



Foreign Affairs Committee

Inquiry: Foreign and Commonwealth Office's Human Rights Annual Report

Submissions of The Redress Trust 22 April 2008

Introduction

1. These submissions are made in response to the Foreign Affairs Committee's call on 28 March 2008 for written submissions for the Committee's inquiry into the Foreign and Commonwealth Office's Human Rights Annual Report 2007 (the Report).

2. The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation. We regularly undertake cases on behalf of survivors and our special expertise in matters relating to torture has been recognised by a variety of national and international fora.

3. On 10 March 2008, REDRESS wrote to the Secretary of State for Foreign Affairs following his oral statement to Parliament on 21 February 2008. The letter was copied to the Prime Minister, the Secretary of State for Justice, the Secretary of State for Transport, the Attorney General of England and Wales, and the Advocate General for Scotland. The Secretary of State's statement is referred to in the section on "Rendition" in the Report at page 16, concerning two occasions in 2002 when a US plane with a single detainee aboard refuelled at the US facility in the British Indian Ocean Territory of Diego Garcia.

4. We have not received any reply from the Secretary of State for Foreign Affairs; the Prime Minister's Office has acknowledged receipt of our letter and has confirmed that its contents have been noted; there has been no response from any of the other recipients.

5. REDRESS' letter has not been published, and the submissions below are based on the said letter to the Secretary of State for Foreign Affairs.

Summary of REDRESS' Submissions

- The Government's response to the US admission is inadequate;
- The UK must identify the two individuals rendered and make humanitarian representations on their behalf;

- The UK has a positive obligation to hold a public inquiry rather than simply to rely on more assurances;
- The UK is under a positive obligation to review its laws and policies to ensure that renditions cannot take place through or on UK territory;
- The laws, policies and practice regarding prior authorization of State aircraft used in rendition are in need of urgent review and reform;
- The use of civil aircraft to render individuals is of equal concern and needs to be urgently addressed.

Government's Response to the United States' Use of UK territory for Rendition Purposes is Wholly Inadequate

6. The Government's response to the United States' recent admission that on two separate occasions the CIA rendered two individuals through UK territory in 2002¹ is inadequate, and the Government should take further steps in response to these particular revelations and more broadly.

7. To date, the Government has treated the US admission as a "disappointment," and continues to limit its response to the diplomatic arena relying on the US' own internal investigations and "assurances". The Secretary of State has said that a list of flights on which a rendition has been alleged will be prepared and sent "to the US to seek their specific assurances that none of these flights were used for rendition purposes."² This response fails completely to capture the significance of what has occurred and merely serves to signal to the US Government that no consequences attach to a violation of UK sovereignty. It also ignores the rights of the two individuals rendered and breaches the UK's positive obligations to conduct an independent and impartial investigation into the use of its territory for rendition, flowing from the UN Convention against Torture.

8. Since the US Government began its "extraordinary rendition" programme, many more allegations have been made that it has rendered detainees through UK territory (including the UK mainland) as well as used Diego Garcia as a holding centre.³ While internal inquiries have been undertaken by the Government, we believe that the Government must adequately respond to these allegations in two ways: first, by holding an independent and public inquiry into the US Government's use of UK territory for rendition purposes; second, implementing the necessary law and policy reforms to prevent the UK territory from being used for renditions purposes in the future.

The UK Must Identify the Two Individuals Rendered and Make Humanitarian Representations on their Behalf

¹ Central Intelligence Agency, "Director's Statement on the Past Use of Diego Garcia" (21 February 2008).

² Matthew Lee, "US Fears Backlash Over Terror Flights" *Associated Press* (21 February 2008); Oral Statement by Foreign Secretary David Miliband on Terrorist Suspects (Rendition) (21 February 2008).

³ See, e.g., Council of Europe, Parliamentary Assembly, "Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States," (12 June 2006) [hereinafter "Parliamentary Assembly Report 1"] at para. 289; "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe member states: second report," (11 June 2007) [hereinafter "Parliamentary Assembly Report 2"] at para. 70; "Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies," SG/Inf (2006) 5 (28 February 2006) [hereinafter "Secretary-General Report 1"]; "Secretary General's supplementary report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies," SG/Inf (2006) 13 (14 June 2006) [hereinafter "Secretary-General Report 2"]; European Parliament, "Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners," (26 January 2007) at para. 78; Richard Norton-Taylor, "Records show Diego Garcia link to alleged torture flights," *The Guardian* (4 January 2007); Cage Prisoners, "Fabricating Terrorism British Complicity in Renditions and Torture" (29 March 2006); Amnesty International, "Below the radar: Secret flights to torture and 'disappearance'" (5 April 2006).

9. The US Government's "extraordinary rendition" programme is marked by the lack of any legal process. Documentation on rendition reveals that individuals are very often tortured or ill-treated in preparation for and during the flight as well as being sent to locations where they face a high risk of further torture or ill-treatment.

10. One of the individuals rendered through Diego Garcia is now detained at Guantánamo Bay and therefore continues to be denied his basic human rights and remains at risk of torture and ill-treatment.⁴ The individual risks being brought before a Military Commission for "trial" under procedures widely condemned as falling short of fair trial standards. While it has been revealed that the second individual rendered has been released to his or her "home" country, no information is available as to whether he or she was at risk of torture or ill-treatment on return in contravention of the principle of *non-refoulement*, whether he or she has been interrogated or detained since, or indeed any information concerning the individual's present welfare.

11. No steps appear to have been taken to establish the identities of the two individuals rendered. Instead, the Secretary of State appears to have suggested that their lack of British nationality or residency should lessen our concern for them, and that nothing further needs to be done:

"The House will want to know what has become of the two individuals in question. There is a limit to what I can say, but I can tell the House the following. The US Government has told us that neither of the men was a British national or a British resident."⁵

12. While the Government cannot formally espouse the two individuals' cases, the fact that their human rights were violated on UK territory by a foreign state should in and of itself be sufficient for it to take up their cases in a humanitarian capacity. This is particularly so in light of the UK's repeated willingness to make representations to foreign governments on human rights grounds even when the case has no connection to the UK.⁶

13. REDRESS notes that the Committee in a letter of 28 February 2008 to the Secretary of State has already asked to be given the identities of the two men admitted to have been rendered through Diego Garcia, and for other specific information relating to them and the rendition flights concerned. REDRESS also notes that in his reply dated 18 March 2008, the Secretary of State does not deal with these requests, but referred to "a range of issues that officials in my Department are currently working on" and that "officials are still analysing the implications of the new information received from the US."

14. REDRESS respectfully agrees that the identity of the two men should be disclosed, as well as the other information relating to them and the rendition flights as requested by the Committee, which request is consistent with the issues in paragraphs 9-12 above. Accordingly, REDRESS respectfully submits that in any

⁴ See, "Situation of Detainees at Guantánamo Bay" Commission on Human Rights UN Doc. E/CN.4/2006/120 (27 February 2006).

⁵ Oral Statement by the Foreign Secretary *supra* note 2.

⁶ For example, since 1990, the UK has made regular and repeated representations to the Myanmar government concerning the prisoner of conscience, Aung San Suu Kyi, and more recently to the Democratic Republic of Congo concerning Marie-Thérèse Nlandu and to the Ethiopian government concerning Kifle Tigneh Abate. The UK government has also intervened in cases concerning the prosecution of individuals in circumstances where their trials are unfair by UK or international standards such as the intervention in relation to Libya's imprisonment and trial of Bulgarian nurses for deliberate infection of children with HIV or their potential punishment disproportionate, such as the representations to the Nigerian government concerning the proposed stoning to death of Amina Lawal for adultery, and to Iran concerning its use of the death penalty.

follow-up, the Committee should reiterate these requests arising from the 21 February 2008 statement.

The UK has a Positive Obligation to Hold a Public Inquiry Rather than Simply to Rely on More Assurances

15. As a matter of international law, where reasonable grounds exist to believe that torture or ill-treatment may have been committed within a State's jurisdiction,⁷ the State is under a positive obligation to conduct a prompt, impartial, independent, effective and thorough investigation into the allegations, even where no formal complaint has been made.⁸

16. Reliance on US assurances falls short of the UK's international legal obligations and contributes towards a culture of impunity which, as the European Court of Human Rights has repeatedly emphasised, renders the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment "ineffective in practice."⁹ An independent public inquiry is therefore urgently required to investigate the use of UK territory for rendition as well as a holding site for detainees. Such an inquiry must be carried out in a public manner in order to ensure that private individuals, foreign states and non-governmental organisations can submit relevant information to the investigating body and to ensure that the investigation is carried out transparently.¹⁰

The UK is under a Positive Obligation to Review its Laws and Policies to Ensure that Renditions Cannot Take Place Through or on UK Territory

17. The UK is also under a positive duty to ensure that it has an effective legal and practical framework to protect individuals under its jurisdiction from the risk of torture or ill-treatment by state agents or third parties within its jurisdiction.¹¹ An overhaul of the current laws and policies on aviation is urgently required to ensure that a strong preventative framework is in place.

18. The former Foreign Secretary, Margaret Beckett, has already acknowledged the deficiencies in record keeping which she conceded are "not all that marvellous, frankly"¹² and may have contributed to failures to detect rendition flights in the past. Moreover, the laws and procedures by which State aircraft are authorised to enter UK territory appear to be inadequate to determine whether a rendition is taking place or is going to take place, as are the laws and practice governing the use of civil aircraft involved in rendition. Accordingly, as part of a public inquiry, an assessment of the adequacy of UK laws, policies and practices to prevent the use of UK territory in renditions is in order.

Prior Authorisation of State Aircraft

19. The Government must be capable of detecting rendition flights. This requires it to become more stringent when setting and enforcing disclosure requirements for

⁷ This obligation exists regardless of whether the allegations are against the state itself or a foreign state or private individuals, *Calvelli and Ciglio v. Italy*, ECtHR, no. 32967/96 (17 January 2002).

⁸ *Bati and Others v. Turkey*, ECtHR, no. 33097/96 and 57834/00 (3 June 2004) at para. 133.

⁹ *Assenov v. Bulgaria*, ECtHR No. 24670/94 ECtHR (28 September 1998) at para. 102; *See also, Aksoy v. Turkey* 23 EHRR 413 (1997) at para. 98.

¹⁰ *See, Bati and Others v. Turkey supra* note 8 at para. 137 (discussing the requirement that investigations be open to "public scrutiny.")

¹¹ *A. v. United Kingdom*, ECtHR 25599/94 (23 September 1998).

¹² "Beckett Attacks Rendition Records," *BBC News* (24 February 2008).

foreign State aircraft wishing to enter UK territory.¹³ Once the foreign State aircraft receives authorisation to enter, the aircraft enjoys immunity and cannot be searched or seized.¹⁴ It is therefore vital that the Government acts pre-emptively prior to authorisation.

20. The Secretary-General of the Council of Europe found that the majority of European states fail to require the foreign State to provide details of “the identities and status of all persons on board, the purpose of the flight and its final destination as well as the final destination of each passenger.”¹⁵ The Parliamentary Assembly of the Council of Europe also highlighted the particular problem posed by multilateral agreements which provide for blanket overflight clearances which reduce the opportunity to effectively detect renditions. For example, the Parliamentary Assembly highlighted the terms of unpublished NATO agreements of 4 October 2001, which provide for

- (1) “blanket overflight clearances for the United States’ and other Allies’ aircraft for military flights related to operations against terrorism,
- (2) blanket access to ports and airfields on NATO territory, including for refuelling, for United States and other Allies for operations against terrorism”.¹⁶

21. In this respect, the UK’s laws, policies and practices on prior authorisation must be reviewed and reformed as appropriate in order to ensure that the Government receives sufficient information to independently assess whether any foreign State aircraft is being used for rendition purposes.

The Use of Civil Aircraft to Render Individuals

22. Both the European Parliament and the Council of Europe have found that the US Government has presented State aircraft as civil aircraft in order to avoid the requirements of prior authorisation but to still benefit from the availability of immunity from search and seizure.¹⁷ For example, the Council of Europe’s Parliamentary Assembly found that:

“The US Government’s post-9/11 detainee transfer operations would frequently make use of practices that were previously considered “anomalies,” such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian operators; and civilian agents and contractors travelling on military travel orders.”¹⁸

23. Under the Convention on International and Civil Aviation of 7 December 1944 (the ‘Chicago Convention’) to which 189 states are parties, no prior authorisation is

¹³ Article 3(c) of the Convention on International and Civil Aviation of 7 December 1944 provides that, “No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise.” See also, James Crawford and Kylie Evans, “Opinion: Extraordinary Rendition of Terrorist Suspects through the United Kingdom,” submitted to the All Party Parliamentary Group (9 December 2005).

¹⁴ Parliamentary Assembly Report 2 *supra* note 3 at para. 102.

¹⁵ Council of Europe, “Follow-up to the Secretary General’s reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies: Proposals made by the Secretary General,” SG(2006)01 (30 June 2006) at para. 12(d).

¹⁶ *Id* at para. 12(d). See also, European Parliament *supra* note 3 at para. 206 (calling on “Calls on Member States to take adequate measures to ensure that overflight clearances for military and/or police aircraft should be granted only if accompanied by guarantees that human rights will be respected and monitored.”)

¹⁷ For example, see Parliamentary Assembly Report 2 *supra* note 3 at paras. 142 – 166 and para. 185; see also, European Parliament *supra* note 3 at para. 46.

¹⁸ Parliamentary Assembly Report 2 *supra* note 3 at para. 78.

needed for unscheduled civil aircraft.¹⁹ Such flights can “make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the State flown over to require landing.”²⁰ Under Article 3 *bis* (b), the territorial State can require the landing of the aircraft if there are “reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention” and under Article 16, “the appropriate authorities of each of the contracting States shall have the right, without reasonable delay, to search the aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.”

24. However, the definition of a State under the Chicago Convention lends itself to uncertainty as to whether rendition flights using civil aircraft would fall within the applicable rules relating to State or civil aviation.²¹ While Article 3(b) of the Chicago Convention provides some direction in setting out that, “Aircraft used in military, customs and police services shall be deemed to be state aircraft,” uncertainty remains as to whether the list in Article 3(b) is exclusive or merely exemplary of the types of aircraft excluded from the scope of the Convention.²² In practice, a functional test is applied to determine whether an aircraft falls within the definition of State aircraft and although the status, ownership or control of the aircraft may be taken into account these are not determinative in classifying the aircraft concerned.²³ The lack of certainty surrounding the proper classification of commercial flights used by the US for rendition purposes means that the UK authorities might not be exercising their rights of search and seizure where rendition is suspected, even in those cases where the US has not sought prior authorisation to enter UK territory, for fear that the UK would be infringing on the US’ immunity – an immunity which doesn’t apply to non-State aircraft.

25. As such, this is an issue which the UK Government must address with urgency both legally and in practice by making clear to all States that all commercial aircraft will be presumed to fall under the legal regime applicable to civil aircraft unless prior authorisation is sought by the State concerned.

26. Moreover, the procedures for detecting the use of civil aircraft for the purposes of rendition must be improved. While the territorial State theoretically has a range of powers available to intervene in a rendition flight, these powers are made meaningless without any information to suggest that rendition is taking place. Although controls over civil aircraft do exist, they generally relate to customs, immigration and security regulations and are therefore unlikely to expose rendition flights.²⁴

Summary

27. The Government should urgently:

- i) Determine the identities of the two rendered persons and their current situations, and place this information in the public domain;

¹⁹ Under Article 6, scheduled flights require prior authorisation.

²⁰ Article 5.

²¹ See, the International Civil Aviation Organisation, “Secretariat Study on “Civil/State Aircraft”” (Montreal, 4 – 15 July 1994) Attachment 1: LC/29 – WP/2-1 at para. 1.1. [hereinafter “the ICAO Study”].

²² *id.* at para. 5.1.1. (discussing the significance of the word “deemed” in Article 3(b)).

²³ See the ICAO Study *id.* and Centre for Human Rights and Global Justice, “Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States: Briefing Paper,” NYU Law (February 2006) at 5.

²⁴ Secretary-General’s Report 2 *supra* note 3 at para. 45.

- ii) Make humanitarian representation in respect of these individuals, as required;
- iii) Conduct a full, impartial and independent investigation into the circumstances surrounding these two flights as well as the additional allegations regarding the use of UK territory for rendition and as a holding site for detainees;
- iv) Tighten its laws, policies and practices relating to aviation to make sure that UK territory cannot be used to facilitate extraordinary rendition.

Additional comment

28. REDRESS also respectfully agrees with the other issues raised by the Committee in its letter of 28 February 2008 to the Secretary of State, which issues, it is respectfully submitted, are consistent with the instant submissions. REDRESS accordingly puts itself at the disposal of the Committee to further assist the Committee's instant Inquiry and/or any follow-up with the Secretary of State in any way deemed appropriate.