

JUSTICE

International Rule of Law Lecture 2006

Extraordinary Rendition

Complicity and its consequences

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Monday 15 May 2006

Middle Temple Hall, London



JUSTICE

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Chaired by Lord Steyn.
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1. My Lord Chairman, Ladies and Gentlemen, I am honoured by Justice's invitation to address the subject of 'Extraordinary Rendition: Complicity and its Consequences'. With its balanced and cross-party approach, as well as its experience over several decades, there can be few organisations better placed to rise to the very real challenges that are currently posed to the international rule of law. The fundamental nature of that challenge is crystallized in the practise of 'extraordinary rendition' which, if permitted, would put a stake through the heart of the international legal order.
2. The concept of 'extraordinary rendition' does not exist as a term of art in international law. You will not find it referred to in any treaty or international instrument of which I am aware. Although not limited to the period since 9/11 (instances date back to 1998 at least), it has emerged into public prominence as a result of actions taken to respond to the threat of global terrorism. It has come to be understood as referring to the practice of forcibly transporting a person – usually alleged to be involved in terrorist activity – from one country to another country without relying on the normal legal processes (extradition, deportation etc) and for the purposes of subjecting them to interrogation and other forms of treatment that include torture or cruel and degrading treatment.
3. Both elements – the forcible transportation outside of due process (characterised by Lord Steyn as "kidnapping" in his Attlee Foundation lecture last month), and the invasive forms of interrogation – raise the most serious issues under



international law. As to the first element, it is impossible to see how the removal of a person from the territory of a state without due process – access to a tribunal – could not violate fundamental human rights reflected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as customary law and regional human rights agreements. If such removal takes place in times of armed conflict it will be strictly limited by Article 49 of the Fourth Geneva Convention, a provision that was adopted to prevent Nazi style deportations from countries it had occupied. As to the second element – invasive interrogation – the 1984 Convention on the Prohibition of Torture outlaws torture in all circumstances. The prohibition is reflected in customary international law and reflects *jus cogens* – a peremptory and intransgressible norm – as the House of Lords made clear in 1999, in *Pinochet No. 3*.

4. Where both elements are present I have no doubt that the practice will be wholly inconsistent with the rules of international law that have been but in place since the Second World War. Every state – all states – have an obligation to prevent such a practice from taking place. I would go further: the association with torture makes the practice of extraordinary rendition an international crime. The concept of the international crime, in its modern sense, emerged with the Nuremberg Statute. It has gained prominence since the 1990s, with the creation of the Yugoslav and Rwanda war crimes tribunals, the International Criminal Court, the indictment of Senator Pinochet and, more recently, the indictment and transfer to Sierra Leone of Charles Taylor, former President of Liberia. The concept of international crime means that international legal obligations are no longer applicable only to states: an international crime gives rise to individual criminal responsibility, with all that implies for worldwide investigation and, as appropriate, prosecution. In the present context it means that all states parties to the 1984 Torture Convention – that includes the United Kingdom and the United States as well as over 140 other states – have the obligation to investigate and, if appropriate, prosecute any person who is alleged to have committed torture within the meaning of the Convention and is present within their jurisdiction. But the 1984 Convention goes further: its Article 4 criminalises participation or complicity in torture. The question therefore arises: how complicit must an



individual be for international criminal responsibility to arise, and for the principles of the Torture Convention to cut in?

5. That is an important question, but it is also a delicate question as allegations of extraordinary rendition are made. Delicate because at this time the facts are yet to be fully established so that firm conclusions cannot yet be drawn. Nevertheless, the alleged facts appear reasonably clear to see, and in some cases even notorious. In one case dating back to September 2002 – Maher Arar – a Canadian national in transit through John F Kennedy airport in New York was arrested, allegedly with the involvement of the Canadian authorities, and ended up being forcibly transported to Syria where, on his account, he was kept in solitary confinement and tortured. Eventually he was released, and he has not been charged with any criminal offence. A major public inquiry is now underway in Canada to establish the facts and the circumstances of Canadian involvement, in which the US has declined to participate. US officials speaking on conditions of anonymity have said that the Arar case fits the profile of extraordinary rendition.¹

6. Closer to home, Moazzam Begg, a British national from Birmingham, has described in his book *Enemy Combatant* how he was arrested at a house in Pakistan where he was living with his wife and children, transported to the US controlled Bagram air base in Afghanistan (where he remained for about a year), and then transported on to Guantanamo where he remained for about two more years. Accused of being an unlawful combatant in the so-called ‘war on terror’ he was never charged with any criminal offences. He was released shortly before the May 2005 British general election. I do not know what he did or did not do, and it is not yet established whether the interrogation and other treatment to which he was subjected went beyond cruel, inhuman and degrading treatment and amounted to torture. But it appears that he may have been subject to ‘extraordinary rendition’. What I found striking about Mr. Begg’s account was the early and extensive involvement of the British intelligence services in his questioning, in Pakistan, in Bagram and in Guantanamo. At the every least that

¹ See House of Commons Library, Extraordinary Rendition, Standard Note SN/IA/3816 (by Adele Brown), last updated 23 March 2006, Appendix 1, at p. 31.



raises the questions of whether any person associated with the British government was in any way involved in his kidnapping and removal to Bagram and Guantanamo and, if so, whether that person knew, or should have known, that it was likely that he would be subject to the treatment he alleges. If the answers to those questions are in the affirmative then an issue of international criminal responsibility may arise.

7. Beyond these two individual cases – in which the United States is plainly involved in both, but in which the UK may be involved only in one – there are numerous other allegations that could imply the involvement of persons associated with the British government. These include the allegations that CIA rendition flights may have passed through UK airspace and, in some cases, landed at UK airports. There have also been other British nationals detained at Guantanamo, and there remain a number of British residents who are incarcerated at Guantanamo. There is also the possibility that detainees have been extraordinarily rendered from Afghanistan and from Iraq. According to human rights NGOs many detainees held by the United States are presently unaccounted for. I understand that Britain may no longer permit persons apprehended by British forces in Afghanistan or Iraq to be handed over to the US, because of the fear of ill-treatment. But the possibility cannot be excluded that prior to any such policy other detainees were handed over and may have been taken outside Afghanistan or Iraq for questioning or detention. What is the potential criminal responsibility of an individual associated with the policy and practise of extraordinary rendition, including torture?

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8. That is a question I had occasion to address rather directly last October, in a debate I was involved in with Professor John Yoo at the World Affairs Council of Northern California, in San Francisco. The event was part of a speaking tour that was organised in the United States for my book *Lawless World*, at about the time that Special Prosecutor Patrick Fitzgerald announced his indictment of Vice-President Dick Cheney's Chief of Staff, Lewis Libby. It was also the time that



Lawrence Wilkerson, Colin Powell's respected former Chief of Staff, broke his silence to brand the Vice President a war criminal. Mr Libby was replaced by David Addington, a lawyer working with Mr. Cheney's office who was known to have been closely involved in the legal policies adopted immediately after 9/11, including the decision to create a detention facility at Guantanamo, to treat Al Qaeda and Taleban detainees as unlawful combatants unprotected by the Geneva Conventions, and to define torture in such a way as to remove the constraints that the established international legal definition impose on the treatment and questioning of detainees. I had mentioned to the media that David Addington and others who were said to be closely associated with the crafting of the Bush Administration's policy on the interrogation of detainees would do well to reflect on the fate of Augusto Pinochet before embarking on their own international travels.

9. As you know, the Chilean Senator and former head of State was unexpectedly arrested during a visit to London in 16 October 1998, at the request of a Spanish judge who sought his extradition on various charges of international criminality, including torture. The House of Lords ruled that the 1984 Convention prohibiting torture removed any right he might have to claim immunity from the English courts, and gave a green light to the continuation of extradition proceedings. My peripheral involvement in that case – as counsel for one of the interveners – allowed me to witness the case first hand. It also gave me the opportunity to chat with Senator Pinochet's advisers, next to whom I happened to sit during the proceedings. One conversation in particular has remained vividly at the forefront of my mind. "It never occurred to us that the torture convention would be used to detain the Senator", I was told by the lawyer who had advised President Pinochet on human rights from the late 1970s and through the 1980s, and who had been involved in the decision by Pinochet and Chile to ratify the Torture Convention in 1988.
10. I mentioned this in the debate with John Yoo. Professor Yoo is now back at Berkeley, following a stint at the US Department of Justice, where he played a leading role in authoring and contributing to the legal advice that rode roughshod



over the Torture Convention. He was directly involved, I understand, in the torture memo that unilaterally re-defined torture so as to allow more intrusive interrogations. His advice was plainly inconsistent with the requirements of international law. It appears to have opened a door into the forbidden world of torture, and perhaps contributed directly to the “war on terror’s” aggressive interrogation techniques and, possibly, the abuses at Abu Ghraib, Bagram and Guantanamo. Professor Yoo was well aware of the Torture Convention. However, when I raised the Pinochet precedent in our debate he seemed taken aback at the suggestion that he may be covered by its Article 4 prohibitions on complicity. Plainly he did not want to engage with a discussion in that direction.

11. It seems clear that he had proceeded on the basis that international law was for others. He appears not to have turned his mind to the possibility that, as a legal adviser associated with a policy that permitted torture contrary to international legal obligations, he could be subject to international investigation and even prosecution. How might this happen?

12. The Torture Convention sets up an elaborate enforcement mechanism. The US, the UK and the 140 plus other countries that have joined the convention agree to take certain actions if any person who has committed torture anywhere in the world is found on their territory. Specifically, such a person is to be investigated, and if the facts warrant must either be prosecuted for the crime of torture or extradited to another country that will prosecute. The Convention aims to avoid impunity for this most serious of international crimes, by removing the possibility that the torturer will be able to find any safe haven. This was the basis for Senator Pinochet’s arrest in Britain. The potential problem for Professor Yoo and others who may have been associated with torture is to be found in Article 4 of the convention. This criminalizes not only the act of torture itself but also other acts, including “an act by any person which constitutes complicity or participation in torture”.

13. Can the mere drafting of legal advice that authorizes a policy of torture amount to complicity in torture? Any case will turn on its particular facts. A prosecutor would



have to establish that there was a direct causal connection between the legal advice and the carrying out of particular acts of torture, or perhaps a clear relationship between the legal advice and the consequential governmental policy that permitted torture. On some approaches it could even be sufficient if the policy allowed a blind eye to be turned to the risk of torture (or to information that a state was allowing its territory to be used in over flight or for refuelling of aircraft that may be engaged in taking detainees to or from a place where the risk of torture exists).

14. At present the evidence on extraordinary rendition or the involvement of any particular individual is not yet established, and it would be inappropriate to prejudge the outcome of any investigations that may be carried out in the future. Nevertheless, those associated with the legal advices and their surrounding policies do need to be aware that there is case-law from Nuremburg that confirms that lawyers and policy-makers can be criminally liable for the advices they have given and the decisions they have taken. In the case of *United States v Josef Altstotter and others* some of the accused were lawyers who had been involved in the enactment and enforcement of laws that allowed acts to occur that were crimes against humanity. They were convicted in December 1947 by a US military tribunal in Germany, on the grounds that they had entered into a plan or scheme that had contributed to acts that were international crimes. “Beneath the cloak of the lawyer lies the dagger of the assassin”, said the military tribunal. The precedent is an important one, that has the potential to draw in the architects of a policy that allows extraordinary rendition or support for extraordinary rendition.
15. One draft legal memorandum has come to light. Before taking up a position at Harvard Law School Jack Goldsmith was Assistant Attorney General in the Office of Legal Counsel in the US Department of Justice. In March 2004 he authored a draft legal opinion on Article 49 of the Fourth Geneva Convention, in relation to the situation in Iraq. Article 49 contains clear and unambiguous language: “Individual ... transfers ... of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”. Despite that language Professor



Goldsmith somehow managed to reach the opposite conclusion: his tightly reasoned and lengthy draft opinion concludes that Article 49 allows overseas transfer of certain persons for a brief but not indefinite period to facilitate interrogation. That conclusion is undoubtedly wrong. It ignores the plain meaning of Article 49 and the negotiating history of that provision. The ICRC is the guardian of the Geneva Conventions, and its' commentary confirms that there are no circumstances in which transfers outside the territory of occupation may be permitted, for interrogation.

16. It is not known whether Mr. Goldsmith's draft opinion was ever finalised, or formally adopted, or acted upon. It is abundantly clear to me, however, that a violation of Article 49 would constitute a grave breach of the Geneva Conventions. It is equally clear to me that the drafter of a legal opinion – even a draft legal opinion – that was directly connected to any transfer that took place could bring the lawyer responsible within the realms of criminality. If any detainee in Iraq was transferred outside of Iraq for the purposes of interrogation for a brief but not indefinite period then criminal liability can arise.

17. The point I make is not that Professors Yoo or Goldsmith are international criminals. It is merely that the existence of certain facts, if proved, could have the consequence of bringing them within the realm of international criminality, including in respect of acts of extraordinary rendition. Such is the implication of the crime of complicity in international law. Such are the consequences of the changes in international law that have occurred since the Second World War. The emergence of the criminal law should serve as a powerful deterrent for those asked to contribute to the design of policies that may permit extraordinary rendition.

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18. What might all this mean in Britain? The facts are, of course very different. Unlike the United States, as far as we know there has been no governmental policy of general application that is premised on the transfer of individuals under



British control from one country to another country, whether for the purposes of interrogation or otherwise. It seems that the most that could emerge is British support for the implementation by the US of its policies. Such support might be active, or it might be passive, including turning a blind eye. What would be the implications if facts were to emerge to establish support in any material sense?

19. At this point we enter the realms of speculation. Nevertheless, we do know that the Prime Minister has a somewhat semi-detached relationship to the rule of law. He was willing to bend the rules in respect of the use of force in Iraq, and to manipulate the presentation of the legal advice he had been given. This past week he has not hesitated to attack the judgment of an English court (in the case of the hijacked Afghan plane) in a manner and with a tone that raises serious constitutional concerns.

20. The Prime Minister's discontent with the law and the judges, and his less than fulsome commitment to international human rights standards, dates back to well before 9/11. One example suffices to illustrate, the case of *Youseff v The Home Office*. Although Mr Justice Field's judgment was given in July 2004, all the material facts date back to the spring and summer of 1999. Even then the Prime Minister was looking to find ways to get around the rules of international human rights law which limited the circumstances in which Britain could return Hani Youssef and three other Egyptians to their homeland. Youseff was a lawyer who represented Muslim groups and activists in cases brought by and against the Egyptian government. The then Home Secretary, Mr Straw, wanted to deny Youssef's application for asylum on the grounds that he was a senior member of Egyptian Islamic Jihad, which had mounted terrorist acts and signed a document declaring that the killing of Americans and allies was the duty of every Muslim. The difficulty was the fear that Youseff would be persecuted if he returned to Egypt, coupled with the government's policy that no one should be removed or deported to a country where there was a "real risk" that the returnee or deportee would be treated in a manner that breached Article 3 of the ECHR ("No one should be subjected to torture or to inhuman or degrading treatment or punishment"). You see here the link with extraordinary rendition: they are



different sides of the same coin. The way around the problem would be to obtain written assurances from the Egyptian government for the safety and well-being of Youseff. The Foreign Office sought assurances on nine grounds, including no ill-treatment, access to an independent and impartial civilian court and various due process rights, no death penalty, and access to British Government officials during any imprisonment or, failing that, telephone access to a UK based lawyer. Mr Blair took a very direct interest. On 1 April 1999 the Private Secretary at the Home Office wrote to his Private Secretary at 10 Downing Street, providing information on the initial reaction of the Egyptian government to the assurances requested. The Prime Minister read the letter. He wrote across the top of it: "Get them back". And in respect of the list of assurances sought he wrote: "This is a bit much. Why do we need all these things?"

21. He need not have worried, since the Egyptian Government declined to give the assurances, on the grounds that they amounted to an unwarranted interference in the affairs of a sovereign state. Egypt was willing to offer some assurances, but not all. On 24 May 1999 the Principal Private Secretary at the FCO wrote to the Prime Minister's Private Secretary: Egypt had been offered some flexibility, but there was no scope for any more. In response to the FCO's view that the Egyptian assurances were inadequate the Prime Minister wrote across the top of this letter: "This isn't good enough. I don't believe we shld (sic) be doing this. Speak to me." The contempt for human rights concerns is clear. By 3 June 1999 the Home Secretary had concluded that the limited Egyptian assurances were insufficient, that the men would face an Article 3 risk if they were returned, and that therefore they should be released and not returned. The Prime Minister was not well pleased. On 14 June 1999 his Private Secretary responded as follows, providing an interesting insight into the Prime Minister's respect for the law, the extent of his commitment to the rules, and the use of courts as part of a political game:

- "[T]he Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If



the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking".²

22. Plainly the Prime Minister was not greatly influenced by the reports of the US State Department and Amnesty International as to Egypt's propensity to torture deportees such as Youssef, or even his Home Secretary's concerns. In the end the Home Office accepted the FCO's view that Egypt would not give even the single torture assurance, in any meaningful way. Mr Youssef was released, and was successful in his application that he had been unlawfully detained. No record of the Prime Minister's reaction has been made public.

23. The Prime Minister's direct intervention indicates the rather direct and personal involvement of No 10 in the affairs of different government departments. It suggests that the overriding objective is not to act consistently with applicable rules, or ensure that fundamental human rights of individuals are protected, but to gauge and then pander to public opinion: hence the strategy of shifting the blame for Youssef's release away from government and onto the courts. The handwritten comments, and the letter of 14 June 1999, suggest that in the post-9/11 world the Prime Minister would have little hesitation in providing such assistance as he could to President Bush in the "war on terror". Little surprise then that the Prime Minister would fail to condemn the Guantanamo Project for its gross violations of international law. The mindset that characterises Guantanamo as an "understandable anomaly" has been laid bare.

24. What has the Prime Minister said about extraordinary rendition? He has tried to say very little. On 7 December 2005 in the House of Commons the then Liberal Democrat leader Charles Kennedy asked him:

² *Hani El Sayed Sabaei Youssef v The Home Office*, Judgment of Mr Justice Field, 30 July 2004. at para. 37.



- “To what extent ... have the Government co-operated in the transport of terrorist suspects to Afghanistan and elsewhere, apparently for torture purposes?³”

25. The Prime Minister does not respond to the question of British cooperation. He notes that torture cannot be justified in any circumstances. He then says that rendition “as described by Secretary of State Condoleezza Rice” has been American policy for many years, that “We have not had such a situation here”, and that the American policy “must be applied in accordance with international conventions, and I accept entirely Secretary of State Rice's assurance that it has been.”

26. Mr. Kennedy then asks him to explain “why the published evidence shows that almost 400 flights have passed through 18 British airports” and “When was he as Prime Minister first made aware of that policy, and when did he approve it?” Again, the questions are not answered. The Prime Minister says: “In respect of airports, I do not know what the right hon. Gentleman is referring to. In respect of the policy of rendition, it has been the policy of the American Government for many years.”

27. Following that exchange, we do not know any more about the extent of the British government's knowledge of or cooperation in US to rendition or extraordinary rendition. I have learnt to read the Prime Minister's words carefully. He is, after all, trained as a barrister. I have also learnt that what the Prime Minister says to one person is not necessarily consistent with what he has said elsewhere. That was brought home to me – again – last month when I appeared before the House of Commons Select Committee on Foreign Affairs. I was asked to appear to address questions concerning the additional chapter in the paperback edition of *Lawless World*. This contained new material, including on the private meeting between President Bush and Mr. Blair on 31 January 2003. The material confirmed unambiguously that by that date President Bush had taken the decision to go to war irrespective of the outcome of the United Nations process,

³ Hansard, 7 December 2005, column 862.



of whether or not there was a second UN Security Council resolution, or of what the weapons inspectors did or did not find. According to the President the start date for the war was penciled in for 10 March 2003. In response to all of that the note of the meeting records the Prime Minister as saying that he is “solidly with the President”.⁴ The *New York Times* has confirmed the authenticity of the material, and there has been no denial by the White House or No. 10 as to its contents. Indeed that would be difficult since, as the *New York Times* has confirmed, the note in question was penned by David Manning, now British Ambassador to the US.⁵

28. This goes to the very last question that I was asked by the House of Commons Select Committee. It came from Andrew Mackinlay MP. It is worth repeating in full:

- “In the period just before it became clear that there was not going to be a second UN resolution I ... met the Prime Minister with two other Members of Parliament and I put to him the question that if there was compliance – and by “compliance” I meant full disclosure, access and destroying weapons of mass destruction if they were there – would an invasion be avoided. He replied to me – and I remember it well because he referred to the President in first name terms; he referred to him as “George” – that he put this to the President of the United States, that if there was full compliance by Saddam there would be no invasion, and he told me that the President of the United States confirmed that was so. [...] I wanted to put that to you because I really want to find out what you think about that.”⁶

29. What I think about that is what I responded to Mr. Mackinlay: It is plain that the Prime Minister’s statement to him was inconsistent with what he told the

⁴ *Lawless World*, (paperback edition, 2006), p. 273.

⁵ Don van Natta, “Bush Was Set on Path to War, British Memo Says”, *New York Times*, 27 March 2006, page A1.

⁶ HOUSE OF COMMONS, MINUTES OF EVIDENCE TAKEN BEFORE FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, WEDNESDAY 19 APRIL 2006, PROFESSOR PHILIPPE SANDS QC, UNCORRECTED TRANSCRIPT.



President of the United States on 31 January 2003. I could have gone further, and no doubt others will.

30. So you will understand if I am a little sceptical when the Prime Minister gives an answer to a question in Parliament that tends to suggest – without actually so stating – that Britain has not cooperated with the United States in any aspects of its rendition policies and that the Prime Minister has no knowledge about the possible use of British airports in support of the US practice.

31. I am sceptical of the Prime Minister's words for another reason. Earlier this year the *New Statesman* magazine published a copy of an internal memorandum from Mr. Irfan Siddiq, a Private Secretary to Jack Straw at the FCO, to Grace Cassy, the Assistant Private Secretary to the Prime Minister for Foreign Affairs, based at No. 10. The memorandum provided advice for the Prime Minister in preparation for Prime Minister's Question on 7 December 2005. It was a briefing paper, and it provides an insight as to the Government's attitude to the facts and to its international obligations. The memorandum has received media attention for the advice it gave the Prime Minister:

- “We should try to avoid getting drawn on detail ... and 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. [...] 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”.⁷

32. This is precisely the path followed by the Prime Minister in his 7 December 2005 PMQs. Yet the memorandum has more interesting points on the substance that did not come out in the Prime Minister's statement. Adopting broadly the same definitions as I began with this evening, the memorandum asserts that rendition

⁷ Memorandum from Irfan Siddiq (Private Secretary, FCO) to Grace Cassy (Assistant Private Secretary, 10 Downing Street), undated but understood to be 6 or 7 December 2005.



“could ... be legal on certain tightly defined circumstances”.⁸ That is wrong. The memorandum also suggests that in most circumstances rendition from the UK would not be legal, but in some limited circumstances it could be legal.⁹ That too is wrong. It confirms that extraordinary rendition (involving torture) could never be legal, but takes refuge in the definition of torture, in the facts and in Condoleeza Rice’s statement shortly before. As the memorandum puts it:

- “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”).”

33. This of course brings us directly back to the case of *Youssef*, in which we saw so clearly how committed was the Prime Minister to the avoidance of torture and compliance with Britain’s international obligations. Mr. Siddiq’s memorandum almost seems to have this in mind. It reminds No. 10: “We would not want to cast doubt on 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”.¹⁰

34. Even more pertinent, on the subject of complicity and its consequences, is what the memorandum has to say about Britain’s involvement and knowledge in US practices. It states: “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’”.¹¹ To my reading that suggests that the possibility of British cooperation in some activity that could amount to violations of

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*, para. 8.

¹⁰ *Ibid.*, para. 10.

¹¹ *Ibid.*, para. 17.



international law. The position has been summarized more recently by the then Foreign Secretary, Mr. Straw, speaking in the House of Commons on 20 January 2006. In response to the leak of the memorandum he provided an updated account: “We have found no evidence of detainees being rendered through the UK or Overseas Territories since 11 September 2001”.¹² Again, the words are carefully crafted. They do not confirm that there have been no renditions through the UK. They leave open the possibility that the Government may have turned a blind eye to acts that it did not wish to obtain information about.

35. And that is the crux of the issue on complicity. What is the extent of the Government’s obligation to satisfy itself that no internationally illegal acts are occurring? Again, the leaked memorandum provides some insight. It says that if the US were to act contrary to its international obligations “then cooperation ... would also be illegal if we knew of the circumstances.” And it adds: “Where we have no knowledge of illegality but allegations are brought to our attention, we ought to make reasonable inquiries”.¹³ That formulation does not go far enough. There is no “ought” about it; under the Torture Convention there is a positive obligation on the part of the Government to satisfy itself that no internationally illegal acts are occurring, and it cannot take refuge in the statements of even the friendliest of States. Professor James Crawford put it very succinctly in a legal opinion to the All Party Parliamentary Group on Extraordinary Rendition last December:

- “[Secretary Rice’s] statement does not bring complete assurance that the practice of [extraordinary rendition] is not occurring. The question that must be asked is whether torture is likely to take place if a person is transported, irrespective of whether or not the government claims that the answer is no, or what its hopes or beliefs may be. And that is essentially an objective question: a Government is not exonerated from conduct

¹² Hansard, 20 Jan 2006, Column 38WS.

¹³ *Supra.* note 7, para. 13.



which leads to a person being tortured merely by closing its eyes to that prospect.”¹⁴

36. Article 4 of the Torture Convention imposes a positive obligation. It is not good enough for the Prime Minister to say he knows nothing about airports. It is not enough for the Foreign Secretary to say that “we expect [the US] to seek permission to render detainees via UK territory and airspace”.¹⁵ Britain’s international obligations require more. If there is a credible allegation then there is a positive duty to investigate. If there has been a policy decision akin to that of President Clinton on gays in the military – “Don’t ask, don’t tell” – then Britain could be complicit and the possibility of individual criminality is there.

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37. This is the background against which to assess the Prime Minister’s protestations of his commitment to fundamental rights and the rule of law, reflected most recently in his email debate with Henry Porter of *The Observer* over several pages of that newspaper late last month.¹⁶ Perhaps the most interesting aspect of the emails is that the Prime Minister felt the need at all to engage directly with Mr. Porter’s far-reaching critique of his Government. It reads to me as though the Prime Minister’s concern with his legacy is driven by the fear that he is fundamentally misunderstood, and that those who seek to challenge him are out of touch. He attacks Mr. Porter’s “mishmash of misunderstanding, gross exaggeration and things that are just plain wrong”, as he put it. Yet it is the Prime Minister who displays these characteristics. It is he who is prone to errors of fact: for example, under the Human Rights Act – for which his government rightly deserves credit – the judges are not empowered to strike down acts of Parliament, as he claimed. It is he who is prone to gross exaggeration: the conditions of the modern world cannot possibly be said to be such that “traditional processes” are inadequate, as he claims. And it is he who is prone to

¹⁴ Extraordinary Rendition of Terrorist Suspects through the United Kingdom, Legal Opinion for the All Party Parliamentary Group on Extraordinary Rendition, Professor James Crawford SC and Kylie Evans, 9 December 2005.

¹⁵ Hansard, 20 Jan 2006 : Column 38WS

¹⁶ “Britain’s Liberties: The Great Debate”, *The Observer*, 23 April 2006, 20-2.



misunderstanding: he says that his approach reflects “a genuine desire to protect our way of life from those who would destroy it”. But our “way of life” includes our system of values, and our system of values includes a commitment to the rule of law. Returning foreigners to near-certain torture is not consistent with our “way of life” or our values. Aiding and abetting the transfer of British nationals and residents to Guantanamo – if that is established to have occurred – would not be consistent with our “way of life” or our values. Turning a blind eye to extraordinary rendition – if that is established – falls within the same category. The Prime Minister’s logic leads inexorably in one direction only. “Whose civil liberties?”, he asks. Everyone’s, we should respond.

38. It is difficult to see the thread of principle that drives the Prime Minister in these written utterances and in his intemperate and inappropriate comments aimed at this week’s first instance judgment on the Afghan hijackers. Did the Prime Minister read the full judgment before commenting? It concerned the manner in which decisions were taken by the Government, not their substance. In his judgment Mr Justice Sullivan said that “It is difficult to conceive of a clearer case of ‘conspicuous unfairness amounting to an abuse of power’.” He added: “Lest there be any misunderstanding, the issue in this case is not whether the executive should take action to discourage hijacking, but whether the executive should be required to take such action within the law as laid down by Parliament and the courts.”

39. By his comments the Prime Minister seems to endorse a different approach, action outside of the law. The idea of adopting new primary legislation to modify the effect of the Human Rights Act to require English judges to balance individual rights with the security of the community would have the perverse effect of diminishing the role of English courts and enhancing the role of the European Court of Human Right. That is precisely opposite to the original intent of the Human Rights Act to ‘repatriate’ the Convention. Withdrawal from specific clauses of the ECHR -0 another option that is apparently under consideration - is not available under international law. The Prime Minister is guided by an essentially populist approach: driven not by principle or by informed assessment



but by what will make the headlines in certain papers. Interventions of this kind raise serious question of judgment, at a time when the country faces real challenges and threats, and when decent judgment and the restoration of trust in government are of such paramount importance. Such interventions by the Prime Minister contribute to a climate of hysteria, encouraging one newspaper to start a national campaign to scrap the Human Rights Act. Yet the daily life of the Act is mundane: the great majority of its beneficiaries are regular and law-abiding citizens who seek to challenge abuses of governmental power, women who might want access to cancer treatments or protection from violent partners, children who seek access to schools, senior citizens in residential care homes who would like to be provided with bed pans.

40. If “Get them back” at any cost is indicative of the Prime Minister’s aim of protecting “civil liberties for the majority”, it is he who is out of touch with fundamental values, and it is he who poses the more fundamental threat to constitutional democracy, the separation of powers, and fundamental rights. In his Observer emails he wrote how a visit to Camden had allowed him to come to the conclusion that Lord Steyn was out of touch with reality. Just two weeks after he wrote that the voters decided to deprive the Labour Party of its controlling majority in Camden (which happens to be my Council), the first time in thirty five years.

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41. Let me conclude and bring together the various threads. In recent years I have asked myself many times what exactly it is that has driven President Bush and Prime Minister Blair foreign policy decisions on issues like Iraq, Guantanamo and other actions against global terrorism, often as joint enterprises. Last week’s issue of the *New Yorker* magazine provided some insight into President Bush’s policy-making process on these issues. “I base a lot of my foreign policy decisions on some things that I think are true”, he told the members of the Orange County Business Council in California. “One, I believe there’s an Almighty. And, secondly, I believe one of the great gifts of the Almighty is the



desire in everybody's soul, regardless of what you look like or where you live, to be free."¹⁷ Tony Blair's approach is not far removed. Asked recently by journalist Con Coughlin what had driven his decisions post-9/11, he responded: "I just go with my instinct".¹⁸

42. We do not yet know all the facts on "extraordinary rendition", or on Britain's possible involvement – if any - in the practicing of it. It is clear that extraordinary rendition carried out in any form would be contrary to international law, and that any individual involved in the practise – even at the highest level – would be open to international criminal charge. Complicity maybe a crime under international law. Complicity could include turning a blind eye. These are still early days in understanding the precise relationship between the Bush Administration's policies on detainee transfers and interrogations, the legal advices and the allegations of abuse at Guantanamo, Abu Ghraib, Bagram and elsewhere, including places unknown. But on the basis of the materials I have seen – on the decision-making in relation to Iraq, on the attitude to the proposed removal of Hani Youssef without effective assurances against torture, on the failure to condemn Guantanamo for more than four years, on the desire to allow English courts to admit certain evidence that may have been obtained by torture, on the indefinite detention without charge of certain foreigners who cannot be deported, on the evasive answers in relation to rendition – it would not surprise me in the least if materials were eventually to emerge which could show involvement in decisions concerning the international transfer of British nationals or residents, and perhaps other actions directly or indirectly associated with rendition. The Pinochet and Altstotter cases and the torture convention indicate what is now possible. In such circumstances neither the Almighty nor instinct would be available by way of a defence.

¹⁷ *New Yorker*, 8 May 2006, p. 24.

¹⁸ Con Coughlin, "We would have been close even if 9/11 hadn't happened", *Daily Telegraph*, 23 April 2006;
<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/23/wcon23.xml&sSheet=/news/2006/04/23/ixworld.html>

