
- b. In *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, the ECtHR found that Macedonia was responsible for rendition and torture committed by CIA agents, because Macedonian state agents facilitated the treatment and failed to take measures to prevent it from occurring: [206] – [211].
- c. In *R v Mullen* [2000] QB 520, the Court of Appeal quashed the applicant’s conviction in circumstances where his arrest and prosecution in the UK had been brought about by the applicant’s unlawful rendition from Zimbabwe (in which British security services had been complicit.) The Court of Appeal held (at 532), “certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice.”
- d. Article 9 of the ICCPR and Article 5 of the ECHR provide the right to liberty and security of person. The arbitrary arrest, secret detention and transfer of persons through extraordinary rendition violates these rights.⁵⁴
- e. Extraordinary rendition violates the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (to which the UK is not a party). The Convention defines “*enforced disappearances*” 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

⁵⁴ See eg. Chief Ebrima Manneh v The Gambia, U.N. Working Group on Arbitrary Detention, Opinion No. 14/2009.

whereabouts of the disappeared person, which place such a person outside the protection of the law.”

39. Extraordinary rendition often entails the transfer of individuals in circumstances where they face a real risk of torture or CIDT, and as such the considerations set out in the previous sections apply equally here. In addition, extraordinary rendition deprives individuals of the opportunity to challenge their detention or transfer before a fair, impartial tribunal.
40. Applying the decision in *El Masri*, the UK would be legally responsible for action which it knows, or should know, would lead to unlawful rendition. Indeed, the ECtHR in *El-Masri* held that Macedonia was responsible, not merely for aiding or assisting the torture and extraordinary rendition (which was carried out by CIA agents) but also for the acts of torture and rendition themselves (*cf.* the rules on state responsibility in general international law set out at paragraph 18 above). Accordingly, it is imperative that the Guidance should instruct officers to avoid any such action.

APPG Recommendations

41. **Consistently with our proposed treatment of CIDT and torture, the most appropriate standard in the Guidance would be that officers should not take, and ministers should not authorise, action which would give rise to a “real risk” of extraordinary rendition, defined as “the removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention.”**
42. **There is an overlap with the rules contained in the Guidance on torture and CIDT, since the extraordinary rendition of an individual from one state to another may give rise to a real risk of torture or CIDT.⁵⁵ Indeed, rendition, where someone is “disappeared” and deliberately deprived of the protection of any legal process, creates the shadowy space beyond the reach of judicial scrutiny where torture and CIDT are able to take place.**

⁵⁵ The term “extraordinary rendition” is generally understood to mean rendition which creates a real risk of torture or CIDT – see e.g. ISC Report, *Detainee Mistreatment and Rendition 2001-2010*, paragraph 180.

Further, as stated at paragraph 31 above, rendition can amount to torture in and of itself. This should be expressly recognised in the Guidance.

43. The revised Guidance should also make explicit that the prohibition on action which would give rise to a “*real risk*” of rendition includes action that would give rise to a “*real risk*” of transport facilities in the United Kingdom or any of its Overseas Territories, being used 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.⁵⁶ This is important given the lacunae identified in this area in Chapter 8 of the ISC Report: Current Issues.⁵⁷

IV. Effective oversight of UK involvement in torture, CIDT and rendition

44. For a revised UK anti-torture and anti-rendition policy to be effective in practice, it needs a suitable system for independent supervision, reporting and whistleblowing. Although the Investigatory Powers Commissioner has formal oversight of the Guidance, the Guidance contains only rudimentary reporting provisions⁵⁸ and no protection for whistleblowers. The importance of effective reporting and record keeping was highlighted in the ISC Report: 2001 – 2010, which criticised the agencies’ poor record keeping during that period.⁵⁹

APPG Recommendations

45. The APPG believes that an independent commissioner or specialist judge, such as the Investigatory Powers Commissioner, should be appointed to conduct detailed *ex post facto* investigations into the implementation of the Guidance at both a generalised level

⁵⁶ This wording is taken from APPG on Extraordinary Rendition, “Extraordinary Rendition: Closing the Gap,” 2009, p.112, available here: <https://www.extraordinaryrendition.org/documents/all-other-documents/send/2-all-other-documents/34-extraordinary-rendition-closing-the-gap.html>.

⁵⁷ See in particular pp.81-87.

⁵⁸ For example, paragraph 9 states that “[p]ersonnel should feel free to raise any concerns with senior responsible personnel”.

⁵⁹ The ISC stated: “the lack of records raises questions as to how confident the Agencies can be in their account of their actions during this period and, crucially, how confident we can be in reaching any conclusions in the absence of a comprehensive and reliable evidence base”, ISC Report: 2001 – 2010, 28 June 2018, p. 21, paragraph 37.

and in specific cases. This would ensure an appropriate level of oversight without requiring judges to make sensitive decisions *ex ante* about whether to authorise action which could lead to torture or CIDT.⁶⁰

46. Such a system would be further strengthened by:

- a. Imposing in the Guidance an obligation on officers to report cases where an officer (i) knows or has reason to suspect that torture, CIDT or rendition has occurred;⁶¹ or (ii) where he or she encounters a situation where there is a “real risk” of torture. The obligation should be for a report to be made to both the officer’s immediate superior and to the relevant Minister. A comprehensive written record should be kept of each reported case, to which Ministers, the ISC and the Investigatory Powers Commissioners Office should have access.
- b. Ensuring that proper protections are given to whistleblowers who have concerns about UK complicity in torture, CIDT or rendition. A formal whistleblowing system should be put in place within the “ring of secrecy”, allowing whistleblowers to communicate securely with either the ISC or the Investigatory Powers Commissioner’s Office.

V. Application of the Guidance to any UK body involved with those detained abroad

47. The Consolidated Guidance currently applies to MI5, SIS, GCHQ and MOD (and the Cabinet Office has already proposed that it also apply to NCA and SO15). The ISC considered the issue of joint units (where the Agencies engage in joint counter-terror operations overseas with partner counter-terrorism units) in a prior report on “Intelligence Relating to the Murder of Fusilier Lee Rigby” and stated that “HMG must...seek to ensure that the same

⁶⁰ We have considered the possibility of introducing a judicial ‘double-lock’ system akin to that under the Investigatory Powers Act 2016. This would require ministers to obtain judicial approval before authorising action which may lead to torture or CIDT. However, we consider that judges are likely to be uncomfortable being asked to authorise such action, which could expose them to the risk of legal liability and prosecution abroad – and there is a risk that parallels could be drawn between such authorisations and the long-outlawed ‘torture warrants’ of the 17th century Star Chamber.

⁶¹ This is arguably required by Article 12 UNCAT, which provides that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”.

legal and moral obligations to which HMG adheres, and guidance which they follow, also apply to such units.”⁶² The ISC further stated that “the Consolidated Guidance must specifically address the question of joint units and make clear that it applies to such units.” Otherwise, as the ISC stated, UK leaves itself open to allegations that it is outsourcing action it cannot take itself.⁶³

48. This is particularly pertinent to allegations of involvement in rendition, since the ISC found at least three instances where the UK had financed renditions carried out by others, which they called “a simple outsourcing of action they knew they were not allowed to undertake themselves,”⁶⁴ as well as 28 cases where the Agencies also suggested, planned or agreed to rendition operations proposed by others, a further 22 cases where SIS or MI5 provided intelligence to enable a rendition operation to take place, and 23 cases where they failed to take action to prevent a rendition.⁶⁵

APPG Recommendations

49. **The APPG agrees with the ISC’s recommendation that: “Any UK body involved with those detained abroad, or the passing of information that could lead to a detention [or, the APPG would add, rendition], must operate in accordance with the Consolidated Guidance, otherwise there is a reputational risk to the UK.”⁶⁶**

VI. The Guidance should be re-named and merged with the Overseas Justice and Security Assistance Human Rights Guidance (OSJA)

50. OSJA sets out which human rights and international humanitarian law (IHL) risks must be considered prior to providing justice or security sector assistance. It specifies that an assessment must be made of the potential impact of any proposed assistance on those

⁶² ISC, ‘Report on the Intelligence relating to the Murder of Fusilier Lee Rigby’ (closed version) (2014), pp. 169–70, quoted at ISC Report: Current Issues, paragraph 103.

⁶³ ISC Report: Current Issues, paragraphs R and S on p. 51.

⁶⁴ ISC Report, Detainee Mistreatment and Rendition: 2001 – 2010, 28 June 2018 (‘ISC Report: 2001-2010’), p. 3.

⁶⁵ ISC Report: 2001 – 2010, p. 3.

⁶⁶ ISC Report: Current Issues, paragraph 110, pp.53-54.

risks, as well as on reputational or political risk, prior to the provision of any assistance. It also sets out examples of measures that may be taken to mitigate the risk that the assistance might directly or significantly contribute to a violation of human rights and/or IHL. Further, it sets out when the decision to provide assistance should be taken by senior personnel or ministers.⁶⁷ It applies to all departmental and agency leads for proposed assistance work and officials making decisions on UK justice and security assistance overseas, including where the engagement is undertaken by external agencies on behalf of a Department or agency and/or with UK funding or endorsement.⁶⁸

51. The ISC noted its concerns about the two sets of guidance operating in parallel and said “we question whether the use of two parallel frameworks is a practical solution and remain concerned that it could lead to duplication and inefficiency. We recommend the Consolidated Guidance and the OSJA Guidance are merged for those bodies that are subject to both.”⁶⁹ The APPG agrees.

APPG Recommendations

52. The APPG believes that two policies operating in parallel could cause unnecessary confusion. A single, merged, re-named policy with clarity on the appropriate standards for Ministers and officers to apply to avoid complicity in torture, CIDT and extraordinary rendition (as recommended by the APPG in this response) would give greater clarity to officers and Ministers. It would also send a strong signal to our international partners that the UK does not participate in, acquiesce in, solicit, encourage or condone the abhorrent practices of torture, CIDT or extraordinary rendition.

⁶⁷ OSJA, paragraph. 3.

⁶⁸ OSJA, paragraph 8.

⁶⁹ ISC Report, paragraph Q, p.47.